



Montgomery County Department of Park and Planning  
THE MARYLAND NATIONAL CAPITAL  
PARK AND PLANNING COMMISSION  
8787 Georgia Avenue  
Silver Spring, Maryland 20901

November 25, 2005

From: Bill Mooney, Deputy Director of Park and Planning  
Rose Krasnow, Chief, Development Review Division

To: Montgomery County Planning Board

Date: November 25, 2005

Subject: Controlling Development Plan Approval Documents for the  
Clarksburg Town Center Project

I. Introduction

This memorandum outlines in detail staff's factual and legal analysis of the documents contained in the Clarksburg Town Center project files, the additional evidence and testimony submitted by all parties in this matter,<sup>1</sup> and recommends to the Board specific findings of fact and conclusions of law with respect to a determination as to which documents are the controlling documents for purposes of evaluating multiple pending alleged violations in the Clarksburg Town Center development.

---

<sup>1</sup> References to correspondence in the record are as follows: Newland Communities, LLC and NNPII-Clarksburg LLC ("Newlands") – N; Bozzuto Homes Inc., BA Clarksburg, LLC and BA Clarksburg Two, LLC (collectively "Bozzuto") – B; Craftstar Homes, Inc. and its LLC affiliates, – C; NVR, Inc., t/a NV Homes – NV; Miller & Smith – MS; Porten Homes, Inc. – P; Clarksburg Town Center Advisory Committee – CTCAC.

## II. Analysis of Specific Project Approvals

### A. Project, Preliminary and Phase I Site Plans

The Planning Board decided three initial agency approvals in the Clarksburg Town Center project. The record is uncontested as to whether these initial approvals are valid and binding. As such, the layout and development standards imposed by those approvals remain in effect. These approvals include Project Plan No. 9-94004; Preliminary Plan No. 1-95042; and Site Plan No. 8-98001 (Phase I).

The Project Plan established height limits for residential units at 4 stories, 45 feet. On July 7, 2005, the Board determined that these are the governing height limits in the Phase I site plan, as these limits are read in harmony with the site plan's height limit of "four stories." The Board also found that the Project Data Table contained within the signature set, which was prepared and submitted by the developer and approved by staff, included a self-limiting height of 35 feet for single-family detached and attached units, and 45 feet for multi-family units. The Board found that the Project Data Table height limits are binding on the developer and its successors in interest through the signature set, and found both height and setback violations based on that finding.

Staff recommends that the Board continue to rely on these findings as it further evaluates the remaining issues in this matter.<sup>2</sup>

---

<sup>2</sup> Staff recognizes that its recommended findings in the April 14, 2005 hearing that the Board not find height violations was directly opposite to the findings it recommended in the July 7, 2005 hearing (staff recommended a finding of no violation in the first hearing, and a finding of violation in the second). This changed recommendation was based on the fact that in the first hearing, Ms. Witthans testified that the height limitation in the project was 4 stories, and not 45 feet. At that hearing she gave to the Planning Board a copy of a Project Data Table that struck specific height limitations of 35 and 45 feet, and replaced those height limits with a height limit of 4 stories. A review of the transcript of the hearing shows that the Board clearly relied on Ms. Witthans' representations as material to their decision that 4 stories was the governing height limit. After learning that Ms. Witthans had changed the document much closer in time to the hearing than she had implied at the hearing, staff in the subsequent hearing reviewed the original documentation in the case and concluded that, based on the Project Data Table, which clearly had not been amended, a finding of violation was the appropriate recommendation to make to the Board.

The description and finding detailed above both are germane to the discussion about staff's authority to amend the Phase I Site Plan through staff's adoption of a "minor" amendment signed on May 30, 2003, commonly referred to as "Amendment C."

#### B. Developer's 2000 Concept Plan

In its November 3, 2005 presentation, Newlands submitted a copy of a document referred to in its testimony as a "Concept Plan," which Newlands testified had been attached to a July 17, 2000 memorandum from Wynn Witthans, in the Commission's Development Review Division, to the "Clarksburg Town Center Site Plan Review Team."<sup>3</sup> Staff has reviewed the project files, and concurs that the document appears to be an authentic Commission document, and recommends that the Board rely on it for purposes of its evaluation.

For purposes of evaluating whether staff properly approved amendments to the project, this review focuses on a comparison of the Board-approved Phase

---

<sup>3</sup> N - November 3, 2005 public hearing handout pp. 4-7. Subsequently, Newlands, Craftstar and NVR, Inc., t/a NV Homes, also submitted into the record of these proceedings the Office of Legislative Oversight report dated November 8, 2005. N – November 18, 2005 letter dated November 18, 2005; C, NVR – November 14, and November 28, 2005 letters. In this administrative proceeding, the evidence of record includes all evidence and testimony submitted into the record by all parties, and all evidence and testimony carries the weight and credibility of the evidence that the Board accords that evidence and testimony. Said otherwise, the findings and conclusions within the OLO report, in and of themselves, carry no more weight than the evidence and recommended findings submitted by any witness to this proceeding.

Maryland law clearly establishes the administrative agency as the entity responsible for the interpretation and application of its laws and regulations. This is clear because when the agency's decision is under judicial review, even the court will use a "substituted judgment" standard with respect to its review of legal findings reached by the Board. *Carriage Hill-Cabin John, Inc. v. Maryland Health Resources Planning Comm'n*, 125 Md. App. 183, 214, 724 A.2d 745, 761 (1999) (citation omitted). Even with respect to matters of pure law, the Maryland Court of Special Appeals has noted that "[u]pon appellate review . . . courts give special weight to an agency's interpretation of its own regulations," and that "[r]ecognizing an agency's superior ability to understand its own rules and regulations, a 'court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken.'" *Department of Health and Mental Hygiene v. Riverview Nursing Centre, Inc.*, 104 Md. App. 593, 602, 657 A.2d 372, 377 (1995) (citations omitted).

I,<sup>4</sup> and a series of amendments related to Phase I. A comparison of the Developer's 2000 Concept Plan,<sup>5</sup> and the as-built layout of the project in 2005 ("As-Built Plan"),<sup>6</sup> clearly shows that the project has been developed in accordance with the 2000 Concept Plan, and not in accordance with the Phase I Site Plan as approved by the Board in 1999. The Phase I buildout was accomplished through a series of amendments<sup>7</sup> culminating with a staff-approved amendment dated May 30, 2003, known as "Amendment C."

A review of the original Phase I site plan shows that the Concept Plan proposed a layout significantly different from the layout in Phase I. The staff-approved changes from the Board-approved Phase I to Amendment C can be framed in four primary categories: (1) "O" Street extended was eliminated; (2) the project data table eliminated entirely all reference to height (in either stories or feet); (3) three multi-family condominium units and a community swimming pool were replaced with approximately 30 townhome units (the pool was relocated elsewhere in Phase I); and (4) the pedestrian mews approved in Phase I was eliminated.<sup>8</sup>

The question becomes whether staff had the authority to approve these changes to the site layout either through a series of amendments or through a single action.<sup>9</sup> The answer to this question depends on whether staff had authority, either through Condition No. 38 of the Phase I Site Plan or through Section 59-D-3.7 of the Zoning Ordinance, to sign off on these changes without going back to the Planning Board. An analysis of staff authority under Maryland law follows.

---

<sup>4</sup> Site Plan No. 8-98001, approved in 1999.

<sup>5</sup> N - November 3, 2005 public hearing handout pp. 4-7.

<sup>6</sup> N – November 3, 2005 handout, Page 58.

<sup>7</sup> Amendments 8-98001 a – h. Staff in this memorandum does not evaluate the cumulative impact of these amendments, in light of the fact that in staff's opinion the violation findings to date, in addition to the violations that staff recommends the Board find during this hearing, and the conclusions staff reaches with respect to Amendment C, all justify moving into a plan of compliance phase without the need to find additional violations.

<sup>8</sup> Compare Phase I layout with Amendment C layout.

<sup>9</sup> As occurred with the May 30, 2003 "Amendment C."

### III. Staff's Authority to Amend Site Plans

#### A. Regional District Act

MNCPPC is a bi-County agency, created by State law, and under its enabling authority the Montgomery County Planning Board has exclusive authority for (among other things) “the administration of subdivision regulations.”<sup>10</sup> The District Council<sup>11</sup> has authority to adopt subdivision regulations,<sup>12</sup> a zoning ordinance and zoning maps to regulate such things as the location, height and bulk of buildings; the size of lots, yards and open spaces; the density and distribution of population; the location and uses of buildings and land.<sup>13</sup> Pursuant to this authority, the District Council has adopted Subdivision Regulations<sup>14</sup> and a Zoning Ordinance.<sup>15</sup>

#### B. Major/Minor amendments

The Zoning Ordinance defines a minor amendment to a site plan as follows:

. . . [A]n amendment or revision to a plan or any findings, conclusions, or conditions associated with the plan that *does not entail matters that are fundamental determinations assigned to the Planning Board*. A minor amendment is an amendment that *does not alter the intent, objectives, or requirements expressed or imposed by the Planning Board in its review of the plan*. A minor amendment may be approved, in writing, by the Planning Board staff. *Such amendments are deemed to be administrative in nature*

---

<sup>10</sup> MD. STATE CODE ANN. ART. 28 § 7-111(a).

<sup>11</sup> The Montgomery County Council, sitting in its zoning capacity.

<sup>12</sup> MD. STATE CODE ANN. ART. 28 § 7-116.

<sup>13</sup> MD. STATE CODE ANN. ART. 28 § 8-101(b)(2).

<sup>14</sup> Montgomery County Code Chapter 50.

<sup>15</sup> Montgomery County Code Chapter 59.

*and concern only matters that are not in conflict with the Board's prior action.*<sup>16</sup>

The Zoning Ordinance specifically defines the action that the Board must take, when approving a site plan:

(a) A public hearing must be held by the Planning Board on each site plan application. The Planning Board must approve, approve subject to modifications, or disapprove the site plan not later than 45 days after receipt of the site plan, but such action and notification is not required before the approval of a preliminary plan of subdivision involving the same property. The Planning Board then must notify the applicant in writing of its action. In reaching its decision the Planning Board must determine whether:

- (1) the site plan is consistent with an approved development plan or a project plan for the optional method of development, if required;
- (2) the site plan meets all of the requirements of the zone in which it is located, and is consistent with an urban renewal plan approved under Chapter 56.
- (3) *the locations of the buildings and structures, the open spaces, the landscaping, recreation facilities, and the pedestrian and vehicular circulation systems are adequate, safe, and efficient;*
- (4) each structure and use is compatible with other uses and other site plans and with existing and proposed adjacent development; and
- (5) the site plan meets all applicable requirements of Chapter 22A regarding forest conservation and Chapter 19 regarding water resource protection.<sup>17</sup>

---

<sup>16</sup> Montgomery County Code Chapter 59 Section 59-D-2.6 (emphasis added). (Hereinafter all references to the Montgomery County Code Chapter 59 will be to "Zoning Ordinance.")

<sup>17</sup> Zoning Ordinance § 59-D-3.4 (Action by Planning Board) (emphasis added). The Zoning Ordinance further provides:

- c) Upon approval, the site plan must be:
- (1) Signed by the applicant agreeing to execute all the features and requirements that are part of the site plan;
  - (2) Signed by the chairman of the Planning Board, or his designee, certifying Planning Board approval of the site plan; and
  - (3) Forwarded to the Department [of Permitting Services] for reference in issuing building permits under Section 59-D-3.5.

Based on a plain reading of the Code, staff concludes that site plan changes that go to the findings imposed by Section 59-D-3 are major amendments that should have gone to the Planning Board.

C. Condition No. 38

Condition #38, in the Phase I Site Plan Opinion, stated that:

The Applicant may propose compatible changes to the units proposed, as market conditions may change, provided the fundamental findings of the Planning Board remain intact and in order to meet the Project Plan and Site Plan findings. Consideration shall be given to building type and location, open space, recreation and pedestrian and vehicular circulation, adequacy of parking etc. for staff review and approval.<sup>18</sup>

Newlands has argued that Condition No. 38 granted to staff broad authority to make changes to unit types, and additionally make changes to open space, recreational, pedestrian and vehicular circulation components of the project.<sup>19</sup> CTCAC, on the other hand, has argued that while Condition No. 38 allowed staff to make modifications to unit types, that this authority was limited to unit types and not to broader changes in the Site Plan. CTCAC further argues that to read Condition No. 38 as granting broader authority to approve changes that are major in effect is an impermissible delegation of authority, in that the Board cannot delegate to staff more authority to approve amendments than the Zoning Ordinance provides.<sup>20</sup>

Staff largely agrees with CTCAC's analysis on this point. In the opinion of staff, Condition 38 was intended to give flexibility to change unit types, and in considering whether to allow a change in unit types staff was charged with taking into consideration whether that change would have an effect on building type and location, on open space, recreation and pedestrian and vehicular circulation and parking. The type of review stated in Condition No. 38 is consistent with the Zoning Ordinance site plan finding requirement that "the location of buildings and

---

<sup>18</sup> Site Plan Phase I Opinion, p. 7, emphasis added. A "major" amendment is defined as "Any action taken by the Planning Board to amend or revise a previously approved plan, whether such amendment is limited or comprehensive in scope, will be considered a major plan amendment."

<sup>19</sup> N – November 18, 2005 letter pp. 1 – 2; N – Attachment 30 to November 18, 2005 letter (Memorandum of Law on Delegation of Staff Authority).

<sup>20</sup> CTCAC – November 21, 2005 letter pp. 2 – 6.

structures, the open spaces, the landscaping, recreation facilities, and the pedestrian and vehicular circulation systems are adequate, safe and efficient.”<sup>21</sup>

The record, however, contains indications that staff believed it had the authority to make some administrative changes to the Site Plan. The July 17, 2000 memorandum from Ms. Witthans to the “members of the Clarksburg Town Center Site Plan Review Team,” (which included Commission staff and government employees from a number of other public agencies) expressly stated that “We anticipate handling some of the changes at a staff level and some may have to go for planning Board approval. We will decide when we go over the changes more fully.”<sup>22</sup> In fact, the Board did not see a single amendment to the Phase I Site Plan until February, 2005 (the Manor Home Amendments, which were amendments to both Phase I and Phase II).<sup>23</sup>

D. May 30, 2003 Amendment C (Staff-level amendment to Phase I)<sup>24</sup>

As noted in Section II.B, above, Amendment C includes four categories of changes to the Phase I Site Plan: (1) “O” Street extended was eliminated; (2) the project data table eliminated entirely all reference to height (in either stories or

---

<sup>21</sup> Zoning Ordinance Section 59-D-3.4(a)(4).

<sup>22</sup> N – November 18, 2005 letter, Attachment 4 page 4.

<sup>23</sup> There is no corollary to Condition No. 38 in Phase II, so the analysis of all staff-level amendments must be undertaken pursuant to the Zoning Ordinance definition of a “minor” vs. a “major” amendment. The Board did approve the Phase II Site Plan (2002) (which largely incorporated the layout of the Developer’s 2000 Concept Plan), and the Manor House Amendments (2005).

<sup>24</sup> CTCAC submitted into the record documentation calling into question the authenticity of certain signatures in the record, specifically of Tracy Graves, Les Powell and of Wynn Witthans. CTCAC - Letters dated November 17 and 18, 2005. Newlands has formally asked that the Board strike these letters from the record. N – letter dated November 21, 2005. Staff recommends that the Board include all of the evidence submitted relative to the authenticity of signatures in the record, in that the issues raised are germane to the authenticity of the documents at issue. The record also includes an affidavit from Tracy Graves dated November 21, 2005 stating that “On occasion I authorized Les Powell to sign myname and attach my signature to documents and plans for Clarksburg Town Center on behalf of Terrabrook.” Rosemary Reed, a member of the Development Review Division staff, has stated that she signed all of the amendments in question at the direction of, and on behalf of, Wynn Witthans. For purposes of this analysis, staff recommends that the Board find that the documents are properly signed and authenticated.



feet); (3) three multi-family condominium units and a community swimming pool were replaced with approximately 30 townhome units (the pool was relocated elsewhere in Phase I); and (4) the pedestrian mews approved in Phase I was eliminated.

Staff concludes that each of these changes is a major amendment to the Phase I Site Plan, in that they “*entail matters that are fundamental determinations assigned to the Planning Board,*” and additionally they “*alter the intent, objectives, or requirements expressed or imposed by the Planning Board in its review of the plan.*”<sup>25</sup>

This conclusion is based on several factors. First, the elimination of “O” Street and relocation of the pool went to core Board findings. The Zoning Ordinance expressly provides that as a precursor to approving any site plan, the Board must find that “*the locations of the buildings and structures, the open spaces, the landscaping, recreation facilities, and the pedestrian and vehicular circulation systems are adequate, safe, and efficient.*” “O” Street was an integral component of the pedestrian<sup>26</sup> and vehicular circulation system, and the pool was a major element of the recreation facilities, and thus the changes to these features resulted in a major change to the Board’s underlying findings and requirements. Second, converting the multifamily units to townhome units goes to the Board finding that “each structure and use is compatible with other uses and other site plans and with existing and proposed adjacent development.”<sup>27</sup> While this change appears to most clearly fall within the parameters of Condition No. 38, which allowed staff to make “compatible changes to the units,” even these changes must be tempered by the limitation in Condition No. 38 that “the fundamental findings of the Planning Board remain intact and in order to meet the Project Plan and Site Plan findings.” Staff concludes that converting from the multifamily to the townhome units also was significant enough to merit Board review as a major amendment.

Third, the Project Data Table in Amendment C eliminates entirely the height limitation (in both stories and feet), in a zone that has no height limit. Even assuming that staff understood the height limit in the project to be four stories, Amendment C became the governing document for Phase I and on its face removed altogether the height limit.<sup>28</sup> Regardless of whether height was to

---

<sup>25</sup> Zoning Ordinance Section 59-D-2.6.

<sup>26</sup> The mews also was an element of the pedestrian circulation system.

<sup>27</sup> Zoning Ordinance Section 59-D-3.5(a)(3).

<sup>28</sup> The Clarksburg Town Center is in the RMX zone, and was developed under the optional method allowed for by Zoning Ordinance Section 59-C-10.2.2.

be stated in stories or in feet, removal of that development standard from the Project Data Table clearly vitiated the Board's Project Plan and Site Plan limitations on height, which development standard goes to the core findings of compatibility of units. The effect of this Amendment allowed the construction of multifamily buildings that exceeded even the 45' height limit established in the Project Plan.

Fourth, with respect to the mews, that particular feature twice was called out specifically in the Site Plan staff report. The mews was called out as "a visual and walkable axis between the church and the Town Square, highlighting these significant features of the existing and proposed development."<sup>29</sup> The staff report

---

Optional method of development for mixed-use development.

Under this method, general commercial uses and higher density residential uses are allowed in the RMX Zones provided that they are in accordance with the provisions of section 59-C-10.3, as well as the density, numerical limitations, and other guidelines contained in the applicable master plan approved by the District Council. In addition, the Planning Board must approve a project plan and site plan.

<sup>29</sup> Staff specifically called out the pedestrian mews feature of the site plan, as described in the following excerpt from the staff report:

Close to the edge of the Clarksburg Historic District, is a diagonal pedestrian mews. The mews contains sitting areas and two large lawn panels and connecting walks, linking the church with the Town Square. The sitting area closest to the Town Square includes a trellis and a memorial to John Clark with the set of found headstones from the family grave site. The mews develops a visual and walkable axis between the church and the Town Square, highlighting these significant features of the existing and proposed development. Phase I Staff Report, pp. 10, 11.

Additionally, the Phase I staff report contained a section entitled "ANALYSIS: Conformance to the Project Plan Approval." In the bulleted highlights under a subheading that called out "Adjustments to the Project Plan Approval Include," staff stated that "The diagonal street [in the project plan] between the church and the town square is a pedestrian mews" (Phase I Staff Report, p. 21), and indicated that this (and the other project plan adjustments) are "acceptable to conformance with the Project Plan."

The Zoning Ordinance states that the Board find that "each structure and use is compatible with other uses and other site plans and with existing and proposed adjacent development." Zoning Ordinance Section 59-D-3.4(a)(4).

also noted that the mews was not included in the Project Plan, however staff recommended to the Board that replacing the street that was in the project plan with the mews could be approved as in conformance with the Project Plan. This goes to a core site plan finding, *i.e.*, that the site plan is consistent with an approved project plan.<sup>30</sup> Additionally, deletion of the mews altered the objectives and requirements imposed by the Board in that its removal potentially minimized the objective of highlighting the connection between the church and the Town Square as described in the staff report.

For all of these reasons, staff recommends that the Board find, as a matter of law, that Condition No. 38 did not grant to staff any broader authority to amend the site plan than is allowed under the Zoning Ordinance, and as a matter of fact that Amendment C constituted a major amendment.

That having been said, staff also notes for the record that it also concludes that staff was acting in good faith in its implementation of the plan, that the evidence of record clearly indicates that staff had assumed it was acting properly in its implementation of Condition No. 38. Nonetheless, the record also shows that at no time before these proceedings did the Board become aware that staff was approving such broad amendments, nor in staff's view was it the Planning Board's intent to authorize such broad amendments under Condition No. 38.

E. Improperly Recorded Record Plats.

The record contains uncontroverted evidence that certain record plats were recorded in the land records, that the size and shape of a number of recorded lots did not conform with the size and/or shape of the lots approved in the site plan (Phase I, Phase II or Amendment C). Lots within Section 1A of the Phase I Site Plan and within the Phase II site plan were reconfigured, without benefit of any written amendment to the site plans (either by the Board or by staff).<sup>31</sup> There is no provision in either the Zoning Ordinance or Subdivision

---

Staff recommended this finding in the Phase I staff report (p. 35). The entire staff report was incorporated into the Phase I Planning Board opinion (Opinion dated March 3, 1998, under Tab 4 in public hearing notebook for July 7, 2005 violation hearing), thus incorporating this description and finding into the Opinion by reference. Additionally, the Board expressly found "The Site Plan is consistent with the approved development plan or a project plan for the optional method of development, if required." Phase I Planning Board Opinion p. 2.

<sup>30</sup> Zoning Ordinance Section 59-D-3.5(a)(1).

<sup>31</sup> N – November 3, 2005 public hearing handout p. 59 – lots highlighted in yellow implemented through record plats, not through site plan amendments. See also N – November 3, 2005 public hearing handout pp. 44, 45 (Phase II Site Plan No. 8-02014 "Site Plan Revision for lot line shifts & unit count adjustment, Approved

Regulations that allows for a site plan to be amended through record plat revisions.

Additionally, a number of record plats for single-family detached units show that the lot sizes for those properties are smaller than the 4,000 square-foot minimum lot size required by all the Project Data Tables, in all Board and staff approved plans.<sup>32</sup>

The developer has argued that Planning Board staff approved record plats,<sup>33</sup> those plats subsequently were recorded in the courthouse, and they should be the controlling document for the purpose of finding violations. There is no authority in the law, however, for staff to amend a site plan through record plat changes. Consequently, the developer and builders should have known they could not rely on staff's direction to implement amendments in this manner.<sup>34</sup> Regardless of how these documents came to be recorded, staff concludes that recordation of plats inconsistent with an approved site plan violates Montgomery County Code.<sup>35</sup> While the law suggests that a record plat *may* be approved

---

by staff (mtg of Oct. 8, 2003) & reflected on Resubdivision Record Plan #22907; pp. 46, 47 (Section 1A revisions within 8-98001, recorded on Plat #23038.

<sup>32</sup> N – November 3, 2005 public hearing handout pp. 117 – 119.

<sup>33</sup> N – November 3, 2005 public hearing handout pp. 76, 77.

<sup>34</sup> See *ARA Health Servs., Inc. v. Dep't of Pub. Safety and Correctional Servs.*, 685 A.2d 435, 440 (Md. 1996) (“[T]he scope of a state official’s authority is co-extensive with his or her actual authority. . . . It matters not that the [agent], though lacking in actual authority, might have acted with *apparent* authority . . . . Public policy demands that the State cannot be bound by the unauthorized acts of its agents.”) (emphasis in original); see also *Heartwood v. Montgomery County*, 846 A.2d 1096, 1118 (Md. Ct. Spec. App. 2004) (applying estoppel to the County but noting that a government entity can only be estopped by the acts of an agent acting within his actual authority).

<sup>35</sup> Montgomery County Code Section 59-D-3.5. Effect of site plan.

In the case of any land in a zone requiring site plan approval, as provided in article 59-C, or any special exception for which site plan approval is a condition, as provided in sections 59-A-4.22 and 59-G-1.22(b), a record plat required by chapter 50 of this Code, title "Subdivision of Land," **must not be approved unless it is in strict compliance with a site plan approved** as provided by this division 59-D-3. No sediment control permit, building permit or use-and-occupancy permit may be issued unless it is in strict compliance with an approved site plan.

before a site plan is approved,<sup>36</sup> that provision speaks to timing and not content. The provision of Section 59-D-3.5 for “strict compliance with a site plan” should be read to require consistency, regardless of the timing of the recordation. In staff’s view, the intent of the ordinance is to have the site plan as the controlling document for record plats.

Staff recommends that the Board find, based upon clear and convincing evidence within the record, that those record plats that do not strictly comply with the site plan layout and dimensional requirements constitute a violation of Section 59-D-3’s requirement that plats be in strict compliance with a site plan, and staff recommends that the Board impose a fine of \$140,000 against Newlands for recording plats before the Phase II signature set was approved in derogation of Montgomery County law.<sup>37</sup>

#### F. Building Permits Issued In Reliance On Reference to Phase I Record Plats

The record contains uncontroverted evidence that builders applied for and received building permits, before the Phase II signature set was signed.<sup>38</sup> The evidence suggests that this occurred because the Phase II record plats (Site Plan No. 8-02014) referenced the Phase I site plan number (8-98001), and as a result the record plat reference led staff to believe that the signature set in fact had been approved.<sup>39</sup>

Whether as a result of error or intention, it is a violation of Montgomery County law to record plats before a site plan signature set is approved, and to obtain building permits before a signature set is approved, and staff concludes the developer/builders were unreasonable to rely on a record plat that referenced the wrong phase as a basis for seeking record plats and building permits. Staff recommends that the Board impose a fine of \$1,930,000 against builders for

---

(Emphases added.)

<sup>36</sup> Subdivision Regulations Section 50-37(b)(2). “In those situations where a site plan is required, the Board may refuse to approve a final (record) plat until a site plan is approved as set forth in Division 59-D-3 of the zoning ordinance.”

<sup>37</sup> Fourteen record plats were issued at least 20 days prior to the signature set. This fine recommendation is for \$500 per permit per day for 20 days.

<sup>38</sup> CTCAC – Letter dated October 24, 2005 p. 7 Paragraph F and referenced attachment.

<sup>39</sup> N – Letter dated November 21, 2005 p.2 para. E.

submitting for building permits before the Phase II signature set was approved in derogation of Montgomery County law.<sup>40</sup>

G. February 2005 Manor House Amendments.

In February, 2005, the Planning Board approved a Site Plan Amendment for certain Manor Homes. The effect of this amendment was to convert five Buildings (in both Phase I and Phase II of the project) from nine-unit condominium buildings to eleven/twelve-unit condominium buildings. The uncontroverted evidence of record shows that (1) the builder applied for building permits before it had an approved site plan amending the unit count for the buildings proposed; and (2) that the builder began construction of Building 7 and Building 9 before it had a signed signature set implementing the February, 2005 site plan.<sup>41</sup> Both of these actions were undertaken in violation of Montgomery County law. The permits for both Buildings 7 and 9 were not lawfully issued because they were not in “strict compliance” with a site plan, as required by Code § 59-D-3.5.<sup>42</sup> The permit for Building 7 was issued before the Manor Homes site plan amendment public hearing had even been held,<sup>43</sup> and yet included changes sought by those amendments; and, as such, strict compliance with the underlying site plan was not present.

---

<sup>40</sup> 193 permits were obtained at least 20 days prior to the signature set. This fine recommendation is for \$500 per permit per day for 20 days. See Zoning Ordinance § 59-D-3.5. “No . . . building permit . . . may be issued unless it is in strict compliance with a site plan approved as provided by this division 59-D-3.” The signature set implements the approval, and specifically is to be “Forwarded to the Department [of Permitting Services] for reference in issuing building permits under Section 59-D-3.5.” Zoning Ordinance Section 59-D-3.4(c)(3). See *a/so* Montgomery County Code Section 8-26(g) (Conditions of [Building] Permit). “The building or structure must comply with all applicable zoning regulations, including all conditions and development standards attached to a site plan approved under Chapter 59.” The building permits could not, at the time they were applied for, conform to the site plan because the change to the unit count had not been made at that time.

<sup>41</sup> B – Letter dated November 18, 2005, pp. 17, 18, noting that Bozzuto submitted Building Permit Applications for Buildings 7 and 9, and permits for Building 7 were issued on October 18, 2004 2005, prior to the Planning Board’s February 10, 2005 approval of the Manor Homes amendment.

<sup>42</sup> See fn. 40.

<sup>43</sup> The Board’s public hearing was February 10, 2005, and the building permit was issued by DPS on October 29, 2004. B – Letter dated November 18, 2005 p. 18.

Staff recommends, based upon clear and convincing evidence of a violation, that the Board impose a fine of \$10,000 per building against Bozzuto for submitting building permits that did not conform to an approved site plan.<sup>44</sup>

Staff also recommends that the Board find, based on clear and convincing evidence of a violation, that Bozzuto began construction of Building 7 and Building 9 before it obtained a signed signature set as required by the Phase I and Phase II Opinions.<sup>45</sup> Staff, by an email, directed Bozzuto to cease work on June 17, 2005, and a formal stop work later was issued and remains in place at this time. Staff recommends based on clear and convincing evidence of a violation that the Board also fine Bozzuto the sum of \$20,000 (\$10,000 per building) for this violation.

#### IV. Staff Recommendations on Enforcement Options

There are four primary enforcement options available to the Board. First, the Board has the option to impose civil fines.<sup>46</sup> Staff is recommending that the

---

<sup>44</sup> Two permits were sought and obtained at least 20 days prior to the signature set. This fine recommendation is for \$500 per permit per day for 20 days.

<sup>45</sup> The Opinion for the Manor Homes Amendment expressly incorporated the conditions of all prior approvals, unless expressly modified. The Phase I Opinion dated March 3, 1998 stated “No clearing or grading prior to Planning Department approval of signature set of plans.” Appendix A to Opinion, Condition No. 4. The Phase II Opinion dated June 17, 2002, stated “No clearing or grading prior to M-NCPPC approval of signature set of plans except to allow rough grading as previously approved with the Preliminary Plan.” Opinion Appendix A, Condition No. 4.

<sup>46</sup> The Subdivision Regulations authorize the Board to impose a civil fine or penalty when the Board believes there is a violation of a Planning Board action. The maximum amount of the fine for each violation of a Planning Board Action is set at \$500.00 for each day that the violation has occurred, and each day that the violation has not been corrected shall be considered a separate violation and the applicable fine or penalty will continue to accrue each day until corrected, without the need of issuing a new citation each day. Subdivision Regulation Section 50-41(c).

Once a fine is imposed, the Board has broad authority to spend fines.

All fines, penalties, or forfeitures collected by the Planning Board or District Court for the violations will be remitted to the Planning Board, placed in the general funds of the Maryland-National Capital Park and Planning Commission and may be utilized by the Commission for project corrections, plan enforcement or other

Board find violations and assess fines, as outlined in Sections III E, F and G, above. Second, the Board has authority to issue stop work orders.<sup>47</sup> Commission staff has issued a stop work order on significant portions of the Clarksburg Town Center project, which has had the effect of preserving the *status quo* of the site pending Planning Board resolution of the pending violation proceedings. Third, the Board may revoke the site plan.<sup>48</sup> Staff is not recommending a site plan revocation at this time because staff does not believe it creates the most effective mechanism to require the developer to bring the project into compliance with those violations found to date (e.g., height, setback and amenity phasing violations). Finally, the Board may require the developer to submit a plan of compliance. In light of staff's recommendation that Amendment C is not a validly approved amendment, and consequently compliance with the validly approved existing site plans is at best impractical and may in fact be impossible, staff recommends that the Planning Board immediately require the developer to submit a plan of compliance for Board review and approval.

The first phase of the plan of compliance should be the submittal of a conceptual plan of compliance. That concept plan should consider the list of features identified below by Community Based Planning staff, as potential elements of a plan of compliance to remediate the height, setback and amenity phasing violations found to date, as well as the record plat and building permit violations that staff is recommending the Board find on December 1.

Additionally, based upon staff's conclusion that approvals in both Phase I and Phase II were either unauthorized or deficient, staff further suggests that additional evaluation of the alleged violations becomes primarily an academic exercise, in that the Board will be assessing alleged violations against improperly

---

Commission purposes. The Commission, in its sole discretion, may utilize collected fines or penalties to perform or correct some or all of the violations noted in the citation, without obligating the Commission to undertake project corrections in lieu of the developer.

Subdivision Regulation Section 50-41(d)(3). See Attachment Two.

<sup>47</sup> Subdivision Regulation Section 50-41(i). See Attachment Two.

<sup>48</sup> "If the Planning Board finds, for any plan approved under this section, on its own motion or after a complaint is filed with the Planning Board or the Department, that any of the terms, conditions or restrictions upon which the site plan was approved are not being complied with, the Planning Board, after due notice to all parties concerned and a hearing, may revoke its approval of the site plan or approve a plan of compliance which would permit the applicant to take corrective action to comply with the site plan. Zoning Ordinance Sec. 59-D-3.6. Failure to comply (emphasis added). See Attachment Three.



approved plan amendments. As such, staff recommends that the Board, based upon the site plan violations found to date, require that the developer submit a comprehensive, project-wide plan of compliance that (a) takes into consideration the concepts suggested by the Community Based Planning Staff below; (b) requires early *public* input to the Board on the plan of compliance; and (c) establishes a single, comprehensive set of development standards for the project.<sup>49</sup>

#### VI. Review Process and Basic Elements of Staff's Recommended Plan of Compliance.

Staff recommends that a plan of compliance be implemented as follows. The Board has tentatively scheduled December 20, 2005, for additional violation hearings. For the reasons stated earlier by staff, these violation hearings should be suspended pending Planning Board consideration of a plan of compliance. The Board could hold, on December 20, a public hearing on a conceptual plan of compliance, to be held as a mini-charette to obtain public input and Planning Board reaction to design elements that would become the framework for development plan amendments that will form the basis of the plan of compliance. After the charette is concluded, staff expects that the developer will work with the community to develop project and site plan amendments that will be submitted to staff and ultimately brought to the Board for review and adoption.<sup>50</sup>

The following list provides features that could be incorporated into a future Plan of Compliance, and the pending Project Plan Amendment, Preliminary Plan and Site Plan for the Clarksburg Town Center. The list includes items that address some of the concerns with the existing development and items that should be considered for inclusion in future approvals. **This list is not exclusive – community members may have additional recommendations to suggest directly to the developer or to the Planning Board in the upcoming reviews of the plan of compliance. Nor it is expected that the developer will provide all of these changes – they are posed for public consideration and Planning Board discussion.**

---

<sup>49</sup> This implementation would occur through a Board adoption of an amended project plan, preliminary plan and a single unified site plan for all phases of the development.

<sup>50</sup> The Board has discretion in whether to approve a plan of compliance as submitted by the developer. In any site plan approval, "The Planning Board must approve, approve subject to modifications, or disapprove the site plan . . ." Zoning Ordinance Section 59-D-3.4(a).

**A. Staff-Recommended Plan Considerations for Plan of Compliance:  
Town Center Vision**

The Clarksburg Town Center was intended to be a transit and pedestrian oriented community in Montgomery County. A plan of compliance that includes the pending Project Plan Amendment, existing Phase I and Phase II Site Plans and the pending Phase II site plan provide opportunities to reinforce this vision and to make the Clarksburg Town Center a unique demonstration of community design in Montgomery County. Increasing opportunities to establish the Clarksburg Town Center as a “heart healthy” community that encourages walking and the use of bicycles, and provides opportunities for transit should be established to implement the original vision. Establishing the entire Clarksburg Town Center as the first certified “green community” in Montgomery County in accordance with LEED standards should also be explored to augment and enhance the original vision of the Clarksburg Town Center.

- 1. Commercial Area** – Revise the pending Project Plan Amendment and Site Plans to improve the commercial center. Possible improvements include increased opportunities for public space to serve as a focus of community life in the Clarksburg Town Center, include opportunities for professional office space, increase the amount of retail space, improve the orientation of buildings to Overlook Drive, and reduce the coverage of the proposed grocery store.
- 2. Town Square and Main Street Area** - Improve the proposed design of the Town Square. Provide special street lighting and paving, a pavilion, street furniture, and a location for the John Clark Memorial. Provide special lighting and landscaping for Main Street from the Town Square to the Hilltop District Recreation Center. Examine the potential to locate retail along both sides of the Town Square.
- 3. Library** - Provide a site and parking for the proposed public library. Provide a schematic design for the library and parking acceptable to Montgomery County.
- 4. Manor Houses** - Revise the manor houses by reducing the building height, bulk, and coverage and provide for nearby parking.
- 5. Town Center Recreation Center** - The presently proposed Site Plan for the pending residential area should be substantially revised to provide a swimming pool, small wading pool, and tennis courts to serve as an active recreation area for the southern portion of the Town Center. This recreation area was already included in the approved Project Plan.

6. **Enhance Murphy's Grove Recreational Area** - Improve the design for this area and provide recreation areas, landscaping including flowering trees, seating areas, and improve the design of the stormwater management pond.
7. **Large Park Area North of A-305 (RDT Area)** - Finalize the design and construct facilities such as the approved soccer, baseball field, and tennis court. Provide opportunities for community gardens.
8. **Central Greenway** - Improve the proposed design for the greenway that provides a central focus for the entire Town Center area. Reduce the impact of the grading and substantially increase the landscaping.
9. **Other Recreational Facilities** - Review the plan of recreational facilities approved in the Project Plan (see attachment) and provide the following:
  - Tennis court areas (4) - review the need for tennis courts and substitute basketball or other more useful facilities to serve a variety of age groups as needed
  - Provide tot lots (4)
  - Provide multi-age playgrounds (6)
  - Provided picnic/sitting areas (6)
  - Establish additional recreation opportunities for teens (e.g. basketball courts and skateboard areas)
10. **Improvements to Kings Pond Park** - Improve the pedestrian connections. Review the design of this park and consider providing a park overlook area, fishing pier, and outdoor classroom area.
11. **Framework Street System** - Improve the character of the street system as required in the approved Project Plan. Include the following:
  - Widen existing roadways where practicable and necessary
  - Provide special street lighting and landscaping, and the overlook area along Main Street
  - Increase the landscaping and provide special street lighting along Overlook Drive
  - Increase the landscaping and improve signage at each of six, site access points
  - Improve the character of the street system by providing additional landscaping and street trees, and street lighting for each of six framework streets
  - Review the approved landscaping concept plan and provide improvements

- Review the width of Clarksburg Road

**12. Pedestrian Framework Plan** - Review the approved pedestrian framework plan and provide the following:

- Provide the greenway pathway with a natural surface that connects the existing pond and elementary school with the residential areas. Provide pedestrian access under Main Street.
- Identify and enhance the bikeway system.

**13. Existing Church** - Provide a clear pedestrian connection to the existing church, substantially revise the grading, and improve the character of the existing street. Provide for overflow church parking. Relocate the proposed pool area to an area within the pending Site Plan.

**14. Connection to the Clarksburg Historic District** - Provide an extension of Redgrave Place to the historic district and relocate the existing historic, Horace Wilson House.

**15. Parking Facilities** - Review the location and number of parking spaces. Provide an increase in the number of visitor spaces. Review the number of on-street spaces.

**16. Town Office and Maintenance Area** – Provide a location for the future homeowners association including a town office and maintenance area. These areas could be located in the commercial area and the large park area located north of A-305.

**17. Town Architect** - Provide a “Town Architect” responsible for the review of all features of the development. The “Town Architect” would work directly with the developers and Montgomery County.

**18. Potential Funding Needs** -

Other funding needs in the Clarksburg area located near the Clarksburg Town Center include the following:

- Purchase of the Clarksburg triangle as Legacy Open Space
- Construction of the library
- Sewer and water service for buildings in the Clarksburg Historic District

## VI. Conclusion

Staff has concluded that there were a number of procedural errors and substantive violations to Planning Board actions during the implementation phase of the Clarksburg Town Center project to date. Based upon those violations found by the Board in its July 7, 2005 hearing (height and setback violations); in the October 6, 2005 hearing (violation of amenity phasing); and the finding of additional violations that staff recommends in this report (untimely filing of record plats and building permits, attempting to amend site plans through record plat process, record plats establishing lots smaller than required by the plan approvals and construction prior to signature set approval), the record is clear that the plan has multiple violations that cannot be effectively remedied by removal/correction of those violations. For example, the Board has grandfathered units that are too tall or that have setback violations, and staff does not recommend that this grandfathering provision be disturbed. Other violations that cannot be corrected include lots smaller than approved and lots that have been recorded in configurations different from those approved by the Board, as all of these lots now are owned by innocent third-party purchasers.

As a result, staff sees little merit in looking further to additional violation proceedings. Based on staff's conclusion that Amendment C was improperly approved, and yet is largely built out, the only effective remedy is to move to a plan of compliance that will allow the remainder of the project to be amended in a manner that will offset the existing violations and impact of the as-built status through new development approvals that take into consideration mitigating factors such as those noted above in Section V. This approach will allow the Board to comprehensively review the Clarksburg Town Center project and move forward into a remedial process that is badly needed at this time.

---

## Attachment One

### Article 28, § 7-116 MD. NATL. CAP. PARK & PLANNING COMM.

(h) (1) (i) In addition to all other remedies provided by law, in Montgomery County, the district council may authorize the planning board to impose civil monetary fines and penalties and, when the public health, safety, or welfare are threatened, issue stop work orders for violations described in item (ii) of this subparagraph.

- (ii) This subsection applies to violations of:
1. Titles 7 and 8 of this article;
  2. Montgomery County subdivision regulations and zoning ordinances;
  3. Any law or regulations which the Commission or the planning board is exclusively authorized to administer; or
  4. Any decision made by the Commission or planning board under its authority.

(2) A fine, not to exceed \$500, may be imposed for each violation. The district council may establish a schedule of fines for each violation and may adopt procedures, consistent with this section, for imposing and collecting those fines. Each day any violation continues shall constitute a separate offense.

(3) The district council may provide that the planning board may enforce the imposition of fines and penalties in a manner consistent with the process requiring certain notification and hearing under Article 66B, § 7.01(c) of the Code. The imposition of fines and penalties under this subsection may not be subject to an appeal to the Board of Zoning Appeals.

(4) The district council may provide that the planning board through counsel, may prosecute violations for which civil monetary fines or penalties are imposed.

(5)

(6) A violation of a local law implementing the State Forest Conservation Law shall be enforced in accordance with those laws and not in accordance with this subsection.

Amended by Acts 1995, c. 562, § 1, eff. Oct. 1, 1995; c. 61. § 6, eff. April 25, 2000.

## Attachment Two

**(2) Sec. 50-41. Enforcement.**

(a) *Definitions.* In this section, these terms have the following meanings:

(1) *Citation.* A document noting a violation of a Planning Board Action, seeking to impose a civil fine or penalty.

(2) *Civil Fine or Penalty.* A requirement to pay a predetermined monetary sum upon the issuance of a citation for violating a Planning Board Action.

(3) *Enforcement Agent.* The Planning Board, or designee responsible for determining compliance with terms, conditions, requirements, agreements, and any other obligations or limitations associated with a Planning Board Action.

(4) *Person.* An individual, partnership, corporation, organization, or other entity, or combination thereof, whether singular or plural that owns property or otherwise has an interest or responsibility for property that was the subject of a Planning Board Action.

(5) *Planning Board Action.* A final decision, on a preliminary plan, site plan, project plan, supplementary plan, water quality plan or other plan, including all associated terms, conditions, requirements and other obligations or limitations made by the Planning Board pursuant to its authority under Article 28, Titles 7 and 8, Maryland Code Annotated and Chapters 50 and 59 of the Montgomery County Code including any regulations promulgated pursuant to this authority. A final decision for purposes of this section does not include a decision made by the Planning Board pursuant to Chapter 22A.

(6) *Stop Work Order or Corrective Order.* An administrative order issued by an Enforcement Agent or the Planning Board requiring a person to discontinue any further development, construction or other land disturbance activity authorized by a Planning Board Action until a violation has been corrected.

(b) *Citation; Civil Fine or Penalty.*

(1) The Enforcement Agent may deliver a citation to a person believed to be in violation of a Planning Board Action. The Planning Board will retain a copy of the citation. The citation must include a certification by the Enforcement Agent attesting to the truth of the matters set forth in the citation.

(2) The citation must contain at least the following information:

- a. The name and address of the person charged;
- b. The nature of the violation;
- c. The place where and the approximate time that the violation occurred;
- d. The amount of the fine assessed;
- e. The manner, location, and time in which the fine may be paid and the party to whom the fine should be paid;
- f. The date by which the payment must be made; and
- g. A statement advising the person of the right to elect to stand trial for the violation.

The Planning Board may utilize any citation consistent with this Section, including the State of Maryland Uniform Civil Citation form.

(c) *Imposition of Civil Fines and Penalties.*

(1) A citation may require the payment of a civil fine or penalty for the alleged violation of the Planning Board Action.

(2) The maximum amount of the fine for each violation of a Planning Board Action is set at \$500.00 for each day that the violation has occurred.

(3) Each day that the violation has not been corrected shall be considered a separate violation and the applicable fine or penalty will continue to accrue each day until corrected, without the need of issuing a new citation each day.

(d) *Request for District Court Review.*

(1) A person who receives a citation imposing a civil fine or penalty may elect to stand trial for the offense by filing with the Planning Board a notice of intention to stand trial. The notice of intention must be given to the Chairman of the Montgomery County Planning Board no less than 5 days before the date that the payment is due as established on the citation.

(2) Upon receipt of the notice of intention to stand trial, the Planning Board will forward to the District Court having venue a copy of the citation and the notice of intention to stand trial. On receipt of the citation, the District Court will schedule the case for trial and notify the defendant of the trial date.

(3) All fines, penalties, or forfeitures collected by the Planning Board or District Court for the violations will be remitted to the Planning Board, placed in the general funds of the Maryland-National Capital Park and Planning Commission and may be utilized by the Commission for project corrections, plan enforcement or other Commission purposes. The Commission, in its sole discretion, may utilize collected fines or penalties to perform or correct some or all of the violations noted in the citation, without obligating the Commission to undertake project corrections in lieu of the developer.

(e) *Failure to Pay Fine or Penalty.*

(1) If a person who receives a citation for a violation, does not timely pay the fine by the payment due date as established in the citation and fails to file a notice of intention to stand trial, a formal notice of the violation shall be sent to the person's last known address. If the citation is not satisfied within 15 days from the date of the notice, the person is liable for an additional fine not to exceed twice the original fine.

(2) If, after 35 days, the citation is not satisfied, the Planning Board may request adjudication of the case through the District Court. The District Court will schedule the case for trial and summon the defendant to appear.

(f) *Prosecution by the Office of the General Counsel.* The Office of the General Counsel for the Maryland-National Capital Park and Planning Commission will prosecute a violation under this section.

(g) *Conduct of Hearing.* Proceedings before the District Court will be conducted in such manner as provided in Article 23A, Sections 3(b)(8) through (15) of the Maryland Code Annotated.

(h) *Payment of Court Costs.* A person found by the District Court to be in violation of a Planning Board Action will pay the costs of the proceedings in the District Court.

(i) *Issuance of Stop Work Orders or Corrective Orders.*



(1) In addition to the authority to impose civil fines and penalties, in instances where the Enforcement Agent reasonably determines that:

- a. a person is in violation of any element of a Planning Board Action, and
- b. the public health, safety, or welfare are threatened or may be threatened because of the violation; then Enforcement Agent may also issue a stop work order or corrective order.

(2) An order must include the following information as may be applicable:

- a. The name and address of the person charged;
- b. The nature of the violation;
- c. The place where and the approximate time that the violation occurred;
- d. A clear statement indicating the action that must be taken or discontinued to cure the violation including the requirement to prepare a plan of compliance; and
- e. The date, approximate time, and location for the Planning Board hearing to review the order.

The order must include a certification by the Enforcement Agent attesting to the truth of the matters set forth in the order.

(3) The Enforcement Agent must prominently display the order in close proximity to the location where the violation has occurred. In addition, the Enforcement Agent may deliver or mail, as practical, a copy of the order to the last known address of the person that secured approval of the Planning Board Action.

(4) When an order has been posted, the recipient must immediately discontinue any further development or construction activities authorized in accordance with the Planning Board Action until such time as the order is rescinded. An order posted by the Enforcement Agent has the effect of suspending the entire underlying Planning Board plan approval, unless:

- a. the Planning Board in its consideration of the Planning Board Action approved phasing for the project; and
- b. the Enforcement Agent determines that the violation only relates to either:
  - (i) a certain phase or phases of the project but not other phases of the same project; or
  - (ii) activities on a single lot or parcel.

In these instances, the order may only suspend the Planning Board's approval as it relates to those phases or lots determined to be in violation.

(5) Upon posting an order, the Enforcement Agent will schedule a review hearing with the Planning Board at the Board's next available regular session. In the event that a hearing before the Planning Board is not practical in a reasonable period of time as determined by the Enforcement Agent the matter may be reviewed by the Chairman of the Planning Board or Vice-Chair. A determination by the Chair or Vice-Chair will have the same effect as if the Board acted under this section. The Planning Board or Chairman, if applicable, will hear

the case *de novo*. In the event the violation is corrected and a plan of compliance prepared by the person prior to the hearing as confirmed by the Enforcement Agent, the hearing will be cancelled.

(6) At the Planning Board hearing, the Enforcement Agent will indicate to the Board the grounds and reasoning for issuing the order. The recipient must state all grounds concerning why the order should be discontinued and may propose a plan of compliance indicating how and when the violations will be corrected. The Planning Board will determine if the order should be continued, modified, or rescinded and if a plan of compliance should be approved. The Board's determination that the order should continue has the effect of revoking the underlying Planning Board approvals for the entire project or portions of the project as determined by the Board until such time as the violation is corrected.

(7) An appeal of a decision of the Planning Board not to modify or rescind an order will be administered as an administrative appeal filed with the circuit court, not as a municipal infraction. The Board of Appeals does not have jurisdiction to review an administrative appeal arising from a decision of the Planning Board.

(8) An order will be rescinded when the Planning Board or Enforcement Agent determines that the violation has been satisfactorily corrected, which determination should not be unreasonably withheld.

(j) *Other Remedies*. The authority to issue civil fines, penalties, and impose stop work orders are in addition to any other rights or authority of the Planning Board to enforce its actions, including injunctive, declaratory, or other relief. The election to pursue one remedy does not preclude the Planning Board from pursuing such other available remedies as the Board deems appropriate.

(k) *Exclusive Authority*. The Planning Board or its designee has exclusive authority to enforce violations of a Planning Board Action. The authority granted in this Chapter supersedes any authority for enforcing Planning Board Actions that may have been granted to the Planning Board or any other officer, agent, or agency of Montgomery County or the State of Maryland in Chapter 1 of the Code. (Ord. No. 12-74, § 1.)

## Endnotes

\*Editor's note-In *Irvine v. Montgomery County*, 239 Md. 113, 210 A.2d 359 (1965), the County was found to be immune from liability for damage allegedly caused by continuous diversion of surface waters and denial of use of public road as result of excavation, grading and paving of streets pursuant to requirements and under supervision of County Department of PublicWorks and Transportation, which had approved the subdivision plat.

[Note] This chapter is cited in *Washington Suburban Sanitary Commission v. TKU Associates*, 281 Md.1, 376 A.2d 505 (1971). This chapter is mentioned in *Badian v. Hickey*, 228 Md. 334, 179 A.2d 873 (1962).

Cross references-Buildings, ch. 8; condominiums, ch. 11A; cooperative housing, ch. 11C; permit for land-disturbing activities, § 19-2 et seq.; storm water management, § 19-20 et seq.; homeowners' associations, ch. 24B; planning procedures. ch. 33A; real property. ch. 40; streets and

roads, ch. 49; zoning, ch. 59; subdivision signs, § 59-F-1.32(b), (c).  
State law reference-Maryland-National Capital Park and Planning  
Commission, Ann. Code of Md., art. 28.

[\[Note\]](#) \*State law reference-County exempted from general subdivision plat laws,  
Md. Ann. Code, Real Property Art., § 3-108.

## Attachment Three

### b) **Sec. 59-D-3.6. Failure to comply.**

If the Planning Board finds, for any plan approved under this section, on its own motion or after a complaint is filed with the Planning Board or the Department, that any of the terms, conditions or restrictions upon which the site plan was approved are not being complied with, the Planning Board, after due notice to all parties concerned and a hearing, may revoke its approval of the site plan or approve a plan of compliance which would permit the applicant to take corrective action to comply with the site plan. If at the end of the term of the plan of compliance sufficient corrective action has not taken place to cause compliance, the Planning Board may revoke its approval of the site plan or take other action necessary to ensure compliance, including imposing civil fines, penalties, stop work orders and corrective orders under Chapter 50. The Planning Board may request and obtain investigations and reports as to compliance from appropriate County or State agencies.

Upon decision by the Planning Board to revoke approval of a site plan, any applicable building permits and use-and-occupancy permits issued pursuant to a prior Planning Board approval are hereby declared invalid.

(Legislative History: Ord. No. 9-39, § 1; Ord. No. 12-73, § 2; Ord. No. 13-35, § 1; Ord. No. 13-112, §1; Ord. No. 14-36, § 1; Ord. No. 14-49, § 1.)

1.