LAW OFFICES OF

KNOPF & BROWN

401 EAST JEFFERSON STREET
SUITE 206
ROCKVILLE, MARYLAND 20850
(301) 545-6100

FAX: (301) 545-6103
E-MAIL KNOPF@KNOPF-BROWN.COM

WRITER'S DIRECT DIAL
(301) 545-6104

NORMAN G. KNOPF

October 8, 2013

Via Federal Express
410-260-1450

Leslie D. Gradet, Clerk
Court of Special Appeals for Maryland
Court of Appeals Building
361 Rowe Blvd., 2nd Floor
Annapolis, Maryland 21401-1698

RE: **Huntington Terrace Citizens Association v. Suburban Hospital**
Court of Special Appeals, No. 01251, September Term, 2011

Dear Clerk Gradet:

Enclosed please find the original and four copies of Appellant's Motion for Reconsideration, for filing in the captioned matter. Also enclosed is the filing fee of $50.

Please date stamp the extra copy of this letter and return it to us in the enclosed postage prepaid, self-addressed envelope.

Sincerely yours,

Norman G. Knopf

/enclosure

cc: Barbara Sears, Esq.
Erin Girard, Esq.

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IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Huntington Terrace Citizens Association	:	
	:	
Appellant,	:	
	:	September Term 2011
v.	:	No. 01251
	:	
Suburban Hospital	:	
	:	
Appellee.	:	

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); Rodriquez 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

Norman G. Knopf
KNOPF & BROWN
401 E. Jefferson Street
Suite 206
Rockville, Maryland 20850
(301) 545-6100
Attorney for Appellant

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.
Erin Girard, Esq.
Linowes and Blocher LLP
Suite 800
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

Copies to:

Norman G. Knopf
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Rockville, MD 20850

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Erin Girard, Esq.
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