IN THE MATTER OF

PALMETTO HOSPITALITY GM, LLC, MANAGER of OTO ROCK, LLC AND COLEMAN ROCK, LLC; HOWARD COUNTY INDEPENDENT BUSINESS ASSOCIATION, INC. (HCIBA); BRITISH AMERICAN BUILDING, LLC T/A BRITISH AMERICAN AUTO CARE; BRIAN ENGLAND, INDIVIDUALLY AND AS A HCIBA MEMBER; AMAHA LLC T/A EXXON; AMRAN PASHA, INDIVIDUALLY AND AS A HCIBA MEMBER; AND; CONVENIENCE RETAILING LLC T/A AUTOSTREAM CAR CARE CENTER (RICK LEVITAN)	:	BEFORE THE
	:	HOWARD COUNTY
	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 692-D

Appellants

vs.

HOWARD COUNTY PLANNING BOARD & H & ROCK, LLC

Appellees

::

DECISION AND ORDER

On September 6, 2012, October 11, 2012, and November 13, 2012, 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 Palmetto Hospitality GM, LLC, Manager of OTO Rock, LLC and Coleman Rock, LLC (Palmetto Hospitality); Howard County Independent Business Association, Inc. (HCIBA); British American Building, LLC t/a British American Auto Care, Brian England, individually and as a HCIBA member, Amaha LLC t/a Exxon; Amran Pasha, individually and as a HCIBA member, and; Convenience Retailing LLC t/a Autostream Car Care Center (Rick Levitan) (Appellants). Appellants are appealing the Howard County Planning Board's approval of H&H Rock's "red-line" revision to a previously approved Site Development Plan, SDP-07-078, to allow for the

addition of a one-story retail and restaurant building, a one-story retail ad vehicle service building, parking and associated site improvements, in accordance with Final Development Plans FDP-55, FDP-99-A-1 and the Howard County Zoning Regulations (Zoning Regulations).

The appeal is filed pursuant to Howard County Code (HCC) Section 16.900.(j)(2)(iii), which authorizes any person "specially aggrieved by any decision of the Planning Board and a party to the proceedings before it" to appeal said decision within 30 days of said decision to the Board of Appeals in accordance with section 501 of the Howard County Charter.

Appellants certified to compliance with the notice requirements of the HCC. The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Nicole M. Galvin, Esquire represented Palmetto Hospitality GM, LLC, Manager of OTO Rock, LLC and Coleman Rock, LLC; Howard County Independent Business Association, Inc. (HCIBA); British American Building, LLC t/a British American Auto Care, Brian England, individually and as a HCIBA member, Amaha LLC t/a Exxon; Amran Pasha, individually and as a HCIBA member, and; Convenience Retailing LLC t/a Autostream Car Care Center (Rick Levitan). Sang Oh, Esquire, represented Appellee H&H Rock, LLC.[1]

I. Appellee H&H Rock's Preliminary Partial Motion to Dismiss

As a preliminary matter, Appellee H&H Rock (H&H Rock) moved for dismissal of Appellants' Issues A, C, D, and E for Appeal, as described in Appellants Supplement to the Petition for Appeal, arguing the four issues are not preserved for appellate review because Appellants failed to present and argue these issues before the Planning Board at its May 24,

2012 meeting. Upon consideration of H&H Rock's preliminary motion to dismiss, Appellants' response, and oral arguments heard on September 6, 2012, and for the reasons stated below, the Hearing Examiner denied the motion.

H&H Rock, the developer of the Minstrel Crossing II subdivision, alleges a proscription against presenting new issues on appeal from a Planning Board decision implicated by the joint application of two procedural directives: 1) Section 1.106.G of the Planning Board Rules of Procedure (PBROP), which provides for a decision made following a public meeting to be heard de novo by the Howard County Hearing Authority, and 2) the standard of review provided in Hearing Examiner Rule of Procedure Section 10.2(c), which obliges the Hearing Examiner to consider the Planning Board's decision and treat it as correct unless, based on the facts found from the evidence, she determines that the decision was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law. Invoking the Court's reasoning in Hikmat v. Howard County, 148 Md. App. 502, 527, 813 A.2d 306, 321 (2001) (decided on other grounds), wherein the Court read PBROP Section 1.106.G together with the same standard of review for administrative appeals to the Board of Appeals, as well as other judicial decisions ruling on the non-admissibility of issues not argued before an administrative agency, H&H Rock asserts the Hearing Examiner hearing is not a pure de novo proceeding, with the consequence that the Planning Board cannot be found to have been clearly erroneous, arbitrary and capricious or contrary to law on issues never brought to its attention.

---

[1] The Planning Board does not participate in de novo administrative appeals.

Appellants oppose the motion, advancing two arguments. First, the case law upon which H&H Rock relies is not binding authority because these cases concern appeals from a hearing where a record was made. Second, given the limited nature of the Planning Board's own public meeting rules, which provide those in opposition to a petition a reasonable but limited opportunity to present information to the Board and where no record was made, Appellants were not obligated to raise all their issues. The Hearing Examiner agreed with Appellants' arguments and therefore orally denied the motion, with the explanation as follows.

The Howard County Planning Board exercises its authority through two different types of forums, each of which have different purposes and rules of conduct. When the Board meets to take official action on Board business, it holds an administrative public meeting where it may receive information, deliberate, make decisions, recommendations and policy or take final action pursuant to Section 1.106.D of the Planning Board Rules of Procedure (PBROP). PBROP Section 1.106.A identifies the types of situations where the Planning Board exercises its administrative decision-making authority following a public meeting, including site development plan approval in the NT Zoning District where the Board has reserved that right for itself. The Board thusly held a public meeting regarding the SDP-07-078 red-line revision and provided an opportunity for Appellants to present information to the Board for its consideration as provided by PBROP Section 1.106.D. The Board did not hold the second type of forum, a public hearing as set forth in PBROP Section 1.105 because no property or legal rights were implicated. This type of hearing is an evidentiary due process hearing where the

Board receives sworn testimony and other credible evidence, and the petitioner and any opposition are permitted to cross-examine witnesses.

II. Appellants' Standing to Appeal

At the outset of the hearing on the merits of the appeal, the Hearing Examiner sue sponte raised the issue of whether Appellants had standing to pursue the appeal. The impetus for the Hearing Examiner's raising the standing issue is the appeal petition's omission of the requisite pleading statement explaining the alleged manner in which an appellant is aggrieved by the ruling or action. In the area where the aggrievement pleading statement is to be provided, the reader is referred to the attached supplement, but nowhere in the supplement is there such a statement.

It is well established that the right to appeal is statutory. Howard County v. JJM, 301 Md. 256, 482 A.2d 908 (1984) (citing Maryland Bd. v. Armacost, 286 Md. 353, 354-55 (1979); Criminal Inj. Comp. Bd. v. Gould, 273 Md. 486, 500 (1975); Urbana Civic v. Urbana Mobile, 260 Md. 458, 461 (1971)). To this end, HCC 16.900.j.(2)(iii) provides that any person specially aggrieved by any decision of the Planning Board and a party to the proceedings before it may, within thirty (30) days thereof, appeal said decision to the board of appeals in accordance with section 501 of the Howard County Charter. This section clarifies that "any person specially aggrieved" includes but is not limited to a duly constituted civic improvement, or community association provided such association or its members meet the criteria for aggrievement set

forth in Section 16.013(b) of this title.[2] The Hearing Examiner therefore has jurisdiction to hear Appellants' administrative appeal only if they are persons aggrieved by the decision below.

The phrase "person aggrieved," when used in relation to administrative appeals, has a well-recognized meaning in Maryland spelled out in a line of cases. Sugarloaf Citizens' Ass'n v. Department of Env't, 344 Md. 271, 288, 686 A.2d 614 (1996). The preeminent case in this line is Bryniarski v. Montgomery County Board of Appeals, 247 Md. 137, 230 A.2d 289 (1967). Although the status of Appellants in these cases, which mainly concern appeals from boards of appeals or other administrative review bodies to the Maryland courts, differs from this case, which concerns appeals to such a body, the matter of "aggrievement" is the same. Demonstrating aggrievement under Bryniarski is a two-part test. First, the appellant must demonstrate a protectable property or personal interest. Second, the impact of the land use decision on such interest must be different from its impact upon the public generally. Bryniarski, 247 Md. at 137, 230 A.2d at 294.

The Bryniarski Court goes on to summarize several principles of aggrievement derived from court cases wherein Protestants were found to have or lack standing based on this two-part test. The preeminent principle is the "Bryniarski exception." Under the Bryniarski exception, an appellant who is an adjoining, confronting, or nearby property owner is deemed, prima facie, to be specially damaged and, therefore, a person aggrieved. Bryniarski 247 Md. at 145-6, 230 A.2d at 295-96. With respect to nearby property owners, the Maryland Courts have

---

[2] There being no such criteria in the Code, the Hearing Authority has long applied the case law on aggrieved persons, as did the Hikmat Court.

applied a "sight or sound" standard to determine if a nearby property owner person is presumptively aggrieved (subject to rebuttal). Sugarloaf Citizens Ass'n, 344 Md. at 298, 686 A.2d. at 629 (internal citations omitted).

A second principle is that persons whose property is far removed from the subject property ordinarily will not be considered aggrieved. This is the geography of presumptive non-aggrievement. In this terrain, protestants must rebut their presumptive non-aggrievement by alleging and proving by competent evidence that their personal or property rights are specially and adversely affected by the decision/action at issue. Ray v. Mayor & City Council of Baltimore, 203 Md. App. 15, 41, 36 A.3d 521, 536 (2012)(citing Bryniarski, 247 Md. at 145-6, 230 A.2d at 295-96).

This geography of presumptive non-aggrievement has been applied to deny allegations of special harm shared by small groups of persons or small but distinct areas, where protestants claim adverse effect from harm shared by membership in a particular community of interests or a neighborhood. Notwithstanding the fact that members of such alleged "aggrieved classes" are smaller in population or geography, the adverse impact is still no different from that suffered by the public generally. In Holland v. Woodhaven Bldg. & Development, Inc., 113 Md. App. 274, 281, 687 A.2d 699, 703 (1996), the court upheld a Board of Appeals ruling that a property owner living some distance from the subject property but claiming special aggrievement because overcrowded conditions of his child's school would be exacerbated lacked standing for failing to meet his burden of alleging and proving by competent evidence a special and adverse effect on his personal or property rights by the

decision/action at issue, because these effects were no different from those of other families whose children attended the same school. In the 2011 Ray opinion, the court rejected one appellant's allegation of special harm stemming from alleged harm to the neighborhood economy from a proposed Walmart. The court found this allegation to be only a speculative and general plight for everyone in the larger neighborhood or community, not a personal and special effect on the protestant, and so a circumstance in no way different from the public generally—a matter of "quintessential general aggrievement," in the Court's words. Ray v. Mayor & City Council, 203 Md. App. at 44, 36 A.3d at 538.

A third Bryniarski principle concerning objections to decisions to prevent competition is addressed in relation to Appellant Amaha LLC t/a Exxon; Amran Pasha's claim of aggrievement.

Palmetto Hospitality GM, LLC, Manager of OTO Rock, LLC and Coleman Rock, LLC (Palmetto Hospitality)[3]

As an adjoining property owner who participated in, or was represented by counsel at the Planning Board Meeting, Palmetto Hospitality is presumptively aggrieved under the first Bryniarski exception. This rebuttable presumption was mooted, however, because upon the introduction, acceptance and approval by the Hearing Examiner of Red-line SDP Revision Three, as detailed below, Palmetto Hospitality informed the Hearing Examiner, through counsel, that it was withdrawing its opposition and asked to be dismissed from the case. The Hearing Examiner subsequently dismissed Palmetto before the close of Appellants' case-in-chief.

[3] All Appellants appeared at the Planning Board meeting or were represented by counsel.

Howard County Independent Business Association, Inc. (HCIBA)

Maryland law as it applies to standing for associations is extraordinarily restrictive. Simply stated, the Maryland rule is that an association, including a community association, has no standing to appeal unless the entity itself has a property interest separate and distinct from that of its individual members that is injured by the action being challenged. See e.g. Medical Waste Associates, Inc. v. Maryland Waste Coalition, Inc., 327 Md. 596, 612, 612 A.2d 241, 249 (1990).

Appellants' counsel proffered HCIBA is specially aggrieved because its members are aggrieved, including several Appellants in the instant case and further, that HCIBA has an interest in the enforcement of New Town Zoning Regulations. The petition and the record being silent as to any distinct HCIBA property interest or special injury harmed by the Planning Board's decision, HCIBA has failed to establish itself as an aggrieved party specially affected in a way different form that suffered from the public generally.

Convenience Retailing LLC t/a Autostream Car Care Center (Rick Levitan)

Per Appellants' counsel proffer, Convenience Retailing is located in the closest village center to Lot 27, and Rick Levitan, whose business in located in this village (Owen Brown), therefore has standing to protect the village centers, which is a PlanHoward 2030 issue. Counsel quoted this language from the Plan to support Mr. Levitan's aggrievement: "Redevelopment plans for the Snowden River Parkway area need to consider the impact that increased development along Snowden River Parkway would have on Columbia and its village

centers." (PlanHoward 2030, P.59). Counsel contends failure to consider this adverse impact will result in a loss of property value and a loss of business.

Applying the Bryniarski principle of presumptive non-aggrievement and heeding the case law that protestants who have no interest at stake other that shared by a community of interests or neighborhood have no adverse impact different from that suffered by the public generally, the Hearing Examiner finds this protestant is in not aggrieved by the Planning Board's decision. Convenience Retailing is located at 7248 Cradlerock Way, Columbia, 20045, a substantial distance from Lot 27. Between this property and Lot 27, as the crow flies, is the very large Elkhorn Park and much of the Village of Owen Brown. To the extent that Convenience Retailing/Rick Levitan has a general concern about protecting a village center from increased development along the Snowden River Parkway area, Convenience Retailing/Rick Levitan suffers no harm separate and distinct from the public generally, and consequently lacks standing.

If we further examine Mr. Levitan's core claim of specific injury or harm, this protestant asserts an interest protected by the Plan and is seeking standing to enforce it. Appellant is really alleging the Planning Board's decision is inconsistent with PlanHoward2030. Unhappily, for Appellant this alleged inconsistency does not rise to the level of a protectable property interest; in Maryland, the plan is a guide rather than a document imposing a mandate in the context of the Planning Board's decision. Equally significant, the New Town Zoning Regulations do not charge the Planning Board with assessing an SDP against PlanHoward 2030 at this late stage of review, as is further discussed in Part VII.

British American Building, LLC t/a British American Auto Care;
Brian England, Individually and as a HCIBA Member (British American)

Appellants' Counsel proffered British American is aggrieved because it is located in the Guilford Industrial Park, which is governed by a general plan of development and guidelines called the Guilford Industrial Regulations (declarations of covenants and agreements)[4]. Lot 27 is also a member of the Guilford Industrial Park. British American alleges special damages by the Planning Board's decision to allow a commercial use in the industrial park in contravention of the declarations of covenants and agreements, which Counsel characterized as a common scheme of development. This Appellant specifically alleges harm by an increase in commercial uses within the industrial park. As this protestant alleges adverse effect based on being a member of a community of interests, he suffers no harm separate and distinct from the public generally, and lacks standing to pursue this appeal.

Amaha LLC t/a Exxon; Amran Pasha, Individually (Amran Pasha)

Amran Pasha testified to being a member of the limited liability company that owns property at 7100 Minstrel Way, which is located at the northeast corner of the intersection of Snowden River Parkway and Minstrel Way. He is also a member of the limited liability company that owns the Hopewell Exxon station at this site. There is also a convenience store on the property, but it is unclear whether it is part of the real property owned by Amaha LLC or part of the Hopewell Exxon operation.

[4] The official name for the park is the EGU (Employment Guilford) subdivision.

Mr. Pasha testified to purchasing the property and the gas station in 2011. Before he purchased the property, which is one of only a few commercially zoned properties along Snowden River Parkway, he did due diligence to determine what uses were or could be permitted along Snowden River Parkway. As he understood the zoning across Snowden River Parkway, only M-1 uses were allowed. He believes he will suffer special harm if Lot 27 is developed as retail because it will have a ripple effect by opening the door to an increased retail presence on Snowden River Parkway. The result of this ripple effect will be a decrease in the value of his property, which he purchased at a premium because of its commercial zoning. He explained the property right injury he would suffer as a loss of property value based on an element of exclusivity due to its commercial zoning. This exclusivity would also be damaged because the proposed uses would harm the planned community he bought into, creating a significant devaluation of his property by the presence of more commercially used properties.

As the owner of a property within sight or sound of Lot 27, Mr. Pasha enjoys a rebuttable presumption of aggrievement under the Bryniarski exception. H&H Rocks rebuts this presumptive aggrievement perforce of a third Bryniarski principle: a person whose sole reason for objecting to a zoning action is to prevent competition with his established business is not a person aggrieved. Bryniarski, 247 Md. at 145-6, 230 A.2d at 295-96; Kreatchman v. Ramsburg, et al., 224 Md. 209, 219, 167 A.2d 345 (1961). H&H Rock argued, through questioning, that Mr. Pasha's sole motive is to prevent threatened competition from a gas station and/or a convenience store across the street. As proof that this goal is the sole motive for Mr. Pasha's participation in the appeal, H&H Rock introduced into evidence as Exhibit 3, a

December 28, 2010 letter to H&H Rock's counsel from Mr. Pasha's counsel Alexander Adams. In this letter, Mr. Adams states his client's opposition to any SDP that would include a retail building in Minstrel Crossing. H&H Rock reads this letter as clear evidence of Mr. Pasha's sole interest in protesting the Board's decision, staving off competition with his business, a gas station and a convenience store.

To be sure, a competitor is not an aggrieved party. It is not the function of county zoning ordinances to provide economic protection for existing businesses. Reduced incomes by more vigorous or appealing competition or depreciation in value of the properties on which such businesses are operated do not give rise to standing to sue. Superior v. Eller Media, 150 Md. App. 479, 485, 822 A.2d 478, 492 (2003). However, concerning Mr. Pasha, the Hearing Examiner declines to make an express ruling on H&H Rock's allegation that his claim of aggrieved person standing is rooted solely on economic competition grounds, where such allegations are implied rather than expressly proffered by the protestant. In Maryland, the dismissal of an appeal for lack of standing based solely on economic competition generally relies on protestants' express statements that the requisite showing of harm arises from competition. See e.g. Eastern Service Centers, Inc. v. Cloverland, 130 Md. App. 1, 744, A.2d 63, 67 (2000). Mr. Pasha made no such statement. It is also inappropriate to deny standing to a business competitor who may show other injury, as did Mr. Pasha alleges through his allegation that the approved uses would decrease the value of his property, if only indirectly. The Hearing Examiner also considers it inappropriate to dismiss Mr. Pasha as an appellant,

where she raised the standing issue, where it would result in the ultimate denial of the appeal without a hearing on the merits.

We turn now to Mr. Pasha's alternative allegation of special harm to a protected interest, harm to the planned community he bought into resulting from an increase in retail uses. The Hearing Examiner finds this non-economic concern to be outside the zone of interests protected by the Zoning Regulations. This last alleged harm is not a vested property right protected by the Zoning Regulations or PlanHoward2030 and the unavailability of this alleged injury as a basis for standing has been adequately covered. From here on in, Mr. Pasha is referred to as the Appellant.

III. Evidentiary Exhibits

Appellant introduced into evidence the exhibits as follows.

1A. Final Development Plan (FDP) 55 (February 1969, filed June 2, 1969), Sheet 2 of 4
1B. FDP 99-A, Part I (filed May 31, 1985), Sheet 2 of 3
2. Zoning Bill (ZB) 858, Amending Retail Center regulations in the M-1 and M-2 Zoning Districts (1988)
3. FDP 117-A-II, Seiling Industrial Center, Section 1, Area 1, (plat recorded September 29, 2007)
4. December 4, 2003 letter from George L. Beisser, Chief Division of Pubic Service and Zoning Administration, DPZ, to Richard Talkin, Esq. regarding retail grocery stores in Seiling Industrial Center, FDP 227-A-1
5. November 30, 2006 letter from Marsha McLaughlin, DPZ Director, to Richard Talkin, Esq., regarding Wegmans grocery stores in Seiling Industrial Center, FDP 227-A-1
6. August 27, 2003 letter from George L. Beisser, Chief, Division of Pubic Service and Zoning Administration, DPZ, to Joseph Blanchfield, regarding compliance of 9199 Red Branch Road with FDP Three-A
7. DPZ, Division of Land Development, Homebuilder's Newsletter, June 2011
8. Google Aerial Map with location of convenience stores
9. E-Mail correspondence concerning proposed plan for Royal Farms store, gas station, car wash and pharmacy building, as regulated by SDP Phase—55 for EGU, Section 2,

Area 2, January 17, 2012 to February 15, 2012, between Kent Sheubrooks, DPZ and Michael Coughlin. Morris & Ritchie Associates

H&H Rock introduced into evidence the exhibits as follows.

1. Red-Line SDP Revision Three to SDP-07-078, 32 pages
2. October 10, 2012 letter from H&H Rock President Mark Levy to Palmetto Hospitality
3. December 28, 2010 letter to Sang Oh, Esquire, from E. Alexander Adams, Esquire, regarding Hopewell Exxon's concerns about "retail building" at Minstrel Crossing

4A-M. Retail uses in industrial areas controlled by FDPs

IV. General Background

Given the nature of this appeal, a brief discussion of the Final Development Plan review, approval, and amendment process for NT zoned property is warranted. Pursuant to Section 125.C of the Zoning Regulations, the use of land in an NT Zoning District is controlled through a Final Development Plan (FDP), which must be submitted to the Planning Board for approval. The FDP includes both drawings delineating the various land use areas and text (criteria) and must be consistent with the Comprehensive Sketch Plan previously approved by the Planning Board. The Petitioner may also submit the associated SDP for the FDP to the Department of Planning and Zoning (DPZ) for concurrent review and, eventually, for the Planning Board's final approval, where provided for by the Planning Board.

Before the FDP and SDP are submitted to the Planning Board for its consideration, DPZ's Division of Land Development evaluates the FDP and SDP through its Subdivision Review Committee (SRC), a state and county interagency review group organized to coordinate the review process. Howard County Subdivision and Land Development Regulations, Section 16.144. Amendments to approved FDPs are subject to the same Section 125.C and SRC review

procedure. DPZ also submits a Technical Staff Report (TSR) on the proposed FDP or FDP amendment to the Planning Board. The TSR describes the plans and any SRC action on the plans and contains DPZ's recommendation of approval or denial.

This appeal concerns SDP-07-078/Minstrel Crossing II, which is generally subject to two FDPs, FDP 55 and FDP 99-A, Part I. Both FDP 55 and FDP 99-A-Part I direct the development of an easterly portion of Lot 27 and the use of Building C, which lies partly within the area controlled by FDP 55 and partly within the area controlled by FDP 99-A-Part I. The development of Building D, located on the westerly portion of Lot 27, is controlled only by FDP 99-A, Part I.

The Planning Board approved FDP 55 in 1969. The requisite text subjects development of the area to nine criteria, three of which are in part pertinent to this appeal.

> Criteria 6. Employment Center Land use Areas – Industrial
> . . . No parking lot shall be located within 25 feet of the right-of-way of any public street, road, or highway . . . All structures must be developed in accordance with a site development plan approved by the Howard County Planning Board.
>
> Criteria 7. Permitted Uses – Section 17.031.D
> Employment Center Land Use – industrial Land Use Areas
> All uses permitted in industrial districts or industrial land use zones are permitted including but not limited to, all uses permitted in M-1 and M-R districts except, however that uses only permitted in M-2 and T-2 Districts are prohibited. Commercial uses ancillary to, or compatible with, permitted industrial uses are permitted, including, but not limited to, all of the following:
> a. Restaurants and lunchrooms, and similar establishments serving food and/or beverages
> b. Personal service shops and retail stores which primarily sell or service merchandise manufactured on the premises.
> c. Banks
> d. Gasoline service station
> e. Wholesale Distributors

f. Savings and Loan Associations
g. Business and Professional offices
h. Parking Lots or Garages
i. Building Supplies and Lumberyards
j. Storage of prepared dairy products and other food products to be distributed on truck vending routes
k. Such other ancillary uses as may be approved by the Howard County Planning Board

The Planning Board approved FDP 99 A-1 in 1985, with this pertinent text.

6C-2. Employment Center Land Use – Industrial
Employment Center Land Use – industrial Land Use Areas
. . . No structure shall be located within 25 feet of the right-of-way of any public street, road, or highway . . . parking lot shall be located within 25 feet of the right-of-way of any public street, road, or highway

7. Permitted Uses – Section 119-C-1-d
EMPLOYMENT CENTER LAND USE – INDUSTRIAL LAND USE AREAS
All uses permitted in industrial districts and use zones are permitted including but not limited to, all uses permitted in M-1 districts except, however, the uses only permitted in M-2 and RMH Districts are prohibited. Location of commercial uses ancillary to, or compatible with, permitted industrial uses are permitted and planned as an integral part of the predominately industrial area are permitted as approved by the Howard County Planning Board.

In 2008, the Planning Board held a public meeting and approved SDP-07-08, Minstrel Crossing II, which proposed the Hampton Inn & Suites and Springhill Suites on Lots 26 and 28, apparently. The approved SDP also included a reservation for future Building C (a future pad site) on Lot 27. On May 24, 2012, following a public meeting, the Planning Board approved H&H Rock's red-line SDP revision (Red-line SDP Revision Two), allowing the addition of Buildings "C" and "D" to Lot 27 of the Minstrel Crossing II subdivision. According to the November 2011 SDP submitted with the appeal petition, the one-story Building C is proposed for retail use. The one-story Building D is proposed for vehicle service and retail use. The

Planning Board's May 2012 approval of these uses is the subject of this appeal.

Appellant is opposed to the red-line SDP revisions. Appellant contends the Planning Board impermissibly approved the red-line SDP revisions, alleging five errors.

A. The Planning Board erred in approving the red-line SDP because the red-line process is not available for substantial revisions to an approved SDP.
B. The Planning Board failed to determine if the proposed uses comply with the uses permitted by FDP–55, FDP 99-A-1 and the Zoning Regulations.
C. The Planning Board failed to determine whether the red-line SDP has sufficient parking and whether the easement required to be extinguished could in fact be distinguished.
D. The Planning Board failed to determine whether the red-line SDP is compatible with the Howard County General Plan.
E. The Planning Board inappropriately placed the burden of proof on Appellant.

V. Revisions to Red-line SDP Revision Two – Red-line SDP Revision Three

At the outset of the September 6, 2012 proceeding, counsel for H&H Rock introduced into evidence additional red-line revisions to SDP-07-078 (H&H Rock Exhibit 1) and an October 10, 2012 letter from H&H Rock President Mark Levy to Palmetto Hospitality memorializing an agreement between the two with respect, in part, to seven amendments (H&H Rock Exhibit 2).[5] The amendments are as follows.[6]

1. The American Automobile Association (AAA) facility shall not operate between 8:00 p.m. and 7:00 a.m. seven days a week.
2. The HVAC air conditioning shall be installed prior to the opening of the AAA facility.
3. H&H Rock shall install a wing wall to block the AAA use and potential noise.
4. AAA Service Center, southern facing door shall be closed at all times except when moving vehicles in and out of facility.
5. Landscaping along southern end of Service Center—Additional landscaping indicated on the revised red-line revision. Landscaping shall be provided within

[5] Page 2 of Exhibit 2 indicates Palmetto Hospitality's agreement, on the signature of Charles T. King, Assistant Treasurer.

[6] Pursuant to Hearing Examiner Rule 9.4, when a petitioner proposes to amend a petition during the course of the proceedings, the petitioner must submit the amendment as an exhibit. The letter supplements the petition.

three months (weather permitting) of AAA securing its use an occupancy permit. Landscape plan is approved by Howard Research and Development.

6. Additional striping along entry drive—not required on dumpsters being eliminated
7. Proposed new dumpster locations—Location of dumpsters (as approved by Planning Board) eliminated.

Because the amendments are not substantive, the Hearing Examiner determined they could be introduced into evidence in accordance with Hearing Examiner Rule 9.5.[7] Accordingly, the term "Red-line Revision SDP Three" referenced in this decision and order refers to the September 5, 2012 submission.

H&H Rock also requested the Hearing Examiner to approve Red-line SDP Revision Three. Having found that the seven amendments are not substantive, the Hearing Examiner is approving Red-line SDP Revision Three insofar as it incorporates these seven amendments. In approving this revision, the Hearing Examiner is not approving any use not granted by the Planning Board, nor is she approving any revisions in parking calculations or setbacks that do not comport with what the Planning Board approved.

VI. Appellant's Evidence and Testimony

Appellant subpoenaed David Boellner, a subdivision site development plan reviewer in DPZ's Division of Land Development (DLD). Mr. Boellner explained that DPZ's Division of Engineering Development (DED) is responsible for making the decision to accept a red-line revision before he reviews it. He also explained DPZ originally intended the red-line process to

[7] Rule 9.5 requires the hearing examiner to suspend the hearing for at least three weeks if the amendment is substantive, i.e., the amendment proposes a use that is likely to impact vicinal properties aversely.

accommodate small changes, but that it expanded the scope of the process after the economic slowdown to include a wider scope of changes.

Mr. Boellner reviewed the redline revision for SDP 07-078, prepared the red-line SDP-07-078 Technical Staff Report (TSR), and presented it to the Planning Board. He prepared the TSR based on his review of the redline plan, recorded subdivision plats, the prior site development plan (SDP), and pertinent final development plans. He also reviewed the redline revision against the criteria in the two FDPs for compliance and prepared the TSR maps. The TSR recommends approval.

When questioned, Mr. Boellner noted that FDP 55, Criteria 6, imposes a 25-foot setback from any right-of-way (ROW) for any parking lot. FDP 55, Criteria 10.a, provides that "setbacks shall conform to the requirements of Section 6 above." Regarding the 20-foot setback shown on the Red-Line SDP Revision Three (Page 4), he explained it as a drafting error; the setback is actually 25 feet, having scaled it. He had also noticed the error in a prior submission. Additionally, this same parking setback location appears on SDP-07-078/Minstrel Crossing II, which the Planning Board approved on August 8, 2008.

Regarding the number of parking spaces proposed for the red-line additions, Mr. Boellner explained parking was calculated based on the amount required for the whole project, not just the proposed additions and further, that the amount of parking proposed conforms to the parking requirements requirement criteria imposed by Criteria Items 9 in both FDPs. Note 21 on the first sheet of the Red-line SDP Revision Three states all lots shown hereon will share access and parking based on the above declarations (condominium covenants).

Appellant presented Edward Ely as an opinion witness. Mr. Ely testified to having been an officer of Howard Research and Development (HRD) and the Rouse Company for twenty-three years.[8] As the vice-president/director for land sales and development, he marketed Columbia and was in charge of all commercial land sales from 1982-2005, particularly New Town (NT) zoned property.

Mr. Ely's testimony centered on his interpretation as to what uses are permitted under FDP-55 and FDP-99-A-1 (Appellant Exhibit 1A-B). As he read FDP-55, Criteria 7, the permitted uses allowed include uses 7.a-k. He did not believe the M-1 Zoning District would permit the proposed red-line SDP revision uses under the general language in Criteria 7 authorizing all uses permitted in the M-1 Zoning District. Nor are the approved uses permitted under FDP-99-A-1. It was his belief that HRD would not have permitted the proposed retail uses. Some showroom retail goods and personal service shops would be permitted if they were less than about 30 percent of the structure. Only gas stations affiliated with a wholesale use were permitted.

Referring to Appellant Exhibit 2, Zoning Bill 858, Amending Retail Center regulations in the M-1 and M-2 Zoning Districts, Mr. Ely explained the purpose of the bill authoring new sections to the M-1 and M-2 Zoning Districts was to permit an independent retail center in Gateway Overlook to serve employees and uses of projects within the M-1 and M-2 districts. As adopted, the Retail Center use, now Zoning Regulations Section 122.B.55 (uses permitted as a matter of right) provides as follows.

---

[8] The names of the two companies were used interchangeably throughout the hearing.

55. Retail centers. Retail centers to serve the employees and users of projects within this zoning district are permitted within projects of at least 200 acres when such centers conform to the requirements set forth below.

a. Purpose: The purpose of such retail centers is to provide employees and users of development in this zoning district with conveniently located commercial, retail and personal services; to reduce the need for vehicle trips off and onto the site to obtain such services; to provide employees and users with the useable open space and amenities associated with such services (e.g., outdoor eating areas); and to make more efficient use of the site by clustering together related retail, commercial and service activities in retail centers which typically would not exceed 40,000 square feet of gross floor area.

b. Uses permitted by right in such retail centers include any combination of the retail, commercial or service uses permitted by right in this district plus the following uses:

(1) Newsstand.
(2) Convenience store.
(3) Personal service establishments such as barber and beauty shops, opticians, and photographic stores.
(4) Specialty stores.
(5) Telegraph offices, express mail, and messenger services.
(6) Travel bureaus.
(7) Drug and cosmetic stores.

c. Minimum requirements and conditions: Retail centers incorporating the uses cited in paragraph b. above shall be permitted within this zoning district when they meet the following conditions:

(1) Minimum project size shall be 200 gross acres and such projects shall have a continuous internal road system.
(2) The retail center(s) lot shall not occupy, in the aggregate, more than (2%) of the gross acreage of the project.
(3) Development of the retail center(s) shall be phased in with the development of permitted uses within the project so that at no time shall the aggregate floor area of the improvements in the retail center(s) exceed ten percent (10%) of the total aggregate floor area of improvements for permitted uses either constructed or being constructed pursuant to approved Site Development Plans.
(4) Retail center(s) may not be located on a lot that fronts on or abuts any street or highway unless such street or highway is internal to the project. All access to the retail center(s) shall be from interior streets within the project. The distance from any lot line of the retail center lot to the nearest street or highway right-of-way external to the project shall be no less than 500 feet and signage for the center shall not be oriented to such external streets.

In Mr. Ely's opinion, the proposed uses on Lot 27 amount to a Retail Center subject to Section 122.B.55.C.

On cross-examination, Mr. Ely opined that FDP-055 Criteria 7, which identifies the land uses allowed in the EGU (Employment Guilford) subdivision, and specifically Lot 27, does not support the proposed uses, even though this criteria authorizes commercial uses ancillary to, or compatible with, permitted industrial uses. As he interprets the phrase, "commercial uses compatible with" means something different than its plain meaning, "capable of co-existing in harmony," according to the dictionary definition offered by Mr. Oh. Hence, while administering real estate development at the Rouse Company (being one of the gatekeepers, along with the County), Mr. Ely made judgment calls applying additional "compatibility" considerations to disallow even permitted uses in a New Town/M-1 industrial park covered by an FDP because they did not fit in with existing uses. For this reason, he believes the Wegmans Grocery Store in the Seiling Industrial Park is not a compatible use in the Seiling Industrial Park because it is not in the right place.

Appellant also presented Albert F. Edwards as an witness. Mr. Edwards testified to having been a Rouse company employee for almost 17 years and a General Growth Properties employee for almost two years. He reviewed the red-line plans, prior testimony, the transcript from the Planning Board meeting, and the applicable zoning codes and FDPs.

With respect to the two FDPs controlling what uses are permitted on Lot 27, Mr. Edwards believes the permitted uses include anything allowed in the M-1 or other ancillary uses. As he understood the approved uses, they include an AAA car service center with a

substantial retail component in Building D. While the AAA service bays are permitted, he believes it is a stretch to allow the retail uses affiliated with the AAA use under FDP 99-A-**1.** With respect to Building C, the general retail building proposed, he understood the Planning Board Planning Board approved a convenience store under FDPs 55 and 99-A-I. He also pointed out that Red-Line SDP Revision Three notes a retail and restaurant use in Building C in relation to parking details.

In Mr. Edwards opinion, the ambiguous language about commercial uses "compatible with" permitted uses should not be advanced to introduce retail uses that are not an integral part of a predominately industrial area. For this reason, he did not think it appropriate that the DPZ director should have applied this compatibility language in correspondence where she expressed her belief that the then proposed Wegmans grocery store in Seiling Industrial Park was compatible with permitted industrial uses. Appellant Exhibit 5.

Mr. Edwards also presented an overview of the red-line SDP process. It is used by applicants seeking a quicker review process for various reasons, including financial costs and client interests. Applicants may also want to use the process to obtain approval before new regulations effect what is proposed. The red-line process is departmental (DPZ) policy. Appellant Exhibit 7, a June 2011 DPZ Homebuilder's Newsletter, sets forth the department's most recent red-line process.[9] He believes the additions to Lot 27 should not have been reviewed under the red-line process.

---

[9] The Newsletter delineates a DPZ policy memorandum regarding the applicability of Subdivision and Land Development Regulations (SDLDR) Section 16.555, which requires an SDP for all non-residential development and

During cross-examination, Mr. Edwards conceded the Rouse Company added the "ancillary to or compatible with" language for flexibility, but in his view this language is not intended to allow retail to proliferate, only to allow a small amount of retail in one location. When asked what other uses would be appropriate on Lot 27, he opined that warehouses would be an appropriate use. In his view, the convenience store use, which the Planning Board understood as being proposed even though it was not delineated on the red-line revision before it, the retail portion of the AAA building, and the undefined portion of the "General Retail" building are inappropriate because they not permitted under the controlling FDPs. The automotive service portion of the proposed AAA and restaurant uses are appropriate because they are permitted.

The Hearing Examiner questioned Mr. Edwards as to whether the Planning Board could have found the proposed uses to be compatible with an area dominated by two hotels. He replied that the Planning Board could have made this determination.

Regarding Mr. Edward's testimony with respect to the proposed uses and PlanHoward 2030, Mr. Edwards stated he was aware of language in the Plan about the redevelopment of the Snowden River Parkway area, but he could not reference the specific policy on the subject. He believed the policy related to transitioning the area to accommodate different uses.

---

explains an applicant's options to establish changes-in-use, minor modifications and additions to existing non-developed residentially zoned properties with an approved SDP.

VII. H&H Rock's Motion to Dismiss the Appeal

At the close of Appellant's case-in-chief, H&H Rock motioned to dismiss the appeal due to Appellant's failure to satisfy his production burden on all five allegations of error. The Hearing Examiner granted the motion as to all five allegations, making the determinations as follows.

A. The Planning Board erred in approving the red-line SDP because the red-line process is not available for substantial revisions to an approved SDP.

Appellant contends the Board's approval was arbitrary and capricious because it made no finding to establish H&H Rock's right to proceed through the red-line process. There was testimony that the red-line SDP process is policy and that DPZ's most recent policy memorandum on the SDP process is set forth in a June 2011 DPZ Homebuilder's Newsletter. This policy memorandum explains the process by which DPZ will determine if an SDP, Waiver Petition, or a "Red-Line Revision" for changes-in-use and other minor modifications.

The red-line SDP alternative policy announced in the newsletter provides as follows.

Option #3.

If an approved Site Development Plan already exists for the subject property, the applicant may submit a red-line revision to the SDP using the standard "Red-Line Revision Process" administered by the DPZ, Development Engineering Division for a change-in-use to any existing structure(s) or when only minor modifications or additions to existing developed non-residential properties are proposed by the applicant or as required by DPZ and other applicable County and/or State agencies to bring the site into compliance with the minimum Code requirements. If an approved SDP is not available for the site, then the applicant shall follow options 1 or 2 as explained above to process their request. The minimum processing time for a red-line revision is approximately 4 to 6 weeks . . .

There was also testimony as to the general provisions of the red-line process, but no direct testimony or probative evidence as to how this specific red-line revision failed to meet the criteria for review under the Red-line SDP review process.

Having considered this first alleged error, the Hearing Examiner finds it meritless. Appellant failed to assert any probative evidence or regulation tasking the Planning Board with disapproving a red-line SDP revision when proposed revisions are allegedly substantial. Indeed, as DPZ staffer David Boellner testified the Division of Engineering Development is responsible for making the decision to accept a red-line revision before he even reviews it and prepares a TSR. In short, the ultimate decision-maker charged with "green-lighting" the red-line SDP process is DPZ's Division of Engineering Development, not the Planning Board. This is made manifest in the last paragraph of the SDP alternatives policy memorandum appearing in the June 2011 Homebuilder Newsletter, wherein applicants are informed the Division of Engineering Development will issue a written response within 30 days of receipt of a written inquiry as to which SDP process is appropriate, "*once a final determination is made on the appropriate process to attain approval of [a] proposal*" (emphasis added.)

The Hearing Examiner acknowledges the multiple colloquies between counsel and herself on potential remedies arising from this alleged error during the proceeding, where Appellant's counsel contended there was no legal recourse to challenge the use of the red-line SDP process except at the Planning Board level. The Hearing Examiner observed, without

making a legal determination, that the HCC authorizes petitions for declaratory rulings as to whether a rule or statute administered by an agency applies to a person or situation.[10]

A parallel declaratory ruling petition process is provided for in Section 1.105.A.5 of the Planning Board Rules of Procedure, where such petition is heard pursuant to the Board's quasi-judicial decision-making authority following a required public hearing. Assuming arguendo the Planning Board has jurisdiction to rule on a decision approving the use of the alternative red-line SDP process, as applied to the instant case, the appropriate procedure was to have raised the issue is through a petition for a declaratory ruling by the Board, not by shoehorning the challenge onto the instant administrative appeal petition.

Appellant may also have had a third means to challenge DPZ's decision to grant the use of the alternative red-line SDP process in this instant case. The June 2011 policy memorandum identifies its written response to a written inquiry as to which SDP process is appropriate as a "final determination." As such, the written response is a final agency action and may be

---

[10] Howard County Code, Title 2, Sections 2.123 and 2.124 provides as follows under the Administrative Procedures Act.

Sec. 2.123. - Petition to the Agency.

A person may petition an Agency for a declaratory ruling as to whether a rule or statute administered or enforced by the Agency applies to the person or situation. Within 30 calendar days following receipt of the petition, the Agency shall issue a decision on the petition. The declaratory ruling, if issued after argument and stated to be binding, shall be binding on the Agency and on the petitioner unless altered or set aside by a court. A declaratory ruling is subject to review in the same manner as review of contested cases.

Sec. 2.124. - Petition to court.

A person may petition the circuit court for Howard County to issue a declaratory ruling as to the validity of any rule when it appears that the actual or potential application of the rule has or may have an adverse effect upon the person's legal rights or privileges. The Agency shall be made a party to the court proceeding. The court shall declare such a rule invalid if it violates constitutional provisions or exceeds the legal authority of the Agency or if it was adopted without substantial compliance with this subtitle. The court may declare a rule invalid whether or not the petitioner has first requested the Agency to pass upon the validity of the rule.

appealed by an aggrieved person through the administrative appeal process no later than 30 days of the date of the decision letter.

B. The Planning Board failed to determine if the proposed uses comply with the uses permitted by FDP–55, FDP 99-A-1 (the two FDPs) and the HCZR.

The crux of Appellant's challenge to the Planning Board's approval of the SDP 07-078 red-line revision is that the two FDPs and the M-1 Zoning District, particularly Section 122.B.55, do not permit the Planning-Board approved uses on Lot 27. According to the red-line SDP plan before the Planning Board and attached to the administrative appeal petition (Red-line SDP Revision Two), Note 2 states the proposed uses are a retail and restaurant in Building C and retail and vehicle service in Building D. Over the course of the hearing, these uses were clarified to include specific uses: an American Automobile Association (AAA) facility and retail use in Building D, and a one-story retail and restaurant use, including a convenience store in Building C. The record indicates Appellant has no quarrel with the automotive service portion of the proposed AAA and restaurant uses, because the FDPs and Zoning Regulations authorize them. Appellant does contest the retail portion of the AAA building, and the undefined portion of the General Retail building, which includes, apparently, a convenience store, alleging these are impermissible uses.

To persuade us the Board erred in approving these uses, Appellant presented the testimony of former HRD witness Edward Ely, who asserted the uses permitted under the two FDPs do not support the approved red-line SDP revision. He read the FDP use criteria as allowing limited retail or commercial uses to showrooms, retail sales of items produced on-site,

and gas stations affiliated with a wholesale use. He also declared retail uses are permitted only on Lot 27 when they are part of a Retail Center permitted under HCZR Section 122.B.55.C. This witness further reasoned the compatible use language in Criteria 7 of the two FDPs is more limited than the plain meaning of "being compatible with," because even permitted uses should be disallowed if they did not fit in with existing uses, citing the Wegmans Grocery Store in the Seiling Industrial Park as one such incompatible use—despite it being a permitted use under the applicable FDP—it is being in the wrong place.

The Hearing Examiner does not find this witness' testimony to be credible and therefore assigns it no weight for two reasons. First, his interpretation of the phrase "being compatible with" is contrary to the plain meaning rule of statutory interpretation, which is to give language its plain and ordinary meaning. See. e.g., Trembow v. Schonfeld, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006). The witness's more rigid interpretation would disallow even those uses listed in Criteria 7, a judgment that seems inconsistent with the very purpose of the New Town zoning process, which is to provide greater flexibility than Euclidian zoning.

Secondly, this witness' interpretation of what uses are permitted on Lot 27 is premised on the underlying logic, made cogent by Appellant's counsel during questioning, that the "compatible with" language in the two FDPs is to be narrowly construed in relation to all listed uses and the M-1 Zoning Regulations. For this proposition, the witness banks on Zoning Regulations Section 101.A, an interpretative rule of construction pronouncing that "[t]he particular shall control the general" to deny the application of the phrase permitting

"commercial uses ancillary to, or compatible with, permitted industrial uses" . . . including, but not limited to the specific uses in the FDPs.

In the Hearing Examiner's view, this slant on statutory interpretation is an impermissible segregation of a portion of the use criteria in the FDPs. It distorts the intent of the permissible use criteria in contravention of a key canon of statutory interpretation, which is that a statute (including FDPs, which are de facto Zoning Regulations) is to be read so that no word, phrase, clause or sentence is rendered surplusage or meaningless. See e.g. Mueller v. People's Counsel, 934 A.2d 974, 177 Md. App. 43 (2007)(internal citations omitted.) A narrow application of Zoning Regulations 101.A would forever bar the application of the compatible use language, which HRD included as FDP text to accommodate a broader ranges of uses in the EGU subdivision.

Heeding this second principle of statutory interpretation (the Whole Act Rule), the Hearing Examiner finds credible the testimony of the second former HRD witness Mr. Edwards. When asked directly by the Hearing Examiner if the Planning Board could have found the proposed uses to be compatible with an area dominated by two hotels, Mr. Edwards replied in the positive, albeit reluctantly.

Turning now to the DPZ correspondence and plans (Appellant Exhibits 3-7 and 9) Appellant offered as proof of the Planning Board's arbitrary and capricious action in approving Red-Line SDP Revision Two, the Hearing Examiner finds them inapposite. They do not reflect a pattern of decision-making by the Planning Board. Critically, none of this correspondence is a final determination (approval or denial) having legal effect on a zoning action affecting a

property right or interest; the correspondence does not issue or modify any license, permit or approval. This correspondence instead involves informal interpretations made by DPZ staffers and the Director in response to various inquiries about uses permitted under various FDPs.

Given the informal nature of this correspondence, it is not credible evidence of Board error and thus provides no support for a determination that the Planning Board's decision was arbitrary, capricious, or contrary to law. Buttressing the Hearing Examiner's reasoning on this point is the Hearing Examiner decision in Board of Appeals Case No. 517-D (March 29, 2004), an administrative appeal of one such piece of correspondence, Appellant Exhibit 4, a December 4, 2003 letter from George L. Beisser, Chief Division of Pubic Service and Zoning Administration, DPZ, to Richard Talkin, Esq. This letter informed Appellant's attorney that a retail grocery store (the future Wegmans) was not a permitted use in Seiling Industrial Center under FDP 227-A-1.

In dismissing the administrative appeal upon concluding the letter was not an appealable event, there being no case or controversy that warranted a remedy, the Hearing Examiner addressed Appellant's claim that the appeal process disadvantaged it, forcing the Appellant to incur the expense of preparing development plans before it can challenge a legal interpretation by DPZ. The Appellant had alternative recourse, the Hearing Examiner noted. It could have petitioned DPZ under HCC 2.123 for a binding declaratory ruling as to whether a retail grocery store was permitted, which would be an appealable event, or it could have requested a declaratory ruling from the Circuit Court.

In the instant appeal, Appellant was apparently aware of the general nature of the proposed uses on Lot 27 as early as December 2010, according to H&H Rock Exhibit 3, a letter

from Appellant's counsel Alexander Adams, Esquire to Sang Oh, Esquire, (H&H Rock counsel). In this letter, Mr. Adams voices his client's (Mr. Pasha/Hopewell Exxon) opposition to any SDP that would include a retail building in Minstrel Crossing. To his detriment, the Appellant waited until the Planning Board's approval of Red-line SDP Revision Two to plead his case, and he may not invoke this correspondence as credible evidence of Board error where a clear, permissible alternative recourse was available to him.

The Hearing Examiner accordingly concludes Appellant has not met his production burden on this issue, finding insufficient evidence to support this alleged error, whether of law or fact, to defeat the Board's decision. The Planning Board, in the exercise of its discretion, made a judgment call to approve the uses as compatible with the hotels, and the Hearing Examiner is obliged to support this decision under Hearing Examiner Rule of Procedure Section 10.2(c).

C. The Planning Board failed to determine whether the red-line SDP has sufficient parking and whether the easement required to be extinguished could in fact be distinguished.

On the last day of the hearing, Appellant's counsel stated there was no easement issue because it was extinguished, but made no motion to withdraw this alleged error. With respect to the sufficiency of parking, Appellant's production burden was to put forth credible evidence that the parking approved by the Planning Board did not comport with what was required. To this end, Appellant initially sought testimony by DPZ staffer David Boellner that the number of spaces provided for each proposed uses fell short of what was required by the Zoning Regulations, apparently. Mr. Boellner went on to testify that parking was calculated based on

the amount required for the whole project, not just the proposed additions, calling attention to Note 21 on the first sheet of Red-Line SDP Revision Three, which states that all lots shown hereon will share access and parking based on declarations of covenants recorded among the Land Records of Howard County and identified in the Note by Liber and Folio. Because Mr. Boellner was not the appropriate person to testify as to the content of the declarations and Appellant produced no witness to demonstrate that the declarations demonstrate otherwise, Appellant failed its production burden on this issue.

D. The Planning Board failed to determine whether the red-line SDP is compatible with the Howard County General Plan.

The evidence put forth by Appellant witnesses as to this alleged error consisted only of general testimony about PlanHoward 2030 policy and Appellant counsel reference to language in PlanHoward 2030 while making a proffer about the nature of Convenience Retailing/Rick Levitan's alleged aggrievement in the context of a right to appear before the Hearing Examiner as an appellant.

Having heard the Appellant's testimony and evidence s with respect to this second alleged error, the Hearing Examiner finds it meritless. The New Town Zoning Regulations make just two specific provisions for when the General Plan is to be consulted: when the Zoning Board reviews a petition to create an NT District (Section 125.3) and when the Planning Board acts on a Comprehensive Sketch Plan (Section 125.6). No consultation of the General Plan for compatibility is mandated during the Planning Board's review and approval of a Final Development Plan or Site Development Plan in a public meeting.

5. The Planning Board inappropriately placed the burden of proof on Appellant.

According to the narrative supplement attached to the petition, H&H Rock chose not to proceed with its case demonstrating why the Red-line SDP revision should be approved, deferring to speak after Appellant presented his opposition. Appellant therefore contends the Planning Board erred as a matter of law by requiring his counsel to proceed first, which wrongly placed the burden of proof on him.

As discussed above, the Planning Board heard the request for approval under its administrative decision-making authority following a public meeting. There were no parties, no obligations of a party to prove its allegations, and no burden of proof in the PBROP. The Public Participation language in Section 1.106D of the PBROP for public meetings do set out an order of presentation, with opponents presenting last, but this language is directive rather than mandated by due process considerations. Counsel could simply have declined to proceed first.

ORDER

Based upon the foregoing, it is this **20th day of December 2012,** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Appeal of Howard County Independent Business Association, Inc. (HCIBA); British American Building, LLC t/a British American Auto Care, Brian England, individually and as a HCIBA member, and; Convenience Retailing LLC t/a Autostream Car Care Center (Rick Levitan) is **DENIED**.

It is **FURTHER ORDERED** that Palmetto Hospitality GM, LLC, Manager of OTO Rock, LLC and Coleman Rock, LLC (Palmetto Hospitality) is **DISMISSED** as an Appellant.

It is **FURTHER ORDERED** that Red-Line SDP Revision Three (H&H Rock Exhibit 1) is **APPROVED** to the extent that it incorporates the seven amendments set forth in H&H Rock Exhibit 2. No uses other than those approved by the Planning Board are approved, nor does this Approval encompass any revisions to parking calculations or setbacks that do not comport with what the Planning Board approved.

It is **FURTHER ORDERED** that the Petition of Amaha LLC t/a Exxon; Amran Pasha, Individually is **DENIED**.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele L. LeFaivre

Date Mailed

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 appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.