



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION  
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Board Date: 1/13/05  
Item 1

TO: Montgomery County Planning Board

FR: Michele Rosenfeld, Associate General Counsel *MR*  
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DA: January 7, 2005

RE: Amendment to Planning Board Rules of Procedure.  
Eliminate References to Maryland's Administrative Procedures Act.

Staff Recommendation: Approval of Amendments in Section V, below.

I. Introduction

Effective November 1993, the Board adopted Revised Rules of Procedure for the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, (hereinafter "Rules," Attachment One). These Rules include two extraneous references to Maryland's Administrative Procedures Act,<sup>1</sup> leading some to conclude that these provisions govern the Planning Board's public hearings. As the Board has stated on numerous occasions in its public hearings, the Board's hearings are governed not by the APA, but by the procedures adopted in its Rules. These Rules clearly provide for due process protections as required under Maryland and federal law. The amendments discussed below are recommended in order to eliminate confusion over the Board's procedures, and to provide a consistent and common understanding of the standards governing the Planning Board's public hearings.

II. What Do the Planning Board's Rules Provide?

The Planning Board's Rules, in combination with the statutory requirements of the Commission's enabling legislation contained in Article 28 of the Maryland State Code (the "Regional District Act"), clearly provide procedural due process as required in matters such as preliminary and site plan hearings. The Rules provide for such things as notice to applicants and interested parties (such as adjacent and confronting property

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<sup>1</sup> Maryland State Code Ann. §§ 10-201 – 10-226, inclusive.

owners and civic and homeowner's associations);<sup>2</sup> public testimony; the introduction of evidence; the orderly presentation of testimony;<sup>3</sup> cross-examination of witnesses;<sup>4</sup> a prohibition against *ex parte* communications and allowance for certain disclosure requirements if such communications occur;<sup>5</sup> and create a process for requesting reconsideration of Board decisions.<sup>6</sup>

Additionally, and more broadly of course, the combined provisions of the Regional District Act and Montgomery County's Zoning Ordinance and Subdivision Regulations further govern the Board's hearings.<sup>7</sup>

III. The Plain Language of the APA does not include the Planning Board's public hearings.

The Board has stated on the record that its Planning Board's actions do not fall within the purview of the APA.<sup>8</sup> This conclusion is reached through a simple definitional analysis of a "contested case" under the law.

The Commission qualifies as an agency under the APA. An agency is a unit that is "created by general law; operates in at least 2 counties; and is authorized by law to adjudicate contested cases."<sup>9</sup> At first blush the Board's hearings would appear to qualify as a "contested case" (and thus subject to the APA). A contested case is defined as a proceeding before an agency to determine "A right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after an opportunity for an agency hearing."<sup>10</sup>

A matter is not a "contested case" for purposes of the APA, however, unless a statutorily required public hearing "(1) Expressly requires that the public hearing be held in accordance with [the APA]; or (2) Expressly requires that any judicial review of the agency determination following the public hearing be conducted in accordance with [the

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<sup>2</sup> Rules, Section 2 – Notice.

<sup>3</sup> Rules, Section 4 – Information from the Public; Section 6 – Time Guidelines; Section 8 – Evidence; Section 12 – Order of Presentation.

<sup>4</sup> Rules, Section 5 – Questioning of Other Witnesses.

<sup>5</sup> Rules, Section 10 – Ex Parte Communication.

<sup>6</sup> Rules, Section 11 – Reconsideration.

<sup>7</sup> Other specific hearings are governed by separate legislative acts, such as Chapter 22A (Forest Conservation Law).

<sup>8</sup> The Prince George's County Planning Board similarly does not look to the APA to govern its public hearings, relying instead on its own set of Rules of Procedure.

<sup>9</sup> Maryland State Gov't Art. § 10-202(b)(1).

<sup>10</sup> Maryland State Gov't Art. § 10-202(d)(1).

APA].”<sup>11</sup> Nothing in the Regional District Act, the Zoning Ordinance or the Subdivision Regulations requires that the Board’s regulatory hearings (e.g., preliminary and site plan hearings) be held in accordance with the APA. Additionally, the Regional District Act expressly states that judicial review of subdivisions is conducted in accordance with Chapter 200 of the Maryland Rules (Judicial Review of Administrative Agency Decisions) (not the APA). Thus, the Planning Board’s public hearings are clearly exempted from the APA’s “contested case” provisions under both prongs of the exemption standards.

#### IV. Current Rules

Notwithstanding the fact that the APA does not govern Board hearings, the Board’s adopted Rules include some ambiguous language stating:

These Rules are promulgated pursuant to the Annotated Code of Maryland State Government Article, Title 10, Subtitle 2, Administrative Procedure Act – Contested Cases,” Sections 10-201 10-217 [sic]. The following matters shall be subject to these rules:

...

E. Any other matters upon which the Planning Board may be mandated to act which fall within Sections 10-201 10-217 [sic] of The State Government Article of the Annotated Code of Maryland.<sup>12</sup>

Rules, Section 1 – Purpose. These citations do not incorporate the APA, rather the excerpt above says that certain matters shall be “subject to these rules” (i.e., the Rules of Procedure, and not the APA). The inclusion of these references, however, have led some to conclude that the APA standards govern Planning Board hearings. Assuming, *arguendo*, that this conclusion is accurate, one could read the above citations as merely referencing the two sections enumerated (i.e., 10-201 and 10-217), which are the Purpose and the Standard of Proof provisions of the APA. If, alternatively, the citations are read as 10-201 *through* 10-217, then they would include (among other things) standards for giving notice of a public hearing,<sup>13</sup> the ability to hold a hearing by telephone or other means,<sup>14</sup> and the admission and exclusion of evidence.<sup>15</sup> However, these citations do not reference the entire APA, excluding provisions such as those governing how to create a record,<sup>16</sup> the preparation and submission of written decisions,<sup>17</sup> and the standards for judicial review of a decision.<sup>18</sup>

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<sup>11</sup> Maryland State Gov’t Art. § 10-203 (c).

<sup>12</sup> Rules, Section 1 – Purpose.

<sup>13</sup> Maryland State Gov’t Art §§10-207, 10-208.

<sup>14</sup> Maryland State Gov’t Art §10-211.

<sup>15</sup> Maryland State Gov’t Art § 10-213.

<sup>16</sup> Maryland State Gov’t Art §10-218.

<sup>17</sup> Maryland State Gov’t Art §§10-220, 10-221.

Even if one took the position that the Board's Rules adopted the APA, the Board has authority to amend its Rules to remove those provisions. In light of the fact that the Rules, in conjunction with Article 28 and the County Code, provide for due process as required by law, staff recommends that the proposed amendment be adopted in order to preclude future confusion on this issue.

V. Proposed Amendments

Staff recommends the Board amend its Rules by deleting the following underlined text, and relettering Section 1.F to 1.E.<sup>19</sup>

~~These Rules are promulgated pursuant to the Annotated Code of Maryland State Government Article, Title 10, Subtitle 2, Administrative Procedure Act - Contested Cases," Sections 10-201-10-217 [sic]. The following matters shall be subject to these rules:~~

~~E. Any other matters upon which the Planning Board may be mandated to act which fall within Sections 10-201-10-217 [sic] of The State Government Article of the Annotated Code of Maryland.~~

~~F. E. Building permits subject to Article IV, Chapter 8, Montgomery County Code which require a timely adequate public facilities determination by the Planning Board.~~

If the Board adopts this recommended change, staff will re-issue revised Rules of Procedure, with this text deleted and the last paragraph of Section 1 re-lettered, with a revision date of January 13, 2005.

Attachment

Cc: Adrian R. Gardner, General Counsel

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<sup>18</sup> Maryland State Gov't Art §10-222.

<sup>19</sup> The Rules require the amended text be submitted to the Board at least two weeks prior to its adoption of the amendment. In accordance with this requirement, such draft text was submitted to the Board on December 14, 2004.