

**HOWARD COUNTY BOARD OF APPEALS**

IN THE MATTER OF : BEFORE THE HOWARD COUNTY  
KINCADE LLC : BOARD OF APPEALS  
 :  
Appellant : CASE NO. BA-800D

**MEMORANDUM**

Town Center East Parking Lot Business Trust, Town Center East Business Trust, and Sterrett Building Holdings, LLC (collectively “HRD”), by and through the undersigned counsel hereby files this Memorandum.

**I. BACKGROUND**

HRD is the applicant for approval of an amendment to the Lakefront Neighborhood Phase I Final Development Plan, Lakefront Neighborhood Concept Plan, Lakefront Neighborhood Design Guidelines and Lakefront Neighborhood Implementation Plan (collectively, “Final Development Plan”). On April 11, 2023 and April 20, 2023, the Planning Board held public hearings to consider the Final Development Plan. On July 13, 2023, the Planning Board issued a Decision and Order approving the Final Development Plan (“Decision and Order” or “D&O”). The Planning Board’s approval was unanimous. D&O at 23.

Appellant/Petitioner Kincade, LLC (“Kincade”) filed its appeal on July 20, 2023. Board of Appeals Rule 2.210(b) required Kincade to file the Record Transcript not later than August 21, 2023 and the Memorandum of Appellant not later than September 5, 2023. Appellant filed neither, and HRD has filed a Motion to Dismiss based on Rule 2.210(b)(4) which is pending.

**HRD reserves the right to file a reply memorandum and any other appropriate response to any memorandum or other filing by Kincade.**

## II. STANDARD OF REVIEW

Kincade bears the burden of proof to show the action taken by the Planning Board was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law. Rule 2.210(b)(6).

In *Mortimer v. Howard Research and Development*, 83 Md. App. 432, 575 A.2d 750 (1990) the Court held that the Board of Appeals standard of review in appeals based on the record is the same as the Maryland appellate courts. Thus, the Board of Appeals, like an appellate court review of the decision of an administrative agency, has a narrow role in reviewing the agency's decision. *Halici v. City of Gaithersburg*, 180 Md. App. 238, 24, cert. denied, 406 Md. 113 (2008). As the Court of Appeals has explained:

“A court's role in reviewing an administrative agency adjudicatory decision is narrow; it is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. In applying the substantial evidence test, a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence.” *Pautsch v. Md. Real Estate Comm'n*, 423 Md. 229, 253 (2011) (alterations in original) (quoting *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005)).

In short, in applying the substantial evidence standard, “[t]he test is reasonableness, not rightness.” *Alviani v. Dixon*, 365 Md. 95, 108 (2001).

With regard to an agency's legal conclusions, typically no deference is given to a decision based solely on an error of law. *Lee v. Maryland Nat'l Capital Park and Planning Comm'n*, 107 Md. App. 486, 492 (1995), cert. denied, 343 Md. 333 (1996). However, the courts have also stated that a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency

administrators should ordinarily be given considerable weight by reviewing courts. Furthermore, the expertise of the agency in its own field should be respected. *Pautsch*, 423 Md. at 253 (quoting *Noland*, 386 Md. at 572). To that end, “courts give special weight to an agency’s interpretation of its own regulations.” *Dep’t of Health & Mental Hygiene v. Riverview Nursing Ctr., Inc.*, 104 Md. App. 593, 602 (1995).

### **III. ANALYSIS**

In this case, Kincade failed to provide the Board with legal argument, including points and authorities, references to the transcript (not provided), or exhibits presented to the Planning Board, as required under Rule 2.210 (b)(2). Kincade stated conclusively and without support in its Petition: (i) the Planning Board failed to evaluate applicable criteria, including proposed parking and underlying agreements; (ii) the approval violates the Zoning Regulations, subdivision and land development regulations; and (iii) the approval is inconsistent with the Downtown Columbia Plan. *Petition at Continuation Sheet*.

In its 24-page Decision and Order, the Planning Board made extensive findings of fact and summarized the testimony of all witnesses. *D&O at 3-16*. These findings of fact were also supported by the Department of Planning and Zoning Technical Staff Report and presentation which found that all applicable criteria for approval of the FDP had been satisfied (*D&O at 4*), as well as the report of the Howard County Design Advisory Panel which recommended approval of the Neighborhood Design Guidelines with no official motions made for the project. *D&O at 8*.

As noted, the Final Development Plan is an amendment to an existing FDP approved in 2020. *Staff Report at 2*. The number of dwelling units approved in the existing approved FDP did not change. *D&O at 3*. The amount of nonresidential space was reduced from 150,000 square feet of retail and 200,000 square feet of office space to 85,000 square feet of retail space. *Id.* These

adjustments result in a reduction of peak hour traffic compared to the previously approved FDP. *D&O at 13.* All requirements of the Adequate Public Facilities Ordinance were satisfied. *Petitioner's Exhibit 1; D&O at 6; Staff Report at 11.*

HRD described the project in its March 17, 2023 Updated Justification Statement, including a description of how the Petition satisfied of all criteria for approval, and presented the testimony of 7 witnesses, including urban design, architectural, civil engineering, and transportation planning professionals. *D&O at 7-13; Petitioner's Exhibit 9.* The Record also included testimony in strong support of the FDP, and in particular its ability to advance affordable housing objectives, from the Howard County Chamber of Commerce, the Downtown Columbia Community Housing Corporation, the Downtown Columbia Partnership, the Howard County Housing Commission, and the Housing Affordability Coalition. *D&O at 15-16.* The Planning Board noted it found the testimony of HRD officials and these public housing advocates compelling in demonstrating the FDP's ability to accommodate affordable housing projects that will advance efforts to provide a full spectrum of housing per the Downtown Columbia Plan. *D&O at 18, and the testimony of Greg Fitchitt and Gabe Chung at D&O at 11 and 7.*

In its conclusions of law, the Planning Board cited to the Technical Staff Report and HRD's witnesses as demonstrating the amended Lakefront Neighborhood Concept Plan, Lakefront Neighborhood Design Guidelines, Lakefront Neighborhood Implementation Plan and the Final Development Plan met all requirements for approval established in the Zoning Regulations, including conformance with the Downtown Columbia Plan. *D&O at 16-23.* The Planning Board expressly found that based on the evidence HRD met its burden of demonstrating it had satisfied the criteria for approval and that HRD had "conclusively established through the evidence in the record" that the criteria had been met. *D&O at 21.* The Planning Board discussed each criterion

set forth in the Zoning Regulations specifically, and explained its rationale and cited supporting evidence of Record for its legal conclusions. *Id.*

Based on the evidence of record it is clear the Decision and Order is supported by substantial evidence and was not arbitrary or capricious.

Regarding parking, as explained in HRD's Response/Opposition to the Notice of Pending Court case filed by Kincade ("Notice"), the Zoning Regulations specify what materials must be submitted with a final development plan for Downtown Revitalization. *Section 125.0.E.3.* The Regulations do not require that parking information or details be submitted. *Id.* The Zoning Regulations also specify the criteria that must be applied by the Planning Board for review and approval of the final development plan. *Section 125.0.E.4.* Parking is not included in the criteria for review and approval of an FDP. *Id.*

In its Response/Opposition to Kincade's Notice, HRD also explained why the Planning Board correctly limited its review to the applicable criteria specified in the Zoning Regulations and did not consider the private parking covenants as part of its review. *See also D&O at 14 (wherein the Planning Board sustained HRD's objection regarding same).* As stated in settled Maryland law, "such private restrictions controlled by contract and real estate law are entirely independent of zoning and have no proper place in proceedings of this character." *Perry v. County Board of Appeals*, 211 Md. 294, 300 (1956). Although the Zoning Ordinance does not override or defeat whatever private rights exist and are legally enforceable, the Zoning Ordinance is not controlled in its workings or effects by such rights. *Id.* Thus in *Perry*, the Court held the board of appeals was correct in making its determination without reference to restrictive covenants. *Id.* The same holds true in the instant appeal.

In sum, Kincade has failed to provide the Board or parties with a transcript or legal memorandum in violation of the express Rules of Procedure. Its appeal should be dismissed for that reason. *Rule 2.210(b)(4)*. Regardless, it is clear the Planning Board decision is supported by substantial evidence of record and is not contrary to law, neither Howard County law nor settled case law. For these reasons the appeal should be denied.

For the foregoing reasons, the Decision and Order in PB 455 (FDP-DC-L-2A) should be affirmed and Kincade's appeal denied.

**HRD reserves the right to file a reply memorandum and any other appropriate response to any memorandum or other filing by Kincade.**

The undersigned is an attorney admitted to practice law before the Supreme Court of Maryland with a business address of Shulman Rogers, 12505 Park Potomac Avenue, 6<sup>th</sup> Floor, Potomac, Maryland 20854 and telephone number 301.230.6579.

Respectfully submitted,

SHULMAN, ROGERS, GANDAL,  
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By:  \_\_\_\_\_

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**CERTIFICATION**

A copy of the foregoing Memorandum was provided to all parties of record or to their designated spokesperson and all persons known to have an interest in this case, including but not limited to the Appellant/Petitioner, the property owner, the Planning Board, the Department of Planning and Zoning, any person entitled to written notification under Rule 2.203(e) and (f), as the case may be, and IMH Columbia, LLC.

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Todd D. Brown