

HOWARD COUNTY BOARD OF APPEALS

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

REPLY 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 Reply Memorandum to the memorandum filed by Kincade on September 22, 2023.

HRD incorporates herein its Memorandum filed September 20, 2023.

I. HRD’s Pending Motion to Dismiss.

Kincade’s opposition argues for the automatic stay of mandatory filing requirements established by the Board’s Rules of Procedure. HRD anticipated and addressed this response in the Motion. Kincade’s position is simply that the mere filing of a conclusory, self-serving statement automatically stopped everything. Kincade’s position is untenable and lacks support in both the Board’s Rules and Maryland case law. Kincade’s failure to comply was at its own risk.

Kincade states it has filed a transcript of the Planning Board’s FDP proceedings. However, HRD has not received a copy of any correspondence from Kincade filing a transcript in this case. Rule 2.204(i). If a transcript has in fact been filed by Kincade, Kincade has failed to properly notify HRD of such filing.

By its own admission, Kincade filed (*arguendo*) the transcript late. Despite advance notice of this issue (discussed below), Kincade failed to seek additional time for such filing or for the subsequent filing of its memorandum. Instead, well after-the-fact Kincade now offers an email

chain to justify its non-compliance and does so only after HRD has asserted what is proper under the Board's Rules. Kincade also notably omits from its filing a copy of any correspondence transmitting such transcript to the Board.

By email dated June 29, 2023, the transcriber advised Kincade that the estimated delivery date was the end of August. Thus, when Kincade filed its appeal on July 20, 2023 it would have known the transcript would not be available to comply with the August 21, 2023 mandatory filing date. When Kincade chose to file its appeal on July 20, 2023, **more than 3 weeks prior to the filing deadline for this appeal**, it also chose to trigger the mandatory filing requirement for its memorandum. Kincade should have known the transcript would not be ready and could have either delayed the filing of its appeal or filed an appropriate motion with the Board for additional time. Kincade did neither.

Then, by email dated August 23, 2023, two days **AFTER** the latest date the transcript was required to be filed, Kincade told the transcriber that delivery of the transcript to Kincade on August 31, 2023 "should be fine."

HRD recognizes the emails were under the signature of a paralegal. However, Kincade is ultimately responsible. Kincade simply failed to comply with the mandatory filing requirements for the transcript and memorandum, failed to seek appropriate and timely relief when it knew or should have known of the need for same, and now asks the Board to validate its inaction.

Kincade knew when it filed its appeal on July 20, 2023 (**more than ten weeks ago**) that the transcript was not likely to be available in time from this particular transcriber. Yet Kincade chose to file the appeal, the absence of any filing deadline notwithstanding. Kincade should also have known by the August 23, 2023 email that the filing of the transcript was already late. Yet again, Kincade failed to seek any timely relief from the Board. Kincade now seeks to justify its

inaction after-the-fact based on (i) misplaced reliance on the “Notice” and (ii) its untimely filing (*arguendo*) of a transcript. The late filing of Kincade’s memorandum should not be excused under these circumstances and the appeal should be dismissed per Rule 2.210(b)(4).

II. Maintenance of Land Intended for Common, Quasi Public-Amenity Use But Not Proposed for Public Ownership.

Kincade argues the Planning Board’s approval was clearly erroneous or contrary to law because HRD failed to produce a formal agreement for the maintenance of land intended for quasi-public amenity use but not placed in public ownership. Kincade suggests this requirement applies to future parking areas within the FDP boundary.

Kincade is mistaken for several reasons. First, Criterion 9 on the FDP is written in the alternative. Namely, that “Property within the FDP area that is intended for common, quasi-public amenity use will be held, owned and maintained by the property owner(s) *or* subject to such maintenance responsibilities *potentially* being shared among property owners or assumed by a maintenance or other organization....” *FDP Criterion 9 (emphasis supplied).* HRD owns all of the land within the FDP boundary. Thus, Criterion 9 commits HRD to maintain any land intended for common, quasi-public amenity use that will not be under public ownership. Such commitment clearly satisfies the requirement at Section 125.0.E.3.t.(9) that the FDP include a plan for the maintenance of such spaces.

Second, the Board will recall the FDP is an amendment to existing approved FDP-DC-L-2. In that case, also in satisfaction of Section 125.0.E.3.t.(9), the Planning Board approved the same effectual language for the maintenance of common amenity areas. *Criterion 9, FDP-DC-L-2, Petitioner’s Exhibit 3.* FDP-DC-L-2 was recorded among the Land Records (Plat No. 25391-25397); is binding on the property subject to the FDP; and has the full force and effect of specific zoning regulations. *Sections 125.0.D.6 and 10, Howard County Zoning Regulations (“Zoning*

Regulations”). In the instant case, the FDP did not propose any change to HRD’s primary obligation to maintain common amenity areas. *FDP Criterion 9*. And thus the existing zoning requirement is for HRD to do so. Of course, when the instant FDP is recorded it will also bind the property with the full force and effect of zoning regulations enforceable by the County (*see discussion infra*).

The Planning Board also approved the same operative language in separate final development plans for the Crescent Neighborhood (recorded in 2015 and 2017) and for the final development plan in the Lakefront Core Neighborhood (recorded in 2018). *See Criterion 9, FDP-DC-Crescent-1A, Petitioner’s Exhibit 7 and Criterion 9, FDP-DC-L-1 and FDP-DC-L-1A (Plat Nos. 23404 et seq. and 24102 et seq. and Plat Nos. 24772 et seq., respectively)*. Pursuant to Rule 2.210(b)(5), the Board of Appeals may consider FDP-DC-L-1 and FDP-DC-L-1A, Criterion 9 of each, further demonstrating the Planning Board’s consistent interpretation of Section 125.0.E.t.3 and the non-arbitrary quality of its actions. Consideration of such prior FDPs is also permitted under the *Aspen Hill* case to dispel Kincade’s asserted arbitrary and capricious claim. *Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972)*. The Board’s review of such prior Planning Board approvals would not supplement the Record on the merits of HRD’s petition but instead would be public records useful to the Board in determining whether the Planning Board acted arbitrarily. *Id.*

Thus, the Planning Board has consistently interpreted Section 125.0.E.3.t.(9) finding the language in FDP Criterion 9, which binds HRD with the full force and effect of specific zoning regulations, satisfies the requirement. Under *Pautsch v. Md. Real Estate Commission, 423 Md. 229 (2011)*, the Planning Board’s interpretation and application of the Zoning Regulations should be given considerable weight. And it is well-recognized that the consistent and long-standing

construction of a statute by the agency charged with its administration is entitled to **great deference**. *Baltimore Gas and Electric v. Public Service Commission*, 305 Md. 145, 161-162, 501 A.2d 1307, 1315 (1986).

Third, it is not at all certain that Section 125.0.E.3.t.(9) applies to HRD's private parking areas as suggested by Kincade. The clear language in Section 125.0.E.3.t.(9) applies to common, quasi-public amenity areas. These areas were envisioned by the Downtown Columbia Plan and are intended to encourage gathering and community interaction. *Downtown Columbia Plan* at 25. Assuming *arguendo* that parking areas are deemed amenity areas (not conceded), HRD committed in Criterion 9 that it will maintain these spaces, and the Planning Board has consistently found such commitment satisfies Section 125.0.E.3.t.(9).

Fourth, Kincade's argument ignores the iterative nature of the Downtown Revitalization approval process established by the Zoning Regulations and Planning, Zoning and Subdivisions and Land Development Regulations. FDP review is an initial step. *Section 125.0.A.9.a*. The process also requires site development plan approval. *Id.* A site development plan for Downtown Revitalization must conform to the approved FDP, including all FDP approval criteria and conditions. *Section 125.0.H.3.b*. This of course includes FDP Criterion 9.

A site development plan, although approved by the Planning Board, is thereafter administratively processed through the Department of Planning and Zoning and the Department of Real Estate Services. Once the plan is determined to be complete and accurate (based on the Planning Board's approval, any outstanding planning staff or other agency requirements, and the relevant criteria in the County's design manuals (*See e.g.*, Volume I, Storm Drainage; Volume II, Water and Sewer; Volume III Complete Streets and Bridges; Volume IV Standard Specifications and Details for Construction)), the County will sign the SDP. *Section 16.156.(m), Planning,*

Zoning and Subdivisions and Land Development Regulations. Before the SDP can be signed, however, legal documents, including any required legal agreements or easements must be submitted to the County's Department of Real Estate Services as part of the developer agreement package. The County will not sign the final site development plan until the developer agreement package is returned with all legal documents signed. *See e.g., Exhibit A letter from Howard County Real Estate Services; Sections 16.130, 16.156(k), (l), and (m), Planning, Zoning and Subdivisions and Land Development Regulations.* To the extent HRD elects to maintain any common, quasi-public amenity space via a potential agreement as referenced in Criterion 9, as opposed to maintaining such amenity area itself as **required** by Criterion 9 (it having the force and effect of zoning regulations), it would submit such agreement to the County prior to final County signature of the SDP.

Additionally, the Subdivision and Land Development Regulations provide if a property is developed, used or maintained in violation of an approved site development plan, the County "shall institute appropriate action to compel compliance." *Section 16.106(a).* Thus, the common amenity spaces to be shown on HRD's site development plan (which must conform to the FDP criteria), must be maintained and the County must compel such maintenance if needed.

Finally, the above-described process is entirely consistent with the testimony of the Department of Planning and Zoning that the specific mechanisms for implementing the maintenance of common amenity space would be achieved through the site development plan process. *D&O at 7, 20; Staff Report at 12.* As recognized by the courts, a report of the technical planning staff is, in itself, sufficient evidence to make action fairly debatable. *Storch v. Zoning Board of Howard County, 267 Md. 476, 298 A.2d 8 (1972) and prior Maryland cases referred to and cited therein.*

Kincade's assertion of the applicability of Section 133.0.B.4.e is similarly misplaced. Whether and to what extent any parking might be provided on a separate lot from a principal use is not determined at the FDP stage. The FDP does not identify specific uses or the square footage of specific uses beyond the general classifications of dwellings, commercial office, commercial retail, and hotel rooms. *See Section 125.0.A.9.c.* Until specific uses and specific square footages are identified, it is not possible to determine how much parking is actually required. *See generally Section 133.0.F.3.* This level of specificity does not occur at the FDP stage. Once again, the Zoning Regulations do not require the submission of parking details with an FDP. *Section 125.0.E.3;* the Planning Board FDP review and approval criteria do not include any evaluation of parking. *Section 125.0.E.4;* and as indicated in the Staff Report, any required specific mechanisms for maintenance would be established during the site development plan review process. *Staff Report at 12.*

III. Road A Connection.

Kincade references Road A “emptying into” a neighboring property. The neighboring property is located outside the FDP boundary. *FDP sheet 3.* Furthermore, the Amended Lakefront Neighborhood documents show the Road A connection in concept only. *See Amended Lakefront Neighborhood Design Guidelines at, e.g., 13, 15, 31, and Amended Lakefront Neighborhood Concept Plan, Sheet 2.* The Neighborhood documents are only binding on property included within the boundaries of the FDP. *Section 125.0.E.3.a.* And the Lakefront Neighborhood Concept Plan provides: “Elements outside of the final development plan area are shown for continuity purposes only...These elements are non-binding on properties outside of the final development plan area, conceptual, and subject to change in future FDP submissions.” *Amended Neighborhood*

Concept Plan, Sheet 2. Thus, the Road A connection is intended only to provide context and guidance for future final development plan petitions. *Id.*

Moreover, the *Downtown Columbia Plan* has always included a new road connection between the Lakefront Neighborhood and Little Patuxent Parkway through property located north of the FDP area. *See Downtown Columbia Plan at 33,34,38,62.* The Planning Board had already approved a modification to this conceptual alignment in FDP-DC-L-2. *See Petitioner's Exhibits 3-5.* In the instant case, the Planning Board approved the proposed alignment within the FDP area as permitted by the Zoning Regulations. *D&O at 5, 17; Staff Report at 6.* The Planning Board and Planning Staff found the street layout modifications were minor, remained consistent with, and were organized to meet the goals of the Downtown Columbia Plan and will provide improved operational design. *Id.* Staff further noted the design promoted connectivity within the neighborhood and to the surrounding area. *D&O at 5.* It is also worth noting the Zoning Regulations expressly permit further refinements to Road A and other road alignments as part of the site development plan process. *See Section 125.0.H.4.* Contrary to the assertion, Road A conforms to the *Downtown Master Plan* and amended Neighborhood documents.

Regarding the specific design of Road A, the Amended Lakefront Design Guidelines include specific design parameters for the roadway. *Amended Lakefront Neighborhood Design Guidelines at 27-39.* Furthermore, and again representative of the iterative nature of the County's approval process, the intersection of Road A with Sterrett Place is not required to be studied at the FDP stage. *D&O at 13; Staff Report at 11; Section 4.9 et seq. Howard County Design Manual Volume III, Roads and Bridges.* However, all future roadway improvements and access points will be finalized and approved with subsequent site development plans. *Staff Report at 11; Wells & Associates Transportation Study dated February 17, 2022 at 2.*

IV. Harmony with Vicinal Properties.

Citing the testimony of David Costello and Nicole Campbell, Kincade argues the Planning Board erred in finding the FDP was in harmony with planned development. Nicole Campbell represented Mr. Costello and did not testify. Regarding Mr. Costello's testimony, the Board should defer to the Planning Board's fact-finding. *Pautsch supra*. And it is the Planning Board's province to resolve conflicting evidence and to draw inferences from that evidence that are supported by the Record. *Id*.

The Record includes the testimony of Cecily Bedwell and photographs describing/depicting existing development in the immediate area which included a multi-level hotel, a multi-level parking structure, a multi-level residential condominium building, a multi-level residential/office building, and Kincade's own multi-level office building. *D&O at 16; Petitioner's Exhibit 9 (April 11, 2023 powerpoint at 6; April 20, 2023 powerpoint at 4)*. The Record also includes the Amended Lakefront Neighborhood Design Guidelines which contain architectural design criteria to assure a harmonious relationship with vicinal uses, including the stepping back of upper stories, building orientation and building features *D&O at 16; Amended Lakefront Design Guidelines at 97 et seq*. The Planning Board's reliance on this evidence was entirely reasonable.

The Record also includes images of IMH's purportedly planned development. *Protestant's Exhibit 2 (powerpoint)*. These images show conceptual development on IMH's property comprised of a multi-level mixed-use building containing a multi-level garage and tennis facility the equivalent of several stories in height with massing that would present a lengthy expanse of windowless façade directly opposite HRD's development. This blank wall would extend for the great majority of the building frontage along the new street to be constructed by HRD. *Id*.

In essence, IMH's concept would turn its back on HRD's development, the exact implication Kincade makes of the FDP, and instead would focus its design on the lake frontage. *Id.*

Kincade also asserts the FDP converts the area from primarily commercial to mostly residential. The assertion ignores that two multi-story buildings containing residential units already exist in the neighborhood. (*Petitioner's Exhibit 9 (April 11, 2023 powerpoint at 6; testimony of C. Bedwell D&O at 16)*). The assertion also disregards evidence presented by Bedwell that the Downtownwide Design Guidelines describe the vision for the lakefront north area as "a primarily residential and hotel community". *Petitioner's Exhibit 9 (April 20, 2023 powerpoint at 8)*. Most significantly, Kincade completely disregards the fact that the Planning Board had already approved FDP-DC-L-2 for the site containing 775 dwelling units. *Petitioner's Exhibits 3-6*. The instant FDP did not propose any change in the number of dwelling units previously approved. *D&O at 3*.

Based on this evidence, the Planning Board reasonably concluded the FDP is in harmony with existing and planned vicinal uses, *D&O at 19; Finding of Facts 3, 4, 9, 22*. In reaching these conclusions, the Planning Board expressly considered the testimony of Mr. Costello, Mr. Talkin, Mr. Gould, and Mr. Canfield and the arguments of Appellant's counsel. *Id.*

Kincade's assertion that the FDP failed to provide reasonable access to the hotel is also without merit, contrary to the evidence, and notably unrelated to Kincade's property. The hotel is currently accessed via Wincopin Circle which the FDP does not change. *Amended Neighborhood Concept Plan at sheet 2; Amended Design Guidelines at 31*. This alignment is also consistent with the Downtown Columbia Plan Street Framework Plan. *Downtown Columbia Plan at 38*.

The FDP proposes a new road (Road A) that would provide access to IMH's hotel along the entire frontage of IMH's property. *See Petitioner's Exhibit 9 (April 11, 2023 powerpoint at 6); FDP sheets 3, 5 and 6.* This new road was previously approved with FDP-DC-L-2. The Amended Lakefront Neighborhood Design Guidelines include design features for Road A which include on-street parking, landscaping, street trees and sidewalks consistent with the design of other streets in Downtown Columbia. *Amended Lakefront Neighborhood Design Guidelines at 27-68.* In short, the Record demonstrated a new business district street would be created providing access to IMH's property. The Record also confirmed the FDP would maintain IMH's access drive to the loading driveway serving the older portion of the hotel. *FDP at sheet 4; Amended Lakefront Neighborhood Concept at Sheet 3.*

Regarding building height, Kincade acknowledges the Planning Board approved building heights up to 145' in FDP-DC-L-2. However, Kincade asserts the basis of the approval in FDP-DC-L-2 somehow precluded the Planning Board from approving the same height in this case for a residential use. The position is untenable. Cecily Bedwell testified about the proposed building heights and the justification therefore. *D&O at 8; Petitioner's Exhibit 9 (April 11, 2023 powerpoint at 23-25).* Ms. Bedwell also reviewed provisions in the Downtownwide Design Guidelines regarding building heights and previous modifications to building heights approved by the Planning Board. *Id.* The Planning Staff also addressed building height in detail. *Staff Report at 7.*

In this case the vertical height previously approved by the Board in FDP-DC-L-2 did not change. The Planning Board found the testimony and exhibits explained by Ms. Bedwell to be convincing as to the proposed uses and building heights, finding the adjusted height was within the previously approved 145' height limit, would not change the massing and compatibility within

the neighborhood, was within the twenty story maximum building height permitted by the Zoning Regulations, and was appropriate considering compatibility, character, and height of nearby existing and planned development and redevelopment. *D&O at 17*. Moreover, the approved 13-story building height is for Parcel A, development that is located north of Sterrett Place at the north end of the FDP area. *Amended Lakefront Neighborhood Design Guidelines at 21; FDP at Sheet 4*. Kincade's multi-story office building is located south of the FDP area. *Petitioner's Exhibit 9 (April 11, 2023 powerpoint at 6 and 7)*. An existing multi-level garage sits between the Kincade property and the undeveloped FDP area. *Id.* And the recommended building heights for the undeveloped FDP area south of Sterrett Place, the IMH hotel property, and the Kincade office parcel are all 9-stories in the Downtown Columbia Plan and 9-stories for the property within the FDP boundary. Based on the evidence the Planning Board could reasonably conclude the building height was appropriate.

Lastly, Kincade again mistakenly asserts private parking or other private rights as a basis for invalidating the Planning Board's approval. Whatever private contractual rights Kincade might have, they operate independently of zoning. *Perry v. Board of Appeals*, 211 Md. 294 (1956); *Eppard v. RDC Harbourtown LLC*, 2020 Md.App. Lexis 995 (2020); *Capital Commercial Properties, Inc. v. Montgomery County Planning Board*, 158 Md.App. 88 (2004). *See also HRD's Response/Opposition to Kincade's "Notice of Pending Court Case" filed with the Board on August 15, 2023.*

V. Request to Dismiss Appeal or, Alternatively, to Deny the Appeal and Affirm the Planning Board's Approval of the FDP.

In closing, in the event the Board does not dismiss Kincade's appeal as requested in HRD's Motion to Dismiss, it is clear the FDP was debated thoroughly, and the Planning Board resolved any evidentiary conflicts as it is permitted to do. The approval was consistent with prior FDP

approvals in Downtown Columbia, including FDP-DC-L-2 which was merely being amended in this case, and with the Planning Board's long-standing and consistent interpretation of the Zoning Regulations. The Record as a whole contained substantial evidence to support the Planning Board's factual conclusions which were reasonable and not arbitrary or capricious or contrary to law. If the appeal is not dismissed, Kincade's appeal should be denied and the Planning Board's approval of the FDP affirmed.

Respectfully submitted,

SHULMAN, ROGERS, GANDAL,
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CERTIFICATION

A copy of the foregoing Reply 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. Any person interested in responding to this motion must file a written response with the Board within fifteen days of the date that the motion was filed.

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Todd D. Brown

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