Moses, Leonard D.

From: Madeline Kochen <kochenm@gmail.com>
Sent: Wednesday, February 10, 2021 6:27 PM
To: Clerk of the Council
Cc: Moses, Leonard D.
Subject: Re: Appeal from SE-4816 and ROW #220 Two Farms, Inc.
Attachments: KochenAppealCORRECTED.pdf

Follow Up Flag: Follow up
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I apologize, but I've caught a few nasty typos and have to request that you please REPLACE the copy of my APPEAL (I sent a few hours ago) with the Appeal that is attached (It has the word "corrected" in it." I'm really sorry to trouble you. I'm also putting a new hard copy in the mail, too.
Please let me know if this all works out. Thank you very much.
corrected copy attached.
Best,
Madeline Kochen

On Wed, Feb 10, 2021 at 3:16 PM Madeline Kochen <kochenm@gmail.com> wrote:

> To the Clerk of the County Council,
>
> I am a Person of Record in the above-entitled cases. Attached please find my *Petition for Appeal, Exceptions and Request for Oral Argument* in these cases. I am also mailing you a hard copy of the Petition. Please let me know if there are any problems.
>
> Thank you very much.
>
> Best,
> Madeline Kochen
> *Pro Se* Opponent
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> (734)308-8253

TWO FARMS, INC., Applicant	*	**BEFORE THE COUTY COUNCIL**
	*	
IN RE: APPLICATIONS FOR	*	**FOR PRINCE GEOGE'S COUNTY**
SPECIAL EXCEPTION NO. SE-4816	*	
AND FOR PERMITS TO BUILD IN.	*	**SITTING AS DISTRICT COUNCIL**
A PROPOSED RIGHT-OF-WAY	*	
ROW #220 TWO FARMS	*	**CASE NOS. _____**
*		

PETITION FOR APPEAL, EXCEPTIONS AND REQUEST FOR ORAL ARGUMENT

Madeline Kochen, Esq., a person of record in the above cases, asserts errors in the Decision of the Zoning Hearing Examiner dated January 11, 2021, ("the decision"), approving the applications for a Special Exception ("SE") and for permits to build within a proposed right-of-way ("ROW"), as legally incorrect and not based on facts or evidence in the Record, and in support thereof, states as follows:

1. The hearing examiner violated the Council's November 1, 2019, Order in the ROW #220 case that, upon remand, "*any person of record*, shall be allowed, through their attorney or *pro se*, to present additional testimony or evidence" (emphasis added). Madeline Kochen is a person of record and was precluded by the hearing officer from participating *pro se* in these cases (see the decision, Fn.1). She ruled, incorrectly, that because Kochen is an attorney admitted to practice in other states but not in Maryland, *any* participation in the proceedings (including testifying) on her part amounted to the unauthorized practice of law. Because of this legal error, Kochen was not permitted to testify or to present evidence on her own, [1] or to participate in legal arguments. Indeed, the Legal Memorandum she submitted on June 3, 2020 was "struck from the record" Id.

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[1] The hearing officer would not permit Kochen to testify unless and until another attorney agreed to put her on the stand as part of his case . See e.g. Transcript 1/21/20, p. 44.

This ruling was in error. There exists no broad ban prohibiting an unbarred attorney from "perform[ing any] legal activities in the State of Maryland" (Fn.1). Such a ban would likely violate Kochen's rights to Due Process and Equal Protection of the Law. The rules of professional conduct only preclude an unadmitted attorney from providing legal services or representation *to other people,* something that did not occur here. Kochen has only attempted to exercise her right to represent herself *pro se*. As the District Council recognized in its November 1st Order, the law guarantees *any person of record* the right to represent herself *pro se.*

2. Both the SE and ROW permit applications were legally deficient such that they should have been dismissed as a matter of law by the hearing examiner. The applications on their face reflect two major defects: (a) the singular, 2.94-acre unit of land referred to as "the subject property" does not exist in the eyes of the law, and (2) the record is bereft of any evidence proving that Applicant Royal Farms has a legal relationship to, much less a legally cognizable interest in, the "subject property". [2] A feature of both applications that is ignored and, indeed, at times obfuscated by the hearing examiner, is that they presuppose the amalgamation of four small, separately-owned properties -- a legal event that has not taken place and for which permission should have been explicitly requested in these applications (due to the inherent increased intensity of use the amalgamation signifies). The subterfuge of essentially treating the applications as if they apply to one large property with one owner is reflected in the paperwork itself. The stapling together of five improperly completed SE application forms (one from each of the four parcel owners and one from Royal Farms), to create the illusion of a unity of ownership in Royal Farms, not does not add up to a singular SE application (#4816) related to

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[2] See Kochen's Legal Memorandum, submitted on June 3, 2019, for a more complete discussion of the myriad legal defects in the Applications that call for their dismissal as a matter of law.

one 2.94 acre unit of property; such an entity does not legally exist. Furthermore, Royal Farms' alleged status as "contract purchaser" status is not supported by any documentation in the record. By statute, the ROW request can only be filed by the owner (explicitly *not* the contract purchaser), and thus is deficient on its face because it was filed by Royal Farms..

3. The major legal error in the decision relates to the hearing officer's lack of attention to the plain language of the *Adopted Subregion 5 Master Plan and Sectional Map Amendment* ("MP"). State law explicitly requires that the hearing examiner's ruling on both applications must be "consistent" with certain aspects of the MP (see e.g. MD LU Secs. 101(p), 1-303, 1-417); the hearing officer is required to deny them unless she finds that they "further, and [are] not contrary to" the mandatory elements of the MP; these include the MP's recommended land use plan and development pattern, particularly as they relate to densities and intensities. The hearing examiner gave lip service to the need for MP compliance analysis, but failed to apply the proper legal standard of "further, and not contrary". Even a cursory reading of the MP reveals that the proper application of the "consistency" requirement calls for dismissal of these applications as a matter of law.

The MP summarized its vision and land use recommendation for Accokeek (and for the subject property) in one sentence:

> The key planning concept in Accokeek preserves *the rural Livingston Road corridor* as the *focus of the community* and recommends *low-intensity* future development (emphasis added) (MP Abstract p.ii).

The MP's legal designation of the two-mile stretch of Livingston Road (precisely where the so-called "subject property" is located) as a rural corridor, with only low-intensity, community-oriented future development, renders the high-intensity, highway-oriented use proposed by Royal Farms "contrary" thereto as a matter of law. In addition to this "rural, low-intensity corridor"

designation for the Livingston Road corridor ("LRC"), the MP also (1) wants future development directed away from areas like Accokeek that are designated to retain rural character (id.); (2) recommends against any increase in commercial development in Accokeek (beyond the current level, with two shopping centers east of MD 210 and the small retail area west of MD 210 where the "subject property" is located), and (3) recommends against disruptive highway-oriented commercial uses for the town.

4. In addition to applying the incorrect legal standard to the MP compliance analysis, the hearing examiner misinterpreted the MP's land use designations and recommendations for the "subject property". Mistakenly placing heavy reliance on the MP's failure to recommend a change in *zoning classification* for the "subject property" (away from Commercial-Shopping-Center ("CSC")), the hearing examiner ignored the MP's explicit change in the *land use designation* for the "subject property," from "general commercial" to "rural, low-intensity, neighborhood-oriented commercial" use, or what is commonly called "Commercial-Neighborhood" ("CN")).[3] There existed no low-intensity commercial zone such as CN in the County Code at the time; therefore, the retention of the CSC zone classification (which allowed for CN uses) cannot rationally be read to negate or minimize its explicit recommendation that only a *subset* of general commercial (CSC) uses should be permitted in downtown Accokeek. The hearing officer is bound by these explicit MP and land use designations and recommendations.

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[3] The land use designation assigned to the "subject property" by the MP is the functional equivalent of the new CN zone in the County's new Zoning Ordinance (with an added element of rurality). It is because the CN zone did not exist in 2013 that the MP could not recommend a zoning change for the "subject property". Prince George's County's new Zoning Ordinance establishes only one new zone, and it is CN, the zone that was missing in 2013. The creation of that new zone emphasizes the importance of this as County policy and the clear intent to enable rezoning to CN where appropriate, such as along the LRC.

5. As a result of the hearing officer's erroneous interpretation and analysis of the MP's designations and recommendations for the "subject property," most if not all of her findings and conclusions on the more general questions she analyzed (such as compatibility with purposes of the commercial zones or of the CSC zone) were erroneous. She was required to analyze the relevant questions (such as the proposals' impact on, or compatibility with, the surrounding neighborhood) from the perspective of the MP's vision for the area, not her own. Such actions were, in fact, *ultra vires* because they are not authorized by State law.[4] Thus, for example, when examined in light of the MP's vision and recommendations, the hearing examiner's finding that the proposed amalgamation of four small retail plots and the razing of existing small-scale commercial buildings to make way for a high-intensity, highway-oriented commercial enterprise is a "modernizing" improvement for the town is arbitrary and capricious. Razing and paving over the small commercial plots that comprise the three-acre "subject property" utterly destroys the MP's vision and future land use recommendation for this location: "a small, locally serving commercial and office development" (MP p. 27). Because the hearing officer is required, by law, to assess the proposal from the perspective of the mandatory elements of the MP, most, if not all, of her findings and conclusions about the project in its particular context were wrong.

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[4] The hearing examiner erred in failing to even consider the MP's very specific visions, legal designation and land use recommendations for this precise "subject property." The County's authority to regulate land use is derived from the State's limited delegation of police power. Accordingly, the County has no authority to do so in ways that contravene the dictates of the State. While some aspects of the MP are mere guidelines, State law renders certain aspects thereof tantamount to "regulatory devices." As was reemphasized by the General Assembly in 2009, State Law requires that land use decisions (including Special Exception decisions in particular (see MD LU Sec. 1-101(p)) be "consistent" with the core elements of the MP. The Applicant does not deny that their proposed use would be high-intensity, highway-oriented rather than small-scale, low-intensity community oriented as desired by the MP, nor did the hearing examiner find otherwise.

6. The Royal Farms applications should have been rejected as a matter of law for being in direct contravention of the MP's vision, development pattern recommendations and future land use plans for Accokeek and for the "subject property". The hearing examiner misinterpreted the MP's amendment of the interchange plan (rendering it dependent on being "deemed necessary") to suggest the MP would not object to the Royal Farms proposal. When read in context, it is clear that the interchange amendment intends the exact opposite.[5] Had the interchange proposed in the 1993 *Adopted Subregion 5 Master Plan and Sectional Map Amendment* not been amended by the 2013 MP, it would have eviscerated the small scale, locally-oriented commercial segment of the LRC west of MD210, which the MP recognized to be the sole remaining location in Accokeek capable of serving as the town's communal core. For indeed, it was recognized that the 1993 *Adopted Subregion 5 Master Plan's* attempt to foster such a *community/civic* center in the north east quadrant of the MD 21/LRC intersection has admittedly failed, as it has developed as a purely commercial center (see MP p. 39). In prioritizing, as its "key planning concept" for Accokeek the designation of the CN corridor for the town's "main street," the MP was recommending its last hope of nurturing a traditional, rural, character-reenforcing town center at the MD210/LRC intersection in Accokeek; it is not too late to protect and preserve the small-scale, locally-oriented retail district that has long existed on the western side of that central intersection with MD210. Hence the amendment to the proposal for ten graded interchanges on MD210, applicable *only* to the LRC intersection. It directed that the interchange would only be built if "deemed necessary" and, should it be deemed necessary, MD 210 will have to be built

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[5] In any event, the decreased likelihood that the interchange would be built is, in any event, irrelevant to the enforcement of the ROW. *All* proposed ROW's are only possibilities for the future and their contingency does not make them less enforceable, particularly when the MP that creates the ROW specifically address its plan for that location as occurred here.

underneath the LRC. The explicit purpose of this amendment was to *preserve* – literally and physically -- the LRC commercial segment west of MD 210, which is the Accokeek town center. The Royal Farms proposal would accomplish what the MD 210 interchange was not allowed to accomplish: the effective destruction of the "subject property" as the last remaining hope for a functioning Accokeek town center. Indeed, should this proposal be permitted in the face of the clear dictates of the MP, it will be regarded as Terrapin Run 2.0. given its extreme lack of "consistency" with the MP. See *The Smart and Sustainable Growth Act of* 20009 (SB 280/HB 297); Trail v. Terrapin Run, 943 A.2d 1192, 403 Md. 523 (Md 2008).

7. In connection with the ROW application, the hearing officer erroneously found that the properties ("subject property"?) failed to yield a "reasonable return". The Applicant's own witnesses provided evidence that that there is a reasonable return that is, and can be obtained by the four properties in their current state. The hearing officer erred in interpreting the statutorily required findings of no "reasonable return" and "unfairness" to imply that property owners are entitled to the most profitable use of their property. That is wrong as a matter of law. See e.g. Spaid v. Board of County Coommissioners for Prince George's County, 269 A.2d 707, 259 Md. 369, 383 (Md. 1970); Montgomery County Council v. Kacur, 253 Md. 220, 252 A.2d 832 (Ct. App, 1969); cf. Pulte Home Corp. v. Montgomery Countu, 909 F.3d 685 (4th Cir., 2018).

8. The hearing officer was generally biased against the Opponents, as evidenced by her failure to take into account the mountain of evidence provided by Opponent witnesses who attested to the negative impact Royal Farms would have on the town of Accokeek, by her repeated failure to accept their expert witnesses while accepting those of the Applicant, by her nearly universal pattern of ruling in favor of the Applicant over the Opponents, by her attempt to exclude Madeline Kochen's participation on the side of the Opponents and by the degree to which many

of her ideas about what is good for the people of Accokeek strain credulity – such as her treatment of the ability to purchase "convenience foods" without having to cross a highway as a genuine benefit[6]

9. The hearing examiner erred in failing to require People's Zoning Counsel, Stan Brown, to recuse himself from the case because, as a landlord to Royal Farms, he has a clear conflict of interest. (Transcript 4/10/19 p. 5; Transcript 12/17/19 pp.11-17).

Conclusion

For all of these reasons, Madeline Kochen urges the Council to remand these cases to the Zoning Hearing Examiner to undertake proceedings in which she can participate or (preferably) to deny the applications for a SP and for permits to build in a ROW for a project that will destroy downtown Accokeek.

Request for Oral Argument

Madeline Kochen, Esq., respectfully requests Oral Argument be granted on these cases, and requests that she be allotted extra time for Oral Argument because, until now, she has been precluded from participating in the proceedings in these cases.

Respectfully yours,

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Pro Se Opponent

[6] This finding was factually incorrect, because there is small food store packed with potato chips and other convenience foods at the Gas-and-Go on the West side of MD210 on the LRC.

Certificate of Service

I HEREBY CERTIFY THAT ON THIS 10th day of February, 2021, a copy of the foregoing Petition for Appeal, Exceptions and Request for Oral Argument was served on all persons of record by being mailed (at the direction of People's Zoning Counsel Stan Brown) first-class, postage pre-paid to the following persons:

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