

HOWARD COUNTY BOARD OF APPEALS

IN THE MATTER OF : BEFORE THE HOWARD COUNTY
KINCADE LLC : BOARD OF APPEALS
: :
: :
: : CASE NO. BA-795D

**RESPONSE/OPPOSITION TO NOTICE OF PENDING COURT CASE FILED BY
APPELLANT KINCADE, LLC**

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 and pursuant to Board of Appeals Rule 2.207(e), hereby files this Response/Opposition to the letter filed by Appellant, Kincade LLC, dated August 23, 2023 and in support thereof states as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

HRD is the applicant for approval of an amendment to a Site Development Plan (SDP-22-042) (“Site Development Plan”) by the Howard County Planning Board (“Planning Board”) for a mixed-use development in Downtown Columbia, the Lakefront Neighborhood. On February 8, 2022, HRD held a Pre-submission Community Meeting to present the proposed development plan in accordance with Section 16-128 of the Howard County Code. The appropriate documents related to notices, meeting minutes, and attendees’ contact information for the Pre-submission Community meeting were filed with the Howard County Department of Planning and Zoning (“Department of Planning and Zoning”). The Design Advisory Panel reviewed the architectural and site plans for the proposed development on February 9, 2022. A second Design Advisory Panel meeting was held May 25, 2022. The meeting summaries for the Design Advisory Panel meetings were filed with the Department of Planning and Zoning and the Planning Board.

On February 3, 2023, the Department of Planning and Zoning issued a letter (“DPZ Letter”) advising the interested parties that the Site Development Plan may proceed to the Planning Board

for a hearing on the merits and final approval of the Site Development Plan application. On March 3, 2023, Appellant/Petitioner Kincade LLC (“Kincade”) filed an appeal (“Appeal”) of the DPZ Letter to the Howard County Board of Appeals Hearing Examiner (“Hearing Examiner”). On April 26, 2023, HRD filed a Motion to Dismiss the Appeal for lack of jurisdiction. On May 15, 2023, the Hearing Examiner dismissed the Appeal because the DPZ Letter was not a final administrative action and the Hearing Examiner therefore lacked jurisdiction to hear the Appeal. On June 13, 2023, Kincade filed this appeal.

On June 28, 2023, the Planning Board approved HRD’s Site Development Plan. Kincade appealed the approval on July 20, 2023, and that appeal is pending before the Howard County Board of Appeals (“Board of Appeals”) in Case No. BA-799D.

On August 23, 2023, Kincade submitted to the Board of Appeals a letter styled “Notice of Pending Court Case” (“Notice Letter”) asserting the applicability of Board of Appeals Rule 2.204(j) pending a final decision in the Howard County Circuit Court Case, *IMH Columbia, LLC v. The Howard Research and Development Corporation*, Case No. C-13-CV-22-000212 (“Court Case”). A copy of the Notice Letter is attached hereto as Exhibit A. In its Notice Letter, Kincade asserts that the Court Case “involves substantially the same issues” as the instant appeal; the “Board of Appeals may not schedule or hold a hearing on this matter”; and “any filings in this matter would also be stayed and deadlines tolled until the court has reached its decision”. While HRD received a copy of the Notice Letter when it was filed with the Board of Appeals, the Notice Letter did not include the signed certification required by Board of Appeals Rule 2.207(e).

HRD requests the Board of Appeals deny Kincade’s request/motion to stay the instant appeal proceedings and order that the case proceed in accordance with the timelines established in the Board of Appeals Rules of Procedure.

II. ANALYSIS

1. The Notice Letter Was Not Properly Filed.

The Notice Letter was not properly filed because it did not include the signed certification required by Board of Appeals Rule 2.207(e). Because the Notice Letter does not comply with Board of Appeals Rule 2.207(e), Kincade's request/motion to stay the proceedings in this appeal is not properly before the Board of Appeals, and the request/motion to stay the proceedings in this appeal must be denied.¹

2. This Appeal and the Court Case Do Not Involve Substantially the Same Issues.

Kincade is not entitled to a continuance of the hearing in this matter because the issues in the Court Case are not substantially the same as the issues in this appeal.

Board of Appeals Rule 2.204(j) states in relevant part, "the Board shall not hold a hearing on a petition involving substantially the same issues of a case that has been filed and is pending before a court of law."

The Court Case is related solely to the use and proposed development of property owned by IMH Columbia, LLC at 10207 Wincopin Circle, Columbia, Maryland (the "IMH Property") and the interpretation of private restrictive parking covenants ("Parking Covenants") as related to that use and proposed development. Those issues cannot properly be considered in this appeal. Furthermore, the Second Amended Complaint attached to the Notice Letter shows there are four counts pending and asserted by IMH in the Court Case. Those four counts include (i) two counts of Declaratory Judgment and one count of Breach of Covenants solely related to the interpretation of the Parking Covenants and (ii) one count of Equitable Estoppel and Detrimental Reliance related to development of the IMH Property. None of the pending counts or potential relief to be granted in the Court Case would have

¹ Assuming *arguendo* Kincade is entitled to a stay of the hearing on this appeal due to the pending Court Case, Kincade is still not entitled to an extension of time for other deadlines related to the appeal. Rule 2.204(j) does not stay or waive the requirements of Rule 2.210(b). HRD requests the Board of Appeals deny Kincade's request to extend the time for any deadlines other than a hearing on this matter.

any effect on whether the DPZ Letter represented a final, appealable action; or on the regulatory approval of the Site Development Plan, each of which are separate and distinct from the private rights between IMH and HRD related to the Parking Covenants involved in the Court Case. As discussed below, private restrictive covenants such as the Parking Covenants and the interpretation of those by the Court Case are not to be considered by the Planning Board or the Board of Appeals when considering the approval of the Site Development Plan or the regulatory process related to that approval. Moreover, Kincade is not a party to the Court Case. The Court Case will determine the rights of the parties, namely IMH and HRD. The Court Case will not determine the rights of Kincade.

As to the issues raised in Kincade's "Supplemental Statement", they are either procedurally related to the Site Development Plan processing and have nothing whatsoever to do with the Court's interpretation of the Parking Covenants in the Court Case or they are related to the interpretation of the Parking Covenants which are before the Court but not properly considered in land use regulatory proceedings.

The law in Maryland is clear that a Planning Board or Board of Appeals is to make its determination without considering and without interpreting private restrictive covenants. Construction and enforcement of private covenants are matters for courts of equity, not matters to be considered by the Board. *Perry v. County Board of Appeals*, 211 M 294 (1956); *Eppard v. RDC Harbortown LLC*, 2020 Md. App. LEXIS 995 (2020). When considering whether to approve a development plan, the Board is only to analyze the relevant factors as stated in the ordinance related to the plan approval, not private covenants. *Capital Commercial Properties, Inc. v. Montgomery County Planning Board*, 158 Md. App. 88 (2004). Specifically, when considering plan approval, the Board is not to consider private restrictive covenants related to parking. *Id.*

With regard to whether a Planning Board or Board of Appeals should consider private restrictive covenants when granting or denying a plan approval, the Court in *Perry*, cited by *Capital Commercial Properties*, stated,

The ordinance does not override or defeat whatever private rights exist and are legally enforceable, but neither is it controlled in its workings or effects by such rights. The enforcement of restrictive covenants is a matter for the exercise of the discretion of an equity court in the light of attendant circumstances. Many times the covenant relied on may not have been originally effective or for many reasons, may have ceased to be effective at the time relief is sought. 2 Rathkopf, *The Law of Zoning and Planning*, p. 387, says: 'The validity of the zoning ordinance, the grant of a variance or 'exception' should be considered independently of its effect upon covenants and restrictions in deeds.' *Perry*, at 300.

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, notwithstanding if in a proper proceeding the restrictions contended for are shown to be binding upon the properties mentioned, zoning cannot nullify them. We hold that the Board of Appeals was right in making its determination without reference to the restrictive covenants. *Perry*, at 300.

Thus, it is established that the effect of private restrictive covenants is not a matter to be considered by administrative and zoning agencies in zoning approval matters. These private contractual arrangements are neither overridden nor defeated by the operation of the Zoning Regulations, and **they operate independently** of the application of the Zoning Regulations to the Site Development Plan. As a consequence, the interpretation of the Parking Covenants at issue in the Court Case is irrelevant to the instant appeal. The court's ultimate determination of rights and responsibilities under the Parking Covenants has nothing to do with the DPZ Letter even if properly reviewable (it is not). And, the Board of Appeals' determination of whether the DPZ Letter was proper similarly should have nothing to do with the interpretation of the Parking Covenants. Under *Perry*, *Capital Commercial Properties*, *Rathkopf* and other authority, the interpretation of the Parking Covenants is not properly before the Board of Appeals, and thus, the issues in the two proceedings are not substantially similar.


Based on the foregoing, HRD respectfully requests the Board of Appeals deny Kincade's request to stay the proceedings in this appeal and to proceed according to the timelines articulated in the Board of Appeals Rules.

HRD hereby reserves its right to file response memoranda or any other response to filings 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, 6th Floor, Potomac, Maryland 20854 and telephone number 301.230.6579.


Respectfully submitted,

SHULMAN, ROGERS, GANDAL,
PORDY & ECKER, P.A.

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CERTIFICATION

A copy of the foregoing Response to Motion was provided to all parties of record and 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 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.


Todd D. Brown

HOWARD COUNTY BOARD OF APPEALS

IN THE MATTER OF
KINCADE LLC

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BEFORE THE HOWARD COUNTY
BOARD OF APPEALS

CASE NO. BA-795D

Upon consideration of Kincade LLC's Notice of Pending Court Case and HRD's Response thereto, it is this ____ day of _____, 2023, by the Howard County Board of Appeals, HEREBY:

ORDERED, that Kincade's Request/Motion to Stay the Proceedings is DENIED.

By: _____
Howard County Board of Appeals

EXHIBIT A
Kincade Notice Letter

TALKIN, MUCCIGROSSO & ROBERTS, L.L.P.

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August 23, 2023

Via email and first-class mail

Steve Hunt, Chairman
Howard County Board of Appeals
c/o Ms. Kel Berg, Board Administrator
3430 Court House Drive
Ellicott City, Maryland 21043
kberg@howardcountymd.gov

**Re: Notice of Pending Court Case
Kincade, LLC, Appellant
BA Case No. 795D**

Dear Mr. Chairman:

Please be advised that Count IV in Circuit Court Case No. C-13-CV-22-000212, which is currently pending before the Circuit Court for Howard County involves substantially the same issues as the Kincade, LLC's appeal in BA Case No. 795D. A copy of the Complaint in this matter is attached hereto for the Board's convenience. Pursuant to Howard County Board of Appeals Rules of Procedure 2.204(j), the Board of Appeals may not schedule or hold a hearing on this matter. A hearing may be scheduled when the Board is advised by the Petitioner that the court has reached a final decision. Due to the Court's pending decision, any filings in this matter would also be stayed and deadlines tolled until the court has reached its decision. This notice pursuant to Rule 2.204(j) should not be construed as a request by Appellant to place this case on the Board's inactive docket. Thank you for your anticipated cooperation in this matter.

Sincerely,

Sanford Talkin
Sanford Talkin

Enclosure

cc: Todd D. Brown, Esq.
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IN THE CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND

IMH COLUMBIA, LLC *
10211 Wincopin Circle, Suite 100 *
Columbia, Maryland 21044 *

Plaintiff, *

v. * Case No. C-13-V-22-000212

THE HOWARD RESEARCH AND *
DEVELOPMENT CORPORATION (JURY DEMAND) *
10275 Little Patuxent Parkway *
Columbia, Maryland 21044 *

SERVE ON:

CSC-LAWYERS INCORPORATING *
SERVICE COMPANY *
7 ST. PAUL STREET, SUITE 820 *
BALTIMORE MD 21202 *
Resident Agent *

Defendant. *

* * * * *

SECOND AMENDED COMPLAINT

Plaintiff IMH Columbia, LLC (“IMH”) files this Second Amended Complaint against
Defendant The Howard Research and Development Corporation (“HRD”) and states as follows:

Parties, Jurisdiction, and Venue

1. IMH is a corporation organized under the laws of the State of Maryland with its principal place of business located at 10211 Wincopin Circle, Suite 100, Columbia, Maryland 21044.

2. HRD is a corporation organized under the laws of the State of Maryland with its principal place of business located at 10275 Little Patuxent Parkway, Columbia, Maryland 21044. HRD claims it is owned and operated by The Howard Hughes Corporation (Howard Hughes”), a publicly traded, large-scale developer registered in Maryland as a foreign corporation with a principal place of business in Houston, Texas. Howard Hughes primarily developed properties in other parts of the country before turning its sights on Maryland. HRD claims it is a wholly owned subsidiary of Howard Hughes, and is used by Howard Hughes as the Maryland entity for Howard Hughes’s development plans in downtown Columbia. This Court has subject matter jurisdiction pursuant to §§ 1-501 and 4-401, *et seq.*, of the Courts and Judicial Proceedings Article of the Maryland Code because the amount in controversy in this case exceeds \$30,000.00.

3. This Court has personal jurisdiction over Defendant pursuant to §§ 6-101, 6-102 and 6-103 of the Courts and Judicial Proceedings Article inasmuch as Defendant maintains its principal places of business in the State of Maryland, regularly transacts business and has interest in, uses and possesses real property in the State, and maintains a resident agent for service of process in the State.

4. Venue is appropriate in this Court pursuant to § 6-201 of the Courts and Judicial Proceedings Article because the real property at issue is located in Howard County, Maryland.

Facts

5. Columbia was originally developed over a half a century ago by a local visionary, James Rouse, and the Rouse Company. Rouse created Columbia in the 1960s on 14,000 acres of farmland “as an ordered response to chaotic postwar sprawl and as an integrated, self-contained community.” Paul Goldberger, *James W. Rouse, 81, Dies; Socially Conscious Developer Built New Towns and Malls*, N.Y. Times, April 10, 1996.

6. Columbia was developed under the auspices of Rouse Company’s subsidiary, The Howard Research and Development Corporation, which ultimately became the owner of several parcels of property throughout the area.

7. In 2004, real-estate giant General Growth Properties, Inc. acquired Rouse Company and HRD. However, on April 16, 2009, General Growth Properties filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of New York. *In re. General Growth Properties, Inc.*, Bankr. No. 09-11977-ALG, U.S. Bankr. N.Y., Southern District, Voluntary Petition (Chapter 11), filed April 16, 2009 [Dkt. No. 1].

8. As part of one of the largest real-estate company bankruptcies in U.S. history, General Growth Properties spun off its entire development business in or around 2010, including all of the former Rouse Co. assets here in Columbia.

9. Enter Howard Hughes Development Co., a national developer with a very different agenda for downtown Columbia than Jim Rouse envisioned. According to company shareholder presentations, Howard Hughes seeks the “opportunity to control cities” through aggressive ownership and development. Indeed, Howard Hughes believes that “ownership and monopoly-like control of small cities [like Columbia] allows [it] to both create demand and

control supply of commercial amenities – creating out-sized demands for decades.” Columbia ideally fits Howard Hughes’ objective to obtain “monopoly-like control” over such communities.

10. As early as 2014, Howard Hughes owned and controlled more than 50% of all of the commercial space in downtown Columbia through HRD, and that number is increasing exponentially. See Adam Bednar, *Howard Hughes Corp. dominates downtown Columbia office market*, Daily Record, December 18, 2014.

11. According to *Realty News Report*, Howard Hughes now owns and controls approximately 2,000,000 square feet of space in more than a dozen different commercial and mixed-use properties in downtown Columbia with the ability to develop several million square feet of new space in the future. See *Transwestern to Lease Huge Howard Hughes Project*, Realty News Report, May 8, 2021, <https://realtynewsreport.com/transwestern-to-lease-huge-howard-hughes-project/>.

12. Monopoly-like domination of Columbia apparently is not enough for Howard Hughes and HRD. In a classic “bait-and-switch” scheme, HRD now seeks to financially cripple IMH and the local developer and construction contractor who principally operates it.

13. On December 17, 2017, IMH purchased the property that is the site of the former Sheraton Columbia Town Center Hotel and Lodges and the subject of this litigation (the “Property”). The Property represents approximately seven acres of prime real estate located in the “Lakefront Neighborhood,” which fronts on Lake Kittamanquandi. Its address is 10207 Wincopin Circle, Columbia, MD.

14. When IMH purchased the Property, it sought to conduct a multimillion dollar renovation of the hotel and replace the 50-year old “lodges,” a series of dilapidated one and two-story, brown wood cottages located on the Property with new mixed-use development.

15. The proposed redevelopment would occur in two phases: Phase I encompasses the \$25 million dollar renovation and a multistory, 49,000 square-foot, 78 room addition to the hotel; and Phase II consists of demolishing the 50+ year-old, dilapidated “lodges” and replacing them with a modern mixed-use project consisting of an office building, a multifamily residential building, and an indoor tennis facility with associated parking (hereinafter, the “Project”).

16. Years after consenting to the conceptual plans and onsite parking for the Project conditioned on the requirement that IMH build the necessary parking for the new development on its own Property, and IMH’s overall investment of approximately \$50 million in the purchase and development of the Project to date, HRD reneged. In doing so, HRD purported to supersede the Architectural Review Committee’s exclusive authority to approve the new uses for the Property.

17. Based on outdated 50 year old covenants that are obsolete as to new construction, and despite the County’s sweeping new development plans for downtown Columbia and HRD’s own development plans for the Lakefront that include onsite underground parking, HRD now claims IMH is prohibited from building parking on its own property.

18. The reason: HRD intends to redevelop the entirety of certain shared, surface parking areas adjacent to the Property. Consistent with Howard Hughes’ corporate objective to obtain monopoly-like control of small cities, its subsidiary, HRD, seeks to prohibit IMH’s competing Property’s development.

19. Combined with HRD’s elimination of the shared parking facilities that might be available to IMH’s property, HRD’s bait and switch of approval conditioned on parking only on IMH property followed by notice purporting to prohibit such parking unlawfully denies IMH’s right to develop its Property.

I. The 1971 Deed and Covenants

20. The original Deed from HRD, as grantor, to the Columbia Inn, Inc., as grantee, for the subject Property, was dated March 15, 1971 and recorded among the land records at Liber 552, Folio 686. The Deed included Special and General Covenants and Restrictions.

21. The Special Covenants prevail over the General Covenants according to their express terms. The Special Covenants granted HRD the authority to approve or reject any changes in the use of the Property in its sole discretion for a period of 15 years, which authority expired in 1986.

22. At all times relevant to the subject matter of this action, therefore, the sole authority to approve or reject changes in the use of the Property rests with an Architectural Review Committee established by the Special Covenants, "taking into account the necessity for and the suitability of the proposed use in the neighborhood, its effect on surrounding property, and the nature, quality, appearance and general compatibility of the structure proposed for such use to the character of the neighborhood," which approval cannot be unreasonably withheld. *See Special Covenants* § A(3).

23. Changes in the use of the Property, or additional uses, no longer require HRD's approval inasmuch as it relinquished that right after 15 years or in 1986.

24. Section 4.04 of the General Covenants generally provided that permanent parking cannot be placed on the Property in lieu of the Property's use of a shared parking regime without HRD's approval.

25. Section 5.03 of the General Covenants also provides that the Architectural Review Committee may disapprove of any development plans or specifications based on the "inadequacy of parking spaces proposed for the Property based upon the considerations set forth

in Section 4.04.” In such a case, “the Architectural Review Committee shall, if requested, make reasonable efforts to assist and advise the applicant in order that an acceptable proposal can be prepared and submitted for approval.”

26. When making any determinations on the proposed uses of the Property, § 9.01 of the General Covenants further requires the Architectural Review Committee [and when HRD is involved] to “take into consideration the best interests of the Owner and of the Property and the owners of property and property in the vicinity.”

27. Under the 1971 Deed and Covenants, the Property and several others became part of a shared parking regime whereby they were provided the right to utilize shared parking facilities located on HRD parcels.

28. On or around March 9, 1971, a Declaration of Parking Covenants reflecting the shared parking regime was recorded among the land records of Howard County at Liber 553, Folio 516.

29. Article IV of the Parking Covenants also established the minimum parking space requirements for office, hotel and residential unit uses entitled the “Parking Indices.” Section 5.02 required that 75% of all parking spaces shall be located within 500 feet of the business entrance to the Property, and 100% of the parking spaces shall be located within 750 feet of the entrance to the business on the Property.

30. The Parking Covenants mirror the Covenants in several respects, including § 7.02 of the Parking Covenants stating that “[n]o parking facility shall be erected, placed or permitted... on any Lot ... unless plans and specifications have been submitted to and approved in writing by the [ARC]; and § 8.01(b) of the Parking Covenants requiring that “HRD and the Architectural Review Committee shall take into consideration the best interests of the Owners

and of the Property to the end that the Property shall be preserved and maintained as a first-class town center.”

31. The introductory paragraph of the Parking Covenants states that grantees or their successors “will not, without the consent of HRD, permit any alterations to the use or size of improvements as originally built upon such Lot which would result in the need for additional parking areas determined by Articles IV and V.” Articles IV and V of the Parking Covenants relate to common parking areas which must be built on the grantor’s designated properties, not on grantee’s lot. Consent would therefore not be necessary if parking was on the grantee’s lot and otherwise approved by the ARC.

32. The shared parking originally provided for the Property was located on the adjacent surface lot with an above-ground parking structure added later.

33. Considering all of these Covenants together, a change in the Property’s use after 15 years was contemplated. The Architectural Review Committee’s approval of such a change cannot be unreasonably withheld and may involve parking on the Property. Decisions about the change of use shall be based on compatibility of the new use with the area taking into consideration the best interest of the Property Owner and others in the vicinity.

II. The Downtown Columbia Plan

34. After years of planning, public hearings, studies and reports by various agencies, commissions and stakeholders regarding a comprehensive overhaul of downtown Columbia’s aging development and infrastructure, the Howard County Council adopted a new “30-year master plan for the revitalization and redevelopment of Downtown Columbia” known as the Downtown Columbia Plan on February 1, 2010. The Plan was generally amended on November

16, 2016. *See* Howard County Council Bills 58-2009 and 52-2016 (collectively referred to as the “Plan” where appropriate).

35. The Plan was adopted for the express purpose of “revitalization and redevelopment” of outdated properties and infrastructure dating back to the 1960s to a more modern commercial and residential environment.

36. An overarching objective of the Plan is to increase the number of downtown Columbia residents “by adding more residences, shops and recreational and cultural amenities in Downtown Columbia, while also making downtown more attractive and easier for pedestrians to navigate.”

37. The Plan calls for the transformation of the Lakefront Core, the heart and center of the Lakefront Neighborhood, into a more attractive, dense, mixed-use district, including adaptive reuse, selective demolition and new construction, and open space enhancement.

38. As the owner of a majority of the land, HRD was an integral part of the redevelopment planning leading to adoption of the Downtown Columbia Plan, and has received enormous benefits to redevelop millions of square feet of commercial, mixed-use and residential properties throughout downtown Columbia as a result.

III. HRD and the County’s Memorandum of Understanding

39. In conjunction with the Downtown Columbia Plan’s redevelopment objectives, the County and HRD entered into the Downtown Columbia Memorandum of Understanding (the “MOU”) on November 9, 2016.

40. Section A of the MOU recognizes that the “Downtown Columbia Plan calls for the development of approximately 391 acres of land located in Downtown Columbia, Maryland,

into a transformative, urban-oriented business and cultural hub, that will include more than 13 million square feet of new building development at completion.”

41. Section D states that this massive development “cannot occur without the creation of the necessary public infrastructure, such as streets, roads, sidewalks, water lines, sewerage systems, and structured parking,” estimated at approximately \$171 million.

42. Pursuant to the MOU and related legislation, HRD received \$127 million in tax increment financing (the “TIF”) in connection with its development of 8.5 million square feet of the properties in downtown Columbia.

43. Both HRD and the County acknowledge in the MOU the need to modernize outdated parking and other covenants that have become obsolete because they do not support the sweeping new development planned on 391 acres with 13 million square feet of new buildings in downtown Columbia.

44. Therefore, in § V of the MOU, entitled “**Columbia Covenant Modernization and Improvement**” HRD stated that it “is committed to modernizing and improving the real property covenant structure in Columbia and, in the furtherance of this goal, [HRD] and the County have set the following goal:

- i. Deed Covenant Modernization and Improvement Initiative. The Developer [HRD] *shall make a good faith effort to work over the next 6 to 12-months* after the enactment of the Legislation, *with* the County, the Columbia Association, the Columbia Village Associations and *commercial property owners throughout Columbia, to improve and modernize the real property covenant structure throughout Columbia.*

MOU § V.A.i at p. 6 (final emphasis added).

45. Thus, the MOU requires HRD to work in good faith with all of the other commercial property owners “to improve and modernize the real property covenant structure throughout Columbia.”

46. After accepting millions of dollars in TIF money, HRD did not contact IMH or, upon information and belief, any other property owners in the vicinity in good faith to improve or modernize the outdated covenant structure as agreed.

IV. Howard Hughes' Lakefront Core Neighborhood Design Guidelines

47. Upon information and belief, Howard Hughes commissioned the preparation of the "Lakefront Core Neighborhood Design Guidelines" by its architectural design team with the assistance of its engineers and outside counsel (the "Design Guidelines"). The Design Guidelines were approved by the Howard County Planning Board and are recorded among the land records for Howard County at Liber 18398, Folio 338 on or around October 5, 2016.

48. Development of the Property within the Lakefront Core Neighborhood is governed by these Design Guidelines. The Design Guidelines also specifically encompass the IMH Property.

49. Consistent with all of the other recent redevelopment plans, the Design Guidelines promote the overhaul and revitalization of the entire Lakefront Neighborhood with new cultural, retail, restaurant, office, residential, and hospitality development to "bring community life and activity back to the water's edge."

50. In keeping with that vision of the Lakefront Neighborhood, the Design Guidelines require buildings to range from 1 to 15 stories in height "with shared parking facilities integrated either wholly or partially within individual buildings."

51. "Parking shall be located primarily in structured parking garages, with pedestrian access to and from parking provided to the more pedestrian-oriented, primary street(s) and/or amenity space(s)."

52. The "Structured Parking" section of the Design Guidelines provides as follows:

Structured Parking: New stand-alone structured parking garages are not encouraged as a building type in Downtown. Structured parking, integrated wholly or partially within new buildings, is anticipated in the Lakefront Core Neighborhood. In Lakefront Core, some exposure of garages to primary or secondary streets is anticipated; on primary streets, such as Little Patuxent Parkway, exposed garages should be treated appropriately.

53. For residential/retail mixed-use buildings and office/retail mixed-use buildings, the Design Guidelines require parking in garages above or below grade, which are integrated wholly or partially into the new buildings.

V. The Subject Property

54. In July 2017, IMH began negotiations with the Property's owner, Interstate Columbia, LLC, to purchase the Property for potential redevelopment as a multiuse facility.

55. At around the same time, IMH representatives met with HRD's Senior Vice President and chief representative of both HRD and Howard Hughes in Columbia, John DeWolf III, to discuss the planned redevelopment of the Property before purchasing it. IMH wanted to ensure that HRD would not object to, or attempt to block, the proposed multiuse redevelopment plan before expending millions of dollars in purchase, design and development costs. During these discussions, Mr. DeWolf provided his consent, on behalf of HRD, to onsite parking and IMH's overall redevelopment plan.

56. HRD was pleased that IMH intended to purchase and significantly upgrade the Property from its dilapidated and aged conditions. DeWolf informed IMH that "we're actually glad you are planning to purchase it because we know you'll do a first-class job developing the property."

57. DeWolf consented to the change in use and onsite parking, and approved IMH's redevelopment plan for the Property consisting of the following elements:

- a. Complete renovation of the hotel with a multistory, 49,000 square-foot, 78 room addition;
- b. A new 200,000 square-foot office building;
- c. A new 200 unit, residential condominium building; and
- d. A new indoor tennis facility.

58. HRD confirmed that the multiuse project incorporating hotel, office, residential, and tennis facilities would be an excellent development of the parcel and that HRD would collaboratively work with IMH to facilitate that redevelopment. DeWolf informed IMH that he was very excited and “loved the plan” because, in part, it would increase the value of HRD’s property in the immediate vicinity consistent with Columbia’s overall redevelopment plans.

59. Consistent with HRD’s preliminary approval and encouragement, IMH commenced a six-month feasibility study for the purchase.

60. On October 12, 2017, Arianne Monroe, HRD’s Senior Assistant General Counsel, wrote to IMH’s transactional counsel to address approval of the plans by the Architectural Review Committee (also known as the “ARC”). In that email, Monroe stated the following:

The hotel was originally allocated 376 spaces under the FDP, thus, to the extent new building(s) are constructed, the owner would be required to construct, at its expense, any additional spaces required under the Downtown Methodology in excess of the 376, to support such new use(s). With regard to a residential use (if approved by the Architectural Review Committee), given that the Common Parking Area is non-exclusive and used for MPP parking, it may be necessary to “self-park” (on the hotel property) so as to ensure spaces are available to its residents.

61. Monroe’s email therefore also confirmed HRD’s consent to onsite parking for new uses approved by the ARC and the need for compliance with new redevelopment plans for downtown Columbia and the Design Guidelines:

Finally, in the event the owner wants to re-develop all or a portion of the property, it would be required to do so pursuant to the Downtown Revitalization (16-step) process including filing a FDP

Amendment, Neighborhood Design Guidelines, Concept Plan and Implementation Plan for the Lakefront Area (which includes property beyond the hotel boundary).

62. Consistent with Ms. Monroe's comments, IMH's redevelopment plans included onsite parking.

63. HRD and IMH representatives met again after Monroe's email and again confirmed HRD's continuing support for the redevelopment plan consistent with their prior communications.

64. In reliance on HRD's approval of the initial redevelopment plan, IMH settled the purchase of the Property on December 14, 2017, and a Special Warranty Deed was issued for the conveyance which is recorded among the land records for Howard County at Liber 17979, Folio 170.

65. IMH paid a total of \$23 million dollars for the purchase.

66. On or about February 8, 2018, at the request of John DeWolf, IMH delivered initial conceptual plans and program descriptions for the Property's redevelopment to HRD, which were consistent with all of the communications between IMH and HRD to date, and HRD's prior approvals and directions regarding onsite parking. HRD then submitted these plans to the ARC.

67. The conceptual plans encompassed the following principal buildings:

a. **Renovation of the hotel and conference center.** The plans contemplated renovation and expansion of the existing hotel tower and conference center and demolition and replacement of the lodge/villas. The hotel and conference center were proposed to be completely renovated to bring it up to the standard of a first-class hotel, including a complete exterior renovation.

b. **Office building.** The plans included the 200,000 square-foot commercial office building constructed next to the hotel tower.

c. **Residential building.** The Plans also included the 200-unit residential building next to the office building.

d. **Tennis Facility.** Finally, the Plans included the 45,000 square-foot tennis facility at the northern end of the property containing five tennis courts and supporting facilities. While the construction of the proposed tennis facility would require an easement into a portion of what is now shared parking spaces, the facility was to provide a much-needed recreational center in Downtown Columbia and would be a significant enhancement attracting people to Town Center East, in accordance with the goals and intentions of the Plan to help bolster and revitalize Downtown Columbia's economic and social, and cultural viability.

68. Increased parking needs were considered by all of the parties as a component of the Project. Preliminary estimates of the Project's parking requirements submitted to HRD included 810 additional parking spaces in addition to the hotel's existing parking entitlements.

69. IMH proposed to meet these additional parking requirements in two ways: (1) expand the existing, above-grade, shared parking garage to accommodate additional shared parking; and (2) construct a below-grade parking garage underneath the Project for the additional needs of the Project itself.

70. The proposed below-grade parking garage on the Property included a small underground encroachment into the shared parking area of about .0975 acres. Together these facilities would accommodate all of the additional parking required by the Project.

71. Since HRD provided its consent to onsite parking for the new uses, HRD forwarded IMH's conceptual plans to the Architectural Review Committee for approval in the spring of 2018 per Monroe's prior direction. IMH sought approval of the change in use of the Property to include the residential building, commercial office building, tennis facility, and particularly, the onsite underground parking facility and modifications to the existing shared parking garage.

72. On or about March 23, 2018, Monroe provided IMH with correspondence regarding IMH's conceptual plans for the Property, a copy of which is attached hereto, and incorporated herein by reference, as **Exhibit 1** (the "March 2018 Letter").

73. The March 2018 Letter confirmed that the Architectural Review Committee reviewed IMH's "proposed plans for the change of use of the Property *and modification to the existing parking facilities in the context of the Amended Plan and its vision for the Lakefront* and has evaluated the necessity, suitability, nature, quality, and compatibility of the proposed uses. I have attached the Architectural Review Committee's preliminary review comments. The proposed changes and sizes of the residential building and office building may be appropriate uses and densities, subject to approved architectural treatment, use of associated open space, and, most importantly, adequate parking and any required mitigation of transportation impacts being implemented. As for the recreational facility, however, the Architectural Review Committee does not believe this new use is appropriate in this Downtown development area." The Architectural Review Committee Report dated March 22, 2018, is attached hereto and incorporated herein by reference as **Exhibit 2** (hereinafter, the "Report").

74. In the March 2018 Letter, HRD provided the following assurances to IMH regarding its redevelopment plans: (1) HRD "concur[s] that the hotel's redevelopment, including retaining and renovating the tower and demolishing the villas, will provide a much needed facelift and improved utilization of the facility"; (2) HRD "agrees that a change in use that includes residential and office components, properly sized and designed, may be appropriate and consistent with the vision of a more urban mixed-use environment"; and (3) HRD "will, subject to agreement on the various elements of the project, agree to the alteration to the use and size of

existing improvements and to provide a waiver of the prohibition against residential use under the General Covenant.”

75. At no point in any of the communications, review or approvals leading up to and including the March 2018 Letter did HRD retract its consent, nor did the Architectural Review Committee ever refuse to approve IMH’s plans with underground parking on its own Property. Indeed, HRD reaffirmed its consent and conditional approval of appropriately designed and planned onsite parking for the development consistent with the Downtown Columbia Plan and the Design Guidelines.

76. IMH again met with DeWolf shortly before the issuance of the March 2018 Letter and Report to discuss construction of a roadway in conjunction with expansion of shared underground parking encroaching on HRD property containing the shared parking facilities. Although DeWolf liked the concept, he made it clear that the roadway and encroachment on HRD land “will never fly.”

77. Instead, DeWolf reiterated that “you will have to park on your own land.”

78. Consistent with HRD’s position, the March 2018 Letter confirmed that HRD was “amenable to allow an encroachment” regarding the expansion of the existing parking deck onto the Common Area Parking lot, but that it would not grant an easement on HRD land for any encroachment for underground parking.

79. Strictly with respect to “any encroachment onto HRD land,” the letter confirmed that such encroachment “must be consistent with the Parking Covenants, *i.e.*, it shall only be for shared parking purposes and shall be in such areas as designated by HRD, and second, ***the underground encroachment should not be necessary with deletion of the tennis facility and reconfiguration of the proposed residential and office buildings.***” (Emphasis added.)

80. Thus, HRD provided its consent for onsite parking and to the change in use and the Architectural Review Committee approved the change in use of the Property including the redevelopment of the existing hotel and conference center and construction of new office and residential buildings, and both HRD and the Architectural Review Committee approved underground parking built on the Property for these new buildings.

81. At all times relevant, HRD's only stated concern was encroachment on its land, not construction of parking facilities on IMH's Property. From March until September 2018, IMH met with DeWolf and his ultimate replacement, Greg Fitchett, several times. Both individuals indicated that HRD intended to develop the shared parking lot parcels for commercial purposes, thereby eliminating the shared parking lot.

82. At no point during that timeframe did any HRD representative express an intent to enforce the purported prohibitions in the Parking Covenants against parking on IMH's Property.

83. IMH justifiably relied on the March 2018 Letter from HRD, the Architectural Review Committee review approval, and repeated reassurances from authorized HRD and Howard Hughes representatives that IMH could not only construct onsite parking but that it should construct such parking on its own Property.

84. Based on IMH's justifiable reliance on all of these approvals and commitments, it proceeded with redevelopment of the Property. IMH moved forward with Phase I of the Project as follows: (i) completing the final design for the hotel renovation and expansion in June 2018; (ii) obtaining permit review from the County on August 5, 2018; (iii) obtaining construction financing for the project; and (iv) executing construction contracts to commence work in November 2019. The renovations and addition were performed as planned and contracted, and with the full knowledge and support of HRD and the Architectural Review Committee.

85. The newly renovated and expanded hotel reopened in November 2021 under the new name Merriweather Lakehouse Hotel. Consistent with the prior approvals and the Downtown Columbia Plan's revitalization objectives, the newly renovated, modern hotel is one of Marriott's limited "Autograph Collection" properties—a marque facility for downtown Columbia's economic, community and aesthetic revitalization efforts.

86. IMH incurred approximately \$50,000,000 in the purchase, design, permitting, development, construction and miscellaneous costs in connection with Phase I of the Project.

87. After March 2018, IMH and HRD met a number of times to further discuss the Project. The discussions concerned the number of parking spaces that HRD owed IMH as part of the shared parking regime set forth in the Declaration of Parking Covenants, but HRD always agreed that the majority of parking for the redevelopment would be underground on the Property.

88. IMH engaged Machado Silvetti, an internationally renowned architectural firm, to provide additional master planning and more detailed plans for Phase II of the development, and incurred approximately another \$2,000,000 in design costs for the Project.

89. On September 25, 2019, IMH submitted the design package for the Property to the Architectural Review Committee via an in person presentation. The design package included most of the same components, but removed the underground encroachment under HRD land for parking that was included in the original concepts as directed by HRD.

90. The Architectural Review Committee verbally approved the plans at that meeting.

91. On October 15, 2019, two ARC members, one of which is also an HRD employee, Nancy Tucker, and the other who is not, Bill Nitzel, exchanged the following email regarding the ARC's review of IMH's plan:

From: Nancy Tucker
Sent: Tuesday, October 15, 2019 4:09 PM

To: Bill Nitzel
Subject: Re: Sheraton
Perfect

Sent from my iPhone

On Oct 15, 2019, at 3:27 PM, Bill Nitzel <bill@nitzelconsulting.com> wrote:

This email originated from an external server. Use caution.

I'll do whatever you want? - I know Gabe had a lot of discussion about alignment of road system between their plan and HHC's, I agree, and can outline them in our comments- that said, I'm not fully up to speed with your master plan for the area - I'll proceed with the ARC review and comments - give me thru the weekend - then we can share with your team

Thanks

Bill

On Oct 15, 2019, at 2:05 PM, Nancy Tucker <nancy.tucker@howardhughes.com> wrote:

It was my understanding that you would be reviewing it and the HHC team would review it before we send it back to Costello with the comments..

Nancy Tucker | Community Relations Manager | The Howard Hughes Corporation
110960 Grantchester Way, Suite 110 | Columbia MD 21044 | 410.964.5446 o. | 410.977.1605 m.

<image001.png>

From: Nitzel Consulting <bill@nitzelconsulting.com>
Sent: Tuesday, October 15, 2019 3:00 PM
To: Nancy Tucker <nancy.tucker@howardhughes.com> Cc: Bill Nitzel <bill@nitzelconsulting.com>
Subject: Re: Sheraton

This email originated from an external server. Use caution.

When we left the meeting it was my understanding that the HHC team would be reviewing and I was to stand down with the ARC review until

an internal meeting to coordinate a response was scheduled - we gave comments at the presentation meeting B

Sent from my iPhone

On Oct 15, 2019, at 12:18 PM, Nancy Tucker
<nancy.tucker@howardhughes.com> wrote:

Hey Bill. Hope you had a nice vacation. Greg is interested in the status of the Phase II Costello review.

92. Despite the fact that HRD transferred all authority over new property use decisions to the Architectural Review Committee in 1986 and the committee's prior approval of IMH proposed new uses for the Property, the Architectural Review Committee issued a notice on November 1, 2019 in which it continued to approve of the new uses and onsite parking, but, as instructed by HRD, the Architectural Review Committee stood down and purported to surrender its approval authority to HRD. Indeed, the November 1, 2019 Notice unlawfully contends that IMH was suddenly required to "[s]eek necessary approvals/waivers from HRD re new uses," and then resubmit the plans to the committee again.

93. Neither the Architectural Review Committee nor HRD possessed the authority to make such a demand.

94. HRD transmitted the Architectural Review Committee's notice to IMH with a cover letter reinforcing the following:

[P]lease understand that your submission contains uses that are either new uses not previously approved and/or uses that are prohibited by applicable recorded documents. ***Decisions regarding the approval or denial of those uses are HRD's, as the Owner/Declarant under the Deed and the Covenants, and must be sought directly from HRD in that capacity.*** So while I am enclosing the ARC's Notice of Committee Action, please know that it is subject to approval of and granting of Deed and Covenant restriction waivers by HRD for the new uses. The ARC's conceptual design

review in no way suggests approval of these uses.” (Emphasis added.)

95.

HRD’s insertion into the use approval process breaches the Covenants that transferred authority over the approval of new property uses to the Architectural Review Committee. HRD was not authorized to reverse the Architectural Review Committee’s prior approval of the new uses set forth in the March 2018 Report and thereafter November 1, 2019 comments, which identify only the following items to be addressed in future submissions:

Site/Landscape

1. Assure the proposed road infrastructure aligns with the HRD redevelopment master plan.
2. Resolve the road grade issues at the north entrance to the existing parking garage.
3. Resolve and detail all delivery and trash removal logistics to and from all buildings.
4. Assure appropriate screening of service areas with mechanical enclosures and landscaping for approval.
5. Finalize and document all site amenities for approval.
6. **Final Site and Landscape approval is contingent upon review and approval of the detailed construction drawing submittal.**
7. Finalize and document all parking requirements - assure compliance with all parking requirements consistent w HRD letter dated June 4, 2019.
8. Provide additional information about all possible adjacent off-site public (CA) amenities and areas.
9. Restricted to max 90% lot coverage.

Architecture

1. **Final Architectural approval is contingent upon review and approval of the detailed construction drawing submittal.**
2. All rooftop equipment must be screened to the highest part of the equipment.
3. Potential building signage locations should be incorporated into the building’s architectural elements and margins.
4. Exposed utilities will not be permitted and must be screened.
5. Must stay within the applicable 150’ height restriction.

Signage

1. **Final Signage approval is contingent upon review and approval of a detailed construction drawing submittal for each sign location.**

2. A comprehensive development building signage and wayfinding signage criteria must be developed for the entire project site - that criteria shall incorporate the all minimum standards of the Columbia Commercial and Office Guidelines and these documents will be used to determine final compliance with the development criteria.

96. On November 8, 2019, the ARC provided its final approval of Phase 1 of the project – the hotel renovation and addition – knowing full well that the project involved two phases with Phase 2 encompassing demolition of the lodges and construction of the residential and office buildings and underground parking for the new uses.

97. On November 11, 2019, IMH commenced construction of the hotel renovation and addition.

98. On November 20, 2019, Monroe sent a letter to Costello in which she stated for the very first time that “HRD has not waived any of the applicable restrictions and reserves its rights with regard to same.” Costello responded via email the same day expressing total confusion as to HRD’s new position, which appeared to suggest that HRD was revoking its previous consent over the past two years. His email stated:

From: David Costello
Sent: Wednesday, November 20, 2019 1:04 PM
To: Arianne Monroe <Arianne.Monroe@howardhughes.com>
Cc: Sang Oh Esq <soh@talkin-oh.com>; Greg Fitchitt <Greg.Fitchitt@howardhughes.com>; Gabriel Chung <gabriel.chung@howardhughes.com>; Todd D. Brown Esq. (Tbrown@shulmanrogers.com) <Tbrown@shulmanrogers.com>; brad.canfield@930.com
Subject: Re: Sheraton - Notice re Process

Thanks for the note. Would you mind clarifying a couple things.

1. What uses are you saying are prohibited?
2. Can you please let us know the applicable provisions of the “recorded documents” you are relying on in your assertion we need HRD’s approval of our plan.

It seems HRD is unusually reluctant to just come right out with what its position is. I believe HRD, has a duty and obligation to be forthcoming about matters like this. The secrecy is hurting us.

At this point we are very confused. We submitted a plan a couple years ago and you yourself sent along conditional approval. Everything we've done since then, including embarking on a \$20m addition to the existing hotel, has been predicated on the language of the deed and on your previous approval of the two primary uses; office and residential. All we have done to our Phase 2 plans since that initial submission was fine tune our design to comport with the HRD comments, and generally approve the design.

It should be noted that we also had to retain a new design firm because Howard Hughes forbid Design Collective from working on our project.

A prompt response is appreciated.

99. On December 9, 2019, HRD sent another letter to IMH renegeing its prior consent to onsite parking and the new uses and usurping the ARC's approval of the same:

As to whether HRD is willing to approve the requested use changes and parking arrangement included in the latest conceptual iteration of his redevelopment plan, HRD respectfully rejects the proposal. HRD makes this decision in its sole and absolute discretion, as reserved to it in the referenced recorded documents. Waiving the applicable restrictions is viewed as contrary to HRD's interests, both as an owner/developer of its own parcels and as the Community Developer under the Plan, due to a number of potential issues including, but not limited to, excessive massing, forgone CEPPA cost reimbursement, and a variety of other negative impacts to traffic, transportation, infrastructure, view corridors, and public access.

100. These letters represent a complete reversal of the approvals and consent to the change in use and onsite parking provided in 2017, March 2018 and every day thereafter until almost two years later. At no point leading up to November 2019 had anyone from either HRD or the Architectural Review Committee ever questioned the approval of the change in use and onsite parking or raised any supposed concerns about "excessive massing, forgone CEPPA cost

reimbursement, and a variety of other negative impacts to traffic, transportation, infrastructure, view corridors, and public access.”

101. Contrary to HRD’s assertions in its December 9, 2019 letter, it does not have the right to reject a change of use to the Property. Rather, under the Covenants (to the extent they even remain enforceable in light of overwhelming development changes in downtown Columbia), changes in the Property’s use were already considered and approved by the Architectural Review Committee. Moreover, the Covenants state that approval of such a change of use by the Architectural Review Committee shall not be unreasonably withheld, may involve parking on the Property and that decisions about the change of use would be based on compatibility of the new use with the area and would take into consideration the best interest of the Property Owner and others in the vicinity.

102. HRD’s insertion of itself into the change of use approval process and then outright rejection of the proposed redevelopment after nearly two years of reliance by IMH on the prior consent and approvals, during which IMH incurred tens of millions in development costs, constitutes a breach of the Covenants and all prior approvals to the ultimate detriment of IMH.

103. HRD’s new denial of the change in use of the Property and newly raised concerns with onsite parking for the redevelopment is in stark contrast to all of its statements in and leading up to the March 2018 Letter and thereafter, particularly including its assertion that “the overall redevelopment of the Property with mixed-use components is harmonious with the Amended Plan...” and its expressed consent to waive the prohibition against residential use for an approved project.

104. Moreover, it did not express any objection whatsoever to the planned onsite parking facility before, but rather objected to any encroachment of parking facilities on its land subject to the shared parking regime. To this day, HRD has maintained in meetings with Howard County officials relating to its planned redevelopment in the Lakefront District that underground parking, like that proposed by IMH, is the appropriate means by which to add parking in the area for new construction.

105. HRD's disingenuous reasoning to subsequently reject the redevelopment in December 2019 is for its own self-dealing. HRD now plans its own redevelopment of the shared parking lot and on other lots it owns in the Lakefront District, which encompasses far more density and underground, onsite parking for its own purposes.

106. HRD's rejection of IMH's Project breached the Covenants that HRD purported to enforce at the eleventh hour, and is directly contrary to the Downtown Columbia Plan, the Design Guidelines on which HRD and the Architectural Review Committee both relied in approving Phase I and HRD's agreement in the MOU to revamp and modernize those antiquated Covenants.

107. Additionally, HRD's 2019 reversal of prior commitments regarding the Project violates prior approvals, the Parties' course of dealing, was not made in good faith and constitutes a default of the Covenants and the terms of the MOU.

COUNT I
(Declaratory Judgment Pursuant to
MD. CODE ANN., CTS & JUD. PROC. § 3-401, *et seq.*)

108. IMH incorporates Paragraphs 1 through 103 as though fully set forth herein.

109. IMH owns the property located at 10207 Wincopin Circle that is part of the Lakefront Core Neighborhood in downtown Columbia subject to the Plan and Design Guidelines, which require onsite structured parking.

110. IMH sought consent and approval from the Architectural Review Committee for redevelopment of the Property for mixed-use to fit within the Plan and Design Guidelines. IMH simultaneously sought consent from HRD to construct onsite parking for the Project's needs.

111. With full knowledge of the Plan, Design Guidelines, the preparation and issuance of which HRD took part in, the Architectural Review Committee provided its approval of a change in the use of the Property consistent with IMH's redevelopment plans.¹ HRD consented to, and indeed directed, the construction of parking for the new and renovated buildings on IMH's Property.

112. Both HRD and the Architectural Review Committee considered the proposed redevelopment harmonious and consistent with the overall Downtown Plan.

113. HRD expressly consented to onsite parking when it directed IMH to build an underground parking facility on the Property to serve the new uses as long as the underground parking did not encroach on HRD's land and when it sent IMH's plans to the Architectural Review Committee for its consideration and approval of the project.

¹ The Architectural Review Committee provided its conditional approval of IMH's redevelopment of its Property, including the change in use and onsite parking throughout the approval process, as evidenced by (a) its March 2018 comments; (b) the ARC's oral approval of the project at a September 2019 meeting; (c) the email from Bill Nitzel in October 2019 (in which he indicated that he, on behalf of the ARC, provided his comments at the September meeting, his only outstanding comments concerned alignment of roads between IMH's project and HRD's neighboring project, and that he was told to stand down by HRD); (d) the ARC's approval of Phase 1 of the project on November 8, 2019; and (e) the ARC's November 1, 2019 written comments regarding Phase 2 of the project citing only minor issues awaiting final approval after submittal of detailed construction drawings.

114. HRD reversed its consent and commitments by rejecting IMH's Project in its entirety in December 2019 after IMH incurred substantial sums of money in the design and development of the project.

115. HRD also violated the Covenants by usurping the Architectural Review Committee's approval authority and by purporting to reverse the Architectural Review Committee's continuing conditional approval of the change in use. Then, HRD rejected the change in use (even though it had offered its own consent to the change before, during and after March 2018).

116. HRD's actions directly contradict the terms of the Covenants, the Downtown Columbia Plan and Design Guidelines, and constitute a material breach of the Covenants.

117. Alternatively, the Parking Covenants have become obsolete and unenforceable as they relate to onsite parking for the new buildings planned by IMH (the shared parking regime remains necessary for existing buildings that are part of the regime and use the shared parking) by the sweeping and substantial changes in downtown Columbia's redevelopment according to the Plan, Design Guidelines and the MOU, which requires HRD to work in good faith with all property owners, including IMH, to revamp and redo those Covenants.

118. The Covenants' restriction on residential uses and requirements to park on common land are 50 years old, no longer serve a legitimate purpose in connection with new development in downtown Columbia, and conflict with the new development vision for the Lakefront Neighborhood.

119. HRD intends to develop commercial and residential mixed use buildings with below grade onsite parking (just as IMH proposed for its development) for its own purposes on the shared parking lot and other property it owns within the Lakefront Neighborhood.

120. The parking restrictions and residential change in use restrictions in the Special and General Covenants and the Parking Covenants are unreasonable, illogical, and serve no legitimate purpose for new building construction because of overwhelming changes with regard to new construction in downtown Columbia (including in the Lakefront District itself) and by reason of HRD's own planned development in the Lakefront District and its waiver.

121. In either respect, IMH is entitled to have its rights, status and legal relationships, as well as the question of the construction or validity of the Parking Covenants, among the other relevant documents, determined in this action pursuant to § 3-406 of the Courts and Judicial Proceedings Article (hereinafter, "the Act").

122. This action will serve to terminate the uncertainty or controversy giving rise to this proceeding pursuant to § 3-409 of the Act inasmuch as (i) this dispute represents an actual controversy between the parties; (ii) antagonistic claims exist between these parties which implicate imminent and inevitable litigation; and (iii) IMH asserts a legal relation, status, right, or privilege challenged or denied by HRD.

123. IMH, therefore, seeks declaratory judgment pursuant to § 3-409 of the Act in order to settle and afford relief from uncertainty and insecurity with respect to IMH's rights, status, and other legal relations with regard to the Covenants and other relevant documents identified herein, and HRD's prior approvals.

WHEREFORE, IMH respectfully requests that this Honorable Court issue a Declaration pursuant to § 3-401, *et seq.* of Maryland's Courts and Judicial Proceedings Article construing the rights, obligations and legal relations of the parties, stating the following:

- 1) The Covenants authorize the ARC to approve changes in use and onsite parking for the Property;
- 2) The ARC properly exercised its authority in March 2018, September 2019 and November 2019 when it conditionally approved IMH's plans for a change in use and onsite parking for the Property;
- 3) The Covenants do not authorize HRD to overrule the ARC's conditional approval of the changes in use and onsite parking;
- 4) The Covenants do not require IMH to obtain HRD's consent for a change in use that does not increase parking in the shared parking areas;
- 5) HRD breached the Covenants and the ARC's approval authority by rejecting the proposed change in use and onsite parking for the Property in December 2019;
- 6) HRD consented to onsite parking for the proposed new development uses and waived any right to object by (i) directing IMH to park on its own property for the new uses; and (ii) directing IMH to obtain ARC approval of the change in use, including onsite parking; and
- 7) HRD is estopped from denying HRD and the ARC's conditional approval of the change in use and onsite parking for the new use for Phase II of IMH's proposed redevelopment;
- 8) Under the Covenants, HRD's role with regard to approving a change in use that does not result in an increase of shared parking is confined to appointing ARC members and then enforcing ARC's decisions and offering interpretation of the disputed Covenants, absent Court involvement;
- 9) HRD breached the Covenants by halting the ARC's approval process and directing ARC members to stand down;

Alternatively, IMH respectfully requests that this Honorable Court issue a Declaration pursuant to § 3-401, *et seq.* of Maryland's Courts and Judicial Proceedings Article construing the subject Covenants limitations on changes in use and onsite parking as obsolete and unenforceable.

COUNT II
(Equitable Estoppel and Detrimental Reliance)

124. IMH incorporates Paragraphs 1 through 119 as though fully set forth herein.

125. HRD and the Architectural Review Committee made statements, commitments and representations to the effect that IMH could develop its Property for additional and new uses consistent with its conceptual plans, including expansion and renovation of the hotel, demolition of the lodges/villas, construction of new office and residential buildings, and the construction of underground parking facilities for those uses on its own Property.

126. HRD and the Architectural Review Committee's commitments and representations were clear and definite in their terms.

127. IMH justifiably relied on those representations and commitments in commencing redevelopment of the Property and incurred substantial sums of money in the redesign, permitting, redevelopment and construction of the same.

128. IMH's reliance was all to its detriment, particularly if HRD is now permitted to renege on its commitments and prevent completion of the approved redevelopment of the Property.

129. IMH suffered damages as a direct and proximate result of its reliance on HRD's representations, commitments and approvals in an amount to be proven at trial that exceeds \$15,000,000.

130. HRD should be estopped from renegeing on its commitments and preventing IMH from completing the redevelopment of its own Property consistent with those commitments.

WHEREFORE, IMH requests that this Court issue an order estopping HRD from interfering with redevelopment of the Property, including the change in use, and from denying its prior approval and commitments regarding construction of onsite parking on the Property, or alternatively, that HRD is responsible to reimburse IMH for all of the costs and expenses it incurred in reliance on HRD's commitments in an amount to be proven at trial that exceeds

\$75,000, plus interest and the costs of this action, together with such other relief as this Court deems just and appropriate.

COUNT III
(Breach of the Covenants)

131. IMH incorporates Paragraphs 1 through 126 as though fully set forth herein.

132. To the extent this Court deems that the existing Special and General Covenants and Parking Covenants remain enforceable, HRD materially breached the Covenants when it reneged its consent to the Property's redevelopment with onsite parking pursuant to those Covenants.

133. HRD is not entitled to supersede the Architectural Review Committee's approval of the change in use of the Property under the Covenants, and it materially breached those Covenants by purporting to prohibit IMH from proceeding with redevelopment of the Property consistent with the Architectural Review Committee's prior approval.

134. IMH suffered and continues to suffer substantial damages as a result of HRD's material breaches of the Covenants, including but not limited to the costs and expenses incurred in the redevelopment thus far, the loss of its right to complete that redevelopment pursuant to the approvals given, and the loss of substantial potential revenue associated with the redevelopment. The amount of IMH's damages will be proven at trial and exceed \$15,000,000.

135. Alternatively, IMH is entitled to specific performance from HRD permitting IMH to complete the redevelopment of its Property with onsite, underground parking.

WHEREFORE, IMH demands judgment against HRD on Count III in an amount in excess of \$75,000, plus interest and the costs of this action, together with such other relief as this Court deems just and appropriate, or alternatively a judgment of specific performance against

HRD requiring it to honor its agreement regarding the construction of onsite parking and preventing HRD from interfering with the approved redevelopment of the Property.

COUNT IV
(Declaratory Judgment Pursuant to
MD. CODE ANN., CTS & JUD. PROC. § 3-401, *et seq.*)

136. IMH incorporates Paragraphs 1-14; 21-31 and 120 as though fully set forth herein.

137. For background purposes, when HRD originally subdivided and sold the subject properties it did so by selling smaller parcels of land with insufficient space for the required surface parking that was contemplated at the time (because of the rural nature of the area, structured parking was not even contemplated at the time). HRD, as part of the sale and as part of the selling price, consolidated the various lot owner's parking into central parking areas and established the Parking Covenants to provide for the parking requirements of the Lot Owners. The various Lot Owners, in return for the money paid for each lot, were provided perpetual, free access to the shared parking areas and were provided an easement on the shared parking lot. This resulted in each Lot Owner paying for access to the shared parking as part of the total land acquisition cost.

138. As stated herein, the elements of the covenants that prohibit residential uses and onsite parking are obsolete due to radical changes in Downtown Columbia and the Lakefront District. On the other hand, the Parking Covenants remain enforceable for, among other things, the provisions that provide for the only available parking for the existing Lot Owners who continue to have rights to use the shared parking areas.

139. HRD and its Subsidiaries are in the process of developing the shared parking lot that is part of the Common Parking Areas subject to the Parking Covenants as amended. HRD,

and its Subsidiaries that own the parcels, intend to construct residential mixed-use buildings on the shared parking lot and on other property they own within the Lakefront Neighborhood.

140. IMH disputes HRD's allocation of necessary parking for the existing buildings, including IMH's hotel, in HRD's planned redevelopment of the shared parking lot. IMH contends HRD's plans violate IMH's rights. IMH, through its successors have enjoyed the use of the surface parking lot for close to 50 years and rejects the notion that the entire surface lot can be covered with buildings so as to force IMH and the Hotel's customers to park in other buildings with no correlation or relationship to the hotel itself.

141. The Parking Covenants were established to provide parking for the Lot Owners, not as an instrument to pave the way for HRD's future redevelopment of the entire shared parking area parcels for its own profit by eliminating rights of the Lot Owners under the Parking Covenants. HRD's redevelopment must preserve the rights of the Lot Owners under the Parking Covenants. Otherwise, the result of HRD's redevelopment will be to put the Lot Owners out of business and forever restrict the Lot Owner's ability to make beneficial use of their land.

142. Adequate and convenient parking is a quintessential component of any building. Accordingly, Article 6.02 of the Parking Covenants granted each Lot Owner the right in perpetuity to construct a "Multi Level Parking Facility" in the shared parking areas. Allowing the construction of HRD's planned buildings over the entirety of the surface parking lot would forever extinguish this right. It would also make it impossible for IMH to ever change the configuration of its buildings on its 6 acre parcel because there will be no available area to construct parking in the shared parking areas in a different location.

143. With respect to HRD's development of the shared parking lot and the effect of that development on IMH's rights under the Parking Covenants, IMH is entitled to have its

rights, status and legal relationships, as well as the question of the construction and interpretation of the Parking Covenants (among the other relevant documents) determined by the Court pursuant to the Declaratory Judgment Act (the “Act”).

144. This action will serve to terminate the uncertainty or controversy giving rise to this proceeding pursuant to § 3-409 of the Act inasmuch as (i) this dispute represents an actual controversy between the parties; (ii) antagonistic claims exist between these parties which implicate imminent and inevitable litigation; and (iii) IMH asserts a legal relation, status, right, or privilege challenged or denied by HRD and its Subsidiaries.

145. IMH, therefore, seeks declaratory judgment pursuant to § 3-409 of the Act in order to settle and afford relief from uncertainty and insecurity with respect to IMH’s rights, status, and other legal relations with regard to the Covenants and other relevant documents identified herein, and HRD’s planned redevelopment.

146. Pursuant to Article XI(4) of the Parking Covenants at Liber 552, Page 544, sixty days prior to HRD exercising any reserved right under the Parking Covenants to, among other things, utilize any of the Parking Areas for anything other than parking, HRD shall give written notice to Kincade and IMH of its intent and the means by which it proposes to comply with the provisions of the Parking Covenants. To date, despite numerous requests, HRD has failed to provide notice of the “means by which it proposes to comply with the provisions of the Parking Covenants” despite its plans to redevelop the shared parking lot.

147. On February 8, 2022, HRD held a pre-submission meeting for the Lakefront Neighborhood for its Site Development Plan (the “Lakefront SDP”) pursuant to which HRD and its Subsidiaries, proposed to develop the two properties they own and the entire shared parking

lot into three mixed use residential buildings, including 675 residential units, with onsite parking structures for the new residential and commercial uses planned in the re-development.

148. At that meeting, Kincade and IMH members had several questions related to their parking rights under the Parking Covenants. Greg Fitchitt, who served as HRD/Howard Hughes' regional president in Columbia and who was running the meeting, responded that it was not the time or place to address the questions, but that he would be happy to discuss those issues later.

149. To date, HRD has refused to discuss how HRD plans to meet its obligations to Kincade and IMH under the Parking Covenants despite HRD's proposed development plan that eliminates the shared parking lot areas.

150. Nearly a year later, on or about February 1, 2023, IMH learned that the Lakefront SDP as well as the Lakefront Final Development Plan (the "FDP") have been reviewed by Howard County and scheduled for a hearing before the Howard County Planning Board for final approval on or about April 20, 2023 (the "Final Approval Meeting").

151. The approval of the Lakefront SDP and Lakefront FDP by the Howard County Planning Board are the final steps that HRD needs to complete before obtaining a building permit to construct the proposed improvements as shown on the Lakefront SDP and FDP.

152. HRD therefore should have provided written notice to IMH as required by Article XI(4) of the Parking Covenants of "the means by which it proposes to comply with the provisions of the Parking Covenants" sixty days prior to the Final Approval Meeting because final approval of its plans constitutes "HRD exercising any reserved right under the Parking Covenants" to, among other things, "utilize any of the Parking Areas for anything other than parking."

153. HRD's failure to provide the notice constitutes a breach of the Parking Covenants.

154. Defendants redevelopment plans as set forth in the Lakefront FDP and SDP constitutes a breach of the Parking Covenants.

155. For instance, according to HRD, it owes 463 spaces to IMH for the hotel and 261 spaces to the Kincade Building in the Shared Parking Areas (a total of 724 non-exclusive spaces).² By HRD's count, the existing parking garage in the Shared Parking Areas (the "Parking Garage") includes only 480 spaces. In the SDP and FDP, HRD provides no information regarding any additional parking it will provide to Kincade and IMH. The SDP and FDP state only that its plans provide 199 spaces for "existing parking needs of others within the SDP" (SDP and FDP Sheet 001) (which may or may not be for Kincade and IMH). Assuming the 199 spaces are for Kincade and IMH and assuming exclusive use of the 480 spaces in the Parking Garage for the Kincade office building and the IMH hotel (a total of 679 spaces), there is unquestionably, under HRD's own analysis (which IMH does not agree to), insufficient parking spaces allotted for the Kincade and IMH existing buildings if HRD, and its Subsidiaries, moves forward with the final plans shown in the Lakefront SDP and FDP that are planned to be presented at the Final Approval Hearing.

156. In other plans prepared by HRD, that its counsel claims are outdated, there appears to be an intention to force IMH to park on **REDACTED DUE TO CONFIDENTIALITY ORDER**. To the extent these plans are implemented, those plans also violate the Parking Covenants.

157. In addition, HRD's SDP and FDP redevelopment plans constitute a breach of the Parking Covenants because it results in IMH losing rights under the Parking Covenants,

² On the other hand, for allocating the maintenance costs of the parking areas, HRD insists it is providing IMH over 700 spaces.

including, but not limited to: (1) IMH's right to construct new parking in the Shared Parking Areas pursuant to Paragraph 6.02 of the Parking Covenants to meet existing parking needs or new parking demands in the Lakefront Area; (2) IMH's right under the Parking Covenants to park in the shared parking lot area during a renovation or reconstruction of the current and existing Parking Garage, that is now nearly 35 years old (and has a useful life of 40-50 years before significant repairs will be needed); (3) IMH's right to construct parking in the shared parking areas for any future redevelopment of the hotel use;³ and (4) IMH's right under the Parking Covenants to construct new additional parking in the Shared Parking Areas for future new uses.⁴

158. To the extent that HRD or its Subsidiaries attempt to eliminate the shared parking lot to build the planned development shown in the SDP or FDP prior to the Court ruling on this declaratory judgment count, IMH will suffer immediate, substantial and irreparable harm to its business, operations and reputation.

159. If that situation arises, then: IMH is entitled to preliminary injunctive relief to prevent such immediate, ongoing and irreparable harm; a significant likelihood that IMH will be successful on the merits of its request for injunctive relief exists under the facts, the terms of the Covenants, and Maryland law; and injunctive relief serves the public interest to protect IMH's property rights and business interests and the hotel's ongoing viability and reputation as a vital

³ This would: (1) forever limit IMH's flexibility to utilize all of its 6 acre lot, that is over 1,000' long, as there will be no place to park for a reconfigured hotel and (2) forever limit IMH to the current configuration of its hotel building in contravention of the Covenants.

⁴ Of course, in this suit IMH would prefer to build its planned development with onsite parking as discussed herein. Parking in the shared parking areas for a new use would only be necessary if HRD is successful in proving the Parking Covenants restriction relating to parking on IMH land is still in effect and enforceable against IMH despite: (1) the radical changes in Downtown Columbia and in the Lakefront District itself and (2) HRD's actions described herein directing IMH to park on its own land for the new development.

part of the downtown Columbia community as reflected in the Downtown Columbia Plan, among various other public interests.

WHEREFORE, IMH requests that this Court declare the following: (1) HRD and its Subsidiaries' redevelopment plans shown in the SDP and FDP breach the Parking Covenants; (3) HRD and its Subsidiaries must cease and desist their development plans for the shared parking lot as shown in the SDP and FDP because the plans breach the Parking Covenants; (4) to the extent that HRD or its Subsidiaries attempt to eliminate the shared parking lot prior to the Court ruling on this declaratory judgment count, HRD and its Subsidiaries are enjoined from proceeding with the SDP and FDP plans until the Court provides its final ruling; and (5) HRD's failure to provide written notice to IMH as required by Article XI(4) of the Parking Covenants of "the means by which it proposes to comply with the provisions of the Parking Covenants" is a breach of the Parking Covenants and it must provide the required notice immediately.

JURY DEMAND

Plaintiff IMH hereby demands a trial by jury in this action for those matters triable to a jury.

Dated: March 2, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2023 a copy of the foregoing was served electronically via the Court's electronic filing system on all persons entitled to receive service, including:

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