

<b>AGS BORROWER LAKEVIEW, LLC.</b>	:	BEFORE THE
Appellant	:	HOWARD COUNTY
v.	:	BOARD OF APPEALS
<b>HOWARD COUNTY PLANNING BOARD</b>	:	HEARING EXAMINER
<b>SDP-20-042, LAKEVIEW RETAIL</b>	:	BA Case No. 781-D
Appellee		

.....  
 .....  
**DECISION AND ORDER**

On May 18, 2021, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of AGS Borrowers Lakeview, LLC. (Lakeview) (Appellant). Appellant is appealing the Howard County Planning Board's letter of decision of January 25, 2021, denying the application for a Site Development Plan (SDP) for a 1-story 8,373 sq. ft. building, Lakeview Retail, located in the Village of Owen Brown, Tax Map 42, Grid 3, Parcel 392, Lots A-3 and A-4, also identified as 9841 and 9861 Broken Land Parkway, Columbia, Maryland.

Sang Oh, Esq. represented the Appellant Lakeview. Christopher Alleva and Brian English appeared in support of the Planning Boards denial and in opposition to SDP-20-042. Jessica Bellah appeared in opposition on behalf of Columbia Association.

**BACKGROUND**

Lakeview filed a request for the Howard County Planning Board to approve SDP-20-042, a request for a 1-story 8,373 sq. ft. commercial/retail structure, Lakeview Retail,

located in the Village of Owen Brown, Tax Map 42, Grid 3, Parcel 392, Lots A-3 and A-4 (the Property). The Property is subject to Final Development Plan 125-A (FDP). Section 125.0.D.3 of the Howard County Zoning Regulations (HCZR) authorizes the adoption of an FDP which requires further approval of a SDP. FDP 125-A 6C-1 requires that Planning Board approval of a Specific Design Plan must be obtained. Section 125.0.G. of the HCZR requires Planning Board approval of an SDP prior to the approval of any permits for the Property.

On January 21, 2021, the Planning Board conducted a public meeting on SDP 20-042 in accordance with the Planning Board Rules of Procedure, Section 1.106. (Administrative Decision-Making Authority Following a Public Meeting) At the conclusion of the public meeting, the Planning Board moved into work session to discuss SDP-20-042 and after lengthy discussion voted unanimously to deny the SDP. In accordance with Section 1.106.F., Lakeview was notified by letter dated January 23, 2021, and transmitted electronically to Lakeview on January 27, 2021, that SDP-20-042 was denied.

By email dated February 18, 2021, Lakeview requested (1) that the Planning Board "temporarily rescind" its February 25, 2021 Decision, thereby tolling the 30-day appeal period, and (2) that the Planning Board schedule a public meeting at its next regularly scheduled public meeting for the purpose of reconsidering the Board's Decision based on "good cause". "We believe the Board's Decision does not accord with the principles of legally delegating zoning powers.....and deprives the Applicant of an important Constitutional right." (citations omitted). "A copy of this e-mail has been provided to Brian English, Chris Alleva, and Jessica Bellah on behalf of the Columbia Association, the parties in this case."

By letter dated February 23, 2021, the Planning Board notified all parties that "The Howard County Planning Board, at its regularly scheduled meeting held on February 18, 2021, considered Mr. Oh's request and voted to temporarily suspend the effect of their order so that the appeal period would be tolled until such time they (sic) receive legal counsel and determine what, if any, further action will be taken."

On March 18, 2021, after another lengthy work session, the Planning Board voted to reinstate its January 25, 2021 decision letter denying SDP-20-042. Lakeview filed its appeal from this decision letter to the Board of Appeals on March 19, 2021 in accordance with Planning Board Rules of Procedure Section 1.106.G. Section 1.106.G. states that this appeal shall be heard de novo in accordance with the Board of Appeals Rules of Procedure.

On May 4, 2021, Christopher Alleva and Brian England filed their Motion to Dismiss for Failure to Note a Timely Appeal and Appellants' Lack of Standing. On May 13, 2021 Appellant Lakeview filed its Opposition to Chris Alleva and Brian England's Motion to Dismiss for Failure to Note a Timely Appeal and Appellant's Lack of Standing. It is noted that neither the Motion nor the Opposition thereto were served on all parties of record, particularly the Columbia Association.

#### **MOTION TO DISMISS FOR FAILURE TO NOTE A TIMELY APPEAL**

On May 18, 2021 oral argument was held on the Motion to Dismiss and Opposition thereto. Christopher Alleva and Brian England testified in support of the Motion to Dismiss and Mr. Oh, Esq. represented the Appellant Lakeview in Opposition to the Motion.



The right to appeal an administrative decision is wholly statutory. Howard County v. JJM, Inc., 301 Md. 256, 261, 482 A.2d 908, 910 (1984) (citing Maryland Bd. V. Armacost, 286 Md. 353, 354-55, 407 A.2d 1148, 1150 (1979); Criminal Injuries Comp. Bd. V. Gould, 273 Md. 486, 500, 331 A.2d 55, 64 (19751); Urbana Civic Ass'n v. Urbana Mobile Vill., Inc., 260 Md. 458, 461, 272 A.2d 628, 630 (1971).

Howard County Administrative Procedure Act (APA), Title 2, Howard County Code, applies to the Planning Board's Procedures pursuant to §2.103. HCZR §16.900(j)(2)(iii) provides the statutory authorization for an appeal from the administrative decision of the Planning Board: "Any person specially aggrieved by any decision of the Planning Board and a party to the proceedings before it may, within 30 days thereof, appeal said decision to the Board of Appeals in accordance with section 501 of the Howard County Charter." Sections 501 and 502 of the Charter establish the County Board of Appeals and the Board of Appeals Hearing Examiner.

Section 2.119(g) of the APA provides for the reconsideration of its own decision by any board, agency or commission. The Board of Appeals is specifically exempt from the APA and is subject to its own Rules of Procedure for the Howard County Board of Appeals. The Planning Board has not adopted procedures for reconsideration and are therefore governed by § 2.119(g). Any party to a proceeding may request reconsideration of the final decision and order within 15 calendar days of the final decision and order, or after fifteen calendar days in the case of "fraud, mistake or irregularity". A request shall be in writing, contain the reasons to support a reconsideration, and the requesting party shall send copies to all parties of record. A request shall not automatically stay the operation of the Order unless the body agrees to the stay.

Appellant Lakeview filed a timely written request for reconsideration to the Planning Board from its January 25, 2021 decision letter denying SDP-20-042 on February 18, 2021. Appellants request for reconsideration cited mistake as its basis. By letter dated February 23, 2021 the Planning Board notified Appellant that their January 25 decision letter denying SDP-20-042 was temporarily suspended. The Planning Board reinstated their January 25, 2021 decision letter denying SDP-20-042 during its work session on March 18, 2021. Appellant filed its timely Administrative Appeal Petition to the Howard County Hearing Authority from the Planning Board denial of SDP-20-042 on March 19, 2021. Accordingly, the Motion to Dismiss for Failure to Note a Timely Appeal is DENIED.

#### **MOTION TO DISMISS FOR LACK OF STANDING**

Following the standards in *Bryniarski v. Montgomery County*, 247 Md. 137, 230 A.2d 289 (1967), two conditions precedent must be met before a person has standing: (1) he must have been a party to the proceeding before the agency, and (2) he must be aggrieved by the agency decision. A person aggrieved is one whose personal or property rights are adversely affected by the agency decision in a way different from that suffered by the public generally. *Maryland-National Capitol Park & Planning Com'n v. Smith*, 333 Md. 3, 11, 633 A.2d 855, 859 (1993) (internal citation omitted). It is noted that Howard County Code Section 16.1215 dispenses with the first prong of the *Bryniarski* test as there is no requirement that the appellant have been a party to the prior proceeding. Appellant Lakeview is the property owner seeking approval of the SDP and is thus specially aggrieved as its property rights are adversely affected by the Planning Boards denial in a

way different from that suffered by the public generally. Accordingly the Motion to Dismiss for Lack of Standing is DENIED.

### **APPEAL**

On May 18, 2021, an evidentiary hearing was held on Appellant's appeal. Mr. Oh, Esq. represented Appellant Lakeview. Zach Fisch and Alan Grabush testified on behalf of the Appellant. Christopher Alleva and Brian England testified in opposition to the SDP. Jessica Bellah, Senior Community Planner, testified on behalf of Columbia Association in opposition to the SDP. All witnesses provided sworn testimony.

Appellant presented the following Exhibits:

Exhibit 1: Preliminary Development Plan

Exhibit 2: Final Development Plan

Exhibit 3: Site Development Plan

Exhibit 4: Colorized Landscape Plan

Opposition Alleva presented the following Exhibits:

Exhibit 1: Lease Agreement

Exhibit 2: 1965 memo and order establishing Columbia

Exhibit 3: Alleva memo expounding on 1965 memo and order

Exhibit 4: BCC 412

Exhibit 5: Plan 2030, pages 59-61, 69, and 169



Exhibit 6: ARC Rights

Opposition Columbia Association presented the following Exhibit:

Exhibit 1: Statement of Jessica Bellah on behalf of Columbia Association

**STANDARD OF REVIEW**

HCZR §125.0.D.3 provides that the approval of a FDP may include the requirement of Planning Board approval of a subsequent SDP; FDP 125-A (governing the subject Property) includes the requirement of SDP approval. HCZR §125.0.G requires that where, as in the instant application, the Planning Board reserved for itself the authority to approve a SDP, no permit shall be issued for any use until the SDP is approved by the Planning Board after being considered in a public hearing before the Planning Board. After notice was given, the Planning Board considered SDP-20-042 in a public meeting on January 21, 2021. Planning Board Rules of Procedure § 1.106 states in pertinent part:

Section 1.106. Administrative Decision-Making Authority Following a Public Hearing

F. The Boards Action

The Board shall make a decision by issuing a letter as required by law. The Executive Secretary shall notify the Petitioner and upon request, other interested persons of the decision by sending them a copy of the Decision.

G. Appeals to the Board of Appeals

Appeals to the Board of Appeals of decisions made pursuant to the Planning Board's administrative decision-making authority shall be heard de novo by the Board of Appeals in accordance with the Board of Appeal's Rules of Procedure.

In a *de novo* (meaning as new) appeal, the role of the Hearing Examiner is akin to a trial court, and the appeal may be a contested case, in which the evidence is adduced and the Hearing Examiner is the trier of fact awarded deference on appellate review as the Examiner saw the witnesses and the evidence firsthand. In Hikmat v. Howard County, 148 Md. App. 502, 813 A.2d 306 (2002) the court held where, as here, an appeal to the Board of Appeals from a waiver granted by a county department provides for the first evidentiary hearing to be before the Board of Appeals, it is a de novo hearing and the Board of Appeals role is more akin to a second-tier administrative agency rather than a first tier judicial reviewer. As a second-tier administrative agency the Board of Appeals has the authority to make its own findings, apply the facts to the law, and to grant the relief sought. Where the first full evidentiary hearing was before another agency or board whose decision is appealed, the Board of Appeals functions are similar to a reviewing court and limited to a determination of whether the first evidentiary hearing body's decision was supported by substantial evidence and issues of law but not issues of mixed facts and law. As the Planning Board held a public hearing and not an evidentiary hearing, the Board of Appeals is a second-tier administrative agency and not a first-tier judicial reviewer. Pollard's Towing, Inc., et al. v. Berman's Body Frame & Mechanical, Inc., 137 Md. App. 277, 768 A. 2d 131 (2001) (In an appeal of an agency's action, the matter is treated as if it had not been heard before and as if no decision had previously been



rendered. Where there has been no previous evidentiary hearing, the board of appeals was exercising what amounts to original jurisdiction. The appellate court's focus is on the decision of the board and whether there was substantial evidence to support the board's decision, not on whether the board correctly reversed the earlier decision of the department.)

The application for SDP-20-042 was reviewed in a public meeting by the Planning Board. This was not a quasi-judicial hearing, witnesses were not sworn. The Planning Board's action was via a letter and does not conform to the legal requirements of a quasi-judicial proceeding wherein the decision must articulate findings of fact, conclusions of law, and possibly adjudicate mixed questions of law and facts. As the Planning Board held a public hearing and not an evidentiary hearing, the Board of Appeals is acting as a second-tier administrative agency and not a first-tier judicial reviewer and as such must make its own findings of fact and conclusions of law. Neither the County Solicitor nor the Planning Board participated in the instant appeal; Howard County Code § 2.210 is not dispositive.

### **FINDINGS OF FACT**

#### **Subject Property**

The subject Property is in the New Town (NT) zone, located at 9841 and 9861 Broken Land Parkway in the Lakeview Office Center, Village of Owen Brown, Tax Map 42, Grid 3, Parcel 392, Lots A-3 and A-4, in Columbia, Maryland. Applicant Lakeview petitioned for approval of SDP-20-042 to construct a 1-story, 8,373 sq. ft. retail center.

The application was processed in accordance with FDP-125-A and §125.0 of the HCZR. Vicinal properties are zoned NT: to the North, Lakeview Office Center, to the East, Broken Land Parkway (a public intermediate arterial road), to the South and West, Columbia Association open space.

### **Site History**

FDP-125: A final development plan for the Village of Owen Brown to establish an employment center-commercial land use. Recorded March, 1972.

FDP-125-A: A final development plan for the Village of Owen Brown to revise the point of access to and from Broken Land Parkway. Recorded November, 1980.

F-82-061: A final plat to resubdivide Parcel A into new lots A-1 and A-2. Recorded December, 1980.

F-82-063: A final plat to resubdivide Parcel A-2 into new lots A-3 and A-4. Recorded June, 1982.

SDP-81-116: A site development plan for 5 office buildings (Buildings A-1, A-2, B, C-1 and C-2), parking areas and related site improvements. Recorded June, 1981.

SDP-84-299: A revision to SDP-81-115 to eliminate plans for Buildings C-1 and C-2 and to replace them with one building, Building C. Recorded October, 1984.

Design Advisory Panel: The instant petition was presented before the Howard County Design Advisory Panel for architectural and site design comments on July 25, 2018. The Panel issued 5 site design recommendations that were endorsed by the Director, Department of Planning and Zoning (DPZ). Appellant incorporated DAP 1-3 in its design,

enhancing pedestrian connections, enhancing the width of the sidewalk area in front of the proposed retail center, and providing sidewalk connections to Broken Land Parkway.

Appellant declined to incorporate either DAP 4 "The applicant consider locating the retail buildings closer to the office buildings and create and internal street network." or 5 "The applicant redesign the architecture to be more contemporary and better match adjacent office buildings."

ECP-19-038: An environmental concept plan to demonstrate the site's ability to manage stormwater runoff and to identify environmentally sensitive areas for the proposed retail center was approved June, 2019.

Design Manual Waiver: A request to reduce the required 16-foot drive-thru land width (per Design Manual Vol.III, Appendix (G)) to 12 feet was approved on July 2, 2020.

### **Existing Site Conditions**

Lots A-3 and A-4 are developed with 4 commercial office buildings, 436 surface parking spaces, a private access road, drive lanes, stormwater management/drain systems, internal walkways and landscaping. A restaurant occupies a portion of one of the office buildings.

### **Site Proposal**

Appellant is seeking approval to construct a stand-alone 1-story, 8,373 sq. ft. retail center on a pad site of Lot A-3 of the Lakeview Office Center. A portion of this strip center is subject to a lease agreement with Chipotle's fast food restaurant. The proposal includes a drive-thru lane (for a fast food type restaurant), an outdoor concrete patio, landscaping



and landscaped islands, an asphalt pathway, internal sidewalks, parking, curbing, stormwater management, and outdoor lighting. A 10-foot-wide asphalt pathway is proposed along the frontage of Lots A-3 and A-4 that will connect to the existing pathway on the adjacent Columbia Association open space lot and provided pedestrian access to the adjacent parcels.

### **FDP Minimum Requirements**

Permitted Uses: All uses permitted in commercial districts or commercial land use zones are permitted, including but not limited to, all uses if the B-1 (Business: Local), B-2 (Business: General) and S-C (Shopping Center) zones. (The proposed retail center is permitted)

Setback: No structures shall be located within 50 feet of the right-of-way of a freeway or primary road. (The proposed structure is located the minimum 50 foot setback from Broken Land Parkway)

Building Height: No building height limitation provided the buildings are approved via an SDP.

Lot Coverage: No minimum/maximum lot coverage for commercial land uses,

Parking: Per the FDP and the HCZR, 5 parking spaces / 1,000 sq ft of retail sales, and 14 spaces/1,000 sq ft restaurant use, and 3 parking spaces/1,000sq ft of outdoor dining are required. Appellant proposes to provide parking at the higher restaurant use for the entire strip center. CB-67-2018 requires that Appellant provide 58 parking spaces to

service office space leased by the County. 614 parking spaces are required for Lots A-3 and A-4, including the instant proposal, and 666 parking spaces will be provided.

### **CONCLUSIONS OF LAW**

The instant appeal is from the denial of a Site Development Plan in the NT (New Town) zoning district. It is a unique but critical part of the development process. The subject property has an approved Preliminary Development Plan, an approved FDP (FDP 125-A) in which the Planning Board reserved to itself the approval authority over the SDP, and an SDP. The instant request is an amendment to the existing SDP as Appellant is seeking approval for development and landscape changes in order to erect an additional building on-site which may be occupied by restaurants, stores or offices as permitted uses if the amended SDP is approved.

This application is not for a special use, which is deemed legislatively compatible in specific zones and must be approved if the conditions precedent are met and there is no unique harm at the particular location different than that harm which would occur at any other property in the zone. *Shultz v. Pritts*, 291 Md.1, 432 A. 2d 1319 (1981) This application is for a site plan which involves a purely subjective review. A case in point is *Pomeranc-Burke, LLC. V. Wicomico Environmental Trust*, 197 Md. App. 714, 14 A.3d 1266 (2011), involving the approval of a cluster subdivision wherein the agency dealt with the specific design of a proposed subdivision. The court held that the regulations applicable to site design are permissive and are not mandatory.

“While residential use is a permitted use, and a cluster form of development is permitted under certain circumstances, the design of a specific subdivision, including its

location and density, is subject to approval. The Board did not deny the plat on the ground that cluster developments are not a permitted use, or that cluster developments generally are inconsistent with the purposes of the applicable ordinance but rather that this particular subdivision as designed was inconsistent with the purposes. The density permitted (citation omitted) generally , and in cluster developments specifically, is the maximum permitted. The maximum density is not available as a matter of right.” 14 A.3d at 1287.

Through the use of site plan review a municipality may reject a proposed use of property generally permitted under the zoning ordinance. Within the municipality’s authority to enact a zoning ordinance is the right to delegate to a planning commission the authority to determine, via the site plan process, whether a particular building or use is designed, located and landscaped properly within its requested setting. Southland Corp. 7-Eleven Stores v. Mayor and City Council of Laurel, 75 Md. App. 375, 541 A.2d 653 (1988) (The decision of the planning commission denying a site plan was upheld even though the use proposed was a permitted use under the zoning ordinance.) Site plans are not mere ministerial acts like the issuance of a use and occupancy or building permit; site plans permit the exercise of a broad range of discretion. County Council of Prince George’s County v. FCW Justice, Inc., 238 Md. App.641, 193 A.3d 241 (2018)

There are no specific criteria for approval of the SDP, the compliance with which will compel the approval of the SDP. Rather the FDP, by requiring the approval of an SDP, gives total discretion over all aspects of the design and landscape. Discretionary review of the SDP is only limited as to use; the FDP limits the uses to those permitted uses in 3 specific zones and these uses cannot be expanded or denied. However, an SDP may be



denied because of the design or setting or landscaping of a permitted use; it is not the use that is being denied, it is the design of the site plan.

Opposition Alleva and England argue that this SDP must comply with the 1965 Order establishing Columbia, the 1965 Preliminary Development Plan (BCC 412), Plan 2030, FDP-125-A, SDP-84-299 (as this is an amendment to the previously approved SDP), and any other adopted or approved plan. This is an extremely overbroad interpretation and will not be decided herein as this application can be disposed of on a much more narrow basis.

The applicant argues that jurisdiction in an SDP is extremely limited and an SDP must be approved where the minimum development regulations established in the FDP are met. As discussed *supra*, the FDP establishes the minimum design requirements and the SDP is a further refinement of the details of the proposed development which are left to the discretion of the approving body. Meeting the minimum requirements set forth in FDP-125-A does not compel the approval of SDP-20-042. The design flexibility given to a developer through the FDP also empowers the approving authority great discretion in approving final site design and layout, and any alterations thereto, in order to achieve context sensitive quality design.

Columbia Association, which is adjacent to the subject property on 2 sides, points to the development proposal being directly across from Lake Elkhorn and townhome developments, and within the viewshed of these residential uses. The siting and screening of the proposed commercial development will adversely affect the character and sense of place that is unique to Columbia parkways and particularly Lake Elkhorn,

the most used public amenity in Columbia. In lieu of siting and orienting the retail center towards, and being an integral part of the existing campus, as suggested by DAP, DPZ and Columbia Association, the development instead proposes a prominent and inadequately screened drive-thru along the Broken Land Parkway. This physical and visual incursion will be the first of its kind along the Parkway and will set the standard for future development.

Columbia Association made clear that the landscaping was inadequate and could never be made adequate no matter how much shrubbery was planted, due to the siting of the retail center the minimum 50 feet from Broken Land Parkway. The proposed design turns its back on the Parkway while having its signage and architecture engage with the Parkway. A greater setback is required to provide adequate landscaping for the proposed use at the proposed location.

FDP-125-A Section 6C-1 requires:

“Adequate planting and landscaping must be provided, as required by the Howard County Planning Board at the time a site development plan is submitted for approval, whenever employment center commercial areas are in proximity to residential land use.”

This is a grant of discretion to the approving body; it does not state that if the minimum standards of the Landscape Manual are met the landscape plan must be approved. The FDP recognized that the SDP must be reviewed in its entirety, determining how the bulk regulations interact with each other and the proposed plan. This is why the FDP established minimum and not maximum regulations, leaving to the final site plan reviewing

body the flexibility to analyze the proposal as a whole, including its envelope and location. All SDPs will be different and the FDP recognized this and to assert that all SDPs must be approved if the FDP minimums are met is contrary to statute, to case law and to planning principals.

The building's location and orientation, its height and design with a large amount of storefront glass with opaque spandrel film, the lack of sufficient foundation plantings, the lack of clarity regarding the removal of mature trees, the view of the stacking and idling motor vehicles in the drive-thru aisle, and how the proposed retail center will be viewed and experienced from off-site, including Broken Land Parkway, the adjacent townhome community which overlooks the Property, and the heavily used public Lake Elkhorn open space, are all legitimate concerns which have not been adequately addressed. The use is permitted, the SDP is not being denied because of the use, it is being denied because of the design.

### **DECISION**

SDP-20-042 does not provide appropriate landscaping, setbacks, building location, architecture or orientation to preserve and shield its adjacent neighbors, the townhome community, Lake Elkhorn and Broken Land Parkway. This proposal will be the first incursion of its kind along Broken Land Parkway and will set the standard for future development. The Property can be designed to address all of these concerns which have been suggested at earlier stages of the design process. The Planning Board denied SDP-20-042 for many of these design issues. For these reasons, and others contained herein, SDP-20-042 is **Denied**.



**ORDER**

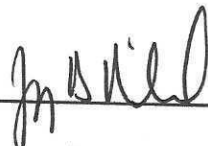
Based upon the foregoing, it is this 27th day of May, 2021, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Motion to Dismiss for Failure to File a Timely Appeal and Appellant's Lack of Standing is **DENIED**, and it is further, **ORDERED**,

That the Appeal of the Planning Board's denial of SDP-20-042 for a 1-story 8,373 sq. ft. strip retail/commercial center, on the southwest side of Broken Land Parkway, north of its intersection with Snowden River Parkway, Tax Map 42, Grid 3, Parcel 392, Lots A-3 and Lot A-4, also identified as 9841 and 9861 Broken Land Parkway, Columbia, be and is hereby **DENIED**, and SDP-20-042 be, and hereby is, **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS**

**HEARING EXAMINER**

  
\_\_\_\_\_  
**Joyce B. Nichols**

**Notice:** A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The person filing the appeal will bear the expense of providing notice and advertising the hearing.