

IN RE:	*	BEFORE THE
HRVC Ltd. Partnership,	*	HOWARD COUNTY
c/o KIMCO Realty Corp.	*	ZONING BOARD
	*	Case No. ZB-1119M

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OPPOSITION'S CLOSING ARGUMENT TO ZONING BOARD

Madame Chairperson and members of the Board - - - Good Evening! This Zoning Board hearing has been long and difficult for everyone, yourselves included. We appreciate that fact and thank your staff and the Board itself.

INTRODUCTION:

At the conclusion of the last hearing held before the Zoning Board on February 24, 2021, the Zoning Board Chairperson requested that Closing Arguments (or Summation Statements), intending to be offered by Petitioner, the Hickory Ridge Village Board ("HRVB"), those persons represented by counsel in these proceedings ("Opponents"), and others not represented, be submitted to the Zoning Board in writing in advance of the next scheduled hearing on March 24, 2021. As the Zoning Board is well aware, Closing Arguments (or Summation Statements) are permitted pursuant to the Zoning Board Rules of Procedure (see Section 2.403-D.3.i. & j.). Such Summations are not intended to be Legal Memoranda which are covered under Section 2.403-D.7, inasmuch as Legal Memoranda (which include the presentations of the several sides and an analysis of the applicable law), are only permitted after a specific request to the Zoning Board in open session by a party. No party made such a request. Notwithstanding that fact, KIMCO presented to the Zoning Board its document entitled "Closing Memorandum" on March 15, 2021, which is 36 pages in length, replete with alleged "factual" statements not necessarily part

of the record in this proceeding, and legal citations also not necessarily part of this record. Indeed, as more fully stated below, KIMCO has ignored or marginalized the Zoning Board Rules of Procedure when it was convenient to its case, and has consistently objected to the efforts of Opponents and individual opponents to present their point of view regarding KIMCO's "Petition for Approval of an Amended Preliminary Development Plan for the Hickory Ridge Village Center" (the "Petition"). Notwithstanding KIMCO's effort to present a full blown legal memorandum in lieu of a typical Closing Argument, I present this Statement as a narrative, typical of courtroom closing statements, and not as a Legal Memorandum. Accordingly, this document is intentionally not in the format of a typical legal memorandum.

I note, however, that the continuous reference by KIMCO in its Closing Memorandum to the so-called "redundant" testimony of the citizens opposed to the Petition, is not only incorrect, but it is a failure to recognize that the number of people in the community who are opposed to (or even favor) the Petition is material to this case; and it is demeaning to the citizens who took the time and effort to testify and state their reasons for opposing (or favoring) the Petition. They should be congratulated for their participation in what is intended by law to be a community process. That takes me to what I shall refer to as:

PRELIMINARY MATTERS:

A. The Petition Is Incomplete And Was Not Submitted Into The Record:

Pursuant to the Zoning Regulations, the Rules of Procedure, and the Administrative Procedures Act, Petitioner is required to submit into the record any documents it wishes to be part of the hearing process and record. On July 21, 2020, I submitted a Motion to Dismiss the case after Petitioner closed its case without submitting into the record: (1) the Petition; and (2) the Concept Plan. (See Petitioner admitted Exhibit List, Items 1 through 11, exclusive of Items 3

& 4). Petitioner endeavored to label another document as its Concept Plan but that does not suffice and a close review of that document shows that it does not contain all of the elements of a Concept Plan as defined by law. And the Design Guidelines, although designated under the heading “Helpful Information,” do not meet all of the requirements of Design Guidelines also as testified to by Mr. Chris Alleva.

Opponents’ Motion to Dismiss (incorporated herein) was not granted by the Zoning Board. Nevertheless, Opponents, hereby continue their objection, specifically reiterating Section 2.117(c)(1) of the Howard County Code which specifically provides that: “All evidence, including records and documents relevant to the case which belong to the Agency, **shall be offered into evidence** and made part of the official record.” (emphasis added) None of the aforementioned documents were offered into evidence by Petitioner (or the Agency) and, therefore, are not a part of the official record. This failure may perhaps be unprecedented in the annals of Zoning Board history, but it is of uncompromising importance. Formally, submitting these documents into the record at the appropriate time is of tremendous significance and is important to the persons who wish to testify in opposition to the Petition. Such persons are required by the Zoning Board Rules of Procedure to register to testify prior to the conclusion of Petitioner’s case presentation. By failing to introduce the foregoing documents, Petitioner denied those persons the opportunity and right to see all record Exhibits before they had to sign up to testify. Petitioner’s error is arguably fatal to this case.

B. The Virtual Hearing Process Did Not, And Does Not, Comply With The Zoning Board Rules Of Procedure:

On May 1, 2020, after KIMCO had presented its case in full and it was time for Opponents to present their case, the COVID-19 pandemic forced the closure of the County governmental offices, and the Zoning Board proposed to proceed virtually - - - for Opponents

only. Opponents believed that proceeding in this fashion would diminish and make harder the presentation of their opposition. As counsel, I was sequestered from my clients, saw other difficulties proceeding virtually, and accordingly, I filed a Motion for Continuance on May 1, 2020 (incorporated herein). I argued that it would be fundamentally unfair and a violation of both procedural and substantive due process to permit and require that only one side in a case - - Opponents - - - be forced to participate virtually while they were at home and sequestered. I argued that the Zoning Board Rules of Procedure did not permit virtual hearings without amendment to those rules, nor does any other applicable law. The Zoning Board denied my Motion. But after nearly a year of proceeding virtually, I respectfully submit again that requiring only one side in a case to present their case virtually, is unfair and was wrong. As counsel, I was never able to be present with my clients or witnesses during the hearing. I had to provide document exhibits in advance of each hearing - - 37 Exhibits consisting of hundreds of pages - - which was both difficult and not required of KIMCO. No documents could be seen on the large screens in the Zoning Board hearing room, and only persons with adequate computer equipment could participate. There were many technical glitches. Public participation dropped dramatically. Indeed, the Zoning Board advertised the first virtual hearing as not being a live transmission and only hours before it occurred was it broadcast on WebEx. For these reasons, I believe the case should have been postponed so the Zoning Board Rules of Procedure could be amended in accordance with law. I respectfully reserve that position.

C. The Zoning Board Incorrectly Allowed The Hickory Ridge Village Board To Submit An “Addendum To Community Response” (See HRCA Exhibits 1, 3 & 4):

The last procedural objection I raise is, in my opinion, the entirely inappropriate and illegal submission by the Hickory Ridge Village Association (“HRVA”) of the “Addendum to Community Response” (i.e. modifying the original Community Response Statement, “CRS”).

The Zoning Regulations have a specific procedure for a CRS to be prepared. It requires that in this case only the Hickory Ridge Village Association was permitted to provide such a document, and if there was to be one, it had to be submitted to the DPZ under a certain time frame so the DPZ could review it and include it in its Technical Report. The Hickory Ridge Village Association did just that. The resulting product, the original CRS, was prepared by the Hickory Ridge Village Association after conducting a survey of its residents, participating in creating the Village Center Community Plan (“VCCP”), and holding numerous public meetings. The final document was included in the DPZ Technical Report and was then submitted to the Planning Board which incorporated reference to it in its final recommendation. This process is a matter of law and cannot be ignored. The HRVA Exhibits 1, 3 & 4 do just that - - - they attempt to revoke in substantial part the original CRS by allowing for (some) apartments. This occurred after a newly elected Hickory Ridge Village Board revised the CRS and submitted it for the first time to the Zoning Board after this hearing commenced. Doing so, not only ignored the original CRS and the VCCP, (See “Helpful Information,” Technical Staff Report), but it ignored the results of the survey and letter given to the Village Board signed by over 350 residents dated December 1, 2018 (see Opposition Exhibits 3, 5, & 6). Accordingly, that action is in clear violation of the Zoning Regulations, and this document, the so-called Addendum, should not be part of the Zoning Board record. I further note that KIMCO’s Closing Memorandum falsely represents that the HRVA is “primarily supportive of the Petition.” (See p. 29, KIMCO Memorandum). The Hickory Ridge Village Association made no such statement as evidenced by its testimony and Exhibits.

SUMMARY OF THE CASE PRESENTED TO THE BOARD:

Setting aside the procedural issues, this entire case is about the New Town zoning concept, the New Town Zoning Regulations, and whether KIMCO has met its burden of proof to redevelop the New Town Hickory Ridge Village Center pursuant to the Petition in compliance with the law.

A. Boundary:

First, the issue of the Boundary of the Village Center must be addressed since the Zoning Board is required to establish a Boundary. There are multiple reasons to include only New Town zoned areas and the zoning regulations intended just that. In fact, in support of this idea, as indicated above, only the New Town designated Village Association (HRVA), is permitted to submit a Community Response Statement. None of the other homeowner associations, no matter how close to the Village Center, are permitted to do such. Mr. Chris Alleva testified on the subject of the Boundary and I refer you to his testimony. Indeed, at the outset of this case, Mr. Oh sought agreement that non New Town property just across the street from the Hickory Ridge Village Center would not be included in the Boundary. More importantly, there are compelling reasons to only include New Town property. This entire matter is regarding the New Town Zoning Regulations as they apply to a New Town Village Center. That is the precise reason why only the New Town Village Association, in this case, the Hickory Ridge Village Association, is permitted to submit a CRS. Accordingly, the Boundary should be confined to New Town property only.

B. Scope Of Case:

This case is not testing whether high density dwellings are permitted anywhere in our New Town City of Columbia. It is where those high density areas are to be located. Jim Rouse designed Columbia to allow for a multitude of uses spread throughout the city. A key element to the concept was to allow residents to pick their neighborhood knowing how those neighborhoods would be developed. And many people did just that when they chose the neighborhood of Clemens Crossing, designated as an entirely single family community. That is just like the choice made by others to live in higher density areas like downtown. This idea was the scheme of development for Columbia and KIMCO's Petition should not change that entire scheme of development just because, as a single land owner, it purchases a parcel of land, and then chooses to dishonor the scheme, the Rouse plan, and the New Town regulations intended to protect that plan. Indeed, the impact of this case is not just about the Hickory Ridge Village Center and the permitted land uses at the Village Center; it is about every land use site in Columbia under the New Town Zoning Regulations. Allowing KIMCO to change the use at the Hickory Ridge Village Center would be the same as allowing open space, such as Lake Elkhorn, to be changed to fill in the lake and then build apartments on the site. Or a neighborhood center pool like at MacGill's Common in Kings Contrivance, to be torn down and become a site for homes. Those kinds of changes would destroy the entire Columbia New Town Plan, its original scheme of development, and should not be permitted.

What is before you, in many ways, resembles changing the land use anywhere in the entire County, to something dramatically different. Can you imagine if the Clark Farm, which is protected agricultural preservation land, was suddenly allowed to become a high density community despite the wishes of area residents who thought agricultural preservation land was

protected as such forever. So while this case is strictly about New Town and the regulations thereunder, please consider the broader picture of dramatically changing land uses anywhere in the county.

C. Legal Requirements:

That brings me to the law. As you know, it requires that various standards and tests be met. We have gone over that in depth and I ask you to review the testimony of Chris Alleva, a highly knowledgeable and qualified witness. His testimony gives you the technical basis on which to deny the Petition including on the important subjects of population densities, parking requirements, and the precedent of prior cases and circumstances, all of which KIMCO seeks to change with inadequate justification. Perhaps the most compelling test of the law is the specific requirement that the plan be **compatible with the surrounding community**. There has been considerable testimony on this issue and this Petition clearly fails that test.

Specifically, the KIMCO Petition would diminish the primary retail use of the site as it now exists, by erecting 230 apartments with dedicated parking, totaling over 350K square feet. The Village Center parcel under the Petition would then have only 105K square feet of retail uses as compared to the 350K. The apartment complex, four stories in height, would be closer to Cedar Lane and Freetown Road than any other nearby multi-story structures, would visually dominate the site, would conceal the retail uses, would increase the population density per acre by an amount clearly not compatible with all of the surrounding New Town single family homes, and would create a traffic pattern of thousands of additional cars per day running through the area, many of which would travel down Quarterstaff Road in a way never intended for this quiet low density neighborhood. High density apartments in an area of single family homes are simply not compatible unless part of the original plan. Virtually every house adjacent to the Hickory

Ridge Village Center is a low density single family home. We cannot be sure of exactly how many people and cars will be associated with the 230 apartments (the KIMCO expert admitted 2,000 vehicle entries and exits daily just from the apartments), but compared to the remaining single family houses surrounding the Village Center in Clemens Crossing, the apartments will have far more people and cars per acre than now exists. Traffic patterns will entirely change the community. These facts alone defy any understanding of the common sense meaning of the term “compatible” as used in the regulations. And allowing such a new intense residential use would be at odds with the widely held community view expressed at this hearing that 230 apartments are simply not compatible with the other areas in the neighborhood. I refer you to the testimony of Ms. Liane DesRoches as an example. (See Opposition Exhibit 37).

The record also contains numerous comments by other opponents that they never viewed high density apartments as being compatible with the intended low density housing when they bought their homes in Clemens Crossing as long as forty or more years ago. Instead, as the record shows, they relied on the integrity and stability of the New Town Plan when they bought their homes, and dutifully paid taxes and the CPRA lien for many years in further reliance thereon. In this regard, Mr. Greg DesRoches specifically spoke to the “common scheme of development” recognized at law in the Turner vs. Brocato case (206Md 336;111A2d855, Md, 1955), a concept that he and many others have relied upon.

There is also substantial evidence in the record from other residents in the surrounding neighborhood who do not believe that the redevelopment proposed by KIMCO is “compatible.” Specifically, I refer you to Opposition Exhibits 2, 3, 5, 6, 8, 46 & 47. Those Exhibits include the letter signed by over 350 people expressing their opposition to any apartments. And they include the survey conducted by the Village Board showing 54% of the residents opposed to any

apartments with an additional 21% opposed to more than 100 apartments. Equally important, are the narrative survey results which set forth the many reasons residents are opposed (see Citizens in Opposition Exhibit 47). Last, there are the significant number of persons who have appeared before this Board who have expressed their opposition to any apartments.

Compare the number of opponents to those who favor the Petition. Only a small handful have testified in favor to this Board, namely four persons, one of whom was then a Village Center merchant. That leaves KIMCO as essentially the sole proponent of this Petition. A single for profit corporation which has much to gain from approval of its plan.

Unfortunately, the DPZ concluded in its Technical Report that the proposal meets the compatibility test without taking into consideration the broad community opposition, the original CRS expressing opposition, the Survey results, or the statement in the VCCP which indicated that the residential use should not “overwhelm” the retail use. At no point did the DPZ Technical Report even fully evaluate these issues or facts. Indeed, the testimony of the DPZ personnel at this hearing showed that they had not even determined the number of people who would be residing in the apartments or the traffic conditions resulting therefrom. And they gave no consideration to the concept relating to the scheme of development, or to the fact that the original (and still existing) HRD covenants on the property do not permit any residential use. These were unfortunate failures by the DPZ staff that cannot be ignored.

KIMCO argues “compatibility” is not determined by the views of all of the residents who are opposed. That interpretation of the law is utter nonsense. Of course it is appropriate and incumbent for the surrounding residents to assess “compatibility.” Indeed, that is the reason for a Community Response Statement and for public hearings.

On the topic of the conclusion and recommendation in the VCCP that the residential use should not “overwhelm” the retail use, KIMCO would have you believe that the term “overwhelm” is not affected by the fact that the massive structure would visually dominate the site, would conceal the retail uses, would have more than three times the square feet dedicated to the residential as compared to the retail, would require that retail parking spaces be reduced, would send thousands of additional cars throughout the neighborhood (including for overflow parking), and would redefine the quiet village center in order to accommodate the massive apartment complex. And that is without regard to the possible environmental impact in the area, or the effect on local schools. KIMCO’s definition of “overwhelm” is novel, meaningless, self-serving, a terrible precedent if followed, and accordingly it should be rejected.

OTHER CONSIDERATIONS:

Based upon the evidence presented in this case, and even ignoring all of the procedural issues, the KIMCO Petition not only fails to meet the requirements of the law, it simply does not provide any facts to show how converting the parcel to largely a residential property would then inure to the benefit of the community and the New Town. There is no shortage of high density apartments in Columbia and no evidence that there is a demand for additional apartments in Hickory Ridge.

That brings me to the argument about the apparent real motivation for this Petition. Simply stated, it is money. As you know, there are no shortage of parcels not far from this site, both in New Town and out of the New Town, that are used for high density apartment purposes. So there is no justification for allowing KIMCO’s Petition on the unsubstantiated argument that it will deny people from having high density living nearby. In fact, areas nearby are constantly

constructing high density housing. And, there is no proof that more high density development is demanded. Further, there was no bona fide evidence presented by KIMCO that the present retail commercial uses were struggling or failing. Indeed, there was testimony that KIMCO was driving out merchants in order to create a false appearance that the parcel requires revitalization. The Hickory Ridge Village Center is economically secure, it has a successful anchor grocery store that has renewed its lease for a long term, and the development in the areas down Cedar Lane are constantly adding new customers for retail use. Furthermore, there was evidence that the Hickory Ridge Village Center parcel has substantially increased in value in recent years based on the tax assessment income method (See Opposition Exhibit 36). Obviously, KIMCO simply wants to change the land use to increase its already profitable revenues and the gross value of its holdings. Apparently, the company thinks it only owes a duty to its shareholders. And maybe that is true. But the Zoning Regulations owe their duty to the residents and to the law. In my opinion, that means standing up to KIMCO, upholding the law and its intent, recognizing the dramatic negative affect the Petition would have based on the overwhelming community opposition, and denying the Petition on the grounds KIMCO has not carried its burden of proof.

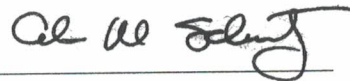
CONCLUSION:

KIMCO's Petition fails to honor the overwhelming majority opinion of the area residents that the Petition should not be approved and that it does not observe the language of the applicable law. Instead KIMCO dismisses the standards under the law requiring community compatibility by ignoring the residents' wishes; and it ignores the VCCP standards that the residential use not overwhelm the retail use. KIMCO even dismisses procedural fairness under

the law by pressing for a virtual hearing for Opponents when KIMCO had a full in-person hearing.

The KIMCO Petition would dramatically change the neighborhood in an unwanted way. The residents living nearby have a reasonable expectation about the intended land use and the Columbia concept. KIMCO does not. I ask you to drive by the Hickory Ridge Village Center site if you have not already done so, take note of its present visual characteristics, natural quietness and low density use; then drive through the Clemens Crossing neighborhood, and see why such a high density large residential structure, as proposed by KIMCO, would be forbidding. I then ask you to please give honor to the rational discussion about observing the rule of law - - - and require it of everybody, including KIMCO. Please deny this Petition because it violates all of these standards and dishonors the entire Rouse New Town Zoning Model, without which this County would never have developed into the nationally recognized and wonderful community that it is. Thank you.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2021, a copy of the foregoing was mailed first-class, postage prepaid and properly addressed and an electronic copy provided to:

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