

MCP-Chairman

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From: Theresa Strausbaugh [tstrausbaugh@srgpe.com]
Sent: Tuesday, November 08, 2005 6:06 PM
To: MCP-Chairman
Cc: Krasnow, Rose; michelle.rosenfeld@mncppc-mc.org
Subject: Clarksburg Town Center [SENT ON BEHALF OF KEVIN KENNEDY]

OFFICE OF THE CHAIRMAN
THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Please see attached transmittal from Kevin Kennedy and Tim Dugan. Thank you.

<<supplemental brief.pdf>>

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November 8, 2005

The Honorable Derick P. Berlage
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The Maryland-National Capital Park and Planning Commission ("P&P")
8787 Georgia Avenue
Silver Spring, Maryland 20910
(via fax & e-mail)

Michele M. Rosenfeld, Esq.
Associate General Counsel
The Montgomery County Planning Board
The Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
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(via fax & e-mail)

Re: Alleged Site Plan Violations at Clarksburg Town Center (the "Project")

Dear Chairman Berlage and Ms. Rosenfeld:

Pursuant to our recent discussions with Ms. Rosenfeld, enclosed is a supplemental brief clarifying the many reasons why the Administrative Procedure Act controls the pending quasi-judicial proceedings in the above-captioned matter. The required disposition of the case, both because the APA is not being followed and otherwise, is respectfully reiterated in the attached. Thank you for your time in consideration of this matter and for your anticipated dismissal on all claims of violation pursuant to same.

Yours, very truly and respectfully,
SHULMAN, ROGERS, GANDAL,
PORDY & ECKER, P.A.

By: Timothy Dugan/td
Timothy Dugan

By: Kevin P. Kennedy/ks
Kevin P. Kennedy

*Co-Counsel to Craftstar Homes, Inc. and
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MEMORANDUM

To: Montgomery County Planning Board
c/o Chairman Derick P. Berlage

CC: Rose Krasnow, Chief, Development Review Division
Michele Rosenfeld, Associate General Counsel

FROM: Kevin P. Kennedy and Timothy Dugan, Co-Counsel to Craftstar Homes, Inc, and
its LLC affiliates and NVR, Inc. t/a NV Homes

DATE: November 8, 2005

I. The Planning Board's Attempts to Exempt Itself from the APA Further Compel Dismissal of the Claims of Site Plan Violation.

In short, M-NCPPC contends that the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission (M-NCPPC or Commission) may, and has, elected to "opt out" of the provisions of the APA.

For the reasons that follow, the rights of Craftstar Homes, Inc. ("Craftstar") and NVR, Inc. t/a NV Homes ("NVR")—and, indeed, all of the respondents in this alleged "Failure to Comply"/site plan violation case (per Montgomery County Code § 59-D-3.6)—to due process and basic fairness in this politically-charged case are further, and unconstitutionally, eroded by the Planning Board's stated misconception **that the Montgomery County Planning Board, *ex cathedra*, can and has divorced itself (and these proceedings) from the statutorily-imposed strictures of the Maryland Administrative Procedure Act (APA), Md. Code § 10-101, *et seq.* of the State Government Article, and more specifically, Md. Code § 10-201 *et seq.* of the State Government Article, which governs the adjudication of contested cases. For the reasons that follow, that misplaced legal position is untenable and, as such, further compels dismissal of this unproved and unapprovable case as a matter of law.**

In short, any such "election" purportedly to eschew the provisions of the Maryland Administrative Procedure Act is not only without merit, but it has no basis in law. Because our clients are guaranteed the application of those procedures in this quasi-judicial contested case, M-NCPPC's dispositive misconception in this case, dooms it forever to being an expensive and unconstitutional waste of time for all concerned; doomed in the sense that whatever the outcome, it will not and cannot stand the test of challenge on appeal. *Accord Maryland-National Capital Park and Planning Commission v. Friendship Heights*, 57 Md.App. 69, 468 A.2d 1353 (1984), *cert denied*, *Friendship Heights and the Hills v. M-NCPPC*, 300 Md. 89, 475 A.2d 1200 (1984), quoting from the "*Accardi Doctrine*:"

An agency of the government must scrupulously observe rules, regulations or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.

United States v. Heffner, 420 F.2d 809 (4th Cir.1970); *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954).

II. The M-NCPPC and the Planning Board are Creatures of Statute

The Montgomery County Planning Board is the five members appointed by Montgomery County to the M-NCPPC, a bi-county agency created by the General Assembly pursuant to the Regional District Act (RDA), Md. Code Art. 28, Title 7. The powers of the M-NCPPC and of its Planning Board may be altered only by an act of the General Assembly or if ruled upon by the Courts.

The RDA sets out the scope of powers delegated to the Commission, including the specification that the Commission is to be composed of five persons appointed by the governing body of Montgomery County and five persons appointed by Prince George's County Executive and subject to the approval of the Prince George's County Council. *See* Md. Code Art. 28, § 2-101. The members of the Commission are designated the Montgomery County Planning Board and the Prince George's County Planning Board. *See* Art. 28, § 7-111. Thus, the action of each County Planning Board constitutes, in effect, the actions of the Commission. One cannot divorce itself from the other.

We have reviewed legislation of the General Assembly, both proposed and enacted. We have unearthed no bill which either states or even hints that the Montgomery County Planning Board is actively or electively exempted from the provisions of the Administrative Procedure Act.

II. The Planning Board is Firmly Ensnared within the APA

Turning attention to the language of the Maryland APA, it is clear that the APA applies to the M-NCPPC—and its Planning Boards—both by “inclusion” and by “exclusion.” The APA, at Md. Code § 10-202 (b), defines “Agency” as:

- “(1) an officer or unit of the State government authorized by law to adjudicate contested cases; or
- (2) a unit that:
 - (i) is created by general law;
 - (ii) operates in at least 2 counties; and
 - (iii) is authorized by law to adjudicate contested cases.”

As indicated, the M-NCPPC was created through the RDA. In that the M-NCPPC operates Planning Boards in both Prince George's and Montgomery Counties, and the Planning Board's review of site plan applications (let alone its prosecution of alleged violations) has been ruled to be a quasi-judicial determination of a right, duty, statutory entitlement or privilege,¹ the Planning Board clearly qualifies as an Agency within the ambit of the APA. Moreover, the M-

¹ *See infra* *Maryland-National Capital Park and Planning Commission v. Friendship Heights*, 57 Md.App. 69, 468 A.2d 1353 (1984), *cert denied*, *Friendship Heights and the Hills v. M-NCPPC*, 300 Md. 89, 475 A.2d 1200 (1984).

NCPPC is *clearly not* one of those delineated agencies of the Executive Branch excluded from the APA. Compare Md. Code § 10-203.

In addition, the Planning Board falls within the sphere of the APA by “exclusion.” As follows, Md. Code § 10-203 (a)(4)(ii), provides:

“(a) This subtitle [Administrative Procedures Act – Contested Cases] does not apply to:

(4) an officer or unit not part of a principal department of State government that:

(i) is created by or pursuant to the Maryland Constitution or general or local law;

(ii) operates in only 1 county; *and*

(iii) is subject to the control of a local government or is funded wholly or partly from local funds[.]”

[Emphasis added.] [Alterations added]

It is clear that the Planning Board cannot fulfill the conjunctive elements of Md. Code § 10-203 (a)(4) that are necessary for exemption from the APA. Although the Montgomery County Council may supplement the salary of one or more Planning Board Commissioners, as already noted, the Planning Board is a subsidiary of the M-NCPPC, *i.e.*, a statutorily created *bi-county, agency* (existing in Prince George’s County and in Montgomery County) as that term is defined in Md. Code § 10-202 (b)(2), *supra*.

Section 10-203 (a)(4)(ii) was added to the APA by 1993 Md. Law Chap. 59. **The “Drafter’s Note” embedded within the Chapter Law is highly instructive and serves to reinforce the applicability of the APA to bi-county agencies such as the Planning Board:**

“Drafter’s Note: Paragraph (4) [*i.e.*, § 10-203 (a)(4)] would exempt local governments and agencies such as school boards and liquor boards from the APA. The language is taken in part from § 10-201 (b)(2) [definition of “Agency”] of the State Government Article, *expressly* includes bicounty agencies under the APA. It is intended to codify existing practice and is not intended to limit or enlarge the applicability of the APA to such entities.”

It is plausible, though illogical, to surmise that the Planning Board may be operating under the misconception that the proceedings it conducts as the *Montgomery County Planning Board* of the Maryland-National Capital Park and Planning Commission are somehow independent of its conduct as the M-NCPPC. Such a position would not only be specious under various doctrines of statutory interpretation, agency, etc., but would also be contrary to a formidable body of case law.

In *Prince George’s County v. Maryland-National Capital Park and Planning Commission*, 269 Md. 202, 306 A.2d 223 (1973), the Court of Appeals held, *inter alia*, that the

Regional District Act was a public general law, and thus, immune from repeal or amendment by the Prince George's County Charter, *i.e.*, a public local law. The Court explained:

“Chapter 780 [i.e., the RDA, enacted by 1959 Md. Laws Ch. 780] does contain ‘administrative detail’ suited to the particular needs of the respective localities, ***but remains a public general law and, as such, is not subject to amendment or repeal by the County Council*** and is not superseded or modified by the Charter. . . [T]he General Assembly understood and intended that [the formerly public local laws under which the M-NCPPC had been codified] were public general laws enacted as bi-county acts and not as public local laws of either county. . . . The consolidation, as it were, of these two public general laws into Chapter 780 obviously did not change Chapter 780 into a public local law!”

Id. at 225, 306 A.2d at 236 (emphasis and parentheticals added). In response to Prince George's County's fervent argument that “the Planning Boards for the portions of the Regional District situated in each county are local agencies and should be subject to local regulations,” the Court of Appeals in *Prince George's County* countered:

“Here again, the County confuses local functions and responsibilities with local laws. Chapter 780, a public general law, does provide for *local functions* and does impose *local responsibilities*; but, as we have already indicated, such provisions do not change Chapter 780 from a *public general law* to a *public local law*, and make the Planning Boards subject to the Charter and local regulations.”

Id. at 230, 306 A.2d at 239 (emphasis original). See also, *Prince George's County v. Mayor and City Council of Laurel*, 262 Md. 171, 188, 277 A.2d 262 (1971) (holding that a legislative act that “applied to only one county and one section of the total area encompassed by the Regional District, [] was legislation which formed an integral part of the entire bicounty scheme (*i.e.*, the Regional District)”) (alterations added).

III. The Planning Board's Procedure Descends from the APA

A. The Planning Board May Not Take Ex-parte Action to Exempt Itself from the APA

Pursuant to the authority provided by Md. Code § 10-206 of the State Government Article, governing APA contested case procedural rules, the Planning Board endeavored to develop its own Agency Rules of Procedure in the early 1980's. The Planning Board subsequently amended those Rules in June 1990. More recently, in January 2004 or January 2005 (while the copy of the Rules indicates revision as of January 13, 2005, the notice advertised in the Planning Board agendas in January and February of 2005 indicates a revision as of January 13, 2004), the Planning Board again altered its Rules of Procedure, to eliminate the reference by which it promulgates its Rules of Procedure. In its January 2004/2005 action, the Planning Board deleted the following statement from Section 1 – Purpose:

“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.”

Having made the language deletion, the Planning Board provided the following public announcement, which appeared on Planning Board agendas in January 2005 and early February 2005:

“The Planning Board’s Rules of Procedure were revised, effective January 13, 2004, to eliminate references to Maryland’s Administrative Procedure Act from Section I (Purpose). Call the Office of General Counsel at 301-495-4646 for a copy of the revised Rules.

“Additionally, the Board will be considering more comprehensive revisions to the Rules later this spring. Staff seeks public comment on the Rules on Monday, February 28, from 1:00 - 4:00 p.m. in the Auditorium at 8787 Georgia Avenue, Silver Spring. Written comments also are welcome, and should be sent to Michele Rosenfeld, Associate General Counsel, at M-NCPPC, Suite 205, 8787 Georgia Avenue, Silver Spring, Maryland 20910. Staff will hold a second open meeting later this spring to discuss proposed draft Rules.”

The Planning Board provided no explanation for deleting the APA authority reference. That the Planning Board amended its Rules of Procedure in January 2004/2005 begs the question as to what basis they had for the amendment which eliminated the reference to the APA. It is perplexing to contemplate how the Planning Board might move to amend its Rules of Procedure, *when the very creation and existence of those Rules is enabled by the APA*. But for the APA, the Planning Board’s Rules of Procedure have no foundation for existence. An observer might sympathize with the Planning Board’s desire to “test its wings,” but even after leaving the nest, the Planning Board does not magically emerge as a horse of a different color. It remains a creature of the RDA . . . and squarely within the purview of the APA.

After the Planning Board’s Rules’ alteration, there appeared on the Planning Board Agendas for February 17, 2005, and February 24, 2005, (*i.e.*, approximately one week *before* the public comment forum on the Rules) the following:

“Closed Session pursuant to Maryland State Government Code Annotated Section (10-508) (a) (7) (consult with counsel to obtain legal advice) (Subject: *Planning Board Rules of Procedures* [sic])” [Emphasis added.]

The Planning Board’s deliberation in closed session in respect to the changes it conjured in the Rules raises many troubling issues, not the least of which is the possible implications that such action may have in connection with the construction of the Maryland Open Public Meetings Act which leans in favor of open meetings. *See* Md. Code § 10-501, *et seq.* **and particularly given the fact that amending the Rules of Procedure is a rulemaking—and public—function of an administrative body under Md. Code § 10-101, et seq.** Moreover, it is notable that the Planning Board held its public comment opportunity *after* it had already deleted the Rules’ reference to the APA.

If the Planning Board were to rely solely upon the provisions found in its Rules of Procedure, it is abundantly clear that those Rules would be woefully inadequate and would serve as further indisputable evidence that the Planning Board is conducting the instant prosecutorial proceeding outside the boundaries of Due Process. To wit, absent the APA's rules on contested cases, the Planning Board has *no* articulated procedures for the adjudication of contested cases.²

B. The Planning Board's Quasi-Judicial Function Mandates that it may not Disregard Established Rules of Procedure

It is settled law that the Planning Board serves a quasi-judicial function and is authorized to hear contested cases. The Court of Special Appeals in *Maryland-National Capital Park and Planning Commission v. Friendship Heights*, 57 Md.App. 69, 468 A.2d 1353 (1984) determined that proceedings before the Planning Board constitute contested case; in that a site plan application requires a hearing in which the agency (*i.e.* Planning Board) decides a right, duty, statutory entitlement or privilege and it performs a quasi-judicial function in adjudicating facts. To wit:

The M-NCPPC's planning board action [on a site plan] involves the application of statutory standards, under the authority set forth in Sec. 59-D-3, to the facts presented by the testimony and exhibits presented at the site plan review hearing. Where, as here, the administrative tribunal is under a duty to consider evidence and apply the law to the facts as found, thereby exercising some discretion, the function is quasi-judicial.

Friendship Heights at 57 Md.App at 82, 468 A.2d at 1359. It is equally uncontested that the Planning Board conducts its site plan review duties pursuant to its APA-based Rules of Procedure. As stated in *Friendship Heights*:

"A hearing is required in site plan review by virtue of the Montgomery County Planning Board's Rules of Procedure. These rules have been adopted pursuant to authority granted to the agency under Sec. [10-206] of the Act.

Id. at 80, 468 A.2d at 1358. An agency must abide by its regulations, such that "rules and regulations promulgated by an administrative agency cannot be waived, suspended, or disregarded as long as such rules and regulations remain in force." *Id.*

The conclusion is clear: The Planning Board cannot either simply renounce the applicable Rules it already has in effect; nor may it forsake its duties as a quasi-adjudicative body determining contested cases.

² On November 3 we respectfully submitted the attached primer on how the Clarksburg Town Center unproved allegations of "site plan" violation under Mo. Co. Code §59-D-3.6 – what all agree to be a quasi-judicial contested case -- was supposed to be (but is not, in fact being) prosecuted by M-NCPPC under the APA. *See* attached, including explanation at footnote 1 thereof distinguishing the Planning Board's Rule 12.

IV. The Procedures of the Planning Board are governed by the APA

As already noted, absent the APA, the Planning Board would lack any sort of framework in which to operate. The Planning Board's recent Rules of Procedure revision attempting to deny the Rules' genesis does not negate the clear APA lineage of the Rules. Case law subjects the M-NCPPC and its Planning Boards to the APA, and the Planning Board cannot simply engage in self-extrication. This conclusion not only comports with the Planning Board's quasi-judicial functions, but it is also underscored by controlling case law.

The Court of Special Appeals' opinion in *Friendship Heights*, 57 Md.App. 69, 468 A.2d 1353, examined the petition to the Circuit Court for Montgomery County filed by Friendship Heights appealing the decision of the Montgomery County Planning Board to grant site plan approval to a residential developer/builder.

In *Friendship Heights*, the Court of Appeals stated, "The M-NCPPC [was] created by the General Assembly as [a state agency] responsible for providing services which would otherwise be the responsibility of the respective counties." *Id.* at 82-83, 468 A.2d at 1359 (alterations added). The M-NCPPC "has regional functions and responsibilities as the representative of the State of Maryland in carrying out its powers and duties. *Id.* at 82, 468 A.2d at 1359. The Court succinctly concluded that, as a state agency, the procedures of the M-NCPPC "are governed by the APA." *Id.* (emphasis added).

V. Conclusion

The thrust could not be more clear; *viz.*, the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission exists as a bi-county agency created by the General Assembly. The Planning Board is subject to the APA and it must conduct its proceedings in accord with the APA procedures on contested cases. To act otherwise is to flout not only the clear intent, dictates and policies of the General Assembly and the Courts of this State, but also the protections of Procedural Due Process to which the Respondents are clearly entitled.

Having improperly permitted the CTCAC, a non-Party (and at most, a complainant witness) to these quasi-adjudicative proceedings, to take over the required prosecution of this case from M-NCPPC's general counsel and having *failed* (i) to call any witnesses, (ii) to allow the presumed innocent respondents any cross-examination, (iii) to adduce any evidence in support of the alleged "site plans" (as acknowledged and permissibly amended by staff c/o Wynn Withans), (iv) to call that essential witness, and having otherwise and completely (v) disregarded the Respondents' procedural and substantive due process entitlements, under the clearly applicable APA and otherwise, the time has clearly come to say "No Violation" to the myriad of unproved and unprovable claims of "site plan" violation. Respectfully, any other outcome, on this record, would wrongfully apply a new set of rules, *ex post facto*, without requisite evidence and a constitutional abomination.

MEMORANDUM

TO: Montgomery County Planning Board
c/o Chairman Derick P. Berlage

CC: Rose Krasnow, Chief, Development Review Division
Michele Rosenfeld, Associate General Counsel

FROM: Kevin P. Kennedy and Timothy Dugan, Co-Counsel to Craftstar Homes, Inc, and
its LLC affiliates and NVR, Inc. t/a NV Homes

DATE: November 3, 2005

Pursuant to the authority of the Regional District Act, Md. Code Art. 28, Title 7, the Maryland Administrative Procedures Act in respect to contested cases, Md. Code § 10-201, *et seq.* of the State Government Article, Md. Code § 10-206 of the State Government Article, and the Montgomery County Planning Board's Rules of Procedure, the Planning Board's procedure in a contested case is intended to operate as follows:

PROCEDURAL PROCESS	AUTHORITY
1. Complaint is filed with Planning Board	Montgomery County Code § 59-D-3.6
2. Planning Board's "Enforcement Agent" (<i>i.e.</i> , Staff) investigates allegations in complaint	Montgomery County Code § 50-41 (a)(3)
3. Planning Board (<i>i.e.</i> , Enforcement Agent/Development Review Staff, in consultation with other Planning Board Divisions) prepares a Staff Report with Staff Recommendation in response to allegations	Montgomery County Code § 50-41 (k) Planning Board course of dealing
4. If basis for allegations, hearing is scheduled as a contested case. Hearing date and notice of hearing are provided. Respondents are notified of alleged violations.	Md. Code § 10-202 (d); § 10-208 of the State Government Article (Administrative Procedures Act) Md. Code Art. 28, § 7-116 (h)(3) COMAR 28.02.01.05 COMAR 28.02.01.17 Montgomery County Code § 59-D-3.6

<p>5. Record of proceedings opened as of date of notice of hearing. Planning Board begins compiling record.</p>	<p>Md. Code § 10-218 of the State Government Article (Administrative Procedures Act) Montgomery County Planning Board Rules of Procedure – Section 3 Montgomery County Planning Board Rules of Procedure – Section 9</p>
<p>6. Prosecution on alleged violation is to be conducted by Planning Board’s Office of General Counsel (<i>i.e.</i>, Planning Board’s Prosecutor)</p>	<p>Md. Code Art. 28, § 7-116 (h)(4) Montgomery Co. Code § 59-A-1.3 Montgomery Co. Code § 50-41 (k)</p>
<p>7. Planning Board functions as Presiding officer in prosecutorial hearing</p>	<p>Md. Code § 10-202 (c) & (g); § 10-205 of the State Government Article (Administrative Procedures Act) Montgomery Co. Code § 50-41 (k) COMAR 28.02.01.17 (D) COMAR 28.02.01.08</p>
<p>8. Prosecutorial proceeding conducted as a contested case¹</p>	<p>Md. Code § 10-206 of the State Government Article (Administrative Procedures Act) COMAR 28.02.01.17 (D)</p>
<p>9. During the prosecutorial hearing, evidence may be presented by Planning Board’s Prosecutor and by Respondents a. Hearsay permitted b. Objections permitted</p>	<p>Md. Code § 10-213 of the State Government Article (Administrative Procedures Act) Montgomery County Planning Board Rules of Procedure – Section 8 COMAR 28.02.01.18</p>
<p>10. During the prosecutorial hearing, witnesses may be called by the Planning Board’s Prosecutor and by Respondents, upon request to Chairman a. “The Planning Board may request and obtain investigations and reports as to compliance from appropriate County or State agencies.” b. Planning Board may compel testimony (<i>See Kennedy letter of 10/31/2005</i>), <i>and</i> c. Witnesses may be cross-examined by the Planning Board’s Prosecutor and by Respondents</p>	<p>Md. Code § 10-213 (f) of the State Government Article (Administrative Procedures Act) COMAR 28.02.01.17 (A) COMAR 28.02.01.11 Montgomery County Code § 59-D-3.6 Montgomery County Planning Board Rules of Procedure – Section 5</p>

¹ The Planning Board, Staff, the Planning Board’s Prosecutor or Others may be laboring under the assumption that the instant prosecutorial proceeding before the Planning Board follows the “Order of Presentation” found in the Montgomery County Planning Board Rules of Procedure – Section 12. Such an assumption is incorrect. The “Order of Presentation” is inapposite to the instant quasi-judicial proceeding in which the Respondents neither are akin to “Applicants” nor carry a burden of proof.

<p>11. Information may be presented by the public, and questions may be asked of speakers.</p>	<p>Md. Code § 10-212 of the State Government Article (Administrative Procedures Act) Montgomery County Planning Board Rules of Procedure – Section 4 Montgomery County Planning Board Rules of Procedure – Section 5 Montgomery County Planning Board Rules of Procedure – Section 6</p>
<p>12. Preponderance of evidence (<i>i.e.</i>, standard of proof) is upon Planning Board's Prosecutor</p>	<p>Md. Code § 10-217 of the State Government Article (Administrative Procedures Act)</p>
<p>13. Planning Board makes a finding or a disposition, or recesses</p>	<p>Md. Code § 10-210 of the State Government Article (Administrative Procedures Act) Montgomery County Code § 59-D-3.6 Montgomery County Planning Board Rules of Procedure – Section 7</p>
<p>14. An aggrieved party may petition the Planning Board for reconsideration</p>	<p>Montgomery County Planning Board Rules of Procedure – Section 11</p>
<p>15. An aggrieved party may petition the Circuit Court for Judicial Review of a final decision</p>	<p>Md. Code § 10-221 of the State Government Article (Administrative Procedures Act) Md. Code § 10-222 (a) of the State Government Article (Administrative Procedures Act)</p>