

HOWARD COUNTY BOARD OF APPEALS

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

MOTION TO DISMISS

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 Rules 2.207(e) and 2.210(b)(4), hereby file this Motion to Dismiss the appeal filed on July 20, 2023 by Appellant/Petitioner, Kincade LLC (“Kincade”) and in support thereof state as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

HRD is the applicant for approval of an amendment to a Final Development Plan (FDP-DC-L-2A) (“Final Development Plan”) by the Howard County Planning Board (“Planning Board”) for a mixed-use development in Downtown Columbia, the Lakefront Neighborhood. On April 11, 2023 and April 20, 2023, the Planning Board held public hearings to consider HRD’s Final Development Plan application. On July 13, 2023, the Planning Board issued a Decision and Order approving HRD’s Final Development Plan (“Decision and Order”). The Planning Board’s approval was unanimous.

On July 20, 2023, Kincade filed an appeal of the Decision and Order to the Howard County Board of Appeals (“Board of Appeals”). With the Appeal Petition, Kincade submitted a letter dated July 20, 2023 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”). On August 15, 2023, HRD filed a Response/Opposition to the Notice Letter (“Response”). HRD did not learn of the existence of the Notice Letter until August 2, 2023 as it was provided only to the Board of Appeals.

II. ANALYSIS

A. The Howard County Charter authorizes the Board of Appeals to adopt and amend rules of practice governing its proceedings which shall have the force of law when approved by legislative act of the County Council. *Section 501, Howard County Charter*. Such rules are codified at Section 2.200 *et seq.* of the Howard County Code.

Rule 2.210 *et seq.* establishes the rules of conduct for administrative appeals on the Record. These Rules are applicable in the instant case which is an appeal of a Final Development Plan under the Downtown Revitalization provisions of the Zoning Regulations which require a public hearing before the Planning Board. *Section 125.0.E, Howard County Zoning Regulations*.

Rule 2.210(b) establishes requirements for the filing of the record transcript, a Memorandum of Appellant, and the Administrative Agency’s Reply Memorandum. The Rule is clear and unambiguous.

First, “within thirty days of filing an appeal on the record from an action of an administrative agency, the Appellant shall file one copy of the record transcript of the hearing being appealed with the clerk of the Board, and shall serve one copy of the record transcript with the administrative agency and five copies with the Board of Appeals.” *Rule 2.210(b)(1)*.

Next, “within fifteen days of filing the transcript, the Appellant shall file a memorandum setting forth concisely all points on which the appeal is based and an argument in support of each point with the clerk of the Board and serve one copy of the memorandum with the

administrative agency and five copies with the Board of Appeals.” *Rule 2.210(b)(2)*. The Rule also states the argument “shall” include: points of law; references to legal authority; page citations to particular portions of the record transcript; and exhibits by number. *Id.*

Finally, the administrative agency shall file a reply memorandum within fifteen days after the Appellant’s memorandum is filed. *Rule 2.210(b)(3)*.

As noted, Appellant filed the instant appeal on July 20, 2023. Pursuant to Rule 2.210(b)(1), Appellant was required to file the record transcript and provide a copies to the Planning Board and Board of Appeals not later than August 21, 2023. Thereafter, Rule 2.210(b)(2) required Appellant to file its Memorandum of Appellant within 15 days of that latest date or not later than September 5, 2021. Appellant failed to file the record transcript by August 21, 2023 in violation of Rule 2.210(b)(1) and failed to file its Memorandum of Appellant by September 5, 2023 in violation of Rule 2.210(b)(2). Although Rule 2.210(b)(2) requires the Memorandum of Appellant to be filed within 15 days of filing the transcript, Rules 2.210(b)(1) and (2) must be read together, and the clear intent is that the transcript will in fact have been filed in accordance with Rule 2.210(b)(1), thus requiring the Memorandum of Appellant to be filed not later than 45 days after the appeal is filed. Read otherwise, the Rule would permit Appellant to delay filing the record transcript, and thus also the filing of its Memorandum, potentially indefinitely and without consequence, while prejudicially delaying the timely review of the appeal.

B. Kincade’s filing of the Notice Letter did not automatically stay or otherwise toll the operation of Rule 2.210(b). First, assuming *arguendo*, Kincade is entitled to a stay of the hearing on this appeal due to the pending Court Case, Kincade’s failure to comply with the filing requirements in Rule 2.210(b) is at its own peril. Like a request for reconsideration, the Notice

Letter does not suspend time as far as other filing requirements go. Nor is Kincade entitled to what would amount to a *nunc pro tunc* extension of time for the filing of an untimely memorandum. The filing of the Notice Letter simply does not stay or waive the requirements of Rule 2.210(b). Absent express ruling from the Board, the filing of the Notice Letter (which we note consists of a two paragraph letter with a **single** conclusory sentence about the issues in this appeal, along with an attached 40-page legal complaint lacking any explanation whatsoever) does not modify or stay the Appellant's requirement to timely file the Memorandum of Appellant. Furthermore, the Notice Letter expressly states: "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." Thus, Appellant clearly understood the case was active.

We further note that nowhere in the Board's Rules of Procedure, whether in Rule 2.204(j) or otherwise, do the Rules provide that all activities and deadlines in an administrative appeal are suspended pending the disposition of a court case involving substantially the same issues as the appeal. To the contrary, all that the Board's Rules provide is that – as stated in Rule 2.204(j) – the Board is only precluded from holding a hearing. If all activities in an administrative appeal were to be suspended during the pendency of a court case, the Board's Rules could have and certainly would have said so. Thus, the fact that Rule 2.204(j) is expressly limited to precluding a hearing, and the Board's Rules are otherwise devoid of any provision suspending the proceeding and/or deadlines in the event of a court filing, makes the intent of the rules clear – only a hearing cannot occur, but otherwise the proceeding continues (unless and until the Board decides otherwise).

Second, the Notice Letter is in the nature of a Motion to Stay the Board's hearing and filing requirements. It is clearly a request that the Board address a preliminary matter before the hearing. *See* Rule 2.207(e). This most certainly is the case with respect to any stay of the

operation of Rule 2.210(b) which Rule 2.204(j) does not address even tangentially. As noted in HRD's Response, the Notice Letter was not properly filed and is not properly before the Board. Its alleged or implied automatic effect is therefore impossible.

Furthermore, to the extent that Kincade's argument is that by merely providing its "Notice" Kincade unilaterally suspended all deadlines and proceedings in this matter that claim also finds no support under Maryland law. By way of analogy, in a court case the mere filing of a motion to dismiss a complaint does not automatically stay the discovery process while that motion to dismiss is pending. *See, e.g., Pacific Mortgage & Investment Group, Ltd. v. Horn*, 100 Md.App. 311, 325, 641 A.2d 913, 920 (1994). Similarly, Rule 2-432(a) of the Maryland Civil Rules of Civil Procedure provides that a party's failure to provide certain discovery can give rise to immediate sanctions, and that "[a]ny such failure may not be excused on the ground that the discovery sought is objectionable unless a protective order **has been obtained** under Rule 2-403" (emphasis added). Thus, here again the mere filing of a motion (or in this case the "Notice") does nothing to suspend deadlines, a party's obligations, or the proceeding generally. To the contrary, the unilateral decree of a party means nothing, and those deadlines/obligations continue to run and be in force and effect unless/until altered by the adjudicative body (the Court in a court case, the Board here).

Lastly, the administration of justice requires dismissal of the appeal. Kincade filed this appeal yet completely failed to comply with timely mandatory filing requirements for the record transcript and the Memorandum of Appellant. The latter failure is and should be fatal. Kincade filed this appeal challenging a unanimous decision by the Planning Board rendered after two full nights of hearings and the arguments of multiple lawyers. And then failed to make the most basic and necessary filings for the Board to conduct its review. Any argument that Kincade

might make to the effect that its failure to meet the deadlines imposed in the Board's Rules was justified due to Kincade's unilateral and self-serving "Notice" must be rejected and the appeal should be dismissed.

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.

By:  _____

Todd D. Brown
Kyle Kirby
12505 Park Potomac Avenue, 6th Floor
Potomac, Maryland 20854
TEL: (301) 230-6579
FAX: (301) 230-2891
Email: tbrown@shulmanrogers.com
kkirby@shulmanrogers.com

Attorneys for HRD

CERTIFICATION

A copy of the foregoing Motion to Dismiss 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.



Todd D. Brown

HOWARD COUNTY BOARD OF APPEALS

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

Upon consideration of HRD’s Motion to Dismiss and any response thereto filed by Kincade,
it is this ____ day of _____, 2023, by the Howard County Board of Appeals,
HEREBY:

ORDERED, that Appeal Case No. BA-800D be and hereby is DISMISSED.

By: _____
Howard County Board of Appeals