

**MOTIONS FILED IN THE
COURT OF SPECIAL APPEALS**

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

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COURT OF SPECIAL APPEALS

Huntington Terrace Citizens Association :

Appellant, :

v. :

Suburban Hospital :

Appellee. :

September Term 2011
No. 01251

MOTION FOR RECONSIDERATION

Appellant, Huntington Terrace Citizens Association (“HTCA”), by and through undersigned counsel, respectfully moves the Court pursuant to Md. Rule 8-605, for reconsideration of the Court’s September 10, 2013 decision in this appeal affirming judgment of the Montgomery County Circuit Court. The reasons for this motion are as follows:

1. The Court’s decision fails to address the principal grounds relied upon by the Appellant as requiring recusal. As set forth in our Main Brief (M.17-19) and in our Reply Brief (R.6), the Chair was required not only to review the testimony of her husband, but in order to rule in favor of HTCA, would have had to find her husband’s testimony had no merit.

Specifically, an issue that had to be decided by the Board of Appeals was whether a physicians’ office building was so essential to a hospital that it was an “inherent” part of the hospital. If it was inherent, its adverse effects would not be the basis for denial. (M.17).

The hospital, in support of its position that it was inherent, cited a prior Board decision granting a previous application for an on-site physician's office building at Suburban Hospital. That prior opinion expressly relied upon the testimony of the Board of Appeals Chair's husband, which stated that an on-site physician's office building was so essential to hospital operations that if the special exception to allow it were not granted the denial "would accelerate the closing of Suburban". (M.18). In contending that the physician's office building was not essential, and therefore not an inherent part of a hospital, appellant argued that the testimony of the Chair's husband was not valid, as the hospital never constructed the physician's office building (although authorized to do so in the prior decision), and that in the years that elapsed since the prior decision, the hospital continued to operate successfully. (M.18).

Thus, in order to rule in favor of HTCA the Chair of the Board of Appeals was required to evaluate the validity of her own husband's testimony and to reject that testimony. This clearly satisfies the standard of mandatory recusal for the appearance of impropriety. The test for the appearance of impropriety requiring recusal is an objective one. Jefferson-El v. State, 330 Md. 99, 108 (1999) ("The test...whether a reasonable member of the public, knowing all the circumstances, would be led to the conclusion that the judge's impartiality might reasonably be questioned".) In re Turney, 311 Md. 246, 253 (1987)

This Court's decision apparently did not even consider, and certainly did not address, these specific facts requiring recusal. It merely vaguely references that the Board of Appeals Chair's husband gave testimony in the past regarding a modification request.

(Opinion, p.8). Further, the Opinion applies the wrong standard, by stating this testimony failed to demonstrate that the Chair could not perform her duties “without bias in favor of Suburban”. Id. Bias was not the grounds asserted by the Appellant as the basis for the recusal. Rather, the asserted ground for recusal was the appearance of impropriety, which, has a different and objective standard. To hold that a reasonable member of the public would not reasonably question the Chair’s impartiality when she had to evaluate and reject the testimony of her own husband does not comport with reality.

2. In evaluating the adverse impacts of the proposed special exception modification, Appellant contended the Board of Appeals applied the wrong legal standard. (M.19-23; R.6-7). The correct legal standard is whether the special exception modification would have “an adverse effect upon neighboring properties in the general area” and if so, it must be denied. People’s Counsel for Baltimore County v. Loyola College, 406 Md. 54, 64 (2008). Appellant contended that the Board of Appeals used the erroneous standard that the adverse effects must be above and beyond, i.e., greater than they would be generally elsewhere in the County. This Court correctly noted that the Board of Appeals’ written decision did not explain what standard of review the Board of Appeals applied. This Court’s Opinion noted that the transcript of the Board of Appeals’ deliberations reflected that late in the deliberations the Vice-Chair noted the correct legal standard. (Opinion, p.9). What the Opinion of this Court fails to address is the fact that transcript of the Board of Appeals’ deliberation shows that the wrong legal standard was expressly and repeatedly stated with this wrong legal standard applied again and again as the basis for the vote on numerous issues. (M.22).

For example, when Board of Appeals Member Shawaker expressed concern regarding certain adverse effects, the Chair and Vice Chair forced her to abandon that position citing the wrong legal standard.

- The Vice-Chair stated: "The question in this case is not whether a hospital has adverse effects....The question is also not whether the hospital at issue will have adverse effects at this proposed location....The proper question is whether those adverse effects are above and beyond, i.e., *greater here than they would be generally elsewhere within areas of the County....*" (E.894, tr. 39-40) (emphasis added).
- Chair: "But what David [Vice-Chair] just stated, and from the Mossburg case and whatever is, you know *the standard that we have to show that adverse effects from this modification rose above the adverse effects in any other special exception use in the zone, that they were unique to this. And they are not.*" (E.895, tr. 41) (emphasis added).
- Vice Chair: But you have to remember, again, *we can only deny on the basis of adverse effects that are above and beyond what would ordinarily have been associated by the assertion of this use into a residential neighborhood.*" Chair: *And it has to rise to a unique level at this place that would not occur at any other.*" (E.900, tr. 62, 64) (emphasis added).

Boardmember Shawaker backed off her position that the requirement for peaceful enjoyment of properties was not met after the Chair and Vice Chair demanded proof that the adverse impacts would be above and beyond those elsewhere in the County, i.e., unique.

- Vice Chair: "*And I would be interested in hearing what the grounds are for denial on the basis of the enjoyment and peaceful enjoyment of the adjoining properties will be adversely impacted above and beyond....;*"

Chair: "*That they would be unique; or that your use and enjoyment would be uniquely adversely affected at this site, more so than any*

other site in the zone that had this condition.” (E.902-03, tr. 72-73) (emphasis added).

For example, when Boardmembers Boyd and Shawaker indicated that they thought the other compatibility requirements were not met, the Vice Chair again reminded them (erroneously) of the law.

- Vice Chair: “So its not enough to say that the surrounding community is adversely affected. There has to be *and in Loyola and other cases the Court has said that if you are going to deny the special exception, you need strong substantial probative evidence to support findings of adverse effects, and not just any adverse effects, but the adverse effects that go above and beyond the effects that would occur in other residential zones.*” (E.894, tr. 38, 40) (emphasis added).

This Court’s Opinion relies upon the self-serving window dressing statements at the beginning and toward the end of the Board of Appeals’ deliberations which purport to state the correct legal standard. This Court’s Opinion ignores the actual discussion by Board of Appeals members and the actual legal standard expressly applied in their deliberations and votes. A fair reading of the transcript at a minimum requires remand for decisions not influenced by the wrong legal standard regarding adverse effects.

3. The decision fails to address the legal issue that the Board of Appeals misinterpreted the statutory provision governing setbacks. As discussed in our briefs, (M.23-24, R.8), §59-G-2.31(3) provides that no hospital building shall be nearer to a single family home lot line than the distance equal to the height of the building and “in all other cases *not less than 50’....*” (Emphasis added). The Hearing Examiner found the proximity of the 200’-300’ long hospital addition, predominantly 50’ in height, located behind homes on Southwick Street, and the proximity of the 200’ x 300’ x 35’ garage to

Southwick Street single family homes was not compatible. She recommended a minimum 100' setback. (E.170-171). The Board of Appeals rejected any setback beyond 50' because it erroneously interpreted the statutory provision to mean "that the Council has decided" that the Board has no discretion to require greater than 50', no matter how lengthy the building, providing the building is not over 50' in height. (E.900, tr. 22-23). This misinterpretation construes "the minimum" to mean "the maximum" permitted. This erroneous interpretation by the Board of Appeals, and its finding of compatibility based upon this interpretation, require reversal. The existence of other evidence in the record that might support a finding of compatibility is irrelevant. "In judicial review of an administration action the Court may only uphold the agency order if it is sustained by the agency's findings *and for the reasons stated by the agency.*" Harford County v. Preston, 322 Md. 493, 505 (1991) (emphasis added). Further, an administrative agency's decision is owed no deference when its conclusion is based upon the wrong standard of law." Belvoir Farms v. North, 355 Md. 259, 267 (1999).

4. The appeal raised numerous issues in which the Board of Appeals failed to make any findings of fact, and other issues in which the Board of Appeals' findings were legally insufficient. This Court's decision fails to specifically address Appellant's contentions. Rather, the decision appears to attempt to resolve these issues by adopting the position that even though the findings of fact are absent or deficient, the Board of Appeals' decision may be affirmed, as evidence in the record could be found that would support the Board of Appeals' decision. This approach is contrary to well settled procedure established by decisions of this Court and the Court of Appeals. As noted

above, the court may uphold the agency's order solely based upon the agency's findings and for the reasons stated by the agency. Harford County, supra, 322 Md. at 505.

Findings, of course, must be "meaningful," cannot consist of "broad conclusory statements" and must "resolve all significant conflicts of evidence...." Mehrling v. Nationwide Ins. Co., 371 Md. 40, 62-64 (2000). If the findings are absent or deficient, it is not proper for the Court to review the record itself to determine whether there is substantial evidence that would support the necessary findings if made. "This court 'may not substitute our judgment for that of the [Board], assess the weight and credibility of that evidence, and make specific findings of fact, and then draw and articulate conclusions of law there from'". Eastern Outdoor Advertising Co. v. Mayor and City Council of Baltimore, 128 Md. App. 494 at 516-17 (1999) (*quoting Colao v. Prince George's County*, 109 Md. App. 431, 463 (1995)).

Thus, if there are not proper findings, "...and if the court elects not to remand, its clumsy alternative is to *read* the record, *speculate* upon the portions which probably were believed by the Board, *guess* at the conclusion drawn from the credited portion, *construct a basis* for the decision, and *try to determine* arrived at should be sustained." Id. 128 Md. at 518 (*quoting Gough v. Board of Zoning Appeals*, 21 Md. App. 697, 702 (1974)) (emphasis in the original). The Opinion of the Court appears to review some of the evidence of record and concludes that there is sufficient evidence to support a few expressly identified issues, and implies that, with regard to other issues, there also must be evidence of record that would support what the Board of Appeals has done. The Court's Opinion states, its role is "to simply determine if the evidence exists of record".

(Opinion. 22). However, that is not the role of this Court. This Court's role is to determine whether the Board of Appeals made express findings explaining its decision, and then the Court is to look at the facts relied upon by the Board of Appeals to determine if they are supported by the record.

The fact that this matter involves a report and recommendation to the Board of Appeals by its Hearing Examiner does not change the findings requirement. Where the Board of Appeals rejects the Hearing Examiner's recommendation and findings, it has the obligation to set forth its own findings to explain the basis for its decision differing from that of the Hearing Examiner. See, e.g., Carriage Hill Cabin John v. Maryland Health Resources Planning Comm'n, 125 Md. App. 183, 221 (1999) (Agency "adequately addressed, directly and indirectly, those matters with which it disagreed" with Hearing Examiner.).

A. An issue was whether the hospital was a "community serving" one so as to be consistent with the Master Plan. Extensive evidence was presented by the Appellant demonstrating it was not a "community serving" hospital. (M.28-29; R.10). The Board of Appeals did not even acknowledge, no less consider, this evidence. The Board of Appeals merely stated, with no findings or explanation, that it was a community serving hospital. (E.28, E.897 tr. 51). Such a bare conclusion does not meet the requirements of finding of fact.

B. An issue was whether the proximity to houses on Southwick Street of the large hospital addition and the large new garage made the structures incompatible with the residential properties. The Hearing Examiner found that under the relevant

County statutory provision, proximity of hospital buildings was not to be considered inherent and that the closeness of these large buildings to the residential properties rendered the requested modifications not compatible. (M.30-31; R.13-14). The Board of Appeals failed to make any findings specifically addressing proximity. It appears to have erroneously considered the proximity to be an inherent characteristic of large hospital buildings.

C. An issue was whether the proposed special exception modification met the requirement of consistency with the Master Plan. Extensive evidence relating to the Master Plan, including the testimony of land planners for both parties, was presented. The Hearing Examiner, after careful analysis of this evidence and the Master Plan, found the proposed special exception modification was not consistent. (M.27-28; R.12-13). The Board of Appeals did not address this issue. It simply stated that it would defer to the Planning Board staff's Master Plan recommendation. (E.897 tr. 50). The staff report essentially consisted of one page and was prepared prior to the commencement of the hearings before the Hearing Examiner and obviously did not consider any of the expert testimony or other evidence presented at the hearing. The decision of the Board of Appeals simply to rely upon the staff report, under these circumstances, with no further explanation, does not constitute the required meaningful findings of fact resolving significant conflicts of evidence in the record. Mehrling, supra. The Board of Appeals decision on the key issue of Master Plan consistency renders the 34 days of hearing before the Hearing Examiner a waste of time and effort for the opponents. At a minimum, findings are required explaining why the staff report was being accepted over

the more extensive evidence presented at the hearing, particularly when the evidence was found meritorious by the Hearing Examiner. Moreover, a mere citation to another agency's report is not an adequate finding. See, Eastern Outdoor Advertising Co. v Mayor and City Council of Baltimore, 146 Md. App. 283, 316-317 (2002); Rodriguez v. Prince George's County, 79 Md. App. 537, 550 (1989). It is particularly inappropriate here where the staff report was essentially one page and prepared prior to the evidence produced at the hearing, and the staff report, contrary to the Board of Appeals' understanding, contained a separate report of the Planning Board's division responsible for Master Plan interpretation concluding that the proposal was not consistent with the Master Plan. (M.27).

D. An issue was whether the proposal would be adverse to the economic value of the surrounding homes. The evidence relied upon by the hospital was a report by the hospital's appraiser. The Hearing Examiner found that the appellant's criticisms of the report were "valid" and the appraiser's efforts "were not persuasive". Therefore the Hearing Examiner advised the Board of Appeals not to rely upon his report and testimony. (M.24-26; R.11). The Hearing Examiner's report contained an extensive discussion of the evidence supporting her conclusion. The transcript of the Board of Appeals' deliberations shows that the Board of Appeals literally only spent two or three minutes before rejecting the examiners findings and conclusion. The Chair merely stated that the appraiser's report "addressed the questions I might have" and there was no further discussion or explanation." (E.899 tr. 60). The Board of Appeals then concluded the hospital met its burden showing no economic detriment. This "finding" is clearly

deficient, to say the least. It consists of nothing more than a conclusory statement, without any basis, which is contrary to the requirements for adequate findings, as discussed above. This Court's Opinion upholding such a finding as adequate is inconsistent with the requirement of meaningful findings resolving conflicting evidence.

E. An issue was whether the Southwick Street entrance to the new 1,176 car garage should be limited to emergency vehicles only, rather than an entrance for employees. (M.31-34; R.15). The Planning Board staff, the hospital's engineer and the hospital's traffic expert all were in agreement that the Southwick Street entrance could be closed as the main entrance had the capacity adequate to handle the traffic. (M.32). The Hearing Examiner found that the "dramatic increases" in traffic on Southwick Street would cause "a significant adverse effect" on the single family houses on that street. The Hearing Examiner found the benefit of having the Southwick Street entrance did not justify its adverse effects. (M.32, E.121, E.173). Again, the Board of Appeals did not even consider the expert testimony that the entrance was not necessary and made no finding as to the necessity for the entrance remaining open. Again, this Court's affirmance of the Board's decision approves an administrative agency's determination made without resolution of conflicts in the evidence and complete findings of fact. Mehrling, supra.

The requirement of adequate written findings of fact and conclusions of law "is in recognition of the fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision" as well as to permit meaningful judicial review. Harford County, supra, 322 Md. at 505.

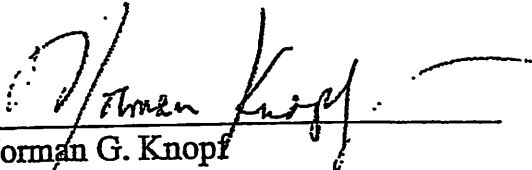
After 34 days of hearing involving over 50 witnesses and 447 exhibits, the Hearing Examiner found Appellant's position meritorious and recommended that the Board of Appeals remand the matter to her for further proceedings to modify the proposal to meet compatibility and Master Plan requirements. The Board of Appeals clearly has the right to reject the Hearing Examiner's findings and conclusions. However, as noted, the Appellant has a fundamental right to have a clear and full explanation as to the basis of the Board of Appeals' findings of fact which would explain why it rejected the Hearing Examiner's findings. This is required in fairness to the Appellant, as well as essential for the community to have confidence in the integrity of the judicial process. This Court's Opinion fails to adhere to these principles. The Court's Opinion, in effect, stands for the proposition that as long as there is evidence in the record which could support the Board of Appeals' decision, the decision will be affirmed even though there are no adequate findings of fact by the agency setting forth the evidence and basis for its decision. This is contrary and inconsistent with settled law and should be rectified by reconsideration.

CONCLUSION

For the foregoing reasons, the Motion for Reconsideration should be granted and at a minimum, the decision of this Court should be withdrawn and the matter set for re-argument, or, in the alternative, the decision of the Circuit Court should be reversed and the matter remanded.

Respectfully submitted,

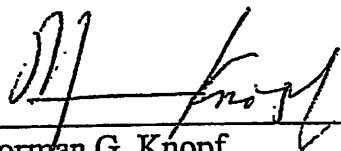
October 8, 2013


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 8th day of October 2013, a true and correct copy of the foregoing Motion for Reconsideration was mailed, first class mail, postage prepaid, to:

Barbara Sears, Esq.
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7200 Wisconsin Avenue
Bethesda, Maryland 20814-4842



Norman G. Knopf

**IN THE COURT OF SPECIAL APPEALS
FOR MARYLAND**

HUNTINGTON TERRACE CITIZENS ASSOCIATION	:	
	:	
Appellant,	:	Case No. 01251
	:	
	:	September Term 2011
	:	
v.	:	
	:	
SUBURBAN HOSPITAL	:	
	:	
Appellee.	:	

ORDER

UPON CONSIDERATION of Appellant's Motion For Reconsideration, and Appellee's opposition thereto, it is this _____ day of _____, 2013, by the Court of Special Appeals for Maryland,

ORDERED, that the motion is **GRANTED**, and, it is further

ORDERED, that the decision of this Court is hereby **WITHDRAWN** and the matter set for re-argument, or, the decision of the Circuit Court is hereby **REVERSED** and the matter **REMANDED**.

SO ORDERED.

Judge, Court of Special Appeals

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IN THE COURT OF SPECIAL APPEALS OF MARYLAND

HUNTINGTON TERRACE
CITIZENS ASSOCIATION

Appellant

v.

SUBURBAN HOSPITAL

Appellee

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Case No. 01251
September Term, 2011

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**APPELLEE SUBURBAN HOSPITAL'S RESPONSE IN OPPOSITION
TO APPELLANT HUNTINGTON TERRACE CITIZENS ASSOCIATION'S
MOTION FOR RECONSIDERATION**

Pursuant to Maryland Rule 8-605(a), Appellee Suburban Hospital, Inc. ("Suburban" or "Hospital"), by its attorneys, Barbara A. Sears, Erin E. Girard, Phillip A. Hummel, and Linowes and Blocher LLP, hereby submits its Response in Opposition to Appellant Huntington Terrace Citizens Association's Motion for Reconsideration ("Motion"). Suburban states its grounds for its opposition to the Motion as follows.

I. INTRODUCTION

1. On August 4, 2011, Appellant appealed from the judgment of the Circuit Court for Montgomery County ("Appeal") affirming the decision of the Board of Appeals for Montgomery County ("Board") to grant Suburban's Petition for a Special Exception Modification to its existing hospital special exception use ("Modification").
2. The Appeal was argued before the Court on September 13, 2012.
3. On September 10, 2013, the Court filed an opinion ("Opinion") affirming the judgment of the Circuit Court for Montgomery County.

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4. On October 9, 2013, Appellant filed the Motion with the Court pursuant to Rule 8-605. By a telephone call from the Clerk of the Court on the same day, Appellee's Counsel was advised that although not requiring a response to the Motion, the Court would allow Appellee to file one.

5. The Opinion, at pages 1-4, summarized the facts and procedural history pertaining to the Court's discussion and ruling.

II. STANDARD OF REVIEW

1. It is a well-established tenet of appellate procedure that a motion for reconsideration via rehearing does not present an opportunity for an appellant to reassert previously rejected arguments. "It should go without saying that a petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original appeal proceedings[.]" 16AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §3986.1 (4th ed. 2008); *accord* 5 C.J.S. Appeal and Error § 796 (2007) ("[T]he purpose is not to permit the litigants to try the case a second time."). Likewise, "[m]otions for rehearing are not to be used for the purpose of venting counsel's frustrations with the form or substance of the Court's decision." 5 C.J.S. Appeal and Error § 798 (2013 Cum. Supp.). Thus, "[a] rehearing should never be granted when it would amount to nothing more than a second appeal on a question determined in the first." 5 C.J.S. Appeal and Error § 796.

III. ARGUMENT

1. In its Motion, Appellant raises the following issues as the basis for its reconsideration request:

- a. The Court's Opinion failed to address its argument that Board Chair Catherine Titus was compelled to recuse herself because she was required to evaluate her

husband's 1987 testimony in support of an unrelated special exception modification, and the Court applied the incorrect legal standard to Appellant's recusal arguments. (Motion, pgs. 1-3).

- b. The Court's Opinion neglected to acknowledge that the Board relied upon an incorrect legal standard regarding adverse impacts during its deliberations and misinterpreted the specific special exception setback standard for a hospital use. (Motion, pgs. 3-6).
- c. The Court's Opinion failed to specifically address Appellant's argument that the Board's decision was not supported by sufficient factual findings. (Motion, pgs. 6-12).

For the reasons stated below, Appellant's Motion is both unpersuasive and improper, as it reargues issues already deemed unmeritorious by the Court in its Opinion.

A. THE COURT CONSIDERED AND PROPERLY REJECTED ALL OF APPELLANT'S RECUSAL ARGUMENTS

1. As its first ground for reconsideration, Appellant claims that the Opinion failed to properly address its argument that the Board's Chair was obliged to recuse herself because she was required to evaluate the validity of her husband's 23-year-old testimony from a previous case. (Motion, pgs. 1-2). According to Appellant, the Opinion "apparently did not even consider, and certainly did not address, these specific facts requiring recusal." (Motion, pg. 2). Additionally, Appellant states that the Opinion applied the wrong legal standard when considering its recusal arguments by requiring a showing of bias. (Motion, pg. 3). Even a cursory reading of the Opinion, however, is sufficient to demonstrate that Appellant's assertions are without merit and that the Court applied the correct standard in its review of the recusal issue.

2. After accurately identifying Appellant's allegation that the Chair was required to recuse herself because her "partiality might reasonably be questioned," the Court, relying on *Regan v. Board of Chiropractic Examiners*, 355 Md. 397 (1999), determined that the "appearance of impropriety" standard was applicable to the instant matter. (Opinion, pgs. 4-5). The Opinion then specifically outlined the recusal arguments made by Appellant before the Board, including "that Chair Titus's husband had, in 1987, testified in support of Suburban's then-pending modification application." (Opinion, pg. 7). The Court addressed each basis for recusal presented by Appellant and "[found] no merit in any of [Appellant]'s recusal arguments." (Opinion, pg. 7). With respect to the specific assertion that the Chair was required to recuse herself on account of her husband's 1987 testimony, the Court concluded that Appellant's argument was "ill-supported." (Opinion, pg. 8).

3. Focusing exclusively on the Court's isolated use of the word "bias" when concluding that the Chair's husband's 1987 testimony did not create an appearance of impropriety, Appellant argues that the Court applied the wrong legal standard in its analysis. (Opinion, pg. 8, Motion, pg. 3). The Opinion, however, clearly established that the Court both identified Appellant's argument and applied the correct "appearance of impropriety" standard from *Regan* when assessing the Appellant's recusal arguments. The first two sentences from the Opinion's discussion of Appellant's recusal argument specifically noted that Appellant did not allege "*actual bias*," but that her "partiality might reasonably be questioned." (Opinion, pg. 4) (Emphasis added). The Court then assumed that the "appearance of impropriety" standard from *Regan* applied to Chair Titus's participation. (Opinion, pg. 5). Even the topic sentence from the Opinion in the paragraph cited by Appellant to support its contention recognized the proper standard by concluding that the "other arguments as to the '*appearance of impropriety*' are

similarly ill-supported.” (Opinion, pg. 8) (Emphasis added). Contrary to the assertions of the Motion, therefore, the Opinion established that the Court was aware of the proper legal standard and correctly applied it to reject Appellant’s recusal arguments.

4. Thus, the Opinion appropriately identified each of Appellant’s recusal arguments, including discussion regarding the previous testimony of the Chair’s husband, identified the proper “appearance of impropriety” standard from *Regan*, correctly applied that legal standard to the facts of the case, and suitably concluded that all of Appellant’s recusal arguments had “no merit” and were “ill-supported.” (Opinion, pgs. 7-8). Appellant’s Motion, therefore, is nothing more than an attempt to reargue allegations that were previously considered and rejected by the Court, which is not a proper basis for a reconsideration request. *See* 5 C.J.S. Appeal and Error §798 (“Arguments presented in the appellate brief and not overlooked, but considered and rejected by the court in the original hearing, are not grounds for a rehearing.”)

B. THE COURT CORRECTLY CONSIDERED AND REJECTED APPELLANT’S ARGUMENTS THAT THE BOARD APPLIED THE INCORRECT STANDARD REGARDING ADVERSE IMPACTS DURING ITS DELIBERATION AND MISINTERPRETED THE SETBACK PROVISION

1. Appellant also argues that the Motion should be granted because the Court failed to properly address the Board’s alleged application of the incorrect legal standard for adverse impacts during its deliberations and misinterpreted the applicable setback provision for a hospital special exception. (Motion, pgs. 3-6). Again, a reading of the Opinion belies Appellant’s allegations.

2. Section II of the Opinion begins by recognizing Appellant’s claim that the Court “should infer, based on remarks made during the Board’s deliberations, that ‘all of the Board’s fact finding and conclusions on issues involving adverse effects were based upon, or at least

influenced by, the wrong [legal] standard.” (Opinion, pgs. 8-9) (quoting Appellant’s Reply Brief, pg. 9) (alteration in original). The Court then notes Appellant’s failure to cite to the Board’s use of the proper standard during the deliberations and goes on itself to cite specific portions of the Board’s transcript wherein the Board’s vice-chair enunciated the correct legal standard for evaluating a special exception’s adverse effects. (Opinion, pg. 9).

3. Additionally, the Court concluded in its Opinion that “[i]t is plain from reading the entire opinion that the Board applied the proper standard. The Board’s written opinion made repeated references to its analysis of whether the proposed modification *would have an adverse impact on the neighborhood*. . . . A similar point by point analysis of the county’s general standards for special exceptions set forth the Board’s finding that the ‘general standards’ for granting a special exception in Montgomery County would also be satisfied.” (Opinion, pgs. 11-12) (Emphasis added). These “general standards” include § 59-G-1.2.1 of the Montgomery County Code (“Code”), which requires the Board to consider the inherent and non-inherent adverse effects of the use “*on nearby properties and the general neighborhood at the proposed location*, irrespective of adverse effects the use might have if established elsewhere in the zone.” (emphasis added). Ultimately, the Court concluded that it found “no merit in [Appellant]’s apparent contention that, because other cases that did not state the correct standard were mentioned at one point during the Board’s deliberation – before the discussion was later steered in the proper direction by the Board’s vice-chair – we should find that the entire deliberation and the written opinion were fatally tainted.” (Opinion, pg. 12).

4. With regard to the purported misinterpretation of the specific special exception setback standard for hospitals, the clear language of the Opinion also confirms that the Court considered Appellant’s argument in this regard and was not persuaded. In its Opinion, the Court

determined that the Board's written decision "addressed, point by point, the Montgomery County standards applicable to the proposed use and concluded that 'the *specific standards for this special exception use will be satisfied in this case[.]*'" (Opinion, pg. 12) (Emphasis added). These specific standards include the setback standards contained in § 59-G-2.31(3) of the Code. Thus, the Court explicitly reviewed and approved the Board's interpretation and application of the relevant criteria in making its findings.

5. The Opinion further noted that a similar point by point analysis of the County's general standards for the granting of a special exception in Montgomery County was performed by the Board. (Opinion, p. 12). These general standards, found at § 59-G-1.21 of the Code, are set out in full on pages 18-19 of the Opinion and include a finding of "harmony with the general character of the neighborhood[.]" Thus, the setbacks were further considered and found to be satisfactory in the context of the Board's findings of compatibility of the Modification with the general character of the neighborhood and that finding is noted in the Court's Opinion. (Opinion, pg. 12).

6. Based on the above, and despite Appellant's contention to the contrary, a reading of the Opinion demonstrates that the Court considered Appellant's allegations of legal error by the Board and found them to be without merit. As a result, rather than supplying an appropriate basis for reconsideration, Appellant's Motion does nothing more than reargue points previously considered and rejected by the Court.

C. THE COURT CORRECTLY CONSIDERED AND REJECTED APPELLANT'S CONTENTION REGARDING THE LEGAL SUFFICIENCY OF THE BOARD'S FINDINGS

1. Appellant's final argument is that the Opinion does not address Appellant's contention that the Board failed to make findings of fact on a number of issues and that its

findings on other issues were legally insufficient. (Motion, pg. 6). Much of Appellant's Motion in this regard is devoted to how the Board failed to explain its departure from the Hearing Examiner's recommendations on particular topics. (Motion, pgs. 8-12).

2. After establishing the legal standards for its review of the Board's decision, the Court specifically rejected Appellant's argument that the Board was required to explain the basis for declining to follow a number of the Hearing Examiner's recommendations. According to the Court, "[a]n agency is expected to support its own final decision with substantial evidence. But it does not need to provide a point-by-point refutation, supported by substantial evidence, of preliminary recommendations." (Opinion, pg. 15). On this topic, the Court properly noted, "[t]he final decision in this case was not the rejection of the hearing examiner's recommendations, but the grant, with conditions, by the Board of Suburban's request to modify its existing special exception." (Opinion, pg. 15).

3. In its Opinion, the Court also disagreed with Appellant that this Court's decision in *Maryland Board of Physicians v. Elliott*, 170 Md. App. 369, *cert. denied*, 396 Md. 12 (2006) buttressed its argument that the Board was legally required "to set forth its reasons for disagreeing with the hearing examiner." (Opinion, pg. 15-17). The Court determined that "[w]e find no support in *Elliott* for [Appellant]'s contention that the Board was required to articulate why it disagreed with the recommendation of the Hearing Examiner." (Opinion, pg. 17). The Court ultimately cited with approval the language from *Elliott* that, "it does not matter that the agency may have ignored the findings and the proposed decision of the ALJ, even without having had any rational basis to do so, just so long as there still exists some other basis for the agency's decision that would be enough, in and of itself, to satisfy the substantial evidence test." (Opinion, pg. 17) (quoting *Elliott*, 170 Md. App. at 386). Therefore, the Court explicitly

considered and disagreed with Appellant's argument that the Board was required to explain its reasoning for disagreeing with the Hearing Examiner in its final written decision.

4. In its Motion, Appellant completely disregards this analysis and instead cites repeatedly to the Hearing Examiner's findings as the basis for its argument that the Board failed to make proper findings on a number of issues, including the proximity of the structures to the neighborhood, master plan compliance, economic impact and the inclusion of the employees only entrance on Southwick Street. Appellant concludes its analysis by stating it "has a fundamental right to have a clear and full explanation as to the basis of the Board's findings of fact *which would explain why it rejected the Hearing Examiner's findings.*" (Motion, pg. 12) (Emphasis added). Thus, Appellant does nothing more than use its Motion to "reargue matters already argued unsuccessfully in the original proceeding," *i.e.*, the need for the Board to explain its deviation from the Hearing Examiner's recommendations, which is not a proper basis for reconsideration. Federal Practice and Procedure § 3986.1.

5. After disposing of Appellant's argument that disagreement with the Hearing Examiner placed a higher evidentiary burden on the Board, the Court in its Opinion properly reviewed whether substantial evidence existed in the record to support the Board's conclusions. The Court concluded by determining that the evidence upon which the Board relied in its decision, such as the report of Technical Staff recommending approval of the Modification, the testimony of Dr. Dany Westerband, and the real estate market conditions report of Ryland Mitchell, as well as other evidence of record considered by the Board, constituted substantial evidence to support the Board's grant of the Modification. Although Appellant's Motion contests the persuasiveness of this evidence, the Court in its Opinion correctly noted that "it is not the task of a reviewing court to weigh the evidence and substitute our judgment for that of

the agency[.]” (Opinion, pg. 22). The assertions contained in Appellant’s Motion, therefore, represent nothing more than an invitation to have the Court reconsider an issue that it has already analyzed and rejected.

III. CONCLUSION

For the foregoing reasons, the Court should deny Appellant’s Motion and issue the mandate affirming the judgment of the Circuit Court for Montgomery County and ordering Appellant to pay costs.

Respectfully submitted,

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By: 

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By: 

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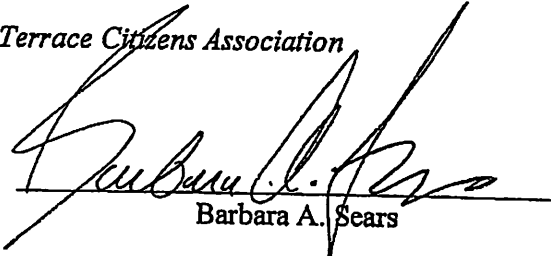
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CERTIFICATE OF SERVICE

I hereby certify on this 18 day of October, 2013, that a copy of the foregoing Response, along with the accompanying Order, was mailed via first-class mail, postage prepaid, to:

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Barbara A. Sears

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

HUNTINGTON TERRACE
CITIZENS ASSOCIATION

Appellant

v.

SUBURBAN HOSPITAL

Appellee

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Case No. 01251
September Term, 2011

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**ORDER DENYING APPELLANT HUNTINGTON TERRACE CITIZENS
ASSOCIATION'S MOTION FOR RECONSIDERATION**

It is this ____ day of _____, 2013, by the Court of Special Appeals of
Maryland,

ORDERED, that Appellant's Motion for Reconsideration is **DENIED**, and it is further

ORDERED, that the Clerk issue the mandate affirming the judgment of the Circuit Court
for Montgomery County and ordering Appellant to pay costs.

Judge, Court of Special Appeals of Maryland

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