COLUMBIA ASSOCIATION, INC. Appellant vs. **HOWARD COUNTY DEPARTMENT OF PLANNING & ZONING & TWO FARMS, INC.** Appellees	: BEFORE THE : HOWARD COUNTY : BOARD OF APPEALS : HEARING EXAMINER : BA Case No. 753-D

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BRITISH AMERICAN BUILDING, LLC, ET AL. Appellants vs. **HOWARD COUNTY DEPARTMENT OF PLANNING & ZONING & TWO FARMS, INC.** Appellees	: BEFORE THE : HOWARD COUNTY : BOARD OF APPEALS : HEARING EXAMINER : BA Case No. 754-D

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DECISION AND ORDER

On October 19 and December 19, 2018, 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 appeals of Columbia Association, LLC, (Columbia Association), British American Building, LLC, Brian England, Managing Member, Efficient Properties, LLC, and 9620 Gerwig Lane, LLC (British American et al.) Appellants are appealing a Howard County Department of Planning & Zoning May 3, 2018 letter to Two Farms, Inc., (Two Farms) informing Two Farms with respect to SDP-17-041 EGU Subdivision Royal Farms Store & Canton Car Wash "[t]he Subdivision Review Committee has determined that the above referenced plan may be approved, subject to the attached comments and plan, and approval by the Howard County Planning Board" at a June 7, 2018 meeting (the Approvable Letter). Although the petition forms do not identify the statutory source for noticing the appeals, they are filed

pursuant to Howard County Code (HCC) Title 16, Subtitle 1 (HCC § 16.100 et seq.) HCC § 16.100 et seq. contains the Howard County Subdivision and Land Development Regulations. HCC § 16.105(a) obliges a person aggrieved by a Department of Planning and Zoning order to appeal the order to the Board of Appeals within 30 days of the issuance of the order. HCC Title 2, Subtitle 2, § 2.200 et seq. contains the Board of Appeals Rules of Procedure. HCC § 2.206, "Administrative Appeals," requires an individual wishing to appeal an administrative decision of a County Agency to file an appeal on the petition provided by the Department of Planning and Zoning within 30 days of the date of that administrative decision.

William Erskine, Esquire, represented the Columbia Association. James Parsons, Esquire, represented British American, LLC, Efficient Properties, LLC, and 9620 Gerwig Lane, LLC. Thomas Coale, Esquire, represented Two Farms. David Moore, Senior Assistant County Solicitor, represented the Department of Planning and Zoning (DPZ).

The hearing was limited to the Hearing Examiner's request for oral argument on whether the Approvable Letter is a final agency action for the purposes of noticing an HCC § 16.105(a) appeal and provides sufficient notice affording ordinary citizens the opportunity to take a timely appeal. Upon consideration of the arguments and memoranda of law, the Hearing Examiner has determined to dismiss the petitions.

Background

Appellee Two Farms is the developer of property located at 9585 Snowden River Parkway (the subject property), which is located on the southeast corner of the Snowden River Parkway and Minstrel Way intersection. At the time of the Approvable Letter, Two Farms was proposing

to develop the Property with a Royal Farms store, multiple gasoline-fueling positions, and a car wash under SDP-17-041. Appellant Columbia Association is the owner of two area properties. The first is Open Space Lot 1, located on Minstrel Way across Snowden River Parkway, and which lies about 642 feet from the subject property. The second is 9450 Gerwig Lane (Lot H-2), which Columbia Association uses as administrative offices, and for vehicle/equipment parking and storage. Lot H-2 lies about 2,018 feet from the subject property. Appellant British American, LLC, is the owner of 9577 Berger Road, which lies about 684 feet from the subject property. Appellant Efficient Properties, LLC, is the owner of 9630 Gerwig Lane, which lies about 250 feet from the subject property. Appellant 9620 Gerwig Lane, LLC, is the owner of 9620 Gerwig Lane, which lies about 262 feet from the subject property.

By letter of May 3, 2018, Kent Sheubrooks, Chief of the Department of Planning and Zoning's Division of Land Development, informed Two Farms re: SDP-17-041 EGU Subdivision Royal Farms Store & Canton Car Wash, "[t]he Subdivision Review Committee has determined that the above referenced plan *may be approved*, subject to the attached comments and plan, and approval by the Howard County Planning Board" at a June 7, 2018 meeting (emphasis added.)

Appellant Columbia Association (BA 753-D) filed a timely administrative appeal petition from the Approvable Letter on June 1, 2018. The petition states the appeal is taken from the Department of Planning and Zoning's determination that SDP-17-041 EGU Subdivision Royal Farms Store 186 and Canton Car Wash "may be approved." Columbia Association asserts in its narrative supplement support section providing for a brief description of error, fact, or law presented by the appeal, that the Department of Planning and Zoning erred as a matter of fact

and law when it determined “that SDP-17-041 was ‘approvable’ because SDP-17-041 does not comply with numerous provisions of the Howard County Subdivision and Land Development Regulations (HCC) and the Howard County Design Manual Volume III.” The narrative references multiple provisions alleged as noncompliant with the HCC. Columbia Association claims it is aggrieved because it owns two nearby two parcels, whose value will be greatly diminished as a result of the extreme traffic associated with the proposed use.

Appellants British American et al. (BA 735-D) also filed a timely administrative appeal petition on June 1, 2018. The petition states the appeal is taken from “Subdivision Review Committee (SRC) approval letter dated May 3, 2018.” In the narrative supplement support section providing for a brief description of error, fact, or law presented by the appeal, British American et al. asserts the Department of Planning and Zoning erred as a matter of fact and law because there are numerous discrepancies from the regulations and Design Manuals concerning SDP-17-041. The narrative references multiple provisions alleged to be noncompliant with the HCC. The petition further alleges the adjoining property owners will be adversely impacted by a non-industrial use in the business park. These Appellants claim they are aggrieved because employees will park on Gerwig Lane and Berger Road, that illegal parking of Gerwig Road has increased dramatically, and that their properties’ value will be greatly diminished as a result of the extreme traffic associated with the proposed use.

The Hearing Examiner’s Request for Oral Argument on Whether the Approvable Letter is a Final Agency Action

Subsequent to Two Farms motions to dismiss the appeals for Appellants’ lack of standing and Appellants’ responses thereto, the Hearing Examiner by letter of September 17, 2018 advised

Appellants, Two Farms, and DPZ that the October 19, 2018 hearing would be limited to two preliminary jurisdictional matters: whether Appellants had standing to prosecute the appeal, and whether the Approvable Letter is a final agency action for the purposes of noticing an appeal and provides sufficient notice affording ordinary citizens the opportunity to take a timely appeal. The letter instructed the parties to brief the "finality" issue before hearing the standing arguments because the jurisdictional status of the Approvable Letter is a condition predicate to deciding the standing issue. The Hearing Examiner also requested the parties to submit memoranda of law at the hearing.

Shortly before convening the October 19, 2018 hearing, the Hearing Examiner realized a 2008 decision on an analogous administrative appeal, BA 629-D (William Johnson et al.), was inadvertently not posted on the Hearing Examiner Decision and Orders website link. BA 629-D concerned an administrative appeal from a letter from then Department of Planning and Zoning SRC chair Cindy Hamilton to developer Wegmans Food Markets and Science Fiction, LLC (Wegmans). The letter informed Two Farms of the Subdivision Review Committee's determination that their site development plan, SDP-07-131, may be approved subject to certain conditions, including in relevant part, FDP and Planning Board approval. The Hearing Examiner dismissed this appeal because the letter was not a final agency action and an appealable event, making the appeal unripe for adjudication. Because the Hearing Examiner's decisions and order are public policymaking, quasi-adjudicative records, upon convening the October 19, 2019 hearing, the Hearing Examiner provided the parties with copies of BA 629-D and continued the hearing to December 19, 2019 in the interest of fairness.

Oral Arguments and Memoranda of Law

Before the December 19, 2018 continuation hearing, DPZ submitted a memorandum of law arguing the Approvable Letter is final agency action and legally sufficient for the purposes of appeal pursuant to HCC § 16.103 and provides sufficient notice.[1] DPZ maintains the Approvable Letter is not "even necessary for there to be final agency action because '[i]f the Department of Planning and Zoning *does not act* on a subdivision plan or site development plan within the time limits of this subtitle, the plan shall have automatic approval.'" HCC § 16.103(d). (Emphasis added in memorandum.) DPZ further states the Approval Letter is an affirmative approval because it notes the scheduling of the plan for presentation to the Planning Board, an action appropriate as the next step for this plan under HCC § 16.144(f)(1):

> If the subdivision requires Planning Board approval, the Department of Planning and Zoning shall advise the developer of the location, time and date of the Planning Board meeting after the Department notifies the developer that the sketch plan or preliminary equivalent sketch plan has been approved or approved with modifications by the Department.

Finally, DPZ states HCC § 16.103 imposes no notice requirement to the public in general, contending it obliges the Department of Planning and Zoning only to "keep all parties to a proposed subdivision or development advised in writing of the Department's recommendations and actions."

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[1] The Hearing Examiner declined to accept what DPZ styled as an "internal memorandum" on the finality question submitted by email on December 11, 2018. The Hearing Examiner Rules of Procedure barred it.

Rule 7.1. Ex Parte Communications. Except as otherwise provided in these rules, outside of a hearing the hearing examiner may not communicate with any person who is (or who may become) a party or receive any communication from any such person regarding any matter relevant to the merits or the law of a pending or proposed petition. Any request for information concerning a pending or proposed petition should be directed to the administrative assistant.

Rule 7.2. Correspondence. Any party filing written correspondence with the hearing examiner must certify in writing that a copy of the correspondence has been served to all parties to the case or to their designated representative. If the correspondence is not accompanied by the written certification, the hearing examiner will not consider it and will return it.

In its memorandum submitted at the December 19, 2018 hearing, Columbia Association states that based on BA 629-D, the Appealable letter is not a final order and therefore not appealable. The memorandum argued, alternatively, that the Department of Planning and Zoning's "approvable language" in the Approval Letter is at best ambiguous. For this reason, it is not clear to the public at large whether the Department of Planning and Zoning has actually made a final decision or whether it is merely noticing the applicant that an approval of the SDP may be forthcoming in the future. At oral argument, Columbia Association stated that based on BA 629-D, the appeals were not ripe for adjudication but that it was not abandoning or withdrawing the appeal in view of DPZ's memorandum.

Brian England, et al.'s memorandum arguments echoed those of the Columbia Association. These appellants explained they noted the appeal out of an abundance of caution to protect themselves from a possible argument by the developer in the context of the Planning Board's consideration of SDP-17-041 that they waived any right to challenge the plan by not noting an appeal, in the event that it was ultimately determined the Approval Letter is an appealable decision. At oral argument, Brian England, et al., agreed the appeals were not ripe for adjudication based on BA 629-D, but like Columbia Association, they were not abandoning or withdrawing the appeal in view of DPZ's memorandum.

Two Farms stated it was not taking a position initially, but that based on Appellants' memoranda and BA 629-D, the doctrinal "change of mind" standard cannot support "finality." At oral argument, DPZ argued in response to Columbia Association and Brian England, et al. that, alternatively, the appeals are not ripe for appeal and should be withdrawn or dismissed.

Discussion

The immediate issue in these appeals is whether the Approvable Letter is a final, justiciable decision ripe for adjudication under the doctrinal finality standard and commencing the running of the 30-day appeal period. The Approvable Letter is not reviewable because it is not an appealable agency action or event under state and county law and so therefore not a Department of Planning and Zoning *order* under HCC § 16.105(a). The facts in these appeals are directly on point with BA 629-D, which the Hearing Examiner dismissed because the applicable "may be approved" letter was not final agency action. Pgs. 5-6.

> The Board of Appeals Hearing Examiner is authorized to hear only those matters within the jurisdiction of the Board of Appeals. Howard County Code ("HCC") Section 16.302(a). The Board of Appeals' jurisdiction is set forth in Article 25A, Section 5(U) of the Annotated Code of Maryland and as implemented by legislative acts of the County Council. Howard County Charter, Sections 501(b) & (f). In pertinent part, Section 25A, Section 5(U) provides as follows.
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>> [f]or the decision by the board on petition by any interested person and after notice and opportunity for hearing and on the basis of the record before the board, of such of the following matters . . . An application for a zoning variation or exception or amendment of a zoning ordinance map; the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory *order* . . .
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>> With respect to development and subdivision matters, Howard County Code Section 16.105(a) provides for appeals of a Department of Planning and Zoning *order* arising out of the subdivision and land development process to the Board of Appeals from a person aggrieved with 30 days of the issuance of the *order* (emphasis added).

An appealable event must be a final administrative decision, order, or determination. *United Parcel Service v. People's Counsel for Baltimore County,* 336 Md. 569, 650 A.2d 226 (1994). The instant Approvable Letter is not an "order" within the meaning of what is now Local Government Article § 10-324 and HCC § 16.105(a).[2] It simply notices Two Farms SDP-17-041 "may

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[2] Article 25A § 5(U) is now codified in Local Government Article § 10-324.

be approved, subject to the attached comments and plans, and approval by the Howard County Planning Board." The letter also notes the date of the Planning Board meeting, June 7, 2018.

Applying *United Parcel* to the instant appeals, the Approval Letter was not an "operative event" from which a proper appeal could be noted; it merely conveyed in routine correspondence certain functional processing notices. This functional processing notice delimits Two Farms' responsibilities for presenting SDP-17-041 to the Planning Board, including material to be submitted for preparation of the Department of Planning and Zoning staff report and power point presentation before the Planning Board, certain sized drawings for Planning Board use, and posting of the property. The Approvable Letter is therefore a ministerial action, a mandatory administrative procedural letter of correspondence. No rights attach to the issuance of the letter.

As in BA 629-D, the facts of the two instant appeals are analogous to those in *Meadows of Greenspring Homeowners, Inc., v. Foxleigh Enterprises, Inc.*, 133 Md. App. 510, 758 A.2d 611(2000), wherein the Court of Special Appeals discussed its holding in *United Parcel.* The Appellants in *Foxleigh* appealed Baltimore County's Director of the Department of Permit and Development Management letter, which advised the developer that certain changes to a proposed plan must be reviewed by the Design Review Committee, a new and more rigorous administrative review process, and not by the County Review Group, the older review process, and which would have treated the plan under the lesser standards applied to a plan refinement. Affirming the lower court's unripeness ruling, the Court of Special Appeals found the letter was not an "operative event," it merely informed the developer that the plan had to be reviewed by the new administrative review group. Like *Foxleigh*, the Approvable Letter does not "make a

decision and is not an order. "*Foxleigh*, 133 Md. App. At 518, 738 A.2d at 615.

What's more, as BA 629-D underscored, the SDP approval process at the heart of the instant appeals is exceptional, by action of Howard County Zoning Regulations (HCZR) § 125.0 et seq. HCZR § 125.0 et seq. contains the regulations and administrative approval procedures for the New Town (NT) zoning district. The NT district applies, effectively, only to the development of Columbia. The regulatory and administrative procedures comprising HCZR § 125.0 et seq. are a unique zoning district and development plan approval process, including, as applicable to the instant appeals, SDP approval by the Planning Board.

HCZR §§ 125.0.D.3 and 0.G reserve to the Planning Board – not the Department of Planning and Zoning – the right for subsequent Site Development plan approval upon approval and under certain circumstances.

> D. Final Development Plan—General Provisions
> 3. At the time of the approval of the Final Development Plan, the Planning Board may provide for the subsequent approval by it of a Site Development Plan pertaining to the property which is the subject matter of such Final Development Plan.
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> G. Site Development Plans—General Provisions
> 1. Planning Board Approval
> If the Planning Board reserved for itself the authority to approve a Site Development Plan and for all Downtown Revitalization, except as provided in "2" and "3" below, no permit shall be issued for any use until the Site Development Plan is approved by the Planning Board. The Site Development Plan shall be considered at a public meeting. The Petitioner, two weeks prior to the meeting, shall post the property in a prominent location and provide electronic notification to all Columbia Village Boards, the Columbia Association, Howard County Council members and pre-submission meeting attendees who provided email addresses.

An appreciation of the larger statutory context contemplated by HCZR §§ 125.0.D.3 and 0.G and other county laws is critical when testing for whether a Department of Planning and Zoning SDP plan letter is final action. The next section seeks to clarify this context.

Statutory Context

For the purposes of the instant appeals, this three-part discussion is limited to a comparison of what the Hearing Examiner will call a "standard" technically complete letter (Part I) and a "may be approved" ("approvable") letter for a NT SDP requiring Planning Board approval (Part II). The Department of Planning and Zoning also issues "technically complete" or "may be approved" letters when other zoning districts require Planning Board approval for development plans, but a discussion of the notice letters pertinent to these districts is beyond the scope of this decision, except as discussed in Part III, which comments on the public policy and pragmatic effects of assigning quasi-adjudicative finality to the Approvable Letter.

I. "Standard" Technically Complete Letters

The Department of Planning and Zoning issues the "standard" SDP technically complete letter to developers when it is the sole approving authority, in accordance with HCC § 16.156(i).

> (i) Approval/Denial of Site Development Plan:
> (1) Within 60 days of active processing time from submission of the site development plan or, if additional information was requested, within 45 days of receiving the information, the Department of Planning and Zoning shall indicate to the developer in writing whether the site development plan is approved, approved with modifications or denied.
> (2) If the site development plan is approved or approved with modifications, this notice shall serve as authority to proceed to submission of the site development plan originals, except for projects which require Planning Board approval.

A technically complete letter requiring only departmental approval is final agency action and an operative event for the purposes of noticing an appeal under HCC § 16.105(a) and Board of Appeals Rule of Procedure 2.206, "Administrative Appeals."

The Department of Planning and Zoning (the Department) also issues a technically complete letter when an SDP plan is required to establish a use approved by the Hearing

Authority.[3] This SDP plan incorporates the plan approved by the Hearing Authority and all technical plan information required. BA 727-D is a Hearing Examiner decision and order on appeal of the signature approval for SDP-14-059, the required SDP for a funeral home conditional use approved by the Board of Appeals. The Hearing Examiner dismissed this appeal, the operative event for noticing an appeal being the October 21, 2014 technically complete letter.

II. "May be Approved" (Approvable) Letters for SDPs Requiring Planning Board Approval

HCC § 16.100 et seq. regulates in main part two types of development: subdivisions and site development plans. Article IV of the Howard County Subdivision and Development Regulations (HCC § 16.144 et seq.) contains the procedures for filing and processing subdivision applications. "Subdivision" means "any division of a lot or parcel of land into lots or parcels for the immediate or future transfer of ownership, sale, lease or building development. The term includes lot mergers and resubdivision and, when appropriate to the context, shall relate to the process of subdivision or to the land subdivided." HCC § 16.108(b)(60).

HCC § 16.144(f)(1) controls regulated agency behavior for a "subdivision" requiring Planning Board approval of a "sketch plan or preliminary equivalent sketch plan" "after the Department notifies the developer the sketch plan or preliminary equivalent sketch plan has been approved or approved with modifications by the Department. DPZ looks to HCC § 16.144(f)(1) to undergird the "operative event" and finality status of the Approvable Letter. This reliance is inapposite because it is a subdivision procedure provision.

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[3] HCZR § 131.0.I. Establishment of Conditional Use

1. Site Development Plan Requirement. If required by the Department of Planning and Zoning, a Site Development Plan must be approved subsequent to the approval of a Conditional Use. The Site Development Plan must conform substantially to the Conditional Use plan.

The procedure for processing site development plans is instead contained in Article V, HCC § 16.154 et seq. A "site development plan," means "the plan indicating the location of existing and proposed buildings, structures, paved areas, walkways, existing and proposed grades, vegetative cover, landscaping, and screening within a lot or parcel proposed for development." HCC § 16.108(b)(52).

The Department processed SDP-17-041 in accordance with the site development plan procedures set forth in HCC § 16.154 et seq., but by action of law the HCZR controls who approves it. The governing regulatory regime for the NT SDP-17-041 approval process underlying the instant appeals resides in HCZR §§ 125.0 et seq., the NT zoning district provisions granting the Planning Board approval authority over a NT SDP under certain circumstances. The sole decision maker for NT SDPs is the Planning Board. The Planning Board is the decision-maker for compliance with all pertinent state and county laws and regulations and its decision is the operative agency action for noticing an appeal.

HCC § 16.102 is a statutory gateway provision barring the application of the Subdivision and Land Development Regulations to NT development when inconsistent with the NT zoning regulations. It is decisive statutory text codifying the legislative primacy of the NT zoning district regulations over the Subdivision and Land Development Regulations.

> This subtitle shall apply to all divisions of land and all development of land situated within Howard County, with the following exceptions:
> (a) Comprehensive Development. *This subtitle shall not apply where it is inconsistent with the zoning regulations concerning comprehensive development in areas zoned new town*, planned golf course community, mixed-use, or other planned unit development (emphasis added.)

"Zoning and subdivision are normally separate and distinct regulatory entities." *Remes v. Montgomery County,* 387 Md. 52, 64 n. 8, 874 A.2d 470 (2005) (citing *Friends of the Ridge v.*

Baltimore Gas & Elec. Co., 352 Md. 645, 649 n. 4, 724 A.2d 34 (1999)).

The HCZR being the regulatory investiture of Planning Board final SDP approval authority for NT-zoned development, there is no legislative ambiguity that the Department's May 3, 2018 letter is not final agency action subject to review on appeal. Permitting an appeal from a "may be approved" letter would disrupt the administrative review and decision-making process in a manner at odds with the NT zoning district FDP and SDP review and approval procedures.

The Department of Planning and Zoning consistently issues administrative, ministerial SDP letters employing the phrase "may be approved" or "approvable" and sent to developers when the Planning Board has approval authority over NT SDPs. Thus, for a prior SDP for the same (or substantively the same) uses on the subject property (SDP-14-013) the Department informed Two Farms in a February 11, 2014 letter, the SRC determined the SDP revision "approvable" subject to Planning Board approval. The Planning Board public meeting SDP-14-013 TSR noted this SRC action: "[t]he Department of Planning and Zoning, Division of Land Development, by letter dated January 29, 2015, notified the petitioner that the site development plan revision may be approved, subject to Planning Board approval"(emphasis added.) The Planning Board SDP-17-025 TSR (grading and stockpiling dredged lake material on a Village of King's Contrivance NT-zoned open space lot) notes the SRC's determination that the SDP "can be approved, subject to addressing minor drafting errors." The NT-zoned Columbia Gateway SDP-13-002 Planning Board approval TSR notes the SRC's action that the "plan may be approved subject to [compliance with the comments] issued by the SRC and approval by the Planning Board."

HCC § 16.156(m) consequently sets the submission deadline for original signatures from

when Planning Board SDP approval from the date of the Board's approval.

> Submission of Originals for Signature. Within 180 days of approval of the site development plan, the developer shall submit the original Mylar plans corrected to meet the requirements of the various State and County agencies *and the Planning Board (if required by the zoning regulations*). The Department of Planning and Zoning shall coordinate the signature process associated with approval of the site development plan. If the corrected originals are not submitted within 180 days of approval of the site development plan, the approval will expire and a new site development plan submission will be required (emphasis added.)

The Department itself logs the legal effect distinction between the approval procedure attendant to a "technically complete" letter and a "may be approved" or "approvable" letter as benchmarks of final agency action in a 2011 departmental guidance document, "The Site Development Plan Process."[4] This document describing the 7 basic steps for processing an SDP includes three steps relevant to the instant appeals: Step 4, Decision on Technical Completeness of the SDP and *including the agency definition of "technically complete*," Step 6, Planning Board Approval if Applicable, and Step 7, Submission of the SDP Originals (Mylars) for Signature Approval. These three steps clarify the distinct processing requirements for technically complete plans and plans requiring Planning Board approval.

> Step 4. Decision on Technical Completeness of Plan
> Within 60 days from submission of the plan, the Department of Planning and Zoning provides a written decision to the applicant indicating that the plan is: (1) technically complete, (2) technically complete with modifications, or (3) in need of revised plans. *A plan is technically complete if it complies with the requirements of the SRC departments.* If revised plans are necessary in order to approve the plan, the applicant must revise the plans and resubmit them to the Department of Planning and Zoning within 45 days of receiving the written decision or comments (emphasis added.)
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> Step 6 – Planning Board Approval if applicable
> *For SDP projects located in zoning districts that require Planning Board approval, the Department of Planning and Zoning will advise the property owner or developer of the Planning Board meeting date with notification that the SDP is technically approvable* (emphasis added.)

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[4] https://www.howardcountymd.gov/LinkClick.aspx?fileticket=w_nXfAnEq_o%3d&portalid=0

> Step 7 - Submission of the SDP Originals (Mylars) for Signature Approval
> Within 180 days of receiving notice *that the SDP is technically complete, or within 180 days of Planning Board approval*, the applicant must:
>
> - Execute Developer Agreements, if required. This process involves submission and execution of a Developer's Agreement associated with the development plan to the DPW, Real Estate Services Division for installation of public water and sewerage, forest conservation, landscaping, SWM, roads, and a Declaration of Covenants and Maintenance and Right of Entry Agreement for private storm water management, if applicable.
> - Pay all required fees to the County
> - Submit the SDP original mylars to the Department of Planning and Zoning for signature approval processing (emphasis added.)

Other relevant statutory context appears in HCZR § 100.0.E.3, which regulates the construction and effective date of amendments or changes to the HCZR.

> 3. Any amendment or change to the Zoning Regulations, whether previously or hereafter adopted, shall be applicable to all pending and future proceedings and actions of any Board, Hearing Authority or agency empowered to decide applications under these Regulations, whether decided on original application or remand from Court, unless the amendment or change expressly provides that it only applies to future proceedings and actions.
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> a. Cases that require a Decision and Order are considered pending unless the Decision and Order is signed by the Board or the Hearing Authority for a case that is not appealed, or the Department of Planning and Zoning prior to the date the legislation becomes effective, except that any Conditional Use that would be prohibited by a map amendment is considered pending unless the Site Development Plan is technically complete prior to the date the zoning map amendment is adopted.
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> b. Applications for subdivision or Site Development Plan approval are considered pending unless the initial residential plan submittal, as defined in the Subdivision and Land Development Regulations, or the Site Development Plans for all other types of development is technically complete prior to the date the legislation is effective, except that development projects of over 300 units which have processed Site Development Plans on at least 50% of the overall site shall not be considered pending.

These "grandfathering" provisions distinguish between plans, including SDPs, found to be technically complete and those requiring a "Planning Board" decision and order. No shadow of doubt, no ambiguity, can be cast about the absence of agency action that might be considered final in a Department of Planning and Zoning "may be approved" or "approvable" letter.

The action of an administrative agency is "final" only if it determines or concludes the rights of the parties, or if it denies the parties means of further prosecuting or defending their

rights and interests in the subject matter in proceedings before the agency, thus "leaving nothing further for the agency to do." *Kim v. Comptroller*, 350 Md. 527, 533-534, 714 A.2d 176, 179 (1998); *Driggs Corp. v. Md. Aviation*, 348 Md. 389, 407, 704 A.2d 433, 442 (1998); *Md. Comm'n on Human Relations v. B.G & E. Co*., 296 Md. 46, 56, 459 A.2d 205, 211 (1983). The Approvable Letter does not determine or conclude any development rights. Appellants and Two Farms may prosecute or defend their rights and interests at any Planning Board meeting to consider SDP-17-041. The Planning Board's decision letter, not the Approvable Letter, triggers the finality requirement for noticing an appeal, which being a Planning Board zoning action would be taken from HCC § 16.900(j)(2)(iii), the standard for appealing the 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."

Two Farm's argument that the doctrinal "change of mind" standard does not support a finality determination is inapplicable to the instant appeals. This doctrine has narrow application only to the reconsideration of a specific quasi-judicial decision where there is an applicable regulation providing for the decision-maker's reversal from the original decision. *Cinque v. Planning Board*, , 173 Md. App. 349, 918 A.2d 1254, 1261 (2007) (internal citations omitted.)

III. The Public Policy Implications of the Approvable Letter Having Finality Status

That the Department of Planning and Zoning agency action Approvable Letter prompting the instant appeals lacks "finality" status and is therefore unripe for adjudication is the immediate matter prompting their dismissal. Pragmatically, "finality" determinations also have

systemic public policy effects on the public hearing forum where Appellants' concerns may be heard.

We can understand the systemic difference in the scope of a public hearing on administrative appeal between a "technically complete" or a hypothetical NT SDP letter deemed a final Department of Planning and Zoning order and a Planning Board meeting and decision on a NT SDP in reference to the Board's review and approval authority for development in the HCZR § 107.0, R-ED (Resource -Environmental Development) zoning district. Development in this district is subject to Planning Board approval if it involves the submission of a Sketch Plan, the processing of which is regulated and administered under HCC § 16.144 et seq. In considering approval of any necessary preliminary equivalent sketch plan, the Planning Board reviews the plan for compliance only with the three general criteria in HCZR § 107.0.G. The Board's "oversight" approval authority being limited to consideration of these three general criteria, the Department of Planning and Zoning issues the developer a Preliminary Equivalent Sketch Plan "technically complete" letter. For example, the technical staff report (TSR) for PB 437 (Enclave at River Hill, Phase 2), a proposed lot resubdivision to create one additional single-family lot, notes the SRC's action: "[t]the developer was notified . . . that F-18-076 [the last agency action] is "technically complete subject to complying with the SRC comments and any conditions imposed by the Planning Board." This letter was final agency action. Had it been timely appealed by a person aggrieved, a public hearing on the merits before the Hearing Examiner would have permitted the appellant to argue whether the plan complied with all relevant laws and regulations supporting the Department of Planning and Zoning's technically complete

determination – arguments the Planning Board could not entertain under its limited HCZR § 107.0.G review and approval authority. Although the hearing before the Hearing Examiner would have been open to the public, only the appellants on proof of aggrievement, the property owner, and the Department of Planning and Zoning could participate.

Assuming arguendo the Hearing Examiner had adopted DPZ's position, the public policy effect of enlarging the "finality strike zone" would mean divesting the Planning Board of its full review and approval authority over SDP-17-041, including its consideration of the plan for compliance with all the law and regulations encompassed in a "technically complete" letter. Appellants' concerns, upon a showing of aggrievement, would have had to been litigated through their administrative appeal of the Approvable Letter. It is unclear what would have remained for the Planning Board to consider. Appellants' palpable anxiety about this very scenario animates the instant appeals. Furthermore, only those persons who had appealed the Approvable Letter – and had standing to prosecute the appeal – and Two Farms and DPZ could have participated in the proceeding.

The administrative approval process undergirding the Hearing Examiner BA 629-D decision, and as further detailed in this decision and order, supports, consequentially, a Planning Board public meeting on any Two Farms' SDP proposal for a Royal Farms store, multiple gasoline-fueling positions, and a car wash where Appellants may raise their concerns about, and the Planning Board may consider, the SDP's alleged noncompliance with numerous provisions of the Howard County Subdivision and Land Development Regulations and the Howard County Design

Manual Volume III. At this meeting, too, there are no general restrictions on who may participate in the meeting.[5]

Does the Phrase "May be Approved" Provide Sufficient Notice Affording Ordinary Citizens the Opportunity to Take a Timely Appeal

Poignantly, only the local dirt law community and Howard County's land use cognoscenti are on notice that the term "technically complete" triggers the finality requirement for taking an appeal under HCC § 16.105(a), the definition appearing only in a departmental guidance document. Appellants' replies to the Hearing Examiner's request for briefs on the notice issue looked to ambiguity in this language, which in the Hearing Examiner's view was a reasonable response in light of the challenges in pressing a procedural "finality" status confession out of the county's labyrinthian administrative development review, processing, and approval structure.

In large measure, the task of discerning the appealability of the Approvable Letter is the legislative consequence of comingling zoning and subdivision standards (technical development and zoning district requirements) with the administrative review and approval procedures for zoning/development application decisions. Substantive and administrative development review procedures are also comingled in other land use laws and regulations (environmental concept plans, the timing for the issuing of Department of Planning and Zoning technical staff reports, etc.) Some provisions are both standards and procedures, the HCZR § 125.0 NT zoning district being the exemplar.

This decision and order highlights problems in how development review and approval procedures are organized in county law and which warrant revision for clarity and to expedite

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[5] Representatives of various organizations must be duly authorized to speak.

the lengthy decision-making process. The Hearing Examiner understands the zoning/development regulations rewrite proposes to adopt the best practices standard of a separate section on Administration. However, the rewrite will also produce a unified development code containing both the zoning and subdivision regulations. This rewrite must provide clear direction about administrative procedures and explicit regulations recognizing the distinction between zoning and development decision-making. The legal administrative landscape in which county land-use officials and boards make decisions and how this landscape affects meaningful opportunity for citizens and regulated parties to participate and prosecute their rights and legitimate concerns should be more straightforward.

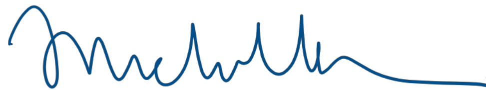
ORDER

Based upon the foregoing, it is this **29th day of January 2019**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petitions of Appeal of Columbia Association, LLC, British American Building, LLC, Brian England, Managing Member, Efficient Properties, LLC, and 9620 Gerwig Lane, LLC in BA Case Nos. 753-D and 754-D are **DISMISSED**.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER



Michele L. LeFaivre

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.

In accordance with C.B. 51-2016, § 1 (HCC Sec. 22.902 - Computation of time), if the deadline to appeal is a Saturday, Sunday, or holiday, or if the County offices are not open, the deadline shall be extended to the end of the next open County office business day.