
In The
Court of Special Appeals

No. 02525

September Term, 2007

THU NGUYEN, et al,

Appellant,

v.

HOWARD COUNTY BOARD OF APPEALS

Appellee.

Appeal from the Circuit Court for Howard County
(Hon. Dennis M. Sweeney, Judge)

Brief for Appellant
Nguyen et al.

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STATEMENT OF THE CASE

This is an appeal from an Order of the Circuit Court for Howard County (Hon. Dennis M. Sweeney) entered on November 26, 2007, which affirmed the decision of the Howard County Board of Appeals (“the Board”) approving the application of Robert Williams et al. (“Appellee”) for a conditional use permit under the Howard County Zoning Regulations (“Regulations”) and dismissing the appeal of Thu Nguyen, et al. (“Appellant”). Appellee sought approval to build a clustered development of fifty (50) age-restricted houses in a rural, residential area. At a pre-submission meeting Appellee stated that the value of the project could be as much as Fifty Million Dollars (\$50,000,000.00).

The application was first heard by the Howard County Board of Appeals Hearing Examiner (the “Hearing Examiner”) on March 6, 2006. After taking testimony from both sides, the Hearing Examiner issued a nine page opinion denying the application. Appellee appealed to the full Howard County Board of Appeals (the “Board”). The Board heard from both sides during five days of testimony and argument in July, August, September and October 2006. On February 1, 2007, the Board issued an 18 page Decision and Order approving the application. Appellant then sought judicial review in the Circuit Court for Howard County. A hearing was held on November 19, 2007. One week later, on November 26, 2007, the court issued an order and memorandum affirming the Board’s decision. The memorandum states in its entirety:

Before the Court is the Petition for Judicial Review seeking judicial review of the Decision and Order of the County Board of Appeals in Case # 05-

046C. The parties have filed extensive memoranda dealing with the issues raised. A hearing was held on November 19, 2007 at which Counsel argued the issues which primarily dealt with whether the approval of a conditional use for age-restricted adult housing in an RR-DEO Zoning District complied with Howard County Zoning Regulations, Section 131.

After the review, the Court is persuaded by the arguments presented by the Respondents as set out in the Memorandum filed October 9, 2007 and at the hearing before the Court that the Decision and Order of the Howard County Board of Appeals should be affirmed. The Board's decision is supported by competent, material and substantial evidence in the record as a whole and contains no errors of law. It was within the Board's discretion after following the procedures it did to approve the conditional sought. Therefore, it is the decision of this Court that the Board's decision is affirmed and the appeal is dismissed.

Although the conditional use at issue seeks approval of a 50 unit age-restricted, adult housing development, Appellee's plan – as clearly recognized by the Hearing Examiner – has none of the indicia of an age-restricted development and does not meet the requirements of Section 131 (conditional uses) of the Regulations. Instead, the proposal would circumvent both the letter and spirit of the Regulations by clustering 50 McMansions in a residential zoning district composed primarily of one to three acre lots.

The Regulations recognize that conditional uses may be authorized in specified zoning districts if the use is generally appropriate and compatible in the district. But the Regulations also recognize that some uses may have characteristics and impacts that are not typical, and are not permitted automatically, but are subject to the very rigorous and lengthy regulations contained within §131, including §131 G, which places the burden of both proof and persuasion upon the applicant to satisfy not only the specific provisos regarding adverse effects but to also prove that the proposal satisfies the general standard

under the Howard County General Plan (the “General Plan”) that the proposal be in harmony with the land uses and policies in the district in which it is located. It is the applicant who must prove that the proposed use at the proposed location will not have adverse effects on vicinal properties above those ordinarily associated with such uses, and not greater at the subject site than elsewhere in the zone.

Appellee failed to meet this burden. Indeed, Appellee offered no evidence whatsoever as to the impact several effects, adverse or otherwise, such as that of lighting, a common septic system, and additional traffic, would have on vicinal properties. Appellee did not prove harmony with the General Plan as Appellee was not and is not to this day even certain of what the final composition of the development will be in terms of the mixture of house sizes.

Appellee’s deficiencies began with the initial application to the Howard County Department of Planning and Zoning (“DPZ”). Appellee stated that the size of the houses was expected to be 6,000 square feet, but, as noted by DPZ, no floor plans, interior feature lists, architectural elevations and other required items were submitted. DPZ has never had the benefit of a complete plan and plat to perform its necessary function of review required under the Regulations.

Neither was this required information provided to the Hearing Examiner. The Hearing Examiner denied the application because of, among other things, these deficiencies and proof failures.

Instead of submitting the necessary information to DPZ Appellee sought review by the Board on the existing record. Then, on the first night of hearings, Appellee presented a revised plan, which not only violated the Board's Rules of Procedure, but prevented both the DPZ and Hearing Examiner from reviewing what was in essence and reality a new conditional use proposal. In particular, Appellee told the Board that the project would contain a mixture of house sizes, depending on market forces, ranging in size the from 1,800 square feet to roughly 5,500 square feet. Still no floor plans were submitted. Over Appellant's objection, the Board ruled that the changes were not substantive.

Even with the new and amended proposal Appellee did not meet his burden of proving harmony with the General Plan. The new plan of a massive block of 50 multi-story units up to 5,600 square feet in size is not in harmony with the policy of the General Plan which provides that the purpose of age-restricted housing is to assist seniors in scaling down from large family homes by allowing the development of smaller, easier to maintain homes with, e.g., a first-floor bedroom, in zoning districts where transit services exist to provide older residents access to services.

As to the requirements that there be no adverse effects, Appellee merely offered conclusory opinions as to safety hazards, the effect of physical conditions such as lighting and sewage and water capacities. No facts were presented to either DMZ, the Hearing Examiner, the Board, or the Circuit Court in support of the these conclusory opinions.

Appellant timely noted this appeal on December 18, 2007.

QUESTIONS PRESENTED

I. Did the Circuit Court Err As a Matter of Law That Changes to the Conditional Use Petition and Plat on the First Night of Hearings Before the Board Were Not Substantive?

II. Did The Circuit Court Err in Finding that Appellant Had Not Proven That the Proposed Conditional Use Would Have Adverse Effects Where Appellee Presented No Evidence of the Effects of Traffic, a Proposed Common Septic System, or of a Lighting Plan, Nor Evidence of Harmony?

III. Did the Circuit Court Err in Finding That Substantial Evidence Supported the Board's Decision?

STATEMENT OF THE FACTS

1. DPZ Staff Review. On November 16, 2005, Appellee submitted his conditional use petition and plat to the Department of Planning and Zoning. E38 The DPZ Technical Staff Report notes that the proposed plan provided for a development including 50 multi-story units and that each might contain 6000 square feet of floor area. E48

Under §131F.2.of the Regulations, an applicant is required to provide the following:

a. A conditional use plan which shows all existing and proposed uses, structures, parking areas, points of ingress and egress, landscaping, and the approximate location of relevant natural features which, when required by the Department of Planning and Zoning, shall include wetlands, steep slopes, and tree and forest cover. [Council Bill 19-2002 (ZRA-35), effective 7/10/02].

b. Information regarding noise, dust, fumes, odors, lighting, vibrations, non-sewage solid waste, hazards or other physical conditions resulting from the use which may adversely impact vicinal properties

c. A statement that indicates:

(1) Whether the property is served by public or private water and sewage disposal;

(2) That additional information can be obtained from the Howard County Health Department; and

(3) The current address of the Howard County Health Department.

[Council Bill 19-2002 (ZRA-35), effective 7/10/02]

d. Supporting documentation, such as traffic studies, market studies, and noise studies, may be required by the Department of Planning and Zoning or by these regulations. e. For expansion or modification of an existing conditional use, the Department of Planning and Zoning may require information regarding compliance with previous requirements and conditions. (Emphasis supplied).

E29

2. The Technical Staff Report. Upon review, DPZ prepared a Technical Staff Report, dated February 22, 2006, which was purportedly later transmitted to the Hearing Examiner under §131F.4. E43 The general recommendation of DPZ Staff was to grant the request subject to conditions, E49, but DPZ clearly required the applicant to supply further paperwork for DPZ review, including “more detailed building plans and floorplans”, “more details on how the age-restrictions will be maintained and enforced”, “floor plans or other material demonstrating that the proposed dwellings will be appropriate for the age-restricted population”, and “further explanation about how five of the proposed dwelling units of the same general size indicated on the Plan will be provided as Moderate Income Housing Units”. E49 Although DPZ’s language is a little imprecise in stating that it recommends approval subject to conditions, DPZ clearly

expected that more information and detail would be forthcoming before the conditional use would or could ever be granted. In particular, DPZ stated that Appellee “shall present more detailed building plans and floorplans.” (Emphasis added.) E49 No further building plans nor floorplans were presented to DPZ.

3. Problems identified by DPZ. A number of problems with the proposal were noted by DPZ. Among these was the fact that none of the apparent qualities of the proposed detached residential units revealed any characteristics that would distinguish them as Age-Restricted Adult Housing from typical by-right single-family detached dwellings. The proposed plan provided for 50 units of two full stories each containing 6,000 square feet of floor area. DPZ called this “quite excessive”, considering the intended “aging in place” purposes of age-restricted housing, stating:

The proposed detached residential units as depicted on the plan have no apparent qualities that show any distinctions as Age-restricted Adult Housing from typical by-right single-family detached dwellings. With two full stories as depicted in the Schematic Footprint and Elevation on the plan, these units might contain 6,000 square feet of floor area. This appears to be quite excessive upon consideration of the intended "aging in place" purposes of universal design features and overall active-senior housing objectives for smaller, more easily maintained dwellings. E48

Explaining the problem further, DPZ reported that such units could be considered an “exploitation” of the Age-Restricted Adult Housing Conditional Use category to significantly increase the density of a standard detached dwelling product over what could be achieved through a by-right residential subdivision. In sum, the applicant was simply using the age-restricted conditional use category as a way to build and sell big and

expensive houses that he would not otherwise be entitled to do. DPZ noted that there would need to be “clear evidence” that the dwellings have a specifically limited number of bedrooms and that the space within the dwellings would not be easily convertible to additional bedrooms. E48 Given so much possible space, DPZ required Appellee to present more detailed building plans and floorplans to prove that the dwelling units qualify, stating at paragraph IV.B. the following:

In the event the proposed dwellings are no different from many by-right single-family dwellings, this could be considered an exploitation of the Age-restricted Adult Housing Conditional Use category to significantly increase the density of a standard detached dwelling product over what could be achieved through a by-right residential subdivision, even one with receiving density. There needs to be clear evidence that the dwellings will have a specifically limited number of bedrooms to meet the Health Department concerns, and that the space within the dwellings will not be easily convertible to additional bedrooms. The Petitioner should present more detailed building plans and floorplans to prove that the dwelling units qualify as Age-restricted Adult Housing on the basis of building design. E48

DPZ further noted that it was improper for the applicant to say in his application that he would not submit floorplans until the time of building permit application. DPZ concluded that more was needed under §131.N.1.m, which requires that the . . . “petition include floor plans or other material demonstrating that the proposed dwellings will be appropriate for age-restricted population”. E49 It was thus evident that a complete and final evaluation of the project had not yet been performed by DPZ, and that it was expecting to review floorplans and other demonstrative materials.

Yet another problem cited was that the proposed plan failed to show how five dwellings units would be provided as Moderate Income Housing Units. DPZ “recommended” that the applicants would need to provide more details to clarify how this requirement would be realized, stating that “it is questionable that Moderate Income Housing Units would be practical based upon the size of the proposed dwelling units”. E49 By the context of its report, DPZ here too expected further detail from the applicants. Yet the applicants ever went back to DPZ with this requested information, neither was DPZ given the opportunity to further review the petition after requesting this further information and paperwork.

4. Hearing Examiner Review. On March 5, 2006, Appellee’s proposal went to a hearing before the Hearing Examiner, who on April 29, 2006 denied the conditional use application. E62-72 A number of the problems referenced by DPZ appeared to also bother the Hearing Examiner, who found that the proposed use would not be in harmony with the General Plan for the district pursuant to §131.B.1.a., and that there was not sufficient evidence establishing that the proposed use would not have adverse effects on vicinal properties above and beyond those ordinarily associated with an age-restricted adult housing development in the RR district. E69 He also found that the specific criteria for age-restricted adult housing, which criteria is set forth in §131.N.1, was not satisfied because Appellee failed to show that the project was designed to provide adequate buffering along the perimeter of the site as was required by §131.N.1.i. E70

In evaluating harmony with the General Plan, the Hearing Examiner found it significant that the General Plan recognizes that this (“active senior”) market is typically seeking to “sell their large family home and yard and to purchase a smaller, easier to maintain home with a first-floor bedroom”. E67 He was also influenced by the General Plan’s recommendation that “in order to supplement the congregate and apartment housing choices now available to seniors, the County should amend the Zoning Regulations to provide other housing options for seniors, including attached and detached single story, single family homes”. E67

The Hearing Examiner also found significant that with respect to the RR Zone, the General Plan “recommends a more restrained approach to senior housing” than the use proposed by Appellee, citing the General Plan where it provides that “The County needs to reconsider senior housing developments that are currently allowed in the Rural West. . .” in that “. . .the West has fewer service available and does not have transit service that could provide access to services”. E69

Indeed, the Hearing Examiner went so far as to state that the units proposed were “well beyond the size of any age-restricted adult dwelling that I have reviewed in the past four years”, and that “it is apparent from the evidence that these homes are not designed for the typical active seniors seeking smaller quarters, but for larger households that happen to have one member who is age 55 or older”. E68 In sum, the Hearing Examiner found that the product proposed was not that which was intended by the Howard County

Council when it enacted the General Plan and conditional use regulations.

5. The Board of Appeals Hearing. It is apparent from the Hearing Examiner's Decision and Order, as well as the many deficiencies set forth by DMZ, that Appellee's conditional use petition and plat submitted in the review process failed to meet the requirements necessary to grant the conditional use. Upon the denial by the Hearing Examiner, the appropriate vetting process, providing notice, advertisement, and a public hearing permitting comment on the petition and accompanying plat, had been fully administered under the Regulations.

At this point Appellee had the choice of: (1) assembling the requested information and making substantive amendments to his petition or plat, necessarily requiring him to start over in the application process, so that all parties, agencies and reviewing bodies would have an opportunity to fully review the merits of the new amendments, or (2) appealing his original conditional use proposal to the Board (for a *de novo* hearing) to determine whether the Hearing Examiner was correct.

Appellee did neither. Rather, dissatisfied with the Decision and Order of the Hearing Examiner, Appellee appealed his decision to the Board, submitting, on July 11, 2006 (the first night of the hearing) an amended conditional use plan to be reviewed at the same time, which included wholesale changes. E83, 88-95 Among others, the changes included sketches of four new models of units (never before introduced)(still without floorplans), additional notes concerning design characteristics, changes and notes

regarding setback, movements of units, changes to the location and type of landscape, buffering, and other substantive modifications never before seen.

It is clear from the transcript that this amendment, containing additional sheets and details, was not presented to DMZ, the Hearing Examiner, or the Board prior to the hearing on July 11, 2006. According to the transcript, Chairman Sharps, when the amended plat was introduced that evening, asked, “[i]s this an amendment?”, to which question Appellee’s counsel stated, “[i]t’s a clarification. That’s all it is, merely a clarification”. E79

An objection was then placed on record opposing Appellee’s right to go forward Chairman Sharps asked why the many changes were not substantial. E104 After some discussion, the Chairman requested that the various modifications be noted for the record, so that the Board could make a decision as to whether they were substantive. E107 Counsel for Appellee categorized the changes into four separate areas, some of which included changes to descriptions, changes to setbacks, changes to unit placement, changes to width of buffer, changes to type of landscaping buffer, and additional information provided in the form of unit sketches, design characteristics, design details, and other additional information.

When the Chairman called for a vote on whether the amendments were substantive, there appeared to be confusion on whether amendments were permitted in a *de novo* hearing. Referring to the Hearing Examiner’s decision, Board Member Hayes

explained that the change in the size of the units was a “major point” to the Hearing Examiner, stating “so that’s significant”. Referring to the different information now before the Board, he said, “I think that would have, I think you may have gotten a different decision from him”. E117

Board Member Simpkins appeared to agree. Referring to the different information before the Board, he said, “[t]o me, it is different. The circumstances appear differently than I perceived them to be before this”. E117

Chairman Sharps then significantly discussed how he assumed one thing when he reviewed the pre-hearing submission, and now understood a different thing after receiving the modifications, saying

but the clarity was certainly not there. Because I wasn’t clear until I’ve heard most of the testimony from Mr. Hikmat, and the description, and we have two other pages in order to that, so for someone to have to come in to give us two additional sheets to clarify what you were discussing, wow, maybe this would have been a whole new case had this been done at the Hearing Examiner’s level. E118

Later in the discussion, Board Member Hayes, in discussing the changes, said:

But I think its substantive because, and again I’m reading from the Hearing Examiners page 8, he says “because the genus are more akin to a large family home, it impacts it with regard to noise, traffic, odors, there are significant things and these are critical to, to the review of this, of a Conditional Use, particularly under the circumstances here. We have all adjacent areas there that are three acre lots. This is going to be a rather dense and intense development here and I don’t want to get into this, but then there’s the lot 2 above which is not spoken for at the given moment. E119

Yet, remarkably, *after all of this discussion indicating that there were significant*

changes, and that the Hearing Examiner may have come to different decisions had he had further information, the Board decided to allow the hearing to proceed under the mistaken premise that they could permit the Appellant to absorb the changes by the time the Board met for the next hearing. E121 Remarkably, they voted to proceed on, which as argued below was a mistake of law.¹

6. The Decision By the Board. On February 1, 2007, the Board issued its Decision and Order, which granted Appellee's petition for a conditional use for age-restricted adult housing in an RR-DEO Zoning District. E463-481

7. Appeal to Howard County Circuit Court. A timely appeal to the Circuit Court for Howard County followed, the decision of which is the subject of this appeal. The parties filed extensive memoranda dealing with the issues raised upon appeal. A hearing was held on November 19, 2007, at which the Honorable Dennis M. Sweeney presided.

On November 26, 2007, Circuit Judge Sweeney issued an Order and Memorandum, affirming the decision of the Howard County Board of Appeals and dismissing Appellants' appeal, finding that it was within the Board's discretion after

¹ After the Board ruled that the proposed changes did not constitute a substantive amendment Appellee again moved the changes into evidence and Appellant stated "no objection". E132 Before the Circuit Court Appellee argued that because Appellant stated "no objection" at that point Appellant had waived the right to appeal the question. But the later statement of "no objection" came well after the Board had ruled on the issue, and it is clear that both the Board and Appellant understood the issue to be whether Appellant had any objections other than that the amendments were substantive.

following the procedures that it did to approve the conditional use sought. E541

APPLICABLE STANDARD OF REVIEW

The standard of review applicable in this case was described in Stover v. Prince George's County, 132 Md. App. 373, 752 A.2d 686 (2000), as follows:

When reviewing a decision of an administrative agency, this Court's role is "precisely the same as that of the circuit court." Department of Health and Mental Hygiene v. Shrieves, 100 Md. App. 283, 303-04, 641 A.2d 899 (1994). "Judicial review of administrative agency action is narrow. The court's task on review is not to 'substitute its judgment for the expertise of those persons who constitute the administrative agency.'" United Parcel Service, Inc. V. People's Counsel for Baltimore County, 336 Md. 569, 576-77, 650 A.2d 226 (1994) (quoting Bulluck v. Pelham Wood Apts., 283 Md. 505, 513, 390 A.2d 1119 (1978)).

To the extent the issues on appeal turn on the correctness of an agency's findings of fact, such findings must be review under the substantial evidence test. Department of Health and Mental Hygiene v. Riverview Nursing Centre, Inc., 104 Md.App. 593, 602, 657 A.2d 372, cert. denied, 340 Md. 215, 665 A.2d 1058 (1995). The reviewing court's task is to determine "whether there was substantial evidence before the administrative agency on the record as a whole to support its conclusions." Maryland Commission on Human Relations v. Mayor and City Council of Baltimore, 86 Md.App. 167, 173, 586 A.2d 37, cert. denied, 323 Md. 309, 593 A.2d 668 (1991).

The court cannot substitute its judgment for that of the agency, but instead must exercise a "restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions." State Administrative Board of Election Laws v. Billhimer,

314 Md. 46, 58-59, 548 A.2d 819 (1988), cert. denied, 490 U.S. 1007, 109 S.Ct. 1644, 104 L.Ed.2d 159 (1989) (quoting Supervisor of Assessments of Montgomery County v. Asbury Methodist Home, Inc., 313 Md. 614, 625, 547 A.2d 190 (1988)).

ARGUMENT

I. The Circuit Court Erred As a Matter of Law in Finding Changes Made to the Conditional Use Petition and Plat on the First Night of Hearings Before the Board Were Not Substantive.

As the record makes clear, Appellee presented a substantially modified plan on the first night of the Board hearing. Among other things, these changes to the proposed plan included the addition of a sketch sheet relating to the configuration and size of units, additional notes concerning design characteristics, additional notes regarding setback, changes to lot layouts and setbacks, changes to the location and type of landscape buffering, and new descriptions of design and amenity options for possible purchasers of the units.

Appellants objected to these changes, arguing at the hearing that such changes constituted substantive amendments to the petition which required the application to be remanded to the DPZ and the Planning Board for further review. They argued that such changes also constituted a new proposed plan never yet reviewed by the appropriate agencies. And they argued that under such circumstances, the applicant must start over and proceed through the process, including DPZ review and hearing examiner review, before any further Board of Appeals hearing.

Rule 2.202(c) of the Howard County Code Rules of Procedure of the Board of

Appeals plainly provides:

Substantive Amendments to the Petition. If any substantive amendments to the petition are made before or during the hearing, the Board, either before or during the hearing, shall suspend or postpone the hearing and remand the amended petition to the Department of Planning and Zoning and the Planning Board for further recommendations.

Similarly, Rule 2.202(b), relating to any amendments to the petition made before or during a hearing, provides as follows:

Amendments to the Petition. If any amendments to the petition are made before or during a hearing, the Board, either before or during the hearing, may continue the hearing, or may suspend or postpone the hearing and remand the amended petition to the Department of Planning and Zoning and the Planning Board for further recommendations.

The Boards' decision to proceed with the hearing, and not remand the amended petition to DPZ for further review was a *mistake* of law. The amendments to the petition and plan were clearly substantive. These changes did not involve corrections of spelling errors, corrections of typos, or similar corrections which would have had no impact on the presentation. Rather, the changes made to the plan by Williams were of a nature that changed the complexion of the review process.

This is particularly evident by comparing the decision of the Hearing Examiner with the decision of the Board of Appeals. The Hearing Examiner made determinations relating to harmony and adverse impact based upon what had been presented to him, commenting upon how the materials presented did not satisfy the requirements of §131 in

precisely those areas where Appellee later amended his plan on the first night of the hearing before the Board.

For example, the Hearing Examiner viewed the original proposal as containing 6000 square foot, two story detached dwelling units, as depicted on the plan presented to him. He found that these large units with expansive second floors were well beyond the size of any age-restricted adult dwelling that he had reviewed in the past four years, and that it was apparent that these homes were not designed for the typical active senior seeking smaller quarters. He noted that the Plan did not specify the number of bedrooms or the use to which the large second floor space might be put. He considered the fact that the units were larger and designed to accommodate more occupants than the typical age-restricted adult dwelling. And, he reasoned that because the units were more akin to a large family home, their impact with regard to noise, traffic, and odors would likely be greater than those ordinarily associated with an age-restricted adult housing project.

The Hearing Examiner also did not have before him the changes made to landscaping and buffering. The plan before him provided forest conservation buffering of one width, while the amended plan going before the Board had a different landscaping proposal which replaced natural tree buffering with new landscaping to be supplied. The Hearing Examiner denied the conditional use plan based upon the buffer proposed in the plan coming before him, which he found was insufficient to screen the visual wall of units which would stretch some 1300 feet and would be visible to the vicinal residential

properties to the east. To the extent the proposed use plan was changed for the Board moving units and altering landscape buffer areas and types, the changes had to be substantive given the result that the Board apparently found such changes sufficient to satisfy the structuring and landscaping requirements which the Hearing Examiner found were not satisfied.

Beyond the Rules of Procedure of the Board of Appeals, Maryland law also requires that substantial amendments to Planning and Zoning applications must be reviewed in each stage of the process; otherwise, the review process at each stage has not occurred, and the full requirements of the law have not been met or complied with -- a mistake of law.

An objection was made by Appellant to the whole amendment process, and the transcript shows Appellant arguing that such changes constituted substantive amendments to the petition which required the application to be remanded to the DPZ for further review. E105-109 The record indicates that Appellant aggressively argued that such changes also constituted a new proposed plan *never* yet reviewed by the appropriate agencies. And the record shows Appellant forcefully argued that under such circumstances, the applicant must *start over* and proceed through the process, including DPZ review and hearing examiner review, before any further Board of Appeals hearing.

Even if *arguendo* there had been no objection, the Board under its rules *was required* to remand the matter if there was a substantive amendment. The Board

represents the entire county and has an independent duty to ensure that the proposal complies with the Regulations, even if no vicinal property owners appear or object.

The Regulations at §131 require that the Conditional Use Plan be reviewed at every stage, from beginning to end. It is not a work-in-progress concept. Maryland law also requires that substantial amendments to Planning and Zoning applications must be reviewed in each stage of the process; otherwise, the review process at each stage has not occurred, and the full requirements of the law have not been met or complied with -- a mistake of law. Appellant's argument that the proceeding was heard de novo misses the point. The ability to elicit new evidence at a de novo hearing, Halle Companies v. Crofton Civic Assn., 339 Md. 131 (1995), does not alter the requirement that the same application and same plan must be reviewed at each review stage. If this were not true, there would be no purpose for having the planning department or hearing examiners involved.

II. The Circuit Court Erred in Finding that Appellant Had Not Proven That the Proposed Conditional Use Would Have Adverse Effects, As Appellee Presented No Evidence of the Effects of Traffic, a Proposed Common Septic System, or of a Lighting Plan, Nor Evidence of Harmony.

Under Mossberg v. Montgomery County, 107 Md. App. 1 (1995), and Schultz v. Pritts, 291 Md. 1 (1985), Appellants have the burden of proving adverse effects once Appellee presents sufficient evidence that the proposed use meets the requirements of the statute. But clearly, it is evidence, not opinion that must be provided. In this case, as to

many material aspects of the proposed plan no evidence whatsoever was provided. Even if the burden is on Appellant to prove adverse effects, surely Appellee must be required to provide sufficient information to allow Appellant to put on a case. Appellee cannot simply fail to provide essential information about specific details of the project and then say Appellant has not proven that the (unknown) details would have an adverse effect.

Section 8(e) of Appellee's Conditional Use Petition to the Howard County Board of Appeals asked Appellee the following: "Will the conditional use generate any physical conditions such as noise, dust, fumes, odors, lighting or vibrations which would be discernible from abutting and vicinal properties?" Appellee responded as follows: "No. The proposed uses are residential in character, use, style and locations, and therefore, are no different than the other residential uses in the area." E40 Appellee provided no facts to support this conclusory statement.

At the hearing, Appellee was asked about the kind of lighting that was going to go on the property. E151 Appellee first testified that "[t]here is no lighting other than what you'd think a family in a regular neighborhood would generate, so there's no public lighting, there's no light", E151, and that "[i]t's the lighting in your own house, probably the lighting next to the driveway, and the street lights as required by the County as needed." E154 But upon further cross-examination Appellee testified that the development would have a community center with lighting and maybe "lighting in the parking lot", and there would be tennis courts and a pool which may be lighted, but that

“chances are nobody’s going to see it.” E155-156. In sum, Appellee offered only a conclusory opinion about the effects of lighting but provided no facts describing what the actual lighting scheme would consist of. Even if the burden is on Appellant to prove no adverse effects surely Appellee must be required to disclose the nature and extent of the lighting scheme to give Appellant a fair chance to address it.

Similarly, because Appellee could not testify as to the final composition of the development in terms of house sizes, Appellant was not given a fair opportunity to present a case as to whether the final proposal is in harmony with the General Plan. One thing is clear: Appellee conceded the possibility that some compositions of house sizes would not be in harmony with the General Plan. In response to the question “if everybody buys the 1,800 square foot house, is that compatible with the harmony of the neighborhood?”, Appellee stated: “[i]f everybody buys the 1,800 square feet house, it will not be compatible with the neighborhood.” E167 It was clear error for the Board to conclude that the proposal was in harmony with the General Plan when Appellant testified that it may not be.

As with the lighting plan and the house sizes, Appellee offered no evidence as to the effects of a proposed common septic system because Appellee had not completed a design. Appellee’s expert testified that “additional study has to be done to finalize all of the information,” for a permit, E188, that the capacity of the system is “not defined yet”, E188, and that he even had not “made any assumptions at this point of how many

bedrooms or units” the septic system would have to support. E187 Later in the hearing Appellee’s expert stated that “[w]e’re in the study period.” E413

It is impossible to see how Appellee could meet its burden of proving that the project would have no adverse effects when Appellee offered no facts whatsoever about the specifics of the proposed system. It is more difficult to see how the burden can be seen as shifting to Appellant to prove that there will be no adverse effects for purposes of granting the conditional use process. According to Appellee, further details come after testing “further down in the process.” E186 Waiting until “further down in the process” to provide details deprives Appellant the opportunity to present a case in response to the application for a conditional use.

In this case, it was particularly important that Appellee provide details as to the specifics of the septic system to give Appellant a chance to assess the plan because Appellee testified that the final project would be similar to other projects Appellee’s expert had designed and “one project has had a problem.” E206 Had Appellee provided more specifics Appellant would have had the opportunity to retain his own experts to review the proposal and to opine as to whether this project would “have a problem.”

The issue of traffic safety was similarly glossed over by Appellee without submitting evidence. Appellee did not conduct a traffic study, and Appellee’s expert admitted that he was not addressing safety issues because they would – like the septic issue – be addressed at a later date. E219-220

The absence of evidence of adverse effects is not evidence of no adverse effects where no evidence has been presented.

III. The Circuit Court Erred in Finding That Substantial Evidence Supported the Board's Decision.

The Regulations provide that the Hearing Authority shall have the power to permit conditional uses, provided the following general standards are met:

The proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district in which it is located. In evaluating the plan under this standard, the Hearing Authority shall consider:

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

The word "will" in this regulation means "must" or "shall" for purposes of construction. The regulation positively requires that the proposed use be in harmony with the General Plan, and that it be proven so. There is no room for "mights" or "maybes" here. Even with the scrimpy amount of evidence presented Appellee failed to prove that the proposal is in harmony with the General Plan. The General Plan recognizes that this market of active seniors is seeking to "sell their large family home and yard and to purchase a smaller, easier to maintain home with a first-floor bedroom". E56 If, by statutory construction, the use plan must be in harmony with this expressed policy, then

the proposed use must be a plan for units that would not be the equivalent of a large home, but rather a smaller easier to maintain unit with a first-floor bedroom.²

Appellee's plan fails to prove that the units proposed are smaller than large family homes which active seniors would be selling, or that these units (consisting of two stories and 5600 square feet of space) would be easier to maintain. In fact, the record of this case plainly shows that these units are as large or larger than family homes active seniors would be selling.

Testimony before the Board does not show otherwise. Extremely large units with expansive second floors have been proposed throughout. While various alternative unit diagrams were added to the plan (at the hearing too late), Appellant made clear that it would be builders or buyers choice as to unit type. E93 The Board's decision on harmony appears to ignore this issue (so important to the Hearing Examiner), mentioning only in a separate section that "[Appellant] stated that market conditions would determine the actual sizes of the proposed dwellings", a statement which seems to avoid rather than decide this important policy issue. E468

Another such policy of the General Plan recommends "in order to supplement the congregate and apartment housing choices now available to seniors, the County should

² As to first-floor bedrooms, the original plan submitted by Appellee which was reviewed by DPZ did not specify first-floor bedrooms. Amendments were accepted by the Board improperly (as argued above), which now provide design detail for a first-floor master bedroom. But as these amendments should not have been allowed, Appellee's original use plan should be rejected as not being in harmony with this policy from the General Plan.

amend the Zoning Regulations to provide other housing options for seniors, including attached and detached single story, single family homes”. E56. Appellee’s use plan fails to prove that its units constitute houses of a single story. Very possibly all of the units in the project would be greater than a single story. And as this policy references these single story family homes in the same grouping (and to supplement) congregate and apartment housing, the Council could only have meant single story units of comparable size. Hence, the large multi-story houses (5600 square feet) with extensive upper stories cannot be in harmony with the policy. Again, Appellee was required to prove³ they were in harmony to satisfy his burden under §131 B.1. He did not do so. The Board’s Decision suggests this policy is not frustrated in this instance because the General Plan language was general and left details of such matters to future legislation. But this does not answer the strict issue involved, where policy is plainly involved and expressed, and where it is the applicant’s burden to prove that units are in harmony with such policy. Just because details of the stated goals and policy have not been enacted does not mean the policy contained within the General Plan does not exist.

Yet another policy of the General Plan finds, “The County needs to reconsider senior housing developments that are currently allowed in the Rural West . . . the West has fewer service available and does not have transit service that could provide access to services”.

³ Appellee is not benefited by any presumptions relating to the harmony issue, given the wording of §131 G. As such, Richmarr Holly Hills, Inc. v. American PCS, L.P., 117 Md. App. 607, 701 A.2d 879 (1997), relating to a finding of non-harmony under a separate local statute, does not apply.

E57 Of course, the Board is an agency of the County, and may easily consider this policy exactly as it pertains to this proposal. Appellee had the burden to prove his proposed plan was in harmony with this policy. He did not so prove. The record is plain that no public transportation exists at this location. Appellee admitted a much. E 163. Seniors would have to drive in highway-like conditions, along a 55 mph road, with one lane of traffic in each direction, with no median between lanes (using headlights mandated due to Howard County's recognition of the hazardous conditions) to attain any needed services, such as groceries, gas, medical treatment, books, clothing, toiletries, hair cuts, etc. The only road to these services, Route 32, is a level "F" road.

Similarly, the General Plan espouses seniors being able to safely age in place. E57-58 With such transit and road difficulties at this location, it is impossible for Appellee's plan to be in harmony with this safely-age-in-place policy.

As pointed out by DPZ the regulations officially define "Age-restricted Adult Housing" as:

A development that contains independent dwelling units with full kitchens that is designed for and restricted to occupancy by households having at least one member who is 55 years of age or older. (Emphasis added).

Because this is a separate use category, "it is implied that Age-restricted Adult Housing is meant to have inherent distinctions from other by-right dwellings, such as single-family detached dwellings. These distinctions should be clearly evident based on design and/or floorplans". And as the burden was on Appellee to prove clearly evident

distinctions from other by-right dwellings, the lack of any such proof on the record indeed disproves his case. And, as stated above, it is irrelevant that several alternative single-story plans were provided (too late), when the choice of builder or customer might very easily result in all units being multi-story 5600 square foot units resembling large by-right single-family dwellings. In any event, providing “a range” of four separate sketches for units is a red herring, and is irrelevant since there is no way to tell which, if any, of the smaller versions would be built, or how many. Appellee stated at the hearing that he did not know what the ultimate complexion of the development would be in terms of house sizes. E164-167

Appellant’s witnesses testified that these large proposed units are not in harmony with the General Plan in this neighborhood, and that these expansive and expensive multi-story structures are inconsistent with the policy and concept of downsizing. E318-330

A separate policy from the General Plan, that of affordability, E51-54, was also not properly addressed by Appellee. Not a single piece of information about unit prices, condominium fees (necessary for maintaining the 50 acre grounds, the roads, a property management company, snow removal, sewage treatment facilities, lighting, pool, tennis courts, meeting room, security, legal enforcement of condo fees, and other), or financing was submitted. DPZ noted that Appellee was to provide an “explanation about how five of the proposed dwelling units of the same general size indicated on the [proposed] plan will be provided as Moderate Income Housing Units”. This requirement, sounding like a

challenge, was an impossible requirement to fulfill at this location. And Appellee failed to fulfill it. No proof was given as to *how* the project would or could accommodate moderate income residents. As such, in evaluating the nature of the use in this respect, Appellee failed to prove by substantial evidence that his proposed plan would be in harmony with the regulations and the affordability policies indicated in the Howard County General Plan.

Just as he failed to prove harmony with the General Plan, Appellant failed to meet his burden of proof and persuasion under §131B.2. in that he failed to provide substantial evidence that his proposed use at this location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. Specifically §131B.2. provides:

The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the plan under this standard, the Hearing Authority shall consider whether:

- a. The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.
- b. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.
- c. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.
- d. The ingress and egress drives will provide safe access

with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

The burden of both proof and persuasion was on Appellant to prove this negative. Under this local ordinance this does not mean a certain degree of acceptable adverse effect may be implied. Rather, given the strict burden within this local ordinance, the proof comparison must be real to show that the proposed use here, will not have adverse effects above and beyond those adverse effects ordinarily associated with such conditional uses in the zone. Under this double-burden, Protestants were not required to prove the existence of adverse effects on vicinal properties (though they did).⁴ Rather, Appellee was required to prove the negative, that no adverse effects exist to any degree, or that every adverse effect which does exist does not go above and beyond the ordinary adverse effect associated with such use elsewhere in the same zone. Obviously, given the way this local ordinance is written, this is no small task for an applicant. And Appellee by not providing substantial evidence and information where he was required to, failed to meet his burden.

Section 31.N.1.i of the Regulations mandates that:

The project shall be designed to provide a transition or adequate buffering near the periphery of the site, either with open space areas and landscaping, or by designing the buildings near the periphery to be compatible in scale and character with residential development in the vicinity as demonstrated by architectural elevations or renderings submitted with the petition. (emphasis added).

No architectural elevations or renderings were “submitted with the petition”. DPZ pointed this out. This is a direct violation of §131 N.1.i. Thus, by law, since Appellee

⁴ The Board’s Decision improperly shifted the burdens. See e.g. Decision and Order, E479 (“Conversely, the opposition failed to provide sufficient evidence . . .”), E474, (“ . . . it is then incumbent upon those opposed to . . .”). This burden shifting would only be applicable if §131 G, imposing both burden of proof and burden of persuasion, was not embedded in the local ordinance, requiring the applicant to prove the negative.

failed to submit for review these required materials for full agency review, the Circuit Court's Decision must be reversed and vacated. Appellee argues this requirement is stated in the disjunctive, which is debatable. But even read this way, §131N.1.i. still requires architectural elevations or renderings to be submitted with the petition. This plainly did not happen.

Reading the requirement in the disjunctive is also irrelevant because the Board rested its decision on its finding, "the opposition failed to provide sufficient evidence that the design of the development is incompatible with the neighborhood". E479 Not only was this inaccurate, as Appellant overwhelmingly provided testimony regarding the quite obvious incompatibility with the residential development, it was simply not Appellant's burden. See §131G. Hence, by law, the Circuit Court's Decision *must* be vacated and/or remanded.

Moreover, it is impossible to determine based upon anything provided (even late) by Appellee what the resultant product would be, so as to determine *compatibility*. Presuming the massive visual wall described by the Hearing Examiner under the real possibility that all (or most) units would be of the 5600 square foot variety, compatibility is certainly disproven. Presuming, by contrast, the units to be of the 1800 square foot variety, Appellee's engineer, (but also the interested developer), Mr. Hikmat, quickly admitted that would not be compatible with residential development in the vicinity. E164-165

Even after amendments were improperly permitted (late), sketches provided on page 3 of the new proposal failed to demonstrate or compare whether buildings near the periphery would be compatible in scale and character. Certainly, no analysis was possible by DPZ to review the later amendment to determine whether replaced landscaping would maintain compatibility, and the Hearing Examiner denied the proposal based on Appellant's failure to prove adequate buffering. He noted the massing and arrangement of the units in a line 20 feet or less apart, 80' wide and 30' tall ("larger in size and massing than any other age-restricted adult housing unit that I have reviewed in the past

four years”), would create a visual wall stretching some 1300 feet. Nothing submitted (even late) by Appellee provided the Board with a means to analyze the sufficiency of the buffering or the compatibility of the many peripheral units. Again, the burden of proof rested entirely on Appellee to show substantial evidence and compliance. This he failed to do, despite creating his own chart to tell himself he did.

The Board, not having adequate information from Appellee, thus in its decision at page 16 straddled the issue, finding, “The units proposed will be single and double-story and will range in size from 1800 square feet to 6000 square feet.” This was not quite accurate, as the testimony was that the units could all be of the 6000 square foot variety (and incompatible), or could all be of the 1800 square foot variety (and incompatible). Indisputably, Appellee failed to provide the specific evaluations for all units “with the petition”.

Section §131 N.1.m of the Regulations mandates:

m. The petition shall include floor plans or other material demonstrating that the proposed dwellings will be appropriate for the age-restricted population, including design features that incorporate universal design principles to be accessible to or adaptable for residents with limited mobility and other age related functional limitations. The petition must include a list of interior features that make individual dwelling units adaptable and must demonstrate that accessible routes will be provided between parking areas, sidewalks, dwelling units and commons areas. (emphasis added).

A review of the petition reveals that the petition filed with DPZ failed to include such an interior feature list. Nor did it include floorplans. Nor did it include other material demonstrating dwelling appropriateness for the age-restricted population. As such, Appellee failed to satisfy §131 N.1.m, and the Circuit Court’s Decision, by law, should be reversed and vacated.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court vacate the Order of the Circuit Court affirming the decision of the Howard County Board of Appeals and dismissing Appellants' appeal to the Circuit Court.

Respectfully Submitted,

Dated: August 1, 2008

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CERTIFICATE OF SERVICE

I do hereby certify that I have, on this 4th day of August, 2008, two copies of the foregoing Brief, along with the Record Extract, was served by first class mail, postage prepaid, and addressed as follows:

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TYPEFACE

Appellants' brief has been prepared with proportionally space type. The font use is Times New Roman and the type size is 13 points. Md. Rule 8-112(c)(1).