IN THE CIRCUIT COURT FOR HOWARD COUNTY

PETITION OF HRVC LIMITED PARTNERSHIP C/O KIMCO REALTY CORP.	*	Case No. C-13-CV-22-000696
FOR JUDICIAL REVIEW OF THE DECISION OF THE HOWARD COUNTY ZONING BOARD	*	and
	*	Case No. C-13-CV-22-000849
IN THE CASE OF HRVC LIMITED PARTNERSHIP, C/O KIMCO REALTY CORP. ZONING BOARD CASE NO. 1119M	*	
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RESPONSE OF HICKORY VILLAGE COMMUNITY ASSOCIATION, INC. TO MOTION TO SUPPLEMENT THE RECORD

The Hickory Village Community Association, Inc. ("Respondent"), by its attorney, G. Macy Nelson, files this Response to Petitioner Kimco Realty Corporation's ("Petitioner's") Motion to Supplement the Record and states as follows:

INTRODUCTION

This petition concerns an ongoing Zoning Board case that has been ongoing since the first hearing on July 14, 2019. The Zoning Board orally rendered its decision on December 1, 2021, finding against the Petitioner on 3-2 grounds and denying its petition for approval of an Amended Preliminary Development Plan in Columbia, Maryland, regarding the Hickory Ridge Village Center ("Petition"). Nearly three months after this decision was rendered, Petitioner requested a large number of Maryland Public Information Act ("MPIA") documents, purportedly to use in a motion for reconsideration. Petitioner asserts that the production of these documents was illegally delayed until after the written

decision by the Zoning Board on July 18, 2022 ("Decision"), and that the delay prevented it from submitting the documents as part of the case record.

Petitioner also alleges that these documents evince a procedural due process violation[1] according to alleged impartiality on the part of one of the Zoning Board members, Deb Jung, via inference from "ex parte communications" between her and various citizens during her tenure on the Zoning Board. In accordance with this purported "delay" in MPIA deliveries—notwithstanding the fact that the MPIA requests in question seeking, in Petitioner's own words, "all communications between adverse parties to Kimco's Petition and members of the Zoning Board from January 2019 to present," resulted in an MPIA production of several *thousand* documents—Petitioner filed a Motion for Reconsideration requesting that the Zoning Board reopen the case on July 25, 2022. The Zoning Board granted this motion, reopened the record, and extended the submission time by two months, with a scheduled public hearing for September 28, 2022. Petitioner filed a Petition for Judicial Review on August 16, 2022, and received a copy of the Zoning Board's written decision a day later ("Reconsideration"). Before this cutoff date Petitioner received 627 records, and Petitioner received an additional 4,031 on the same day as the Reconsideration.

At this point, having construed the suspension of the Decision and accompanying Reconsideration as "moot," Petitioner ignored the Reconsideration and the scheduled

[1] Importantly, the substantive argument presented by the Petitioner is not that any alleged delay of MPIA documents caused a procedural due process violation, but instead that the content of these documents amount to a prior violation.

public hearing, and did not file any of its received documents as part of the record, including those received before the filing of the petition for judicial review. When the Petitioner did not appear at the public hearing, the Zoning Board reinstated its decision and submitted a new order on October 27, 2022. Subsequently, Petitioner filed a motion before this Court to supplement the administrative record and include some portion of the received PIA documents.

ARGUMENT

I. Petitioner's circumstance is caused by its own delay.

1. Petitioner didn't request MPIA documents until after the conclusion of the case, and most of the purportedly prejudicial communications occurred *after* the decision was concluded.

First and foremost, the Court should take notice of the timeline involved in this case. The petition process started in mid-2019, with the first hearing on July 14, 2019. At no point between then and the Zoning Board's oral decision on December 1, 2021 did Petitioner ever file any MPIA request to explore potential "bias" against it in Zoning Board communications (to the extent that Zoning Board communications even constitute bias, *see infra* Section II). In fact, Petitioner did not file an MPIA request until February 16, 2022, two and a half months *after* the hearings were concluded and the Zoning Board's decision made. Even assuming good faith in this initial delay, Petitioner did not react with any sort of due diligence in seeking a postponement of the Zoning Board's Decision while it awaited the MPIA production. It provides no evidence of any subsequent communications asking for an update to its MPIA request until after the Board had issued its written decision several months later. Notwithstanding any legal argument Petitioner wishes to make in C-

13-CV-22-000649 about unreasonable delay, the record before this Court at this time shows that Petitioner was self-evidently not in any rush to receive these documents, given that it took several years to even contemplate asking for them and several additional months to request any follow-through on a facially overbroad MPIA request for *all* Zoning Board member communications extending four years into the past.

Even after reviewing these documents, and setting aside for the moment any discussion of delay, Petitioner identified just *three* communications, in total, during the time period where the case was actually active, and misrepresented the content of these communications. Ms. Jung's communication on May 10, 2020, contained no substantive response, and her "violation of the law and Zoning Board procedure," see Pet'r's Mot. at 5, was merely a statement confirming that "reading your email and letting you know I have received it is within the bounds." *See* Pet'r's Ex. A at 1. The other two emails before the vote were similar "thank you" emails. And the Court should note, as Ms. Jung noted herself in the first, that these emails were all in reference to an administrative hearing regarding the emergent concern of COVID lockdowns as they related to virtual evidentiary hearings—a matter that obviously would not, and could not, have been previously contemplated in the Zoning Board's Rules of Procedure.

Her very first response to any email involving the merits of the case was a response to the December 1, 2021 email from Larry Surowitz, which she sent two weeks later on December 14, 2021. This and all other communications occurred *after* the Zoning Board had concluded hearings and issued its 3-2 decision. Self-evidently, such communications *could not* have resulted in any procedural irregularity on their own, and are forwarded by

the Petitioner for the sole purpose of establishing grounds for personal bias of one of the five Zoning Board members. To wit, the actual language of the Zoning Board's Rules of Procedure states as follows:

> There shall be no ex parte communications between a member of the Board and a party to the case or any person having a direct or indirect interest in the outcome of the case *regarding any matter relevant to the merits of the case*. A party filing written correspondence with the Board shall certify in writing that a copy of the correspondence has been served to all parties of record to the case or to their representative.

Zoning Board Rules of Procedure §2.403.D.11 (emphasis added). These scant few post-decision communications, beyond any argument about constituting bias, do not even rise to the level of being matters "relevant to the merits of the case." Acknowledging receipt of an email or thanking someone for kind words are in no way relevant *ex parte* discussions about merits. And none of the email conversations that occurred before the case's conclusion were even tangentially about the merits, and thus were not prohibited per the Rules of Procedure (to the extent that they even *were* conversations, as each of Ms. Jung's responses were notably laconic).

2. Petitioner did not avail itself of any prudent opportunity to supplement the record when offered the ability to do so.

Petitioner contends that the Zoning Board's Reconsideration and scheduled hearing was mooted by its filing of a Petition for Judicial Review. Even assuming this were true and legally correct, it is Petitioner's own fault that it did not protect its rights by participating in that process.

Firstly, Petitioner was not, in so many words, "out of time" in filing its Petition for Judicial Review. It still had an opportunity to file after the time at which it received the

Board's Reconsideration. *Even if it did not have that time*, a prudent course of action would have been to file the new MPIA documents while stating a continuing objection that the Zoning Board had lost jurisdiction to the Circuit Court. It had the opportunity to withdraw its petition after receiving the Zoning Board's Reconsideration, and then refile after the newly scheduled September hearing. It had the opportunity to maintain the open petition and file a second one after the September hearing. It had the opportunity to *file its motion to suspend the written Decision* many months before the Zoning Board issued the same. Instead of acting in any one of these prudent manners, Petitioner avoided follow-up on its MPIA request, avoided filing its July 25, 2022 motion until a week and a half after the Decision, avoided any request to expedite a written order regarding the August 3, 2022 motion, filed its Petition for Judicial Review early, and then ignored the Zoning Board after it provided the Reconsideration not only within its own 30-day time limit but also within the Petitioner's judicial review deadline, skipped the hearing, and sat on its rights until the filing of this motion six months after the submission of its Petition for Judicial Review.

Petitioner should not be rewarded by accusing the Zoning Board of unreasonable delay while exacerbating or creating its own, nor should it be rewarded for ignoring a clear, procedurally correct opportunity to submit new documents into the record and appear before the Zoning Board.

II. As a matter of law, the referenced communications do not demonstrate any procedural irregularity.

Petitioner's reliance on *Colao v. County Council of Prince George's County* is doubly misplaced. First and foremost, additional statutory language present in the Land

Use article for specifically Prince George's County informed the *Colao* Court of the question of whether to incorporate documents showing allegations of personal bias, because at the time of the *Colao* decision, the Maryland Land Use subsection authorizing judicial review of Prince George's County administrative decisions had specific language allowing so:

> Under the italicized portion of subsection (h), allegations of personal bias may constitute allegations of "irregularities in procedure before the district council not shown in the record. . . ." As a result, the circuit court was at least authorized, upon the requisite "strong showing," to allow appellants to present "outside" evidence of matters not reflected in the administrative record to support their argument that the Council's approval of A–9901 was rendered inoperative as a result of personal bias on the part of certain Council members.

109 Md. App. 431, 467–68 (1996), *aff'd*, 346 Md. 342 (1997). While the judicial review language in the Howard County Code mimics the overarching language found in (the now-relocated) Md. Ann. Code art. 28, § 8–106, it contains no similar provision about allegations of personal bias. Instead, it specifies that the ability to expand the record is limited to the following categories:

> (1) In violation of constitutional or Charter provisions; or
> (2) Beyond the statutory authority or jurisdiction of the Board; or
> (3) Made upon unlawful procedure; or
> (4) Fraudulent; or
> (5) So grossly erroneous as to imply bad faith; or
> (6) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
> (7) Arbitrary or capricious; or
> (8) Affected by other error of law.

HOWARD COUNTY CODE § 16.207(b).

However, let us presume that the *Colao* decision does in fact provide a meaningful corollary to the instant case. As stated in *Colao*:

> [I]t is well established that bias or prejudice of an agency decision maker related to issues of law or policy are not disqualifying. *Turf Valley Assocs. v. Zoning Bd. of Howard County*, 262 Md. 632, 645, 278 A.2d 574 (1971). Personal bias or prejudice going beyond sincere political and philosophical views is, however, another matter. Id. at 646, 278 A.2d 574. *See, c.f., Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 654 A.2d 449 (1995) ("To prove that the State demonstrated bias in promulgating COMAR 09.12.23, the Appellees would have to show that the Commissioner acted with 'an unalterably closed mind on matters critical to the disposition of the proceeding.'" (quoting authority omitted)).

109 Md. App. 431 at 467. The quoted communications do not come close to even demonstrating bias in the first place, let alone an "unalterably close mind on matters critical to the disposition of the proceeding." In chronological order, Deb Jung's communications can be summarized as follows:

- May 10, 2020: A statement that she cannot communicate about substantive matters and an acknowledgement that the email was received, in regards to an administrative hearing about WebEx protocols during COVID lockdowns.
- June 5, 2020: A thank you email with a vague statement of the hearing being an "uphill battle," about the same administrative discussion.
- June 15, 2020: Another thank you email to the same recipient, about the same administrative discussion.
- December 14, 2021: A thank you email with a brief factual summary of the contested application.
- December 14, 2021: A thank you email.
- December 14, 2021: A thank you email.
- December 15, 2021: A thank you email with a hope that the Petitioner "sincerely consider[s] the view of the community."
- February 16, 2022: A thank you email involving a reference to election campaign materials and a statement that she will discuss substantive details "30 days after the decision is released."

See generally Pet'r's Ex. A, 1–15. "In determining whether there is either actual bias or an appearance of impropriety on the part of a decision maker in a judicial or quasi-judicial proceeding, we begin with the presumption of impartiality." *Regan v. State Bd. of Chiropractic Examiners*, 355 Md. 397, 410 (1999).

> Professor Rochvarg has explained that in the context of administrative decision-making, "[i]n general, there are three types of disqualifying bias: financial bias, personal bias and prejudgment bias." Arnold Recharge, Maryland Administrative Law, 91 (2d ed. 2007). Appellee did not allege matters which involved financial, personal or prejudgment bias in its list of ten alleged incidents, but rather generally alleged that the Local Board was opposed to the establishment of charter schools. That, in itself, would not constitute a basis for recusal.
>
> Assuming, *arguendo,* that the Local Board was generally opposed to granting a charter, such opposition would not have automatically rendered the Local Board unable to make a fair and impartial decision. Moreover, assuming the Local Board was so biased, there is no evidence in the record that was before the MSBE that demonstrates that such "bias" influenced the Local Board's decision to deny appellee's application. Professor Rochvarg has explained that merely possessing a "predilection toward a certain policy" does not render an administrative decision-maker unfit to render an impartial decision. *Id.* at 94.

Bd. of Educ. of Somerset Cnty. v. Somerset Advocates for Educ., 189 Md. App. 385, 409–10 (2009). In no conceivable way could one look at eight "thank you for your kind words" emails, three of them about COVID protocols and five occurring *after the hearings were concluded*, and determine that Deb Jung maintained any sort of personal or especially prejudgment bias in her vote. It doesn't even demonstrate a "predilection toward a certain policy"; all that is demonstrated in these emails is that Ms. Jung thought that Petitioner's proposal was insufficient in servicing community needs—a position that should have been obvious from her decision to vote against its petition. Petitioner alleges no procedural

irregularity with regard to hearings, submission of materials, admission of testimony, or legal arguments raising to the level of statutory overreach, fraud, or bad faith. Its singular contention is that, by virtue of Deb Jung sending cursory "thank you" emails to some local citizens, she therefore demonstrated a personal/prejudgment bias that amounts to a *de facto* procedural irregularity. Well-established case law on this point, and a simple cursory review of the emails' contents, demonstrates that its contention is hollow.

III. The Zoning Board's decision would remain the same with or without Deb Jung's vote.

While perhaps tangential to this Court's analysis of what does or does not constitute a procedural irregularity, Respondent wishes to note that, by Petitioner's own admission, "Notably, no similar *ex parte* communications were found with any other Zoning Board members." Pet'r's Mot. at 5, and that the vote to deny the petition was 3-2. Even if Deb Jung had voluntarily recused herself—for whatever hypothetical reason that would justify recusal, and certainly *not* the reason provided by Petitioner—the petition still would have been denied as a 2-2 vote. Petitioner alleges no bias common to the Zoning Board as a whole, or to the other two Zoning Board members who voted against it. Nothing provided in its Motion to Supplement the Record evinces anything equivalent to such an allegation. Thus, setting aside any dispute as to the nature of the communications, their legal effect under Maryland jurisprudence or the Howard County Code, or any substantive arguments put forward by the Petitioner in its Petition for Judicial Review, this Motion is functionally mooted by its own narrow ambit. Even if the Court were to grant it, it would change nothing about the outcome of the case as it relates to Deb Jung's participation therein.

CONCLUSION

Nothing presented in Petitioner's Motion to Supplement the Record rises to the level of procedural irregularity contemplated by the Howard County Code, nor does it demonstrate any form of bias at all, much less a bias that is recognized by Maryland common law, *much less* a bias that is of such nature and severity as to actually be disqualifying for showcasing an "unalterably closed mind." It also would not affect the outcome of the Zoning Board's Decision if Deb Jung's vote were to be disqualified, and thus do little more than muddy the record—which Petitioner had opportunity to supplement properly half a year ago and opportunity to initially explore for almost three years. To the extent not contradictory to the arguments presented herein, Respondent also incorporates the legal arguments and conclusions of the Howard County Office of Law and of Alan M. Schwartz. For all these reasons, this Court should deny Petitioner's Motion to Supplement the Record.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of March, 2023, a copy of the foregoing Response to Motion to Supplement the Record was filed via MDEC and mailed electronically to:

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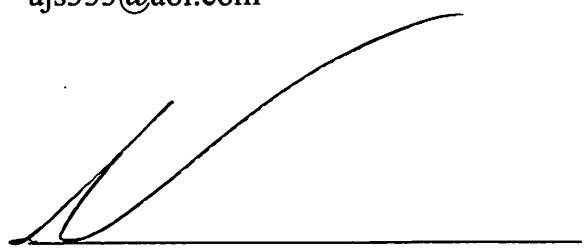

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