

IN THE MATTER OF

\*

BEFORE THE

KINCADE LLC

\*

HOWARD COUNTY

Appellant

\*

BOARD OF APPEALS

\*

BA Case No. 800D

\*

\*\*\*\*\* \*\* \*\*\*\*\* \*\* \*\*\*\*\*

KINCADE’S RESPONSE TO HRD’S MOTION TO DISMISS

Kincade, LLC, by and through its undersigned counsel respectfully submits the response to HRD’s Motion to Dismiss for Untimely Filing of Transcript.

It is unfortunate that HRD has determined to fight the Notice of Pending Case as submitted by Appellant. Despite two pending court cases pertaining to the same issues raised in this appeal, HRD’s Motion to Dismiss seeks to provide no legal effect to the Notice provided by Appellant by urging dismissal for failure of strict compliance with all pre-set deadlines. Requiring portions of this appeal to commence in the absence of public hearings would be counter to the purpose of the Board of Appeals Rule of Procedure 2.204(j). The Board and the litigants’ time and resources should be used efficiently and not for the litigation of matters that should be reserved for the courts. The Appellant appreciates HRD’s position that it disputes that the instant case involves issues that are the same as the court actions but strongly disagrees . Kincade’s understanding is that the hearing that will be conducted on October 3, 2023, will address this question of sameness. HRD’s filing of dispositive motions has the practical effect of negating Kincade’s Notice of

Pending Case. For these reasons, the reasons provided in the Notice of Pending Case and the matters that will be presented at the hearing before the Board on October 3, 2023, the Board should give legal effect to the Notice of Pending Case and hold that any deadlines are tolled in this matter since the filing of the Notice of Pending Case.

In the event that the Board holds that Kincade's Notice of Pending Case did not toll all deadlines, Kincade proffers the following in support of its contention that substantial performance and lack of prejudice should prevent dismissal of this appeal. On July 20, 2023, Kincade LLC ("Kincade"), the Appellant in this matter filed the instant appeal with the Board of Appeals. Even prior to the filing of its appeal, Kincade submitted a request for transcription of the Planning Board hearings in this matter to Alison Mathieson on June 28, 2023. Ms. Mathieson's name was provided to our office by the Board of Appeals administrative staff. Ms. Mathieson has successfully prepared and delivered numerous Board of Appeals transcripts in the past. Despite our expressed request for a 30 day turnaround, Ms. Mathieson advised a time period of 60 days was needed in which to complete the transcript. Ms. Mathieson subsequently notified our office on August 27, 2023 that the transcripts would be further delayed until the week of September 8<sup>th</sup> because of a personal matter. A copy of the correspondence from this office to Ms. Mathieson are included herewith.

The transcripts were received by our office from Ms. Mathieson on or about September 11, 2023. The transcripts were filed immediately thereafter.

Board of Appeals Rule of Procedure 2.210(b) requires substantial compliance and no showing of prejudice. The cases and court rules cited by HRD by analogy are inapposite. The transmittal of an administrative record is not jurisdictional and is not in the nature of a statute of limitations. *E.g., Montgomery County v. Post*, 166 Md. App. 381, 388, 888 A.2d 1224, 1228 (2005). The rule governing transmittal is subject to substantial compliance. *Id.* A petitioner's substantial compliance with the rules will prevent dismissal of a petition, even in cases where the petitioner is partially responsible for the rule violation. *Id.* The burden is on a petitioner to ensure that its petition is properly presented for decision, but if the failure to achieve that is not caused by the petitioner, the petitioner should not suffer the consequences of dismissal. *Id.*

In this case, the inability to file the transcript within 30 days of the filing of the appeal was not the fault of the Appellant. An experienced transcriber recommended by the Board of Appeals was promptly engaged. Nonetheless, for reasons beyond any party's control, the transcriber and her schedule required the delay. Appellant promptly filed the transcript with the Board upon its receipt. Appellant filed its Memorandum within 15 days of the filing of the transcript. The circumstances in the delay of the transmittal of the transcript in this case were clearly beyond Appellant's control. The Appellant took appropriate and reasonable actions to ensure prompt filing of the transcript. Dismissals of cases based on lack of substantial compliance are for circumstances where the delay cannot be attributed to anyone or anything other than the actions or inactions of an appellant.

*E.g., Viveros v. Landcrafters, LLC*, 2015 WL 9257023 (Md. Ct. Spec. App. December 16, 2015); *Wormwood v. Batching Systems, Inc*, 124 Md. App. 695, 124 723 A.2d 568 (1999).

The law could not be more clear that the Board's dismissal of this appeal based on untimely transmittal of the transcript is not warranted under the law and in equity. For the above stated reasons, HRD's Motion to Dismiss should be denied.

Respectfully submitted,



Sanford Talkin  
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(410) 964-0300  
[samt@talkinlaw.com](mailto:samt@talkinlaw.com)

Attorneys for Appellant Kincade LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of September, 2023, a copy of the foregoing was mailed via first class, postage prepaid and sent by electronic mail to:

Todd D. Brown, Esq.  
Kyle Kirby, Esq.  
Sulman Rogers Gandal Pordy & Ecker, P.A.  
12505 Park Potomac Avenue, 6<sup>th</sup> Floor  
Potomac, MD 20854  
[tbrown@shulmanrogers.com](mailto:tbrown@shulmanrogers.com)  
[kkirby@shulmanrogers.com](mailto:kkirby@shulmanrogers.com)

and

Barry Sanders, Esq.  
Howard County Office of Law  
3450 Court House Drive  
Ellicott City, MD 21043  
[bsanders@howardcountymd.gov](mailto:bsanders@howardcountymd.gov)

  
Sanford Talkin  
Sanford Talkin

## Gina Pagani

---

**From:** Alison Mathieson <amathieson@gdldlaw.com>  
**Sent:** Friday, September 8, 2023 9:22 AM  
**To:** Gina Pagani  
**Subject:** Transcript from Planning Board Meetings 6/1/23 - SDP-22-042  
**Attachments:** Planning Board SDP-22-042 - June 1, 2023 - FINAL.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

Hi Gina,

I'm attaching the final transcript. I'm going to give you a call shortly to discuss the invoice and the best way to get the paper copies to you. Thanks.

Alison Mathieson

**From:** Alison Mathieson <amathieson@gdldlaw.com>  
**Sent:** Tuesday, September 5, 2023 7:48 PM  
**To:** Gina Pagani <gpagani@talkin-oh.com>  
**Subject:** PB-455 - Transcripts from Planning Board Meetings re Amended FDP-DC-L-2A

Hi Gina,

I'm attaching searchable PDF's for the Planning Board Hearings on April 11 and April 20, 2023. I'll have the transcript for the June 1, SDP hearing to you later in the week. I also have the two printed copies you requested. Can I deliver those to your office later in the week with the June 1 hearing? Thanks again for your patience.

Alison Mathieson  
410-404-0260

---

**From:** Gina Pagani <gpagani@talkin-oh.com>  
**Sent:** Tuesday, August 29, 2023 3:41 PM  
**To:** Alison Mathieson <amathieson@gdldlaw.com>  
**Subject:** RE: Transcription Extension Request

**\*\*EXTERNAL EMAIL\*\***

Hi Alison,

Sorry for the late reply – it should be fine if we wait to receive everything together. Thank you for asking.

Best,  
Gina

Gina Pagani  
Paralegal  
Talkin & Oh, LLP

5100 Dorsey Hall Drive  
Ellicott City, MD 21042-7870  
410-964-0300  
410-964-2008 fax  
[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)

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**From:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Sent:** Tuesday, August 29, 2023 10:38 AM  
**To:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Subject:** RE: Transcription Extension Request

Hi Gina,

One last question. I can send the first two nights of transcripts this week via searchable PDF and paper copies or do you prefer to have them all sent at the same time. Either way is fine with me. Thanks.

Alison

**From:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Sent:** Monday, August 28, 2023 12:18 PM  
**To:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Subject:** RE: Transcription Extension Request

**\*\*EXTERNAL EMAIL\*\***

Hi Alison,

I am so sorry to hear about your son's accident and I'm glad he's ok! September 8<sup>th</sup> is fine with us – thank you for the update.

Best,  
Gina

Gina Pagani  
Paralegal  
Talkin & Oh, LLP  
5100 Dorsey Hall Drive  
Ellicott City, MD 21042-7870  
410-964-0300  
410-964-2008 fax  
[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)

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**From:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Sent:** Sunday, August 27, 2023 1:54 PM  
**To:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Subject:** Re: Transcription Extension Request

Hi Gina,

I know you won't see this until Monday, but wanted to email you early. I will definitely have the transcripts to you for the hearings on April 11 and 20, however, I'm requesting a one-week extension to September 8th for the hearing on June 1st. My youngest son was involved in a serious car accident on Friday evening in Ellicott City. His car was a total write-off, and he was in hospital overnight. He is now home and will be fine, but as a result the focus has been on him this weekend. If you absolutely need the June 1 transcript by 8/31, let me know and I'll do my best to get it to you. Thanks for your understanding, please let me know.

Alison  
410-404-0260

---

**From:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Sent:** Wednesday, August 23, 2023 2:01 PM  
**To:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Subject:** RE: Transcription Request/ Inquiry

**\*\*EXTERNAL EMAIL\*\***

I'm sorry to hear that. Yes, Thursday 8/31 should be fine.

Thank you!

Gina Pagani  
Paralegal  
Talkin & Oh, LLP  
5100 Dorsey Hall Drive  
Ellicott City, MD 21042-7870  
410-964-0300  
410-964-2008 fax  
[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)

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**From:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Sent:** Wednesday, August 23, 2023 11:51 AM  
**To:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Subject:** RE: Transcription Request/ Inquiry

My plan is get them to you next Thursday, 8/31, had a few unforeseen emergencies this past month, but I should still be good. Hopefully that still works for you.

Alison

**From:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Sent:** Wednesday, August 23, 2023 11:28 AM  
**To:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Subject:** RE: Transcription Request/ Inquiry

**\*\*EXTERNAL EMAIL\*\***

Hi Alison,

I hope you've been well!

I wanted to check in to see if the transcripts are still expected to be completed by next week.

Thank you,  
Gina

Gina Pagani  
Paralegal  
Talkin & Oh, LLP  
5100 Dorsey Hall Drive  
Ellicott City, MD 21042-7870  
410-964-0300  
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**From:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Sent:** Friday, June 30, 2023 11:57 AM  
**To:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Subject:** RE: Transcription Request/ Inquiry

Thanks Gina! I'll get started on these. Have a nice weekend.

Alison

**From:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Sent:** Friday, June 30, 2023 11:41 AM  
**To:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Subject:** RE: Transcription Request/ Inquiry

**\*\*EXTERNAL EMAIL\*\***

Hi Alison,

I just received approval from our managing partner for this job. Please let me know if you need anything further from us before you begin.

I hope you have a nice weekend and 4<sup>th</sup> as well! I will also be in the office Monday but at least we have Tuesday off!

-Gina

Gina Pagani  
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**From:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Sent:** Friday, June 30, 2023 10:07 AM  
**To:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Subject:** RE: Transcription Request/ Inquiry

Hi Gina,

Yes, the electronic copies will be searchable and I can provide you with three bound copies for each hearing. I'll wait to hear back from you regarding approval before I start. Have a great long weekend and a happy 4<sup>th</sup> of July, hopefully you are not working Monday! (unfortunately I have to.....)

Alison

**From:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Sent:** Friday, June 30, 2023 10:04 AM  
**To:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Subject:** RE: Transcription Request/ Inquiry

**\*\*EXTERNAL EMAIL\*\***

Thank you Alison! Will you provide e-copies of the transcripts? I'm assuming your transcriber certification page will be included in the transcripts as well.

Would you also be able to prepare 3 bound copies of the transcripts for each hearing?

I sent your estimate to the managing partner for approval, but I may not hear back from him until next week because he is out of town.

Thanks again,  
Gina

Gina Pagani  
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Ellicott City, MD 21042-7870  
410-964-0300  
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**From:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Sent:** Thursday, June 29, 2023 1:18 PM  
**To:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Subject:** RE: Transcription Request/ Inquiry

Hi Gina,

I was able to get MP3 versions of the hearings so I'm all set to start once you confirm that you guys want the transcripts. I'm attaching an estimate based on the time. I won't move forward until I hear from you. I put an estimate delivery date as the end of August. Let me know. If you need to discuss further please feel free to give me a call.

Alison  
410-404-0260

**From:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Sent:** Wednesday, June 28, 2023 3:17 PM  
**To:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Subject:** RE: Transcription Request/ Inquiry

**\*\*EXTERNAL EMAIL\*\***  
Perfect, thank you!

-Gina

**From:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Sent:** Wednesday, June 28, 2023 3:14 PM  
**To:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Subject:** RE: Transcription Request/ Inquiry

Sounds good. I can definitely do it in that time frame. I'll take a look at it tonight since it looks like they only have video and not a downloadable MP3 version for playback so I'll need to figure that out when I have a minute. I'll get you a quote based on the time and we can go from there.

Alison Mathieson  
410-404-0260

**From:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Sent:** Wednesday, June 28, 2023 2:59 PM  
**To:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Subject:** RE: Transcription Request/ Inquiry

**\*\*EXTERNAL EMAIL\*\***  
Sorry for the double email but we would be fine with completion within 60 days – this is not extremely urgent.

**From:** Gina Pagani  
**Sent:** Wednesday, June 28, 2023 2:52 PM  
**To:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Subject:** RE: Transcription Request/ Inquiry

Hi Alison,

Thank you for your quick response! These hearings were heard by the Planning Board. We do not have a set deadline, but would you be able to complete this in 30 days?

(Also I wanted to mention that we will need 3 printed, bound copies of each hearing transcript as well as an e-copy.)

The links to the hearings are below:

1. <https://howardcounty.granicus.com/player/clip/5281?&redirect=true&h=b76ae41a53047ea6d7f8e6067f73dc94>  
(case no.: PB 455 FDP-DC-L-2A, hearing date 4/11/23)  
length: 4 hours, 6 mins, 41 seconds
2. <https://howardcounty.granicus.com/player/clip/5302?&redirect=true&h=3a8bb36dc33e95ddb78cbb5f42607d0>  
b (case no.: PB 455 FDP-DC-L-2A, hearing date 4/20/23)  
length: 3 hours, 55 mins, 4 seconds  
\*this is a continuation of the 4/11 hearing
3. <https://howardcounty.granicus.com/player/clip/5345?&redirect=true&h=1fc061cbb7f5ff369a779517d119a593>  
(case no.: SDP-22-042, hearing date 6/1/23) **only transcribe from 19:25 to the end of the video**  
length: 3 hours, 40 mins, 19 seconds

Once I receive a quote from you, I will send it to the managing partner for approval.

Thank you!  
Gina

Gina Pagani  
Paralegal  
Talkin & Oh, LLP  
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**From:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Sent:** Wednesday, June 28, 2023 2:45 PM  
**To:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Subject:** RE: Transcription Request/ Inquiry

Hi Gina,

Thanks for your email. I have done a great deal of transcription for various Howard County Boards. Can you tell me which Board it was, the case name/number and the number of hearings? Also do you have a deadline you are working with? I have to make sure I can either download the hearings from the website, or get copies from the particular Board. Once I have the details, I can give you a quote and we can go from there. I look forward to hearing from you.

Alison Mathieson  
410-404-0260

**From:** Gina Pagani <[gpagani@talkin-oh.com](mailto:gpagani@talkin-oh.com)>  
**Sent:** Wednesday, June 28, 2023 2:40 PM  
**To:** Alison Mathieson <[amathieson@gdldlaw.com](mailto:amathieson@gdldlaw.com)>  
**Subject:** Transcription Request/ Inquiry

**\*\*EXTERNAL EMAIL\*\***

Hi Alison,

Kel Berg gave me your information and said that you've transcribed for Howard County before. Our office would like to know if you can transcribe a few hearings for us totaling 11 hours and 42 minutes. We have worked with Planet Depos in the past but would like to work with you if possible since you're more familiar with the HoCo speaker names, etc. Could you please let me know if this is something you can handle? I can send you further details if you'd like.

Thank you,  
Gina

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Talkin & Oh, LLP  
5100 Dorsey Hall Drive  
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410-964-2008 fax  
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