

IN THE MATTER OF	:	BEFORE THE
	:	
AGS BORROWER LAKEVIEW, LLC	:	HOWARD COUNTY
	:	
Appellant	:	BOARD OF APPEALS
	:	
v.	:	BA Case No. 781-D
	:	
THE HOWARD COUNTY	:	
PLANNING BOARD	:	
	:	
Appellee	:	
	:	

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DECISION AND ORDER

The Howard County Board of Appeals (the “Board”) convened on October 14, 2021, December 16, 2021, February 17, 2022, March 10, 2022, and May 12, 2022 to hear and deliberate the administrative appeal of AGS Borrower Lakeview, LLC (“Appellant”). The Appellant is appealing the Howard County Planning Board’s (the “Planning Board”) letter of decision dated January 25, 2021 denying Site Development Plan, SDP 20-042 Lakeview Retail, for a 1-story, 8,373 square foot commercial/retail building, located at 9841 and 9861 Broken Land Parkway in the Village of Owen Brown, Tax Map 42, Grid 3, Parcel 392, Lots A-3 and A-4.

Board members William Santos (Chair), Steven Hunt, Gene Ryan, and Amy Brooks were present at the first hearing on October 14, 2021. Board members William Santos (Chair), Steven Hunt, Gene Ryan and Jean Xu were present at the December 16, 2021 hearing, February 17, 2022 hearing, and March 10, 2022 work session.¹ Board

¹ Board member Amy Brooks resigned from the Board prior to December 16, 2021. Board member Jean Xu was appointed to the Board prior to December 16, 2021. Board member Jean Xu certified on the record that she reviewed the recordings of all the previous hearings on this matter.

members William Santos (Chair), Steven Hunt, Gene Ryan, Jean Xu and Felita Phillips were present at the May 12, 2022 work session.² Chairperson Santos presided over the hearings. Barry Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The Appellant certified that notice of the hearings complied with the requirements of the Howard County Code. The Board members indicated that they had viewed the subject property as required by the Howard County Zoning Regulations.

This case is a *de novo* appeal and is being conducted in accordance with Section 2.210(a) of the Board's Rules of Procedure, which places the burden of proof upon the Appellant to show that the action taken by the Planning Board was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the Howard County Subdivision and Land Development Regulations, the General Plan for Howard County, the General Plan of Highways, the Technical Staff Report of the Howard County Department of Planning and Zoning ("DPZ"), SDP 20-042, and the Petition of Appeal and all materials submitted with it were incorporated into the record by reference.

The Appellant was represented by counsel, Sang W. Oh, Esquire. The Planning Board did not participate in the instant appeal. Jessica Bellah appeared in opposition on behalf of the Columbia Association. Chris Alleva, Brian England, and Joel Hurewitz appeared individually in opposition.

The following persons testified on behalf of the Appellant: Allan Grabush, Zacharia Fisch, Joseph Rutter, and Amy Gowan.

² Board member Felita Phillips was appointed to the Board prior to May 12, 2022. Board member Felita Phillips certified on the record that she had reviewed the recordings of all the previous hearings on this matter.

The following persons testified in opposition: Jessica Bellah, on behalf of the Columbia Association, Chris Alleva, Brian England, and Joel Hurewitz.

The Appellant offered, and the Board accepted, the following documents into evidence:

1. Owen Brown Community Assoc. Letter.
2. Zacharia Fisch's CV.
3. FDP 125-A.
4. Joseph Rutter CV.
5. Design Manual Road Classifications.
6. Lakeview Landscape Plan.

Opposition parties offered, and the Board accepted, the following documents into evidence:

1. Howard County Zoning Map 42 (Offered by Chris Alleva).
2. Newtown FDP Criteria (Offered by Jessica Bellah on behalf of the Columbia Association).
3. Howard County Design Manual (Offered by Chris Alleva).

Background

Appellant filed a request with the Planning Board for the approval of Site Development Plan, SDP-20-042 Lakeview Retail (the "SDP"), to be located at 9841 and 9861 Broken Land Parkway in the Lakeview Office Center (the "Subject Property") in the New Town ("NT") Zoning District. The project consists of a 1-story, 8,373 square foot commercial/retail building setback approximately 80 feet from the right-of-way line of Broken Land Parkway. The applicable Final Development Plan for the Subject Property is FDP-125-A (the "FDP").

Pursuant to Section 125.0.G.1 of the Zoning Regulations, the Planning Board considered the SDP at its regularly scheduled public meeting on January 21, 2021. At the conclusion of the meeting, the Planning Board voted to deny the SDP. On January 25,

2021, the Planning Board issued its decision letter denying the SDP for the reasons that were discussed and recorded during the Planning Board's work session. On February 18, 2021, the Planning Board suspended their decision to receive legal advice from the Howard County Office of Law regarding the Planning Board's authority in reviewing site development plan approvals under Section 125.0.G.1. On March 4, 2021, the Planning Board met in closed session with its counsel. On March 18, 2021, the Planning Board met in open work session and voted to reinstate their order. Appellant timely appealed.

Discussion

Pursuant to §1.106.G of the Planning Board Rules of Procedure, appeals to the Board of Appeals of decisions made pursuant to the Planning Board's administrative decision-making authority following a public meeting shall be heard *de novo* in accordance with the Board of Appeal's Rules of Procedures. Section 2.210(a) of the Board's Rules of Procedure provides that administrative appeals such as the instant appeal are *de novo* and the burden of proof is on the appellant to show that the action taken by the Administrative Agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law.

In the instant action, Appellant asserts that the SDP meets all the requirements of law and that the Planning Board's decision was clearly erroneous, arbitrary and capricious, and contrary to law because it was based on an illegal application of the limited decision-making authority granted to the Planning Board under the Howard County Zoning Regulations. Appellant contends that the Planning Board's decision-making authority was limited to the enumerated criteria contained in the FDP and that the Planning Board illegally went beyond that enumerated criteria by basing its denial on

inconsistency with the Howard County General Plan, incompatibility with the aesthetics of Broken Land Parkway, and incompatibility with the surrounding community.

After reviewing and considering the Petition, and all the materials submitted with it, and all of the evidence and testimony presented at the hearings, and for the reasons detailed below, the Board finds that the SDP meets all the requirements of law and that Appellant met their burden of proof demonstrating that the Planning Board's decision was clearly erroneous, arbitrary and capricious, and contrary to law. The Planning Board's administrative decision-making authority under Section 125.0.G.1 of the Regulations is limited to the enumerated criteria contained in the FDP and the Planning Board went beyond the FDP criteria in their decision to deny the SDP.

Findings of Fact

Based upon all the evidence and testimony presented at the hearings, the Board makes the following Findings of Fact:

1. Site Development Plan, SDP-20-042 Lakeview Retail (the "SDP"), is for a 1-story, 8,373 square foot commercial building to be located at 9841 and 9861 Broken Land Parkway at the Lakeview Office Center in Columbia, Village of Owen Brown; identified on Tax Map 42, Grid 3, Parcel 392, Lots A-3 and A-4, in the New Town ("NT") Zoning District of Howard County, Maryland.

2. In addition to the proposed building, the project includes a drive-thru lane for a fast-food type restaurant, an outdoor concrete patio, landscaping and landscaped islands, an asphalt pathway, internal sidewalks, parking, curbing, stormwater management, and outdoor lighting. The project also includes a proposed 10-foot-wide

asphalt pathway along the frontage of Lots A-3 and A-4 that will connect to the existing pathway on the adjacent Columbia Association open space lot and provide pedestrian access to the adjacent parcels.

3. The stormwater management for this project is provided in accordance with Section 5.5.2.1.c. of the Maryland SWM Manual. Two Focal Point High-Performance Modular Biofiltration Systems and the disconnection of non-rooftop runoff credit (N-2) shall be utilized to manage stormwater.

4. The SDP is subject to Final Development Plan, FDP-125-A (the "FDP").

5. Section 7 of the FDP permits all uses in commercial districts or commercial land use zones including, but not limited to, all uses permitted in the B-1 (Business: Local), B-2 (Business: General) and S-C (Shopping Center) districts. The proposed commercial building's use for retail and a fast-food type restaurant with a drive through lane is a permitted use under Section 7 of the FDP.

6. Section 6C of the FDP requires structures to be setback 50 feet from the right-of-way line of an adjacent freeway or primary road. Section 6C-1 requires a 30 foot setback from the right-of-way of any public street, road or highway and explicitly states that, except as restricted by this section, buildings and other structures may be located at any location within commercial land use areas. Sec. 10 of the FDP specifies that, other than the setbacks required in Section 6, no other setback restrictions are imposed upon land covered by the FDP. The SDP exceeds the required setback as the proposed building is setback approximately 80 feet from Broken Land Parkway.

7. Section 9 of the FDP requires 5 parking spaces for each 1,000 square feet of commercial retail use, 14 parking spaces for each 1,000 square feet of restaurant use, and

3 spaces for each 1,000 square feet of outdoor dining space, requiring a total of 556 parking spaces for the existing and proposed uses in the SDP. The SDP meets the parking requirement. The site currently has 764 parking spaces. The SDP locates the proposed 8,373 commercial building in the parking lot of the commercial office complex reducing the number of available parking spaces to 666 which exceeds the parking requirement.

8. The SDP's Landscape Plan (Appellant's Exhibit 6) provides landscaping that exceeds the requirements of the Howard County Landscape Manual. The Howard County Landscape Manual requires 16 perimeter trees. 39 perimeter trees are provided.

9. Alan Grabush, managing partner of Appellant, testified that the SDP adds a new, 1-story, 8,373 square foot retail building on the Subject Property. Mr. Grabush stated that the Subject Property currently consists of four office buildings and that tenants of the current office buildings wanted more amenities on-site, primarily food. Mr. Grabush testified that the Subject Property currently has roughly 764 parking spaces and only roughly 436 are currently required; and that the proposed building will be located in the excess parking area.

10. Mr. Grabush also testified that Appellant met with the Owen Brown and Kings Contrivance Village Boards regarding the proposed project and neither had opposition. A letter from the Owen Brown Village Board was offered and admitted into evidence as Appellant's Exhibit 1. Mr. Grabush further testified that Appellant took great care and time to design the project to meet all the requirements of law and that, in his opinion, the Planning Board's denial was not based on any applicable criteria.

11. Zacharia Fisch, licensed civil engineer, testified that he has over 35 years of experience working as a civil engineer designing sites in Howard County. Mr. Fisch's curriculum vitae was offered and submitted into evidence as Appellant's Exhibit 2. Mr. Fisch stated that he designed the SDP on behalf of the Appellant. Mr. Fisch testified that the SDP meets all applicable requirements of law and that DPZ's Technical Staff Report indicates that the SDP meets all applicable requirements of law.

12. Mr. Fisch also testified that the Subject Property is subject to FDP-125-A. FDP-125-A was offered and submitted into evidence as Appellant's Exhibit 3. Mr. Fisch stated that the FDP was originally approved in 1972 and the amendment was approved in 1980. Mr. Fisch explained that the FDP sets the bulk regulations for the Subject Property and is the applicable approval criteria for the SDP.

13. Mr. Fisch testified that under the FDP, the required setback for structures from Broken Land Parkway is 50 feet and that the FDP provided the Planning Board authority to approve a lesser setback, but not a greater setback. Mr. Fisch testified that the proposed building is roughly 80 feet from Broken Land Parkway, exceeding the required 50 foot setback by almost 30 feet. Mr. Fisch testified that in his many years practicing as a civil engineer in Howard County that he cannot recall a case in which the Planning Board based its decision on criteria not contained in the FDP and that he believes the Planning Board erred as a matter of law in this case.

14. Joseph Rutter, 3425 Jennings Chapel Road, testified that he previously served as the Director of DPZ and as Executive Secretary to the Planning Board for 12 years. Mr. Rutter's curriculum vitae was offered and submitted into evidence as Exhibit 4. Mr. Rutter stated that as Executive Secretary to the Planning Board he assisted the

Planning Board with approvals and denials of site development plans in the New Town Zoning District.

15. Mr. Rutter testified that, in his opinion, the Planning Board erred as a matter of law in denying the SDP and that its decision was arbitrary and capricious. Mr. Rutter explained that in the New Town Zoning District, there is a sequential development process in which the final development plan establishes the Zoning Regulations for the area it covers and then the subsequent site development plan is required to comply with the criteria contained in the final development plan. Mr. Rutter testified that Section 125.0.D.3 of the Zoning Regulations expressly states that the decisions made in the final development plan are not subject to review or further consideration as part of the subsequent site development plan approval process. Mr. Rutter explained that Section 125.0.D.3 means that the Planning Board's authority is limited to review of a site development plan for compliance with the enumerated criteria contained in the applicable final development plan. Mr. Rutter testified that he reviewed the SDP and the FDP and that, in his professional opinion, the SDP meets all the applicable FDP criteria.

16. Mr. Rutter further testified that the only applicable criteria for the Planning Board to consider was the text criteria contained in the FDP, and that the FDP did not provide the Planning Board authority to review the SDP for compliance with the Howard County General Plan or compatibility with the surrounding community. Mr. Rutter stated that the FDP set the required setback and the Planning Board did not have the authority to require Appellant to provide a greater setback. Mr. Rutter further testified that the FDP did not grant the Planning Board authority to determine if the

Appellant provided adequate landscaping because the proposed structure is setback more than 50 feet from Broken Land Parkway.

17. On cross examination, Mr. Rutter was questioned about whether Section 125.0.D.6 of the Zoning Regulations required that a final development plan be amended before new structures could be constructed as part of a subsequent site development plan. Mr. Rutter testified that Section 125.0.D.6 does not require a petitioner to amend a final development plan in order to seek approval of and construct new structures as a part of a subsequent site development plan. Mr. Rutter explained that amendments to final development plans are only required when you are proposing something different than what is contained in the final development plan, and that the final development plans, including the FDP, do not include structures so there would be nothing to amend. Mr. Rutter further testified that, to his knowledge, neither DPZ nor the Planning Board have ever required that a petitioner amend a final development plan in order to construct a new structure that is a permitted use as part of a subsequent site development plan.

18. Amy Gowan, Director of DPZ, testified that DPZ reviewed the SDP and prepared and submitted to the Planning Board the Technical Staff Report which indicated the SDP complied with the Howard County Code, Section 125.0 of the Zoning Regulations, and the applicable criteria contained in the FDP. Mrs. Gowan further testified that she agreed with Mr. Rutter that the approval criteria for the SDP are contained in the FDP and that the Planning Board does not have the authority to require a greater setback than what is required in the FDP.

19. Chris Alleva, 10848 Harmel Drive, testified that Section 125.0.G.1 of the Zoning Regulations does not provide any approval criteria for the Planning Board to use

when reviewing a site development plan. Mr. Alleva stated that Appellant cannot show that the Planning Board erred because there were no regulations or criteria it was required to follow. Mr. Alleva further testified that Section 125.0.D.3 of the Zoning Regulations does not apply to successor site development plans and that the FDP did not establish the approval criteria for the SDP. Mr. Alleva also testified that Mr. Rutter was incorrect and that Section 125.0.D.6 of the Zoning Regulations required the FDP to be amended before any new structures could be constructed as part the SDP.

20. Mr. Alleva further testified that there are no uses permitted by right in the New Town Zoning District. Mr. Alleva offered into evidence Howard County Zoning Map 42, which was admitted as Opposition Exhibit 1, showing the different land use areas for Columbia.

21. Joel Hurewitz, 5681 C Harpers Farm Road, testified that PlanHoward 2030 states that guidelines are needed for redevelopment involving final development plans in Columbia because currently there are none. Mr. Hurewitz further testified that the Planning Board's decision was not arbitrary and capricious because the FDP provided the Planning Board discretion in reviewing the SDP. Mr. Hurewitz also testified that he did not believe that Appellant was proposing the commercial building to provide amenities to the on-site office employees. He stated that if that were the case, the proposed building would be located closer to the existing office buildings and not adjacent to Broken Land Parkway.

22. Brian England, 11915 Golden Needle Way, testified that the proposed building is out of character with Broken Land Parkway and that it should be moved closer to the existing office building. Mr. England further testified that Policy 10.6 of

PlanHoward 2030 prohibits the extension of commercial strip centers, and the SDP violates that policy. Mr. England also testified that there are specific design guidelines for the Subject Property and regulations for parking lot infill development that were not followed.

23. Jessica Bellah, 6310 Hillside Court, testified on behalf of the Columbia Association that the Section 6C-1 of the FDP provided the Planning Board the authority to approve an adequate landscape plan. Mrs. Bellah offered into evidence other final development plans, which were admitted as Opposition Exhibit 2. Mrs. Bellah further testified that the landscaping provided in the SDP was inadequate to appropriately screen and buffer the proposed building from the residential properties across Broken Land Parkway. Mrs. Bellah stated that the proposed building's design and location near Broken Land Parkway made the provided landscaping inadequate and stated that the proposed building should be located farther back from Broken Land Parkway. Mrs. Bellah further asked that if approved, the approval be conditioned on the requirement that more mature trees be retained in the buffer area and more landscaping be provided for screening.

24. Mr. Fisch testified in rebuttal that Section 6C of the FDP required a 50 foot structure setback from Broken Land Parkway and that Section 6C-1 required a lesser setback of 30 feet from a public road right-of-way. Mr. Fisch stated that the proposed building is setback 80 feet from Broken Land Parkway, exceeding the required setback. Mr. Fisch testified that Broken Land Parkway is a minor arterial road. Mr. Fisch stated that the FDP gave the Planning Board the authority to reduce the setback but not increase it. Mr. Fisch further testified that the Planning Board's approval authority of an adequate landscape plan is limited under Section 6C-1 to instances where the employment center

land use is in proximity to residential land uses. Mr. Fisch stated that the closest residential land use to the proposed building is the townhomes located approximately 278 feet away on the other side of Broken Land Parkway, which is a four-lane minor arterial road. Mr. Fisch testified that in his professional opinion he did not consider 278 feet to be proximate.

25. Mr. Fisch also testified that a landscape plan was provided with the SDP that exceeded the requirements of the Howard County Landscape Manual. Mr. Fisch further testified that the Appellant revised the landscape plan to include even more landscaping than was originally provided. The landscape plan was submitted into evidence as Appellant's Exhibit 6.

Conclusions of Law.

Based upon the foregoing Findings of Fact, the Board concludes as follows:

The Appellant met its burden to prove that the Planning Board's decision was clearly erroneous, arbitrary and capricious, and contrary to law. The Board concludes, based on the evidence provided, including the testimony and documentary exhibits, that the applicable criteria for review in this case were the enumerated criteria contained in the FDP. The Board further concludes that the Planning Board's denial was not based on the applicable criteria. The Planning Board did not have the discretion to deny the SDP for inconsistency with the Howard County General Plan, or incompatibly with Broken Land Parkway or the surrounding community.

The Board further concludes that the SDP meets all applicable requirements of law. The proposed use is a permitted use under the FDP and the FDP allowed for the location of any structure outside of the 50 foot setback area from Broken Land Parkway.


The SDP provided a greater structure setback than was required by the FDP, more parking spaces than was required by the FDP, and landscaping in excess of what was required under the Howard County Landscape Manual. Accordingly, the Planning Board's decision was clearly erroneous, arbitrary and capricious, and contrary to law.

ORDER

Based upon the foregoing, it is this 26 day of May, 2022, by the Howard County Board of Appeals, **ORDERED:**

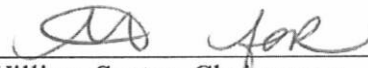
That the Petition of Appeal of AGS Borrower Lakeview, LLC, in BA Case No. 781-D is hereby **GRANTED**; that the Howard County Planning Board's denial of SDP-20-042 is hereby **REVERSED**; and that SDP-20-042 is hereby **REMANDED** to the Planning Board with the specific instruction that the Planning Board **APPROVE** SDP-20-042.

ATTEST:




Ashley Aguilar, Secretary

HOWARD COUNTY BOARD OF APPEALS



William Santos, Chairperson




Steven Hunt

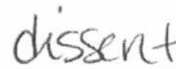
PREPARED BY:

HOWARD COUNTY OFFICE OF LAW


Gary W. Kuc
County Solicitor



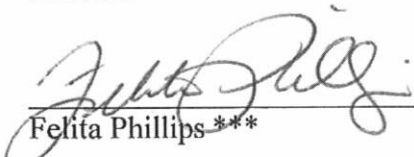
Gene Ryan *



Jean Xu **

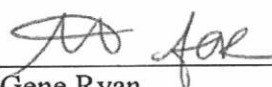


Barry M. Sanders
Senior Assistant County Solicitor



Felita Phillips ***

* I hereby certify that I reviewed all of the evidence submitted and listened to a recording of the portions of the October 14, 2021 hearing for which I was not present.



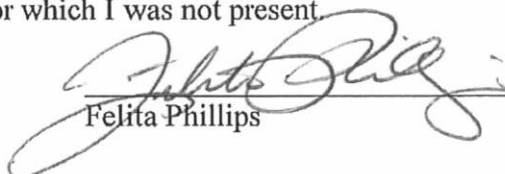
Gene Ryan

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Jean Xu

*** I hereby certify that I reviewed all of the evidence submitted and listened to a recording of the October 14, 2021, December 16, 2021, February 17, 2022, and March 10, 2022 hearings and work session for which I was not present.



Felita Phillips