

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.

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 "f[ound] 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

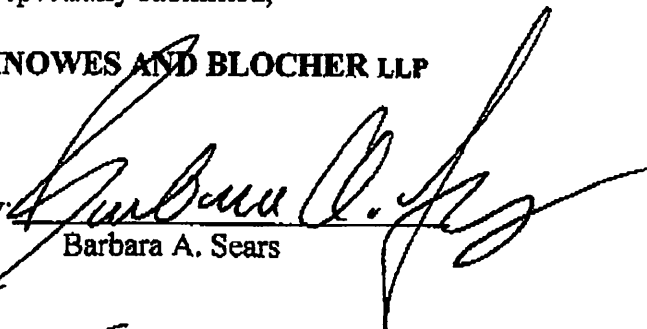
the agency[.]” (Opinion, pg. 22). The assertions contained in Appellant’s Motion, therefore, represent nothing more than an invitation to have the Court reconsider an issue that it has already analyzed and rejected.

III. CONCLUSION

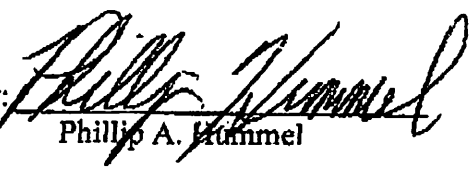
For the foregoing reasons, the Court should deny Appellant’s Motion and issue the mandate affirming the judgment of the Circuit Court for Montgomery County and ordering Appellant to pay costs.

Respectfully submitted,

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Barbara A. Sears

By: 
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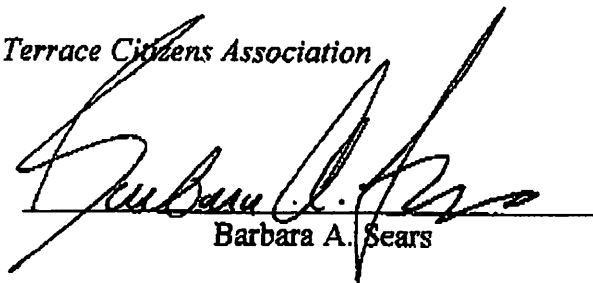
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CERTIFICATE OF SERVICE

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

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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

Copies to:

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