

**BEFORE THE ZONING BOARD OF APPEALS
CITY OF CINCINNATI**

**In re: 4106 Victory Parkway,
Cincinnati, OH 45229** : **On appeal from Zoning Hearing Examiner**
: **case no. ZH20220159**
:
: **Zoning Board of Appeals case no. Z-4077-**
: **2023**

**OMNIBUS BRIEF OF APPELLEE KM REAL ESTATE HOLDING CO. LTD
IN OPPOSITION TO APPELLANTS' 1) MOTIONS FOR ADDITIONAL EVIDENCE,
2) MOTION FOR SUMMARY JUDGMENT, AND 3) MERITS OF APPEAL**

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I. INTRODUCTION

KM Real Estate Holding Co. Ltd. (the “Applicant”) is proposing 50 much needed units of affordable senior housing in the Paddock Hills neighborhood of Cincinnati. The proposed layout of the new building is the Applicant best attempt at accommodating 50 new dwelling units on a currently blighted site with practical topographical challenges. Recognizing the practical difficulties, after a thorough review and hearing that included representatives of Appellants Paddock Hills Assembly and the North Avondale Neighborhood Association (“NANA”), the Zoning Hearing Examiner granted relief from the minimum parking, side and rear yard setbacks, and dumpster location. Granting relief of this narrow issues would allow the much-needed affordable senior housing to be built at an appropriate density while not presenting any adverse impacts to surrounding properties or neighborhood.

In addition to their appeal, Appellants filed a flurry of motions, none of which have any legal merit and should be denied:

1. Motion for Dismissal of Staff Attorney Mr. David Sturky [sic];
2. Motion to Submit Additional Evidence of CAGIS Map Inaccuracy (the “Map Motion”);
3. Motion to Submit Additional Evidence of a Landslide (the “Landslide Motion”);
and
4. Motion for Summary Judgment.

The Board’s Secretary refused to accept Appellants’ first motion. This brief will explain why the appeal and the latter three motions should all be denied and the Zoning Hearing Examiner’s decision affirmed.

II. BACKGROUND

A. The Property and the Project

The Property is located at the northwest corner of Victory Parkway and Asmann Avenue in the neighborhood of Paddock Hills.¹ Much of the eastern portion of the Property consists of steep slopes and soils that would be prohibitively expensive to build on, significantly limiting the usable area of the Property.²

The Property is zoned as RM-1.2, which allows for multi-family dwellings at a density of 1,200 square feet per unit.³ Kingsley + Co. is a local developer with a track record of high-quality multifamily development projects. Kingsley plans to build a 50-unit multi-family development on the Property, which will be affordable to persons 55 years of age and older.⁴ The development will be known as “Victory Vistas” and will be managed by Fairfield Homes, a company with four decades of experience managing affordable housing developments.⁵ The overall cost for this Project is approximately \$14.5 million.⁶ The development adds to the City’s supply of much needed affordable senior housing and activates a currently underutilized and blighted property.

The use and density of the Project are permitted by right under the Zoning Code, and the Project has received significant support from the City. Through the Department of Community & Economic Development, the Project has received funding from the Notice of Funding Availability program.⁷ The Department of Planning & Engagement has also recommended approval for five items of zoning relief for the Project:⁸

¹ Record at 11.

² Record at 208-210.

³ *Id.*

⁴ Record at 174.

⁵ Record at 170.

⁶ Record at 170.

⁷ Record at 11.

⁸ Record at 41, *et seq.*

1. A special exception from the standards for parking location in Section 1425-15;
2. A parking variance of 16 spaces from the standards of Section 1425-19;
3. A rear yard setback variance of 12' from the standards of Section 1405-07;
4. A side yard setback variance of 0.8' from the standards of Section 1405-07; and
5. A locational variance from the standard for location of a refuse container in Section 1421-35 (collectively, the "Requested Relief").

B. The Application and Community Feedback

Kingsley met with the Paddock Hills Assembly multiple times in 2022 to discuss the Project and obtain the organization's feedback.⁹ After this extensive community engagement, through counsel they applied for the Requested Relief on behalf of the Property's owner on October 5, 2022.¹⁰ The application contained extensive analysis of all applicable legal standards for the Requested Relief, both under the Zoning Code itself and under Ohio law.¹¹ Even though the Property is not within the neighborhood limits of North Avondale, Kingsley also met with NANA on November 1, 2022 to discuss the Project.¹²

The Zoning Hearing Examiner scheduled a hearing on November 16, 2022 and followed all relevant procedures to provide notice to affected parties.¹³ Appellants submitted various written materials in opposition to the Project on November 9 and 10, 2022, raising a number of issues, including alleged insufficient community engagement and an alleged lack of analysis of impacts to the adjacent hillside.¹⁴ Those materials included a request to postpone the hearing.¹⁵

⁹ Record at 171.

¹⁰ Record at 7.

¹¹ Record at 11-21.

¹² Record at 158.

¹³ Record at 164.

¹⁴ Record at 54-93.

¹⁵ Record at 73.

C. The Hearing

At the hearing, the Zoning Hearing Examiner first heard argument on the motion for a continuance. In declining to grant the motion, he specifically noted that Kingsley had done significant public engagement and that Appellants had actual notice of the hearing.¹⁶

1. Applicant's Case in Chief

On the merits of the application, the Applicant presented testimony from Kingsley representatives Daniel Buchenroth¹⁷ and Chinedum Ndukwe,¹⁸ who explained the overall development and the process of community engagement. They noted the amount of parking spaces for the Project had been increased from 45 to 59, at the request of the Paddock Hills Assembly.¹⁹ They also explained the important service that this Project would provide—namely, housing seniors at affordable rates.²⁰

The Applicant also presented testimony from Sandra Jones Mitchell, who explained the services that residents of the Project would receive through the non-profit group known as Serving Older Adults Through Changing Times.²¹ These services will include transportation, assistance with obtaining medical care, and education for navigating social services.²²

The Applicant then called George Berardi, of the architecture and design firm Berardi Partners.²³ Mr. Berardi explained that in his experience with designing multi-family projects in 32 different states, elderly residents typically need less parking than other populations.²⁴ He stated that 0.5 spaces per unit is usually sufficient for this type of use, whereas the Zoning Code requires

¹⁶ Record at 164.

¹⁷ Record at 169-172.

¹⁸ Record at 172-175.

¹⁹ Record at 170.

²⁰ Record at 174.

²¹ Record at 175.

²² Record at 179-182.

²³ Record at 182.

²⁴ Record at 198.

an excessive 1.5 spaces per unit for the Property.²⁵ Based on his experience, he testified that the 59 planned spaces should be more than sufficient for the residents.²⁶ He also explained the practical difficulties of the Property due to the soil condition and steep slopes on the eastern portion of the Property, and explained that the proposed design was the best possible effort to comply with the letter of the Zoning Code.²⁷

Next, the Applicant called Jonathan Evans, a civil engineer with the firm of Evans Engineering.²⁸ Mr. Evans expanded on the issues with the soil quality and steep slopes on the eastern portion of the Property.²⁹ He provided support for the proposed location of the building away from the slopes going down to Victory Parkway and that the proposed buildable area of the Property is appropriate albeit somewhat constrained..³⁰

The next witness in support of the application was Mike Westerfield, the President and Project Director at West Tech Environmental Solutions.³¹ Mr. Westerfield explained that the Property has a concentration of naphthalene in excess of EPA standards and that the Project would include a plan for remediation—effectively turning a vacant, contaminated site into a productive, clean one.³²

The Applicant's final witness was Ozie Davis of Davis Consultants.³³ Mr. Davis stated that in his opinion, based on working with numerous real estate developers in the City, Kingsley had done a superior job of community engagement on the Project.³⁴

²⁵ Record at 198-201.

²⁶ Record at 201-202.

²⁷ Record at 190-198.

²⁸ Record at 207.

²⁹ Record at 207-210.

³⁰ Record at 210.

³¹ Record at 210.

³² Record at 213-215.

³³ Record at 222.

³⁴ Record at 222.

2. *Appellants' Testimony*

Following the Applicant's case in chief, Lina Orr of the Paddock Hills Assembly spoke about her concerns with increased traffic and hillside stability, including an assertion that a hillside review should be conducted.³⁵ At that point, the Zoning Administrator explained that the proposed building is not located within the Hillside Overlay District and so a hillside review is not required,³⁶ and the Zoning Hearing Administrator agreed.³⁷

Sarah Koucky of NANA then reiterated many of the concerns about traffic and allegedly insufficient community engagement.³⁸ Walter Koucky then repeated the assertion that the "property is on the hillside overlay district."³⁹

Finally, representatives of the North Avondale Business Association (not a party to this appeal) provided testimony that they were concerned about increased trash, litter, and "concentration of poverty" in the area.⁴⁰

3. *City's Testimony*

In the interest of time, the Zoning Administrator provided a brief statement the City supports the Project in full and does not believe that a hillside review is required.⁴¹

4. *Applicant's Rebuttal*

The Applicant then re-called Mr. Evans to emphasize that, from a geotechnical perspective, the Project will be structurally sound.⁴² Mr. Berardi confirmed that multiple geotechnical engineers would be involved in constructing the foundation to industry standards.⁴³ And Mr.

³⁵ Record at 230, *et seq.*

³⁶ Record at 235-238.

³⁷ Record at 238.

³⁸ Record at 238-243.

³⁹ Record at 244-245

⁴⁰ Record at 250, *et seq.*

⁴¹ Record at 256-257.

⁴² Record at 258.

⁴³ Record at 259.

Westerfield confirmed that the plan for remediation will bring the Property into compliance with EPA standards, making the building safe for residents.⁴⁴

5. Zoning Hearing Examiner's Decision

The Zoning Hearing Examiner published his written decision on December 14, 2022, approving all of the Requested Relief subject to the standard conditions.⁴⁵ The decision concluded that the Applicant had met the standards under Section 1445-13 related to public interest, the variance-specific standards under Section 1445-15, and the special exception standards under Section 1445-19.⁴⁶

III. ADDITIONAL EVIDENCE

The Map Motion and the Landslide Motion are largely identical and will be collectively referred to as the “Motions for Additional Evidence.” For the reasons explained below, the Board should deny the Motions for Additional Evidence in their entirety.

This Board “is confined to consideration of the record and arguments based on the record,” unless an exception applies to allow the admission of additional evidence.⁴⁷ There are only three possible exceptions, which must appear “on the face of the record or by affidavit filed by person affected” in order to apply:⁴⁸

- (1) The record does not contain a report of all evidence admitted or proffered below.
- (2) The testimony adduced was not given under oath.
- (3) The appellant or other person affected was not permitted to be heard in person or by counsel in opposition to the order appealed:
 - (A) To present the position, arguments and contentions of the appellant or other person affected.
 - (B) To offer and examine witnesses and present evidence in support thereof.

⁴⁴ Record at 259.

⁴⁵ Record at 95.

⁴⁶ Record at 99-101.

⁴⁷ Zoning Code § 1449-15(d).

⁴⁸ *Id.*

- (C) To cross-examine witnesses purporting to refute the position, arguments and contentions of the appellant or other person affected.
- (D) To offer evidence to refute evidence and testimony offered in opposition to the position arguments and contentions of the appellant or other person affected.
- (E) To proffer any such evidence into the record, if the admission thereof was denied by the examiner.⁴⁹

Appellants do not meet any of these standards and they do not now get to bring forth evidence that they failed to bring forth in the proceedings below.

A. The Record contains a complete report of all evidence below.

The record is complete as page 96 of the Record contains a very clear report of all evidence, consisting of the application material; witness testimony; motions and other correspondence from the public, including Appellants; comment from MSD; a Staff Report from the City; and a recording of the Zoning Hearing Examiner's hearing.

Appellants argue that additional evidence should be allowed because the Zoning Hearing Examiner's "site visit to observe landslide evidence of relevant site conditions were [sic] excluded from evidence."⁵⁰ The gist of this argument seems to be that the Zoning Hearing Examiner discovered and recorded evidence of a landslide on the Property but purposely acted to conceal this information from the public. This argument is complete conjecture and would require the Board to make unsupported logical leaps.

Appellants have asked to introduce pictures of the Property which *they* believe are evidence of an active landslide. But there is no reason to believe that the Zoning Hearing Examiner in fact 1) observed the same portion of the Property, 2) concluded that it was "an apparently active landslide at 4106 Victory Parkway,"⁵¹ 3) documented such observations in the form of

⁴⁹ *Id.*

⁵⁰ Landslide Motion at 9.

⁵¹ *Id.*

photographs, video, notes, or otherwise, and 4) then deliberately omitted such documentation from the Record.

Such an imagined scenario borders on the fantastical and cannot be a basis for concluding that evidence is missing from the record, which must be demonstrated “on the face of the record or by affidavit.”⁵²

B. Appellants have waived any objection to the Zoning Administrator’s unsworn testimony.

Appellants argue that the Zoning Administrator’s testimony should be stricken from the record because her testimony was not given under oath.⁵³ However, it is well established under Ohio law that if a party fails to request an oath or object to unsworn testimony at an administrative hearing, that party waives any argument on appeal related to the unsworn nature of the testimony below.⁵⁴

And indeed, in this case, Appellants failed to make any objection to a lack of oath during the hearing below, at the time when this issue could have been addressed.⁵⁵ The Zoning Hearing Examiner could have easily administered an oath if Appellants had simply asked.⁵⁶ They did not. Having sat on their hands during the hearing below, Appellants cannot now for the first time raise the issue of unsworn testimony as a “gotcha” card to exclude testimony they would prefer the Board not to hear.⁵⁷

⁵² Zoning Code § 1449-15(d).

⁵³ Motions for Additional Evidence at 2.

⁵⁴ *Stores Realty Co. v. Cleveland, Bd. of Bldg. Standards & Bldg. Appeals*, 41 Ohio St.2d 41, 322 N.E.2d 629 (1975), syllabus (“The omission of administration of the oath to a witness in a trial or administrative hearing is waivable error.”) (emphasis added); *Dudukovich v. Lorain Metropolitan Housing Authority*, 58 Ohio St.2d 202, 206, 389 N.E.2d 1113 (1979) (administrative board’s failure to swear witnesses was waived because no objection was made).

⁵⁵ The Zoning Director’s testimony is on pages 234-237 and 256-257 of the Record. Nowhere in the Record is any objection that she should have been sworn in before testifying.

⁵⁶ *Stores Realty Co.*, 41 Ohio St.2d at 43 (“Had appellee objected to the unsworn testimony during the hearing, there is little doubt that the chairman would have sworn the witness. By failing to bring the matter to the attention of the board, appellee effectively waived the right to appeal upon that ground.”).

⁵⁷ *State v. Wintermeyer*, 158 Ohio St.3d 513, 2019-Ohio-5156, 145 N.E.3d 278, ¶ 24.

Thus, Appellants' request to strike the Zoning Administrator's testimony must be denied. Further, the unsworn nature of her testimony cannot be used as a basis for the Appellants to introduce additional evidence.

C. Appellants had a full and fair opportunity to introduce evidence below.

Appellants further allege that they were not fully heard in the proceedings below. A review of the Record evidences that they were heard. Appellants submitted numerous letters and motions to the Zoning Hearing Examiner in advance of the hearing,⁵⁸ appeared at the hearing by representatives,⁵⁹ presented witness testimony,⁶⁰ cross-examined Appellee's witnesses,⁶¹ and presented extensive argument.⁶² This is all that Section 1449-15(d)(3) requires.

Appellants nevertheless claim that they were prevented from participating in the hearing below because they did not receive adequate notice. Specifically, the Paddock Hills Assembly claims it had "only two days' notice" of the hearing, and NANA claims it had "no notice" at all.⁶³ Based on these allegations, Appellants "assert that they were denied due process."⁶⁴

Here again, Ohio law is clear. All that due process requires is notice and a meaningful opportunity to be heard.⁶⁵ The key to "notice" is not whether a party was formally served with a paper notification of a hearing, but rather whether the party actually knew when the hearing would

⁵⁸ Record at 1-3, 4-6, 54-72, 73-75, 76-79, and 80-93.

⁵⁹ Record at 143-144.

⁶⁰ Record at 238 *et seq.*

⁶¹ Record at 218.

⁶² Record at 238 *et seq.*

⁶³ Motions for Additional Evidence at 4.

⁶⁴ *Id.*

⁶⁵ *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 141 Ohio St.3d 113, 2014-Ohio-4364, 22 N.E.3d 1040, ¶ 34 (citing *State v. Mateo*, 57 Ohio St.3d 50, 52, 565 N.E.2d 590 (1991)).

occur.⁶⁶ When a party has actual notice of a hearing, appears in person, and makes argument, due process has been satisfied.⁶⁷

For one thing, Appellants have not shown any irregularity in the City’s notification processes: the Zoning Hearing Examiner specifically examined this issue, stating that “every single procedure required by [the City] is by code and everything [the City] do[es] on every case was followed on this [case].”⁶⁸ And further, Appellants admitted that they had actual notice of the hearing on November 3, 2022⁶⁹—nearly two weeks before the hearing occurred on November 16, 2022.⁷⁰ This was sufficient time for them to draft and submit extensive written argument to the Zoning Hearing Examiner, meticulously analyzing the legal standards for each item of zoning relief.⁷¹ And as already mentioned, Appellants appeared in person at the hearing to express their opposition in great detail—belying any claim of insufficient notice.

To circumvent these unfavorable facts, Appellants have created an alternate reality: 1) the Zoning Hearing Examiner somehow conducted “an improper hearing on variances” from the Hillside Overlay District,⁷² and 2) Appellants received no notice of these fictitious variances.⁷³ Neither supposition is true. The Zoning Hearing Examiner did not issue any variance from the Hillside Overlay District; he properly concluded that a hillside review was not necessary because

⁶⁶ *Rose v. Rose*, 10th Dist. Franklin Nos. 96APF09-1150, 96APF11-1550, 1997 Ohio App. LEXIS 1235, *8 (Mar. 31, 1997) (“Service upon appellant is not required when he has actual notice.”) (citing *State v. Local Union 5760, United Steelworkers of America*, 172 Ohio St. 75, 87, 173 N.E.2d 331 (1961)).

⁶⁷ *Highfield Farm, Ltd. v. Jackson Twp. Bd. of Zoning Appeals*, 2016-Ohio-4624, 67 N.E.3d 78, ¶ 31 (5th Dist.2016) (“Appellant attended the hearing and had the opportunity to speak before the Board . . . We find Appellant has not demonstrated prejudice as a result of any defect in the notice herein.”); *Kearns v. Monroe Twp. Bd. of Zoning Appeals*, 196 Ohio App. 3d 127, 2011-Ohio-1138, 962 N.E.2d 808, ¶ 6 (4th Dist.2011) (no prejudice from untimely notice because a party “had actual notice of the hearing”).

⁶⁸ Record at 164.

⁶⁹ Record at 159.

⁷⁰ Record at 138.

⁷¹ Record at 54-72 (Paddock Hills Assembly letter); Record at 76-79 (NANA letter).

⁷² Motions for Additional Evidence at 1.

⁷³ *Id.* at 4.

no part of the proposed development will be constructed in a Hillside Overlay District.⁷⁴ And Appellants had plentiful opportunity to provide argument about hillsides. They specifically raised the issue of the Hillside Overlay District’s applicability in their letters to the Zoning Hearing Examiner.⁷⁵ NANA even included a memorandum entitled “Deficiencies in Applying Hillside Overlay Considerations.”⁷⁶ And both Appellants continued this line of argument at the hearing itself.⁷⁷

Appellants knew full well when the hearing would occur and what would be discussed, and they prepared and presented their positions both in writing and orally at the hearing. The Zoning Hearing Examiner simply did not agree with them. Merely receiving an unfavorable decision and wishing for a do-over is not a valid basis for granting Appellants additional evidence on appeal.

IV. SUMMARY JUDGMENT

Appellants’ Motion for Summary Judgment is baseless and should likewise be denied. At the outset, this Board does not have authority to issue summary judgment; it instead has a duty to render a decision on the merits based on consideration of the entire record. And even if the Board entertained the idea of summary judgment, there is no basis to grant Appellants’ motion because the Zoning Hearing Examiner correctly found that a hillside review is not required. Assuming *arguendo* that a hillside review should have been undertaken, such a finding does not affect the validity of the decision.

⁷⁴ Record at 100 (“The location of the principal building is not within a Hillside Overlay District and thus, not subject to the Hillside Overlay District guidelines.”)

⁷⁵ Record at 62-63, 74, 77, 80.

⁷⁶ Record at 80-89.

⁷⁷ Record at 232-233, 235.

A. The Zoning Board of Appeals has a duty to render a decision on the merits, not summary judgment.

Under Rule 56 of the Ohio Rules of Civil Procedure, “a motion for summary judgment is properly granted if the court, upon viewing the evidence in a light most favorable to the party against whom the motion is made, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to a judgment as a matter of law; and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party.”⁷⁸

This is not a trial under the Ohio Rules of Civil Procedure; it is an appeal under Chapter 1449 of the Zoning Code. Under Section 1449-15(e), the Board “has the duty to enter a decision in accordance with § 1449-17,”⁷⁹ which in turn requires the Board to consider whether the decision appealed from “is illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.”⁸⁰

That standard of review is incompatible with summary judgment. The Board’s task is to review “the whole record” and determine whether the Zoning Hearing Examiner’s decision was lawful. In examining the entire record, there will inevitably be factual disputes, making it impossible to determine that “there are no genuine issues as to any material facts”—a prerequisite for granting summary judgment.⁸¹

Ohio courts have considered an analogous issue when parties move for summary judgment in appeals under Ohio Revised Code Chapter 2506, in which the court’s standard of review is identical to the Board’s here.⁸² In that context, courts have held that “summary judgment is

⁷⁸ *Chapman v. Adia Servs.*, 116 Ohio App.3d 534, 688 N.E.2d 604 (1st Dist.1997).

⁷⁹ Zoning Code § 1449-15(e)

⁸⁰ Zoning Code § 1449-17.

⁸¹ *Chapman*, 116 Ohio App.3d at 688.

⁸² Compare R.C. 2506.04 with Zoning Code § 1449-17.

inappropriate to the determination of an administrative appeal,” due to the fact-intensive review required in such a proceeding.⁸³ That review cannot be short-circuited by a summary judgment motion. As one court has explained, “the summary judgment attempted to be invoked by appellants is not available to them on this appeal [] to expedite the hearing.”⁸⁴

Here, Appellants raised numerous factual disputes, including whether the proposed development would be constructed within the Hillside Overlay District,⁸⁵ whether Appellants had adequate notice of the hearing,⁸⁶ and whether the Zoning Hearing Examiner excluded evidence of an alleged landslide from the record.⁸⁷ Appellants identify numerous other factual disputes, going so far as to contrast the Zoning Hearing Examiner’s version of the facts as compared with their “Appellant Fact[s].”⁸⁸ The Board cannot reasonably conclude that there are no issues of material fact in this case when Appellants themselves dispute most of the Zoning Hearing Examiner’s factual conclusions. Appellants’ motion must be denied as a matter of law.

B. Because the proposed development is not in a hillside, the Zoning Hearing Examiner correctly determined that a hillside review is not required.

For their argument that the Zoning Hearing Examiner should have performed a hillside review, Appellants cite to Zoning Code § 1433-05, which states:

A Hillside Overlay District is shown on the zoning map by a HS designator applied to the base district designation. This designation is based upon a moderately high or high landslide susceptibility pursuant to the landslide susceptibility study and map: Any real property either whole or in part within said moderately high or high susceptibility areas should be classified as being within a HS District.

⁸³ *Bryco Co. v. City of Milford*, 12th Dist. No. CA99-04-033, 1999 Ohio App. LEXIS 4750, *8 (Oct. 4, 1999). See also *Dvorak v. Municipal Civil Service Com.*, 46 Ohio St.2d 99, 103, 346 N.E.2d 157 (1976); *Estock v. Conneaut Area City Sch. Dist. Bd. of Educ.*, 11th Dist. Ashtabula No. 92-A-1757, 1993 Ohio App. LEXIS 4787, *9 (Sep. 30, 1993); and *Brosek v. City of Brook Park*, 8th Dist. Cuyahoga No. 34544, 1976 Ohio App. LEXIS 7109, *9-10 (Jan. 15, 1976).

⁸⁴ *In re Sun Oil Co.*, 95 Ohio L. Abs. 86, 88, 200 N.E.2d 366, 28 Ohio Op. 2d 161 (Montgomery C.P.1964).

⁸⁵ Record at 116.

⁸⁶ Record at 120.

⁸⁷ Record at 122.

⁸⁸ Record at 123-133.

Appellants argue that the proposed development must be reviewed for compliance with the Hillside Overlay District simply because a portion of the Property is located within the Hillside Overlay District, as shown on CAGIS; however, Appellants' assertion is unsupported by the plain language of Section 1433-05, by the City Staff's interpretation of that language, and by common sense.

Contrary to Appellants' reading, Section 1433-05 does *not* say that a hillside review is automatically required for any development in which a portion of the lot lies within the Hillside Overlay District. Instead, it states "any real property either in whole or in part within said [district] should be classified as being within a HS District." And "real property" is not defined in the Zoning Code. That term's ordinary legal meaning includes "land and immovable property on land *such as buildings*."⁸⁹ Thus, a reasonable interpretation of Section 1433-05 is that a particular *building* is considered within the Hillside Overlay District if that *building* is "in whole or in part" within the Hillside Overlay District. No portion of the proposed building is located within the boundaries of a Hillside Overlay District. The proposed building is intentionally situated to avoid disturbing any portion of the Property that is located within the Hillside Overlay District. If City Council had intended for the entirety of the Property to be included in and reviewed for impacts to the hillside, they would have drawn the boundary of the Hillside Overlay District to extend across the entire Property. They did not, seemingly because the majority of the Property does not impact the hillside and, as such, as long as one does not disturb the hillside there is no reason to undertake a hillside review.

⁸⁹ Real Property, THE LAW DICTIONARY (accessed Mar. 9, 2023), <https://thelawdictionary.org/real-property/> (emphasis added).

And that interpretation is exactly what the Zoning Administrator and the Zoning Hearing Examiner concluded. Because no part of the proposed development would be constructed within the Hillside Overlay District,⁹⁰ they concluded that a hillside review is not required.⁹¹ This sound interpretation is based on the principle that an ordinance must be considered as a whole, without isolating particular words or provisions.⁹² Thus, Section 1433-05 must be read in conjunction with Section 1433-01, which states that the purposes of the Hillside Overlay District are to regulate “development of land and structure *in existing hillside areas*” and “to prevent damage to the City’s hillsides.”⁹³ Such purposes are not implicated in this case, because the proposed development is not in an existing hillside area and poses no threat to the City’s hillsides.

Appellants’ proposed interpretation would lead to an absurd result in which a hillside review is required for development on any lot that is even partially within the Hillside Overlay District—no matter how large the lot, how small a portion of the lot is within the Hillside Overlay District, how small a portion of a lot is being built on, and how far the building would be from the boundary of the Hillside Overlay District. Section 1544-05 must be construed to avoid such unreasonable and absurd consequences.⁹⁴

Thus, the Zoning Hearing Examiner’s interpretation of Section 1433-05 is a reasonable one that serves the purposes of the Hillside Overlay District and avoids the inevitably absurd results of Appellants’ interpretation. And as the administrative official tasked with administering

⁹⁰ Record at 234 (Zoning Administrator states that Staff “did not find that the building is being constructed in the hillside boundaries”).

⁹¹ Record at 238 (Zoning Administrator states that a hillside review is only required “when a building is within the [Hillside Overlay District] boundaries, and the Zoning Hearing Examiner that that “I think that is right.”); Record at 100 (“The location of the principal building is not within a Hillside Overlay District and thus, not subject to the Hillside Overlay District guidelines.”)

⁹² *Vossman v. Airnet Sys., Inc.*, 159 Ohio St.3d 529, 2020-Ohio-872, 152 N.E.3d 232, ¶ 14.

⁹³ Zoning Code § 1433-01.

⁹⁴ *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 35.

Section 1433-05, the Zoning Hearing Examiner is entitled to deference in his reasonable interpretation of this matter.⁹⁵ For these reasons, the Zoning Hearing Examiner properly determined that a hillside review is not necessary, and Appellants' argument to the contrary is without merit.

C. Even if a hillside review was required, it is harmless error.

Even if a hillside review was required in this case (and it was not), the result would be the same. The Zoning Hearing Examiner did not exclude discussion of the hillside issue; he provided Appellants with ample opportunity to explain all their concerns about hillside stability.⁹⁶ He then heard from Appellees' experts, who explained that geotechnical engineers would be designing the building's foundation according to industry best practices.⁹⁷ He ultimately found Appellants' concerns not credible, in light of the fact that the proposed development would not disturb the hillside. Specifically, he concluded: "[T]he Owner presented credible testimony that the Project is designed to have a minimal impact on the hillside. Further, the Building Department must provide a technical review of all permit applications that are determined to have high landslide susceptibility."⁹⁸

Thus, the Zoning Hearing Examiner clearly took hillside impacts into consideration in issuing his decision. Even if the law is misapplied, such an error is harmless and not grounds for reversal if it "does not affect the substantial right of the parties"⁹⁹ This means that if "the trier of fact would have reached the same decision, had the error not occurred," the decision below must

⁹⁵ *Weaver v. Ohio Dep't of Job & Family Servs.*, 153 Ohio App.3d 331, 2003-Ohio-3827, 794 N.E.2d 92, ¶ 12 (1st Dist.2003).

⁹⁶ Record at 238.

⁹⁷ Record at 258-259.

⁹⁸ Record at 100.

⁹⁹ *Knor v. Parking Co. of America*, 73 Ohio App. 3d 177, 189, 596 N.E.2d 1059 (1st Dist.1991).

stand.¹⁰⁰ Appellants have not suggested that the decision would have been any different had a formal hillside review occurred under Chapter 1433. Because Appellants cannot demonstrate any prejudice to their substantial rights, any alleged failure to conduct a hillside review is harmless error. For this reason as well, the Board should deny the Motion for Summary Judgment.

V. MERITS

The bulk of Appellants' appeal amounts to a rehashing of the same baseless arguments related to hillsides. Appellants fail to present any grounds for overruling the Zoning Hearing Examiner's sound decision and their appeal should be denied.

A. Apart from the "hillside" red herring, the Appellants have raised no substantive issues to justify reversal.

Appellants' hillside arguments are mere distractions and have already been addressed in Sections III and IV of this brief. The Paddock Hills Assembly's appeal raises no issues other than hillsides.¹⁰¹ In its appeal, NANA sprinkles in discussion of the variances between more discussion of hillsides..¹⁰² Distilled to the essence, Appellants' non-hillside arguments are as follows:

- "Applicant did not meet the criteria for advancing his application because he did not adhere to 1445-15 Standards for Variances."¹⁰³
- "The decision is based on inaccurate mathematical calculations."¹⁰⁴

Neither argument stands up under scrutiny.

¹⁰⁰ *Moore v. Univ. of Akron*, 9th Dist. Summit C.A. No. 20320, 2001 Ohio App. LEXIS 3377, *3 (Aug. 1, 2001) (citing *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, 91 N.E.2d 690, (1950), at paragraph three of the syllabus).

¹⁰¹ Record at 113-122.

¹⁰² Record at 123-132.

¹⁰³ Record at 125.

¹⁰⁴ Record at 132.

Appellee presented extensive argument and evidence to demonstrate that all relevant standards were met—not just the variance-specific standard under Section 1445-15, but also the public interest standards in Section 1445-13 and the common law test for variances in *Duncan v. Middlefield*, 23 Ohio St.3d 83, 491 N.E.2d 692 (1986).¹⁰⁵ This included evidence from experts to demonstrate that the topographical conditions of the site present practical difficulties sufficient to justify variances from the strict letter of the Zoning Code.¹⁰⁶ The City Staff Report, authored by a trainer planning professional, likewise recommended approval.¹⁰⁷ Appellants’ opposition amounts to unconvincing lay opinion that did not overcome the positions of Appellee and City Staff. After receiving all of this evidence and argument, the Zoning Hearing Examiner carefully analyzed all applicable law in a well-reasoned decision¹⁰⁸ and properly concluded that Appellee had met the standards for all relief requested.¹⁰⁹

Appellants’ mathematical argument is questionable at best. Appellee applied for the variances per the terms of the adjudication letter received from the City.¹¹⁰ If any error was made on the City’s part, that mistake should not prejudice Appellee, who properly followed all applicable processes and law to obtain relief from the Zoning Code. Further, Appellants’ only conclusion from the alleged mathematical mistake is that *one of the variances was not necessary at all*.¹¹¹ If this is true, then Appellee has even greater development rights than previously thought. And the fact that one variance could be moot is no basis for reversing the others.

¹⁰⁵ See generally Record at 11, *et seq.* (letter in support of application); Record at 166, *et seq.* (evidence and argument in support); and Record at 258, *et seq.* (rebuttal evidence and argument).

¹⁰⁶ Record at 208-210.

¹⁰⁷ Record at 41, *et seq.*

¹⁰⁸ Record at 97-101.

¹⁰⁹ Record at 101.

¹¹⁰ Record at 24.

¹¹¹ Record at 132.

B. Because Appellants have failed to carry their burden, the Zoning Hearing Examiner's decision must be affirmed.

Per the Board's Rules of Procedure, Appellants bear "the ultimate burden of proof by the preponderance of the evidence."¹¹² Having failed to prove that the Zoning Hearing Examiner's decision is "illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record,"¹¹³ Appellants have not carried their burden and are not entitled to vacation or reversal.

VI. CONCLUSION

For all these reasons, the Board should deny the Motions for Additional Evidence, deny the Motion for Summary Judgment, and affirm the decision of the Zoning Hearing Examiner.

Respectfully submitted,



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¹¹² Zoning Board of Appeals Rules of Procedure, Section 5(A)(4).

¹¹³ Zoning Code § 1449-17.

CERTIFICATE OF SERVICE

I hereby certify that the above Omnibus Brief of Appellee KM Real Estate Holding Co. Ltd. in Opposition to Appellants' 1) Motions for Additional Evidence, 2) Motion for Summary Judgment, and 3) Merits of Appeal was filed with the Zoning Board of Appeals and served upon the following persons by email service, this 9th day of March, 2023:

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