

M-NCPPC



**MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING**

THE MARYLAND-NATIONAL CAPITAL  
PARK AND PLANNING COMMISSION

8787 Georgia Avenue  
Silver Spring, Maryland 20910-3760  
301-495-4500, www.mncppc.org

OFFICE OF  
THE GENERAL COUNSEL

(301) 495-4646

FAX (301) 495-2173

**Agenda Date: July 31, 2008**

**Item No. 14**

**MEMORANDUM**

**TO:** Montgomery County Planning Board

**VIA:** Debra Y. Daniel, Associate General Counsel *DYD, ORL*

**FROM:** David B. Lieb, Associate General Counsel *ORL*

**DATE:** July 28, 2008

**RE:** Draft Enforcement Rules

**INTRODUCTION**

Since late 2006, the Planning Board has been working on a three-part set of documents intended to clarify the processes by which the Board accepts applications, conducts hearings, and enforces both its decisions and certain laws over which it has jurisdiction. The first two installments were the Board's Rules of Procedure and the Development Manual, which the Board adopted in January and September 2007, respectively. The third installment, a new set of enforcement rules governing the Planning Board's enforcement process, is coming before the Board in a worksession for adoption and approval to transmit to the County Council. A copy of the draft enforcement rules is Attachment 1 hereto.

**COMMENTS RECEIVED**

The draft rules were posted for public comment in early October 2007, and a public hearing was held on October 25, 2007. Following the hearing, the Board left the record open for several weeks to allow the filing of written comments. We received a memo from an attorney questioning the relationship between the hearing examiner process called for in the enforcement rules and provisions in state law granting jurisdiction over zoning violations to District Court. A copy of the memo is Attachment 2 hereto. We also received some handwritten edits from County Council staff, which were for the most part editorial in nature. Those comments are not attached. We modified the draft rules based on the comments received where appropriate.

## **RECOMMENDATION**

We recommend that the Board vote to adopt the draft enforcement rules and transmit them to the County Council for approval.

Attachments

**ATTACHMENT 1**

## CHAPTER 1: SCOPE

**1.1. Scope and Effectiveness of Rules.** As permitted by law and except where the Montgomery County Code provides other enforcement procedures, these rules govern all proceedings under:

- (a) Section 50-41 of the Montgomery County Code; and
- (b) any other relevant provisions of the Montgomery County Code.

### 1.2. Definitions.

#### 1.2.1 *Applicability.*

In these rules and regulations, the following terms must have the meanings indicated. Other terms must have the meaning indicated in the Planning Board's Rules of Procedure.

#### 1.2.2 *Definitions*

(b) *Board.* "Board" means the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission.

(c) *Citation.*

"Citation" means a citation issued for violation of a Planning Board Action, or a law or regulation under the Planning Board's jurisdiction.

(d) *Enforcement Agent.*

"Enforcement Agent" means the Planning Director or their designee(s) responsible for determining compliance with a Planning Board Action or with any law that the Planning Board administers.

(a) *Hearing Officer.*

"Hearing Officer" means an individual designated by the Planning Board to conduct hearings or proceedings.

(e) *Party.*

"Party" means an Enforcement Agent or a Respondent.

(f) *Planning Director.*

"Planning Director" means the Director of the Montgomery County Planning Department of the Maryland-National Capital Park and Planning Commission.

**1.3. Filings with Planning Director.** All documents permitted or required to be filed with the Planning Board must be filed at the office of the Planning Board Chairman.

**1.4. Form and Service of Documents**

1.4.1 *Captions.* Each document filed with the Board must contain a caption that states:

- (a) the title of the action;
- (b) the citation number or the docket number assigned to the proceeding; and
- (c) a brief descriptive title of the document that indicates its nature.

1.4.2 *Signature*

(a) Every document of a party represented by an attorney must be signed by at least one attorney who has been admitted to practice law in the State of Maryland. Every document of a party who is not represented by an attorney must be signed by the party.

(b) The signature constitutes a certification that:

- (i) the signatory has read the document;
- (ii) to the best of the signatory's knowledge, information and belief, there is good ground to support it; and
- (iii) it is not interposed for delay.

(c) *Signature -Sanctions.*

If a document is not signed as required (except in cases of an inadvertent omission that is promptly corrected) or is signed with intent to defeat the purpose of this rule, it may be stricken, and the action may proceed as though the document had not been filed.

1.4.3 *Service.*

(l) This subsection applies to all documents, except for citations, that are required to be served on other parties.

(2) If service is required on a party represented by an attorney, service must be made on the attorney unless service on the party is ordered by the Planning Board or the Hearing Officer.

(3) Each document must be accompanied by a signed certificate of service that specifies the date and manner of service.

## **1.5. Computation of Time.**

### *1.5.1 In general.*

(a) In computing any time period under these rules, the day of the act, event, or default is not included.

(b) If the time allowed is more than 7 days, intermediate Saturdays, Sundays, and legal holidays are counted.

(c) If the time allowed is 7 days or less, intermediate Saturdays, Sundays, and legal holidays are not counted.

(d) If the last day of the time allowed is a Saturday, Sunday, or legal holiday, the time runs until the next day that is not a Saturday, Sunday, or legal holiday.

### *1.5.2 Mailing.*

When mail is used for service of any document (other than a citation) on an opposing party, the opposing party has 3 additional days to take any action or make any response required or permitted by these rules.

## **1.6. Appearances.**

### *1.6.1 Individuals.*

An individual may appear:

(a) on his or her own behalf; or

(b) by an attorney licensed to practice in the State of Maryland.

### *1.6.2 Businesses, etc.*

A business, non-profit organization, or government agency may appear:

(a) by an attorney licensed to practice in the State of Maryland; or

- (b) to the extent allowed by law, by any officer, employee, or authorized agent.

**1.7. Records.**

*1.7.1 Hearing Officer to keep.*

The Hearing Officer maintain files containing all documents, evidence, and other items and information submitted to or produced by a Hearing Officer or the Board during the course of a proceeding.

*1.7.2 Files to be public.*

These files must be available for public inspection under the Maryland Public Information Act.

**CHAPTER 2 PRE-HEARING PROCEDURES**

**2.1. Citation.**

*2.1.1 Proceedings commenced by citation.*

All proceedings must start by the issuance of a citation on a form approved by the Board.

*2.1.2 Contents.* The Citation must contain:

- (a) the name of the Respondent;
- (b) a description of the Violation, including a reference to the specific law in question with which the Respondent is cited;
- (c) the place and approximate time of the Violation;
- (d) the amount of the any Civil Fine;
- (f) the manner and time in which the Respondent must either:
  - (i) pay the specified fine; or
  - (ii) request a hearing on the Violation;
- (g) any Stop Work Order or Corrective Order, including the time within which the Violation, if ongoing, must be abated;
- (h) a statement advising the Respondent of the right to stand trial for the Violation and that failure to act in the manner and time indicated in the citation may result in a default decision and an order entered against the Respondent.

2.1.3 *Service.*

A citation may be served on a Respondent by mail or hand delivery.

2.1.4 *Filing.*

A copy of the served citation must be filed with the Planning Director.

**2.2. Admissions and Payments.**

2.2.1 *In general.*

A Respondent may admit to the Violation charged and pay the Civil Fine indicated on the citation in the manner and time directed by the citation.

2.2.2 *Effect of payment.*

If the Civil Fine is paid, no hearing or appeal will be allowed. Any Corrective Action required in the Citation must be taken within the time required in the Citation to avoid further findings of Violation.

**2.3. Pre-Hearing Requests to Reschedule.**

2.3.1 *Hearing Officer may grant.*

On written request to the Hearing Officer and for good cause shown, the Hearing Officer may postpone a scheduled hearing or reschedule the hearing.

**2.4. Consolidation.**

In the interest of convenient, expeditious, and complete determination of cases involving the same or similar issues or the same parties, the Hearing Officer may consolidate two or more citations for adjudication at one hearing.

**2.5. Discovery.**

2.5.1 *In general.*

- (a) On timely written request, any Party is entitled to receive from an opposing Party:
  - (i) a list of the names of witnesses intended to be called; and
  - (ii) copies of documents intended to be submitted into evidence.



- (b) To be timely, the request must be received by the opposing Party at least 14 days before the scheduled hearing.
- (c) A Party must no later than 7 days after a request is received serve a written response on all parties.

#### 2.5.2 *Limitations.*

- (a) Pre-hearing discovery is limited to the matters described in §2.5.1(a).
- (b) All other applications or motions for discovery, including depositions on oral examination, must be made to the Hearing Officer at the start of the hearing, and the Hearing Officer may order further discovery as it finds appropriate.

#### 2.5.3 *Supplemental responses.*

If a party has responded to a request for discovery and, before the hearing, obtains further responsive information, the party must supplement the response promptly.

#### 2.5.4 *Sanctions.*

If any party fails to properly respond to a lawful discovery request or order or wrongfully refuses to answer questions or produce documents, the Hearing Officer may take appropriate action, including, but not limited to, precluding evidence or witnesses of the offending party or striking the pleadings or defenses of that party.

### **CHAPTER 3 HEARING PROCEDURES**

#### **3.1. Scheduling; Notice.**

##### 3.1.1 *In general.*

If a Respondent timely requests a hearing, the Planning Director must:

- (a) set the date, time, and place for the hearing before an Hearing Officer; and
- (b) provide the parties with at least 20 days notice of the hearing.

##### 3.1.2 *Contents of Notice.*

The notice must state:

- (a) the date, time, place, and nature of the hearing;
- (b) the right of a party to be represented, at the party's own expense, by an attorney or, if permitted by law, other representative;

- (c) the right of a party to call witnesses and submit documents or other evidence under §3-13; and
- (d) that failure to appear for the scheduled hearing may result in an adverse action against the party.

### **3.2. Timing of Hearing.**

#### **3.2.1 *In general.***

Absent a showing of good cause, the hearing date must be no later than 180 days of the citation's service.

#### **3.2.2 *Accelerated hearing.***

If the Respondent waives the 20 days notice and requests an accelerated hearing, the Planning Director may assign the case for immediate hearing.

#### **3.2.3 *Preliminary hearing to determine if Stop Work Order should be continued.***

The recipient of a Stop Work Order may request an immediate hearing to determine whether the Stop Work Order should remain in place pending a hearing on the merits. When a preliminary hearing is requested, the Hearing Officer must schedule the hearing for the earliest possible time. The Hearing Officer must continue the Stop Work Order if they find that there is prima facie evidence of a Violation and that the public health, safety, or welfare are threatened or may be threatened because of the Violation.

### **3.3. Conduct of Hearing.**

**3.3.1 *Orderly but informal*** All hearings must be conducted in an orderly but informal manner.

#### **3.3.2 *Expedition.***

(a) Hearings must proceed with all reasonable speed and, to the extent practicable, must be held at one place and continue until concluded, except for brief recesses.

(b) The Hearing Officer may grant brief adjournments, for good cause shown and consistent with the requirements of speed.

### **3.4. Record.**

The Hearing Officer must arrange for recording of all hearings.

**3.5. Order of Proceedings.**

All hearings must be conducted in the following order, unless modified by the Hearing Officer for good cause:

- (a) presentation and argument of motions preliminary to a hearing on the merits;
- (b) presentation of opening statements, if any;
- (c) Enforcement Agent's case in chief;
- (d) Respondent's case in chief;
- (e) Enforcement Agent's case in rebuttal;
- (f) Respondent's case in rebuttal;
- (g) Respondent's closing argument; and
- (h) Enforcement Agent's closing argument.

**3.6. Oaths.**

3.6.1 *In general.*

A witness is required to declare that they will testify truthfully before testifying.

3.6.2 *Administration.*

The declaration must be by oath or affirmation administered:

- (a) in the form of Maryland Rule 1-303; or
- (b) in special circumstances, in some other form or affirmation calculated to impress on the witness the duty to tell the truth.

**3.7. General Duties and Powers of Hearing Officer.**

3.7.1 *General duties.*

The Hearing Officer has the duty to:

- (a) conduct a fair and impartial hearing;
- (b) take all necessary action to avoid delay in the disposition of proceedings; and
- (c) maintain order.

**3.7.2 General powers.**

The Hearing Officer has all powers necessary to carry out their duties, including the power to:

- (a) administer oaths and affirmations;
- (b) issue discovery orders and rule on objections to those orders;
- (c) receive evidence;
- (d) regulate the course of the hearing and the conduct of the parties and their representatives;
- (e) hold conferences for simplification of issues or for any other proper purpose;
- (f) question witnesses;
- (g) consider and rule on all procedural and other motions, including requests for adjournment; and
- (h) make and file recommended decisions.

**3.8. Ex Parte Communications.**

A Hearing Officer may not receive any ex-parte communication from any person, other than communications limited to ministerial matters.

**3.9. Impartiality.**

**3.9.1 In general.**

A Hearing Officer should recuse him- or herself from any hearing in which their impartiality might reasonably be questioned, including any instances in which the Hearing Officer:

- (a) has a personal bias or prejudice about a party;
- (b) has personal knowledge of disputed evidentiary facts in the proceeding;
- (c) served as a lawyer in the matter in controversy or was professionally associated with another person while that person served as a lawyer in the matter in controversy;
- (d) has been a material witness to the matter;

- (e) has a financial interest in the subject matter in controversy or in a party to the proceeding;
- (f) has any other interest that could be substantially affected by the outcome of the proceeding; or
- (g) knows that their spouse or dependent child:
  - (i) is serving as a lawyer in the matter in controversy or is professionally associated with another person who is serving as a lawyer in the matter in controversy;
  - (ii) is likely to be a material witness in the proceeding;
  - (iii) has a financial interest in the subject matter in controversy or in a party to the proceeding; or
  - (iv) has any other interest that could be substantially affected by the outcome of the proceeding.

### 3.9.2 *Motion to recuse.*

- (a) A Party may request that the Hearing Officer recuse him-or herself for good cause shown. The Hearing Officer must rule on the request in the proceeding.
- (b) If the Hearing Officer denies the request, the party may obtain a brief adjournment to seek review by the Planning Board.

### 3.9.3 *Notice of recusal.*

When a Hearing Officer recuses him-or herself from a proceeding, they must do so on the record and must notify the Director of the recusal.

### 3.9.4 *Replacement.*

On recusal of a Hearing Officer, the Chairman of the Planning Board must appoint another Hearing Officer to conduct the hearing.

## **3.10. Maintaining Discipline.**

### 3.10.1 *Power of Hearing Officer.*

After a warning, the Hearing Officer may bar any person, including a party or an attorney or other representatives of a party, from continued participation in a hearing if that person refuses to comply with the Hearing Officer's directions or behaves in a disorderly, dilatory, or obstructionist manner.

**3.10.2 *Review by Planning Board Chairman.***

- (a) Any person barred under §3.10.1 may promptly apply to the Planning Board Chairman for a review of the Hearing Officer's action.
- (b) Unless the Planning Board Chairman orders that further proceedings be stayed pending a decision on the application, the hearing may continue at the Hearing Officer's discretion without the person's participation.

**3.11. Amendments to Citation.**

**3.11.1 *Allowable amendments.***

The Hearing Officer may allow appropriate amendments to a citation if doing so will facilitate the determination of a controversy on the merits. Amendments may be subject to conditions necessary to avoid injustice or unfair surprise to a party.

**3.11.2 *Conformance to evidence.***

When issues reasonably within the scope of a citation, but not expressly raised by the citation, are tried by the express or implied consent of the parties:

- (a) the issues must be treated in all respects as if they had been raised by the citation; and
- (b) the citation may be amended at any time as necessary to make it conform to the evidence.

**3.12. Burden of Proof.**

The Enforcement Agent has the burden of proof to establish by a preponderance of the evidence that the Respondent has committed the Violation charged in the citation.

**3.13. Evidence.**

**3.13.1 *In general.***

Except as otherwise provided by these rules, formal rules of evidence and trial procedures do not apply.

**3.13.2 *Right to submit.***

On a material issue of fact, a party is entitled to:

- (a) call witnesses;
- (b) offer evidence, including rebuttal evidence;

- (c) cross-examine any witness that another party calls; and
- (d) present summation and argument.

### 3.13.3 *Scope*

The Hearing Officer:

- (a) may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs;
- (b) may not exclude evidence solely because it is hearsay, but may give hearsay evidence the weight that it deserves under the circumstances of the case;
- (c) must not violate any privilege recognized by law;
- (d) may take official notice of a fact that is judicially noticeable or that is general, technical, or scientific and within the specialized knowledge of the Hearing Officer; and
- (e) may exclude evidence that is:
  - (i) incompetent;
  - (ii) irrelevant;
  - (iii) immaterial; or
  - (iv) unduly repetitious.

### 3.13.4 *Exceptions.*

Formal exception to an adverse ruling is not required at the time of the ruling.

## **3.14. Interlocutory Appeals.**

### 3.14.1 *Leave required.*

An interlocutory appeal from rulings of the Hearing Officer may be filed only with the Hearing Officer's consent.

### 3.14.2 *Criteria for leave.* Leave to appeal will not be granted except on a showing that:

- (a) the ruling complained of involves substantial rights and will materially affect the final decision; and

(b) a determination of its correctness before hearing ends is essential to serve the interests of justice.

**3.14.3 *Planning Board's discretion.***

The Planning Board may refuse to hear an interlocutory appeal in its discretion, even though leave to appeal was obtained from the Hearing Officer.

**3.14.4 *Effect.***

An interlocutory appeal does not stay the proceeding or extend the time for the performance of an act, unless the Hearing Officer orders otherwise.

**3.15. Stipulation in Lieu of Hearing.**

**3.15.1 *Stipulation authorized.***

The Parties may into a stipulation in lieu of further hearing before the Hearing Officer issues a recommended decision and order.

**3.15.2 *Required elements.*** The stipulation must:

- (a) be in the manner and form set by the Director; and
- (b) contain:
  - (i) an admission of the Violation;
  - (ii) the facts stipulated to;
  - (iii) the amount of the civil fine to be paid; and
  - (iv) the corrective action to be ordered, if any.

**3.15.3 *Filing***

The Enforcement Agent must file the stipulation with the Hearing Officer and the Board, and serve a copy on the Respondent. The filing of the stipulation stays any deadlines for discovery, hearing, or issuance of an order in the proceeding before the Hearing Officer.

**3.15.4 *Planning Board review.***

The Planning Board must schedule a public hearing to consider any proposed stipulation within a reasonable time. At the public hearing, the Planning Board may



determine, at its discretion, whether to allow testimony by any Person other than the Respondent or the Enforcement Agent. The Board may accept, modify, or reject the stipulation in its entirety, modify it, or reject it. If the Board modifies the stipulation, within 10 days of the Board's decision the Respondent may request that the alleged Violation be rescheduled for hearing before a Hearing Officer. If the Board rejects the stipulation, the Planning Director must reschedule the alleged Violation for a hearing before an Hearing Officer. Neither the stipulation nor any statements made about it may be used as evidence before the Hearing Officer.

*3.15.6 Stipulation not appealable.*

Decisions and orders based on stipulations are not appealable.

**3.16. Recommended Decisions and Orders.**

*3.16.1 Hearing Officer to prepare.*

The Hearing Officer must prepare a recommended decision and order within no later than 30 days after the completion of a hearing.

*3.16.2 Recommended decision.*

The Hearing Officer's decision must state:

- (a) findings of fact and conclusions of law; and
- (b) the Hearing Officer's reasons for its findings on all material issues.

*3.16.3 Recommended order.*

If the Hearing Officer recommends that the charges in the citation be upheld, the Hearing Officer must prepare a recommended order that includes a proposed penalty and any necessary corrective action.

(a) *Recommended Civil Fine.*

The Hearing Officer may propose any Civil Fine permitted by law, and is not limited to the Civil Fine in the citation initiating the enforcement proceeding

(b) *Recommended Corrective Action.*

If the Hearing Officer finds that the Respondent failed to comply with a Planning Board Action, the Hearing Officer must order compliance with the Planning Board Action. Where the Hearing Officer finds that trees have been cut in Violation of a forest conservation plan or the forest conservation law, the Hearing Officer's recommended decision must include proposed corrective measures.

**3.16.4 Filing.**

The recommended decision and order must be filed with the Chairman of the Planning Board and served on all parties.

**3.16.5 Finality.**

If timely exceptions are not filed under §4-01, the Hearing Officer's recommended decision and order may be adopted by the Board without further action.

**CHAPTER 4 PLANNING BOARD REVIEW**

**4.1 Exceptions.**

Any person aggrieved by the recommended decision and order may file written exceptions with the Planning Board.

**4.2 Filing.**

The exceptions must be filed within 30 days after the recommended decision and order is mailed to the Parties.

**4.3 Contents.**

The exceptions must contain:

- (a) a concise statement of the issues presented;
- (b) specific objections to the findings of fact and conclusions of law in the recommended decision and order; and
- (c) arguments that present clearly the points of law and facts relied on in support of the position taken on each issue.
- (d) a Respondent or the Planning Director may request that the Planning Board modify any corrective order or fine recommended by the Hearing Officer, including a modification to the plan that the Respondent violated.

**4.4 Answer.**

A Party may file an answer opposing any exception no later than 20 days after the exceptions are served.

**4.5 Replies.**

No replies are permitted unless the Planning Board Chairman otherwise directs.

**4.5 Transcripts.**

A party may apply in writing for a written copy of the transcript of the hearing at any time:

- (1) within the period allowed for filing exceptions; or
- (2) if later, within 30 days after the other party has filed exceptions.

**4.5.1 Extension of time.**

If an application is timely made under Section 4.5 of this section, the time within which exceptions must be filed is extended to 20 days from the date when the transcript is delivered or mailed to the party who requested it.

**4.5.2 Fee.**

The Planning Board may charge a fee for the transcript, including the cost of transcription.

**4.6 Applications to Extend Time.**

An application to extend the time for filing exceptions or answers for any reason must be:

- (a) made in writing to the Chairman of the Planning Board; and
- (b) must demonstrate good cause for the requested extension.

**4.7 Review to be on Record.**

**4.7.1 In general.**

The Board must consider any exception only on the basis of the record developed before the Hearing Examiner.

**4.7.2 Record elements.** For this purpose, the record comprises:

- (a) the citation;
- (b) the transcript of the hearing;
- (c) all briefs filed and exhibits received in evidence; and

- (d) the Hearing Officer's recommended decision.

4.7.3 *Witness credibility.*

The Board must give due regard to the Hearing Officer's opportunity to judge the credibility of any witnesses.

4.7.4 *Additional evidence or argument.*

If the Planning Board considers it necessary or appropriate, it may:

- (a) order further testimony or evidence to be taken or submitted; or
- (b) order oral argument on any or all of the questions raised in the exceptions considered.

**4.9 Public hearing**

The Board must hold a public hearing to consider whether to adopt a recommended decision and any exceptions to it.

4.9.1 *Notice*

The Planning Director must provide public notice of the hearing at least 10 days prior to the hearing.

4.9.2 *Arguments*

Unless otherwise ordered by the Board, the Enforcement Agent and the Respondent must have up to 10 minutes to present arguments to the Board. Other Persons may file a written request with the Office of the Chairman for an opportunity to speak at the public hearing. Any request to speak must be served on the Enforcement Agent and the Respondent.

**4.8 Decision and Resolution.**

The Board may adopt the Hearing Officer's recommended decision and order in whole or in part, or remand the matter for further proceedings, and must issue a Resolution memorializing its decision.

**4.9. Reconsideration.**

4.9.1 *Petition*

Any Party may petition the Board to reconsider a Resolution no later than 10 days after the date of mailing of the Resolution. Any request for reconsideration must be

in writing and filed with the Planning Director. The Chairman may waive the filing deadline for good cause shown. Any Party who requests reconsideration must serve a copy of its petition on every other Party. The petition for reconsideration must specify any alleged errors of fact or law and state fully all grounds for reconsideration because of mistake, inadvertence, surprise, fraud, or other good cause.

#### *4.9.2 Decision to Reconsider.*

The Chairman must schedule any petition for reconsideration for Planning Board consideration as soon as practicable. A motion to reconsider may be made only by a member of the Planning Board who voted in the majority on the decision that is subject to reconsideration. The motion passes if it receives the vote of a majority of the Board members present and voting and each member voting on the motion participated in the decision to be reconsidered or read the record of the proceeding. A petition to reconsider (a) does not require notice to the public or the Parties other than by publication on the Planning Board agenda, and (b) may be taken without the appearance or testimony of the Parties. If the Planning Board votes to reconsider, the reconsidered Resolution is void.

#### *4.9.3 Notice of Hearing*

After the Board votes to reconsider a Resolution, the Chairman must promptly schedule a public hearing. At least 10 days before the hearing, the Planning Director must notify all Parties of: (a) the Planning Board's decision to reconsider the Resolution; (b) the date of the hearing; and (c) a reasonable summary of the reasons for reconsideration.

#### *4.9.4 Hearing*

The Board must conduct a public hearing as scheduled. The scope of the hearing must include the reason the Board cited for reconsideration of the Resolution and any other issue that the Board deems to be related.

### **ARTICLE 5 DEFAULT PROCEEDINGS**

**§ 5-01. Acts Constituting Default.** A Respondent is in default if:

- (1) the Respondent fails to pay the prescribed fine or to request a hearing within the time specified on the citation; or
- (2) having requested a hearing, the Respondent fails to appear at the hearing.

**ATTACHMENT 2**

# SHULMAN ROGERS GANDAL PORDY & ECKER, P.A.

Lawrence A. Shulman  
Donald R. Rogers  
David A. Pordy<sup>+</sup>  
David D. Freishtat  
Martin P. Schaffer  
Christopher C. Roberts  
Edward M. Hanson, Jr.  
David M. Kochanski  
Robert B. Canter  
Daniel S. Krakower  
Kevin P. Kennedy  
Nancy P. Regelin  
Samuel M. Spiritos<sup>+</sup>  
Martin Levine  
Worthington H. Talcott, Jr.<sup>+</sup>  
Fred S. Sommer  
Morton A. Faller  
Alan S. Tilles  
James M. Hoffman  
Michael V. Nakamura  
Jay M. Eisenberg\*

Douglas K. Hirsch  
Glenn C. Etelson  
Karl J. Protul, Jr.\*  
Timothy Dugan<sup>+</sup>  
Kim Viti Fiorentino  
Sean P. Sherman<sup>+</sup>  
Gregory D. Grant<sup>+</sup>  
Jacob S. Frenkel<sup>+</sup>  
William C. Davis, III  
Michael L. Kabik  
Scott D. Museles  
Michelle R. Curtis<sup>+</sup>  
Michael J. Lichstein  
Howard J. Ross<sup>+</sup>  
Rebecca Oshway  
Alan B. Sternstein  
Michael J. Froehlich  
Sandy David Baron  
Christine M. Sorge  
Jeffrey W. Rubin  
Simon M. Nadler

Karl W. Means  
Mimi L. Magyar  
Glenn W.D. Golding<sup>+</sup>  
Jeremy W. Schulman  
William F. Askinazi  
Matthew M. Moore<sup>+</sup>  
Jeannie Eun Cho  
David S. Wachen  
Stephen A. Metz  
Patrick J. Howley  
Jacob A. Ginsberg  
Christine P. "Tina" Hsu  
Aaron A. Ghais  
Debra S. Friedman<sup>+</sup>  
Eric J. von Vorys  
Heather L. Howard<sup>+</sup>  
Hong Suk "Paul" Chung<sup>+</sup>  
Carmen J. Morgan<sup>+</sup>  
Kristin E. Draper<sup>+</sup>  
Melissa G. Bernstein<sup>+</sup>  
John D. Sadler

Marc E. Pasekoff  
Alexis H. Peters<sup>+</sup>  
Meredith S. Campbell  
Kristen Reilly<sup>++</sup>  
Leslie G. Moylan<sup>+</sup>  
Anne Marie Vassallo<sup>+</sup>  
Matthew D. Alegr<sup>+</sup>  
Melanie A. Kegan<sup>+</sup>  
Thomas A. Gravely  
Rebekah L. Bina  
William F. Gibson<sup>+</sup>  
William B. Schroeder<sup>+</sup>  
Lawrence M. Kramer  
Alexander C. Vincent<sup>+</sup>  
Stacey L. Schwaber<sup>+</sup>  
Deborah A. Klis  
Courtney R. Sydnor<sup>++</sup>  
Michelle Hunter Green<sup>+</sup>  
Jessica O. Hepburn<sup>+</sup>  
Mark R. Mann<sup>++</sup>  
Scott Sina<sup>+</sup>

*Of Counsel*  
Larry N. Gandal  
Jeffrey A. Shane  
Richard P. Meyer<sup>+</sup>  
Larry A. Gordon<sup>+</sup>  
David E. Weisman  
Lawrence Eisenberg  
Deborah L. Moran  
Scott D. Field

*Special Counsel*  
Philip R. Hochberg<sup>+</sup>

*Retired*  
Karl L. Ecker

*Maryland and D.C. except as noted:*  
<sup>+</sup> Virginia also    <sup>++</sup> D.C. only  
<sup>•</sup> Maryland only  
<sup>•</sup> D.C. and VA only  
<sup>■</sup> VA only


Writer's Direct Dial Number:

(301) 230-5228  
tdugan@srgpe.com

## MEMORANDUM

### By Email

TO: Montgomery County Planning Board  
Debra Y. Daniel, Esq.  
David B. Lieb, Esq.

FROM: Timothy Dugan 

DATE: November 5, 2007

RE: Draft Enforcement Rules

I would appreciate learning how the following provisions have been addressed by the proposed rules.

Md. Code Ann., Cts. & Jud. Proc., Section 4-401(v)<sup>1</sup> provides that challenges to violations under Article 28, Section 8-120(c)<sup>2</sup> may be tried in the District Court. Does not the issuance of a civil citation trigger a person's right to a *trial* at the District Court? If so, the District Court would have concurrent jurisdiction with the Planning Board's proceedings. The District Court proceeding would be a trial, not "on the record." Thereafter, an appeal would proceed to the Circuit Court. A person appears to have the right to contest a civil citation in District Court, yet, the proposed rules appear to establish a procedure for the same subject matter with a "hearing examiner" proceeding, and a subsequent proceeding with the Planning Board. I note that Md. Code Ann., Cts. & Jud. Proc., Section 4-402(d) provides for concurrent jurisdiction cases, but it does not

<sup>1</sup> Md. Code Ann., Cts. & Jud. Proc., Section 4-401(v) provides: Except as provided in Section 4-402 of this subtitle, and subject to the venue provisions of Title 6 of this article, the District Court has exclusive original civil jurisdiction in: (10)(v) A zoning violation for which a civil penalty has been provided pursuant to . . . Article 28, Section 8-120(c) of the Code;

<sup>2</sup> Article 28, Section 8-120(c) provides: *Civil fines and penalties; enforcement; prosecution of violations.* (1) In addition to all other remedies provided by law, the governing body of Montgomery County . . . may provide by ordinance for the imposition of civil monetary fines or penalties for violations of the provisions of this title, or of any of the regulations enacted under this title, or any decision made under this title, or of any zoning text amendment adopted under this title.

appear to preclude District Court trials.<sup>3</sup> Challenges to a Planning Board's decision, including the Board's issuing citations and making other determinations, make their way to the Circuit Court, *on the record*, by way of "judicial review," pursuant to Md. Code Ann., State Government Sections 10-201, *et seq.* or, arguably, through the County's Administrative Procedures Act. I would appreciate learning how the above provisions are reconciled.

Also, Section 59-D-3.6<sup>4</sup> addresses the procedures pertaining to an alleged failure to comply with a site plan approval. The provision requires that the Planning Board first conduct a hearing before a citation may be issued. I am not sure I understand how such section "fits into" the proposed rules, where a citation may be issued to initiate the proceedings, before the Planning Board proceeding.

I would appreciate your thoughts. Thank you for your consideration.

G:\S\PLANNING BOARD ENFORCEMENT RULES\Memorandum About Planning Board Rules 11 05 07#1.DOC

---

<sup>3</sup> Md. Code Ann., Cts. & Jud. Proc., Section 4-402(d) provides: *Concurrent jurisdiction cases.* (1)(i) Except in a case under paragraph [none of the cited provisions pertain to the violations being considered] of Section 4-401 of this subtitle, the plaintiff may elect to file suit in the District Court or in a *trial* court of general jurisdiction, if the amount in controversy exceeds \$5,000, exclusive of prejudgment or postjudgment interest, costs, and attorney's fees if attorney's fees are recoverable by law or contract. (*Emphasis added.*)

<sup>4</sup> Section 59-D-3.6: (a) If the Planning Board finds, on its own motion or after a complaint is filed with the Planning Board or the Department, and after . . . , and holding a public hearing or receiving a report of a public hearing . . . that any term, condition, or restriction in a certified site plan is not being complied with, the Planning Board may: (1) impose a civil fine or penalty authorized under Section 50-41; . . . (b) If at the end of the effective period of any compliance program approved by the Planning Board, the Planning Board finds that the applicant has not taken sufficient corrective action, the Planning Board may without holding further hearings revoke the site plan or take other action necessary to ensure compliance, including imposing civil fines, penalties, stop work orders, and corrective orders under Section 50-41.