



**Subdivision Regulations Waiver Discussion**

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**description**

Staff is seeking Planning Board advice regarding interpretation and use of the waiver provisions of the Subdivision Regulations, and discussion regarding possible expansion of the existing provisions for minor subdivision. The specific issues include:

- What constitutes practical difficulties or unusual circumstances that prevent full compliance with the requirements from being achieved?
- Should waivers be granted to eliminate the requirement to submit a preliminary plan?
- Should the existing list of specific minor subdivisions in the Subdivision Regulations be expanded to include a general provision that would permit the Planning Board to decide on a case by case basis whether a proposed subdivision falls into the minor category?

**summary**

- Staff recommends against using time and cost as grounds for granting a waiver.
- Staff also generally recommends against granting waivers of the requirement to submit a preliminary plan. Instead, staff recommends expansion of the minor subdivision provisions, but only for specifically defined types of subdivision.

The Montgomery County Subdivision Regulations, Chapter 50 of the County Code, specify the procedures for approval of subdivisions by the Planning Board. The procedures involve the submission of a preliminary plan for staff review and Planning Board action. The preliminary plan stage of the process is followed by the submission of a record plat which is reviewed by staff, approved by the Planning Board, reviewed by other agencies, and then recorded in the land records of the county.

Years ago, in response to complaints that some types of simple subdivisions did not warrant the time and expense associated with the review of a preliminary plan, the Subdivision Regulations were amended to provide for approval of minor subdivisions. The minor subdivision process specifies certain types of subdivision that may proceed directly to review and approval of a record plat without the prior approval of a preliminary plan.

The alternative to using the minor subdivision provisions to avoid preliminary plan is requesting a waiver of the requirement. It was, in part, the influx of such waiver requests that prompted the creation of minor subdivisions. Of late, the number of waiver requests to avoid preliminary plan has again been on the rise. Most of them are based on the desire to avoid the time and money involved in going through preliminary plan review. Staff would like to know whether the Board thinks these are grounds for a waiver. Further, staff would like to discuss the potential need for expansion of the minor subdivision provisions, and the types of situations which should be included.

## **Requirements for Subdivision**

The Subdivision Regulations generally specify that whenever land in the county is subdivided for any purpose, a plat of such subdivision must be recorded in the land records of the county. They further specify that, with certain exceptions, the Department of Permitting Services must not approve a building permit for the construction of a dwelling or other structure, unless the dwelling or structure would be located on a lot or parcel of land which is shown on a recorded plat. They also prohibit, with certain exceptions, the issuance of a building permit for construction of a dwelling or other structure which is located on more than one lot, which crosses a lot line, which is located on the unplatted remainder of a resubdivided lot, or which is located on an outlot. Together, these requirements result in the need for platting of many properties prior to land development.

In order to provide an orderly basis for the processing of subdivisions prior to approval, the Subdivision Regulations specify that the Board consider such plans in two stages. The first stage of the process, except for specific minor subdivisions, is submittal of a preliminary plan for approval. The second stage is submittal of a final plat for approval and recordation. In approving these applications, the Board must find that proposed subdivision will meet the standards established both, in the Subdivision Regulations, and in the road construction code or other ordinances or regulations. To ensure that these findings can be made, the preliminary plan and final record plat are referred to other county agencies or departments for their review and recommendations prior to Planning Board action.

The scope of preliminary plan review includes: determination of required public and private improvements; design and layout of roads, lots and blocks; the need for public sites and adequate open spaces; and protection of environmentally sensitive areas. In addition, the Board must find prior to approval of a preliminary plan that it will meet requirements of the applicable master plan, has adequate public facilities, and provides for sediment control, forest conservation, and water quality. Preliminary plan review is also a public process, so it includes requirements for pre-submission public meetings, site posting, noticing and public hearing. As such, the review of some preliminary plans can be quite complex and time consuming.

Record plat review includes review of a detailed plat drawing that shows all boundaries, street lines, lot lines and other encumbrances, such as easements, with survey data that is sufficient to locate and reproduce them on the ground. The layout of features on the plat drawing must be in substantial conformance with the applicable preliminary and site plans and their associated conditions of approval, and the plat must not be approved until other supporting plans such as, road and street profiles and storm drainage construction plans have also been approved. A record plat application and initial drawing are reviewed by staff and referred to selected outside agencies and departments prior to the submittal of a final plat mylar. The final plat must be approved by the Planning Board within 30 days of its submittal. A plat may not be recorded until all required public improvements for the subdivision have been completed or guaranteed. Record plats are approved on the Board's consent agenda and are not noticed to the public.

## **Minor Subdivisions and Subdivision Regulations Waivers**

Prior to the late 90's, there was no way to avoid the two-step subdivision process except to request variations from the requirements which the Board was authorized to grant under the regulations at that time. Variations could be granted upon a finding that specific conditions or limitations of the land to be

subdivided made it impossible or impractical, or would cause a singular and unnecessary hardship, if full conformance with the Chapter were required. Such variations were granted in several types of instances to waive the requirement to submit a preliminary plan. Staff at the time pointed out that the need for a majority of these variations could be avoided if a minor subdivision procedure were established. After further review of the issue by the Planning Board and County Council, provisions for minor subdivisions were added to the Subdivision Regulations by amendment in 1997. The minor subdivision process permits recordation of plats for certain types of subdivisions without prior approval of a preliminary plan. As of now, these subdivisions include:

- Minor lot line adjustments that do not exceed 5% of the combined area of the lots involved
- Conversion of certain outlots into a lot
- Consolidation of recorded lots or parts of lots that were created by deed prior to June 1, 1958
- Further subdivision of commercial, industrial or multi-family residential lots to create ownership or lease lines
- Plats of correction
- Plats for residential lots created from parcels that were created by deed prior to June 1, 1958
- Plats for existing places of worship, private schools, country clubs, private institutions and the like located on unplatted parcels
- Plats to record certain parcels that were created by deed after June 1, 1958, that contain a lawfully constructed residential dwelling and meet the requirements of the zone in place when the dwelling was constructed

The same amendment also created new waiver provisions to replace the previous provisions for granting variations from the Chapter. Staff noted at the time that, because the provisions for minor subdivisions were limited, there would be future requests to use the waiver provisions to avoid preliminary plan in other instances. The current general waiver provision of Section 50-38(a)(1) states:

“The Board may grant a waiver from the requirements of this Chapter upon a determination that practical difficulties or unusual circumstances existing that prevent full compliance with the requirements from being achieved, and that the waiver is: 1) the minimum necessary to provide relief from the requirements; 2) not inconsistent with the purposes and objectives of the General Plan; and 3) not adverse to the public interest.”

### **Discussion of Current Subdivision Waiver Requests**

As expected when the minor subdivision provisions were created, there have been several instances since then where waivers have been requested to permit recordation of subdivision plans without previous approval of a preliminary plan. While staff and the Board previously granted such requests under the previous variance provisions for many of the types of plans that became the current minor subdivisions, they are harder to justify under the current waiver language. In short, most of the current waiver requests are based on the justification that the time and expense involved in preliminary plan review constitute a practical difficulty that prevents achieving full compliance with the requirements. But if having to invest time and money doing a preliminary plan prevents compliance with the requirement then arguably, all applicants could have grounds to request waivers. And the Board would be faced with having to decide in each case the validity of a particular applicants' claim. Further, by their nature, applications for simpler preliminary plans are charged lower fees, are often eligible for exemptions from some of the elements of review that are otherwise required as part of a preliminary

plan and, provided they contain complete information and are diligently pursued by the applicant, require less overall review time. Given that, it seems unnecessary for the Board to give up its authority to review a preliminary plan based on this argument.

Some examples of the more recent requests to waive either or both of the preliminary plan and record plat requirements of the Subdivision Regulations that have been acted upon by the Board are listed in Attachment A of this memorandum, and will be further explained and clarified by staff as part of this discussion with the Board. For the most part, those that received favorable consideration were based upon some type of finding that unusual circumstances or a specific practical difficulty applied to the case, and not on a general finding that overall time and expense of the process was not justified for the case. This should be the way that the waiver provisions are applied.

Instead of granting waivers for additional types of subdivisions that may not warrant preliminary plan before platting, the minor subdivision provisions should be expanded to include them. This is the appropriate mechanism to deal with them because it provides for review by all who might have concerns about loss of their authority to review matters that are associated with preliminary plans, and it bases the decision to eliminate the requirement for preliminary plans on the specific conditions of the subdivision rather than on a judgment based on the case by case argument by the applicants. Staff has recently discussed such an amendment with an applicant who has submitted a waiver request. Staff's mark-up of a draft of the applicant's suggested language, which has not been introduced, is included for information in Attachment B. The Board will note that in addition to a specific minor subdivision provision, this draft also proposes a general provision. Staff does not support that proposal, but would like to discuss the idea for this type of provision with the Board.

## SUBDIVISION WAIVER EXAMPLES

- Waiver of preliminary plan and record plat requirements for a private school on unplatted, formerly public-owned property that was required to do a site plan amendment to increase the number of students, but did not require new development. Waiver granted based on that the practical difficulties associated with duplicative reviews.
- Waiver to permit two parts of lots that were created after June 1, 1958 to be platted under the minor subdivision process as part of a newly created outlot. Waiver granted based on the practical difficulties of doing a preliminary plan without a specific development plan for the site.
- Waiver of preliminary plan and record plat to permit issuance of a building permit for house construction on an unplatted parcel. Waiver based on unusual circumstances involving public funding that was being applied to support the new construction, but would not bear the cost of subdivision.
- Waiver to permit construction of a shed on an unplatted cemetery property that otherwise contained no structures. Waiver granted based on the practical difficulties of having to pay estimated costs for the subdivision that would have been twice as much as the cost of the shed.
- Waiver to permit consolidation of a part of lot created after June 1, 1958 with another pre-'58 part of lot to facilitate a small addition to an existing nursing home. Waiver granted based on the practical difficulties associated with the potential loss of HUD funding because of the time a preliminary plan would take.
- Waiver to permit consolidation of an unplatted parcel with an adjacent lot. Waiver granted based on the unusual circumstance that the tax map incorrectly identified the parcel as a part of lot that would have qualified for consolidation under minor.
- Waiver to permit a lot line adjustment greater than 5% of the area of the combined lots. Waiver granted on the practical difficulties associated with the time and expense for staff and the applicant that would result from requiring a preliminary plan.

EXAMPLE MINOR SUBDIVISION AMENDMENT

~~(10) Adjusting lines between~~ Combining a lot and adjoining property parcel.

~~¶~~Except in agricultural zones, the Planning Board may approve plats under the minor subdivision process to consolidate an existing platted lot, other than an outlot, and a partition of land created as a result of a deed provided:

- a. In a one-family residential zone, the partition of land created by deed cannot itself be platted under the area and dimensional standards of the zone;
- b. Any conditions applicable to the existing lot remain in full force and effect on the new lot; and
- c. Provided any required street dedication is provided. ~~for property classified in a one family zone in order to consolidate a lot and a parcel under common ownership or to adjust or eliminate an existing internal lot or property line.~~

~~(f) — The Planning Board may also approve a plat under the minor subdivision process under circumstances similar to those enumerated in subsection (a) that satisfy the definition of “minor subdivision” in Section 50-1 of this Chapter. The applicant for plat approval must submit a sketch plan for review and approval under the procedures set forth in subsection (a)(1)(d).~~

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