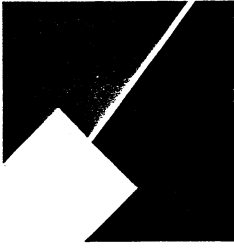


M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

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January 10, 2006

MCPB
Items # 8-15
1/12/06

MEMORANDUM

TO: Montgomery County Planning Board

FROM: Faroll Hamer, Acting Director *FH*
Department of Park and Planning

SUBJECT: Pending Zoning Text Amendments 05-17, 05-18, 05-19, 05-20 and Subdivision
Regulation Amendments 05-04, 05-05, 05-06 and Council Bill 35-05¹

STAFF RECOMMENDATION: Transmit comments to the County Council.

INTRODUCTION

There are currently 8 bills, as referenced above, that have been introduced by the County Council to address the site plan development review and enforcement processes. While Staff agrees in concept with many of the solutions posed by the proposed legislation, in order to provide a comprehensive response, in Staff's opinion, the Planning Board will need to take positions on the broader issues behind the proposed changes.

While Staff has provided below a detailed outline and analysis of these main issues, Staff agrees with the position raised by many of the speakers at the Planning Board's public hearing on January 5, 2006, on this legislation, that the legislation as currently proposed is not a comprehensive attempt to address issues related to the development review process identified as part of the ongoing Clarksburg violations hearings. Instead, the proposed legislation presents competing amendments to the same provisions. Unless carefully analyzed, Staff is concerned that conflicting provisions may be adopted. In addition, as was raised at the Board's January 5 public hearing, Staff is also concerned that there has not been sufficient time to fully analyze the outstanding issues in order to address them comprehensively. In particular, Staff notes that there are still ongoing studies concerning the Planning Board's process that may reveal information that is not currently being considered.

It is Staff's opinion that codifying changes prematurely without the benefit of the conclusions of all of the ongoing studies would not serve the process in the long run. However, given the pending legislation, Staff provides the Planning Board with its analysis based on the information and feedback Staff currently has on the process.

¹ Copies of all 8 of these bills are attached to this Memorandum.

This Memorandum outlines and analyzes the 8 main issues that the proposed legislation, in Staff's opinion, attempts to address or should be addressing. In this Memorandum, for each issue, Staff offers 1) the reason for consideration of the issue, 2) the process currently in place, 3) the process proposed by the pending legislation, if any, 4) Staff's recommended position on the issue, and 5) a list of questions to help guide the Planning Board's deliberation on the issue.

Once the Planning Board takes positions on these issues, Staff can work with Council Staff during the Council's worksessions to draft the appropriate language for implementing the Planning Board's decisions.

The following are the 8 main issues that the proposed legislation attempts to or should resolve:

- 1) How to provide citizens earlier participation in the development process?
- 2) What should "legally" constitute the approved site plan and what is the hierarchy of development approvals (i.e., how will an inconsistency among or within the approvals be addressed)?
- 3) What is the post-approval development process?
- 4) What are the limits of discretion for staff approval of a site plan amendment?
- 5) Who is responsible for reviewing building permits applications for conformance to development approvals?
- 6) Who should inspect for conformance to development approvals and site plan conditions?
- 7) Who should be responsible for determining and correcting violations, and what procedures will be followed?
- 8) Should the Planning Board refer hearings on site plans and site plan amendments to a hearing examiner/officer?

The following section analyzes each of these main issues, describes how the amendments attempt to resolve the issues and offers options for the Planning Board to consider.

8 MAIN ISSUES

Issue 1: Early Citizen Participation

Reason for Issue: The issue of earlier citizen participation in the site plan review process has been raised repeatedly before the Planning Board. Specifically, citizens have complained that they do not have a meaningful opportunity for input while the review process is ongoing. While this issue is not addressed in the proposed legislation, this issue was raised once again at the Planning Board's public hearing on the pending legislation held on January 5, 2005.

Current Process: There currently is no provision in the Zoning Ordinance that promotes citizen participation in the site plan review process. The only provision that contemplates citizen participation in the site plan review process prior to the hearing itself is the provision for notice set forth in the Planning Board's Rules of Procedure. A notice of the hearing date is mailed to all adjoining and confronting property owners and parties of record 10 days before the hearing.

Proposed Legislation: None of the proposed bills address this issue.

Staff Recommendation: In addition to our ongoing efforts to provide transparency in the approval process by posting application and amendment materials on the Department’s web site, staff recommends that the Planning Board pursue amendments to the proposed legislation that would require that applicants send notice to adjacent and confronting property owners as well as affected homeowner and civic associations 30 days prior to filing an application for site plan approval with the Planning Department. This will allow for earlier notification of citizens of proposed development in their neighborhood and allow for earlier participation of citizens in the development process. Staff recommends that the legislation allow for rejection of a site plan application without the certification of this early notice. In addition, Staff recommends that language be drafted to require applicants to provide an opportunity for citizens to meet with the applicant prior to review of the site plan by the Development Review Committee. This provision would also provide an early opportunity for citizen participation in the review process.

Questions for Planning Board Consideration:

1. When in the process should citizens be noticed of potential development?
2. What kind of citizen participation opportunities, if any, should be required of the applicant?

Issue 2: Hierarchy of Development Approvals

Reason for Issue: One of the main issues raised in the OLO report on Clarksburg violations is what happens when there are inconsistencies among and within successive development approvals for the same project? By including a hierarchy of 1) development approvals and 2) documents within a site plan, some of the problems involving inconsistent provisions within the Clarksburg development approvals would be addressed for future cases without the need for Planning Board involvement.

Current Process: Currently there is nothing in the Code that addresses this issue.

Proposed Legislation: The only bill that addresses this issue is ZTA 05-20. 05-20 proposes that if there is any conflict between a site plan and a “previously approved project, urban renewal, or preliminary subdivision plan” that “the site plan governs.”² In addition, 05-20 provides that “[i]n any conflict between 2 or more provisions of an approved site plan, the most rigorous provision governs.”³

Staff Recommendation: Staff does not recommend the Planning Board support a provision that promotes the site plan approval above all other previous Board approvals. In essence, this would allow amendment of prior Board approvals through the site plan. There are two problems with that scenario. The first problem is that required findings are different for different types of plans, so if a preliminary plan, for example, were to be amended through a site plan process, the required findings would not have been made for the preliminary plan. The second problem is that the effect of a revision made to a previous plan through the site plan process would be considered out of context, and therefore the full impact may not be understood. It should be

² Attachment Three, ZTA 05-20, pp. 8-9, lines 184-186.

³ Attachment Three, p. 9, lines 186-187.

noted that as more detail is required in a site plan than, for example, in a preliminary plan, the Planning Board will necessarily be approving site plans that are not identical to previously approved plans. The site plans must, however, conform to all major elements, conditions and data tables of previously approved plans.

It is Staff's opinion that any inconsistency between approvals cannot be addressed by accepting the site plan approval as definitive given the fact that each development approval involves distinct findings related to distinct development issues that do not necessarily overlap. As such, to allow one approval to govern another would not be sound planning policy. Instead, Staff's recommends that the Planning Board require that inconsistencies be resolved through the amendment process to ensure the integrity of each development approval.

Staff also recommends that the Planning Board adopt a definition of what constitutes "an approved site plan." In particular, Staff recommends that the Planning Board find that "an approved site plan" consists of 1) Planning Board conditions of approval; 2) the project data table; and 3) the plan drawings. Staff further recommends that, within the components of an approved site plan, the Planning Board establish the following hierarchy of documents: 1) the Planning Board conditions of approval; 2) the project data table; and 3) the plan drawings. Thus, any inconsistency between these documents themselves may be resolved without an amendment. Finally, Staff recommends that if there are inconsistencies within any of these documents that the most "restrictive" provision apply, rather than the most "rigorous" (since the term "rigorous" is more subjective).

As always, it is Staff's position that if any inconsistency exists that cannot be resolved, the project can be brought back to the Planning Board for its determination of what provision applies.

Questions for Planning Board Consideration:

1. Whether, in a project with inconsistent provisions, a site plan provision should control over a provision in a prior Planning Board approved project plan, urban renewal plan or preliminary plan?
2. Whether there should be a hierarchy of approvals and, if so, what should the hierarchy be?
3. What constitutes "an approved site plan"?
4. What is the hierarchy of documents within a site plan?
5. How should inconsistencies among and within plans be addressed?

Issue 3: Post-Approval Development Process

Reason for Issue: same as Issue 2 above.

Current Process: The post-approval development process for site plans currently involves two main steps. Once the Planning Board approves the site plan, 1) an opinion is drafted and adopted by the Planning Board; and 2) Staff finalizes a "signature set" of the site plan that incorporates changes to the site plan required by the conditions of approval set forth in the adopted opinion.

Proposed Legislation: The proposed language in ZTA 05-20 implies that an opinion is not always necessary and proposes a process in which the signature set of the approved site plan must consist of a “single document” which “must not incorporate any other document by reference” and be adopted by the Planning Board at the same time as the opinion, “when an opinion is legally required.”⁴

Staff Recommendation: Staff does not recommend the Planning Board support a process that would require the Board to adopt signature sets. The Board’s adoption of signature sets as proposed by the pending legislation is not only cumbersome (since signature sets involve many drawings and separate documents), but would also be time consuming (since it would involve another date before the Board) and would not ensure better consistency within the documents (since a Board vote does not in and of itself ensure better accuracy.) Staff recommends that the ministerial act of approving signature sets should remain with Staff.

However, Staff recognizes the concerns the Clarksburg approval process has raised and recommends that the Planning Board pursue an administrative policy of requiring that all complex site plan issues be fully addressed prior to a Planning Board hearing to eliminate discretion in conditions to be applied by Staff. As a result, Staff would only be applying conditions to signature sets that would be capable of objective interpretation, which would eliminate any need for the Planning Board to review the final signature set. This process would be further supported by the hierarchy of documents within the site plan as proposed in Issue 1 above, since the conditions of approval would control over the data table or plan drawings; thus, ensuring that any misinterpretation of a condition would not govern the actual condition.

In addition, in Staff’s opinion, a written opinion of the Planning Board’s action on a site plan is required by law and is not discretionary as implied by the proposed language of 05-20. At the same time, Staff has developed and begun to implement a far more efficient administrative system for preparing Planning Board opinions. Staff recommends that the Planning Board continue to adopt opinions – using the retooled system – prior to approval of the signature set by Staff. We do agree with the concept of having all the relevant approvals set forth in one document; this is a practice that has been in effect for the last several years. The signature set of drawings includes a sheet that duplicates the Planning Board opinion, together with all of the other approvals that precede it.

Questions for Planning Board Consideration:

1. Whether the Planning Board should adopt what is currently known as the “signature set site plan”?
2. What should constitute the “signature set site plan”?
3. Who should sign the signature set site plan?
4. Whether an opinion is required in every case?
5. What the process should be for the adoption of opinions and signature sets?

Issue 4: Site Plan Amendments

⁴ Attachment Three, p.6, lines 110-119.

Reason for Issue: There was much controversy surrounding the validity of the staff-approved site plan amendments in the Clarksburg violations hearings. As such, the proposed legislation attempts to clarify what site plan amendments may be approved at the staff level.

Current Process: Sections 59-D-3.7 and 59-D-2.6 are the provisions that currently govern what constitutes a major and minor site plan amendment. Essentially, they define a minor amendment as one that “does not entail matters that are fundamental determinations assigned to the Planning Board” and “does not alter the intent, objectives, or requirements expressed or imposed by the Planning Board in its review of the plan.” All site plan amendments approved by the Planning Board are defined as major amendments. On December 22, 2005, the Planning Board adopted interim guidelines for approval of Major, Minor, and Limited Site Plan Amendments, which involved 1) defining what constitutes a major amendment (all other amendments may be considered minor amendments); 2) setting forth a procedure for minor amendments; and 3) defining and setting forth a procedure for limited amendments.

Proposed Legislation: ZTA 05-20 proposes new language that sets forth a detailed definition of what constitutes a minor site plan amendment capable of staff-level approval and what types of amendments require Planning Board approval.⁵ In addition, the proposed language sets forth a procedure for adopting minor site plan amendments. Moreover, 05-20 provides that in addition to the property owner, the Director of DPS or the Planning Director “may apply at any time for an amendment to an approved site plan.” Finally, 05-20 requires that the Planning Board Chair sign any site plan amendment approved by the Planning Board.

Staff Recommendation: Staff recommends incorporating the concepts set forth in the interim guidelines adopted by the Planning Board in December. This would require that the legislation be redrafted to define what constitutes a major amendment rather than a minor amendment. In addition, the procedures set forth in the interim guidelines would supplement or supercede the procedural process set forth in the proposed language. Furthermore, Staff recommends adding a provision for limited amendments to the proposed legislation. Staff notes, however, that it would prefer deferring action on this issue at this time given that the interim guidelines have only recently been adopted. Staff requests additional time in which to apply the interim guidelines and will undertake to analyze and report back to the Planning Board on the effectiveness of the guidelines. In Staff’s opinion, the additional time could prevent the Council from adopting ineffective language and could eliminate deficiencies in the process that may be discovered once the procedures are applied.

With respect to the proposed language that the Director of DPS and the Planning Director could, at any time, apply for an amendment to an approved site plan, Staff recommends deleting that language. In Staff’s opinion, this is not a desirable method for correcting discrepancies either between or within plans. Instead, Staff recommends pursuing corrections of plans through 1) the reconsideration process by amending the Planning Board’s Rules of Procedures to allow Staff to request reconsideration of a plan; and 2) through the site plan enforcement process.

Finally, Staff recommends deleting the provision that requires the Planning Board Chair to sign any Planning Board approved site plan amendment. Since Staff currently signs site plans

⁵ See generally, Attachment Three, pp.10-12, lines 223-281.

approved by the Board, Staff recommends that the same process be applied to site plan amendments.

Questions for Planning Board Consideration:

1. What constitutes a major amendment?
2. What constitutes a minor amendment?
3. What process should be in place for approval of staff-level amendments? What are the noticing requirements? What triggers a hearing before the Planning Board?
4. Whether there should be a process for “limited amendments”? If so, what is the process for “limited amendments”?
5. Whether the Director of DPS and the Planning Director should be allowed to initiate site plan amendments?
6. Whether the Planning Board Chair must sign all Planning Board approved site plan amendments?

Issue 5: Building Permit Review

Reason for Issue: It became clear during the Clarksburg violations hearings that there is some confusion between Planning Staff and DPS over who is charged with reviewing building permit applications for conformance to site plan approvals.

Current Process: Under Chapter 8 of the Montgomery County Code⁶, the Director of DPS is currently charged with issuing building permits;⁷ reviewing building permit applications to ensure that “the proposed work conforms to all requirements of this Chapter and all other applicable laws and regulations;”⁸ “make all required inspections;”⁹ and enforce compliance with Chapter 8.¹⁰ In addition, § 59-A-3.34 requires that the Director “must not issue a building permit for: (1) construction of a new principal structure; (2) construction that increases the gross floor area of an existing commercial structure; or (3) construction that substantially increases the gross floor area of any one-family structure, until the application has been submitted to the Commission or its designee for review for conformity with this Chapter.” This requirement is

⁶ All citations to the Montgomery County Code are to the 2004 ed., as amended.

⁷ See § 8-12(a) (“[The Director of DPS] shall receive applications and issue permits for the erections and alteration of buildings and structures and inspect the premises for which such permits have been issued and enforce compliance with the provisions of this Chapter.”) (Emphasis added.)

⁸ See § 8-25(a) (“The Director [of DPS] must examine or cause to be examined each application for a building permit or an amendment to a permit within a reasonable time after the application is filed. If the application or the plans do not conform to all requirements of this Chapter, the Director must reject the application in writing and specify the reasons for rejecting it. If the proposed work conforms to all requirements of this Chapter and all other applicable laws and regulations, the Director must issue a permit for the work as soon as practicable.”) (Emphasis added.)

⁹ See, *supra*, fn. 6; § 8-12 (“The Director [of DPS] must make all the required inspections”); and generally, § 8-17 Inspection.

¹⁰ See, *supra*, fn. 6; and generally §§ 8-20 Stop Work Order, 8-21 Revocation of Permit; 8-22 Violations.

consistent with Article 28 of the State Code on building permits, which provides, in pertinent part, that “[a]n act, ordinance, or regulations issued under the authority of this article does not require the approval by the Commission of any building permit in Montgomery County or Prince George’s County, and any acts, ordinances, or regulations inconsistent herewith are repealed to the extent of the inconsistency. However, in Montgomery County, all building permit applications shall be referred to the Commission for review and recommendations as to zoning requirements.”¹¹ Finally, under § 59-D-3.5, no building permit “may be issued unless it is in strict compliance with an approved site plan.” Unfortunately, as the Clarksburg process revealed, it is unclear who makes that determination.

Proposed Legislation: Currently there is no legislation proposed to clarify the responsibilities of DPS and the Planning Department for review of building permits.

Staff Recommendation: Staff recommends that the Planning Board pursue legislation that clearly sets forth the responsibilities of DPS and the Planning Department for review of building permits. While Staff recognizes DPS’ ultimate authority for issuance of building permits, it is Staff’s opinion that the Planning Department possesses the planning expertise for determining whether a building permit application is in conformance with the plans approved by the Planning Board. Although Staff will make every effort to write conditions that are clear and prescriptive, there will no doubt continue to be questions of interpretation. Furthermore, the Planning Department is better equipped to monitor and track permits for phasing requirements (for elements such as recreational facilities, roads, and other public amenities. Staff recommends that DPS retain responsibility for reviewing permits without Planning Board hearing requirement for conformance to the Zoning Ordinance.

Questions for Planning Board Consideration:

1. What should be the responsibilities of the Planning Department in the review of building permit applications?
2. What should be the responsibilities of DPS in the review of building permit applications?
3. Which department should be responsible for reviewing building permit applications for compliance with zoning requirements?
4. Which department should be responsible for reviewing building permit applications for compliance with a) prior Planning Board approvals; and b) prior zoning approvals?
5. Should the County Code be clarified to require that DPS receive and consider recommendations from the Commission prior to issuance of a building permit?
6. Should the Planning Board pursue amendment to the State and County Codes to prohibit DPS from issuing a building permit without first receiving a recommendation of approval from the Commission? Should they declare permits issued without Commission approval invalid?

Issue 6: Site Plan Inspections

Reason for Issue: In connection with the Clarksburg violations hearings, an issue was raised as to which agency—DPS or the Planning Department—should conduct inspections for

¹¹ Article 28, Annotated Code of Maryland, § 8-119(a) (2005).

conformance with site plan approvals. This issue is closely related to the issue of which agency should enforce site plan violations and whether these two functions should be entrusted to separate agencies.

Current Process: While under Chapter 8 of the County Code, DPS inspects developments for compliance with the requirements of Chapter 8 and “all other applicable laws and regulations”¹² in connection with the issuance of building permits and use-and-occupancy permits, Planning Department Inspectors, under § 50-41¹³, inspect developments for compliance with site plan approvals, which includes elements such as landscaping, lighting, recreational facilities, and parking requirements.

Proposed Legislation: Both ZTA 05-17¹⁴ and 05-19¹⁵ contain proposed language that implies that DPS has the responsibility to inspect developments for compliance with site plan approvals.

Staff Recommendation: Staff recommends that the Planning Board support legislation that would transfer to DPS responsibility for inspection for compliance with site plan approvals. DPS currently inspects all new construction for conformance to structural engineering and life safety regulations. It makes sense for that agency to also inspect for setbacks and height. In Staff’s opinion, it also makes sense, since they are already on the site, to inspect for lighting, landscaping, parking and recreational facilities. Additional training for DPS staff will be important, but the result will be less redundancy, more accountability, and more savings for the public. Planning Staff would still be required to inspect for compliance with forest conservation plans, and would investigate complaints jointly with DPS.

Questions for Planning Board Consideration:

1. Should DPS or the Planning Department be responsible for inspection of developments for compliance with site plan approvals?
2. What kind of expertise is required to determine compliance with site plan approvals?
3. Is DPS or the Planning Department better equipped with the expertise to determine compliance with site plan approvals?
4. Should a cost-benefit analysis play a role in the decision?

¹² See, *supra*, discussion in Issue 4 and fn. 7.

¹³ § 50-41(a)(3) (Defining “Enforcement Agent” as: “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.”)

¹⁴ See ZTA 05-17, p. 5, lines, 67 to 74 (proposed language: “If the Department [of Permitting Services] 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 term, condition, or restriction which the site plan was approved [sic] is not being complied with, the Department, after due notice to all parties concerned and a hearing, may revoke the site plan or approve a compliance program which would permit the applicant to take corrective action to comply with the site plan.”) (Emphasis added.)

¹⁵ See ZTA 05-19, p. 3, lines 5-9, (defining “Zoning Administrator” as “[t]he individual in the Department who has the responsibility for administering, enforcing and interpreting the zoning ordinance, reviewing plans for compliance with the Zoning Ordinance and site plans prior to permit issuance, during and after construction and responding to citizen complaints.”) (Emphasis added.)

Issue 7: Enforcement of Site Plans

Reason for Issue: Many of the proposed bills propose to transfer responsibility for enforcement of site plans or, at least, the determination of whether a violation has taken place, from the Planning Board to another authority.

Current Process: Currently, the Planning Board is charged with enforcement of site plan violations under § 50-41 of the Subdivision Regulations and § 59-D-3.6 of the Zoning Ordinance. Thus, in the case of a site plan violation, the Planning Board has the sole authority to issue citations and stop work orders, set fines, hold hearings, determine violations, and approve corrective actions.

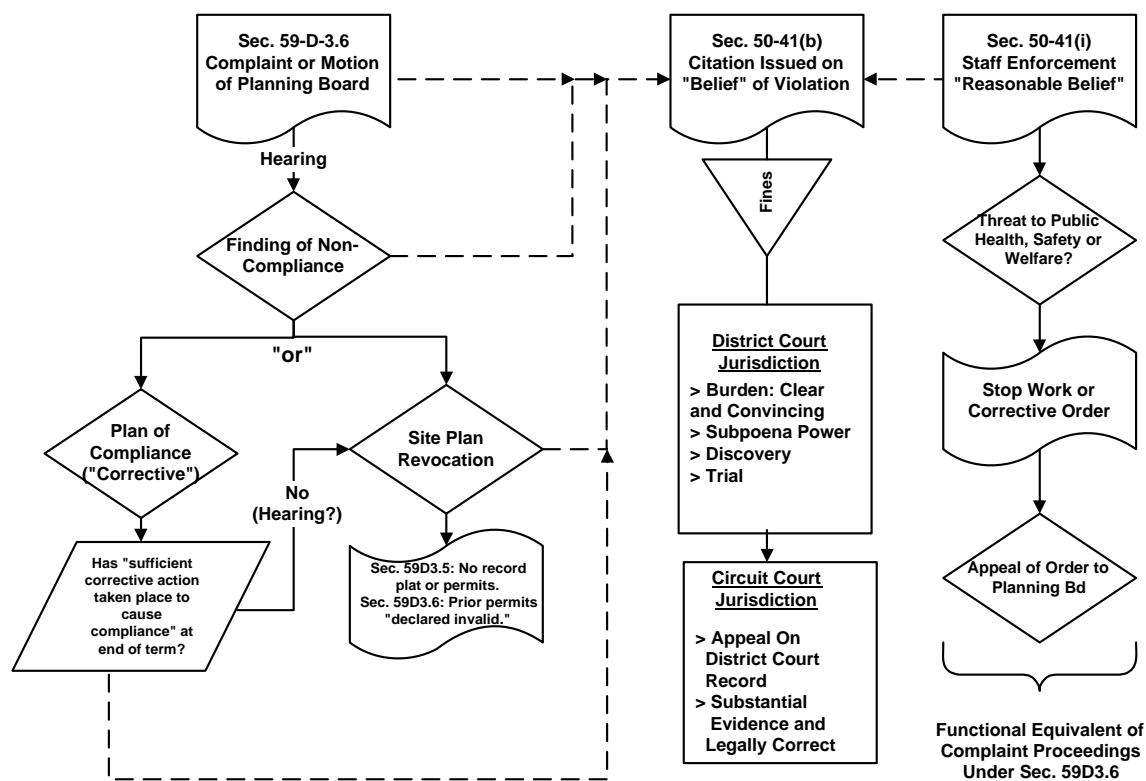


Figure 1: Site Plan Enforcement System

Proposed Legislation: The pending bills address the issue of site plan enforcement as follows:

1. ZTA 05-20: Allows for the use of a “hearing officer” to hold public hearings on site plan violations.¹⁶ Proposes other clarifying changes to § 59-D-3.6.¹⁷ And changes the language of § 59-D-3.6(c) from declaring building and use-and-occupancy permits

¹⁶ ZTA 05-20, p. 9, lines 196-206.

¹⁷ See ZTA 05-20, p. 9-10, lines 195-215.

- invalid upon Planning Board suspension or revocation of a site plan and, instead, immediately suspends the building or use-and-occupancy permit “until the Planning Board reinstates the site plan or approves a new site plan for the development.”¹⁸
2. ZTA 05-17: Transfers authority for enforcement of site plan violations to DPS by creating a new § 59-D-3.6 specifically requiring DPS to “enforce each site plan approved by the Planning Board”¹⁹ and substituting “Department” for “Planning Board” throughout the language in existing § 59-D-3.6.²⁰
 3. ZTA 05-18: Provides enabling language to allow the Planning Board to assign public hearings on site plan violations to the “hearing examiner.”²¹
 4. ZTA 05-19: Attempts to transfer all enforcement authority for site plans to DPS by adding the following sentence to the end of § 59-D-3.5: “The Department [of Permitting Services] is responsible for enforcing compliance with all features of the site plan during both plan review for building permits and during construction and the Department may take all necessary actions to ensure compliance including, but not limited to, stop work orders, corrective orders and civil penalties.”²²
 5. SRA 05-04: Appears to grant DPS concurrent authority for determining compliance with site plan approvals by adding the following sentence to the definition of “Enforcement Agent” under § 50-41: “The Department of permitting Services is responsible for determining compliance with any term, condition, requirement, agreement, or other obligation or limit associated with a site plan approved by the Planning Board.”²³
 6. County Bill 35-05: Amends the Functions of DPS to include “enforcing all requirements of any site plan adopted or amended by the Planning Board.”²⁴

Staff Recommendation: Staff recommends that the Planning Board oppose any legislation transferring the authority to determine a violation of a site plan violation or any other enforcement authority to another body. Given the complex issues involved with determining the most effective enforcement process, Staff recommends that the Planning Board request deferral of any action on this issue until a more comprehensive approach may be developed jointly between Planning Staff and Council Staff. Currently, there is a process in place for enforcement of site plan violations and Staff submits that that process may continue to be effectively followed until a new process is jointly developed. While the current process is not as clear as it should be, it can serve as a placeholder until a comprehensive and well-thought-out process can be designed. If legislation is approved requiring DPS to perform inspections for site plan compliance, DPS can notify the Planning Board of violations so the Planning Staff can investigate and the Board may conduct violation hearings under the current law.

¹⁸ ZTA 05-20, p. 10, lines 216-222.

¹⁹ ZTA 05-17, p.5, line 62.

²⁰ See ZTA 05-17, p.5-6, lines 62-85.

²¹ ZTA 05-18, p. 3, lines 6-10.

²² ZTA 05-19, p. 5, lines 63-67.

²³ SRA 05-04, p. 3.

²⁴ County Bill 35-05, p. 2, lines 10-11.

Questions for Planning Board Consideration:

1. Who should initiate violation process? Planning Staff? Planning Board? Citizens?
2. What constitutes a violation? What discretion does Staff have in determining which violations to pursue?
3. What process should be followed for determining a violation?
4. Should the Planning Board delegate the determination of a violation to the Zoning Hearing Examiner or other regulatory body?
5. Should the Planning Board delegate the determination of remedies to another regulatory body?
6. How are decisions on violations appealed?
7. How are decisions on remedies appealed?
8. What remedies should be available (e.g., fines, stop work orders, compliance plans) and when should they be available (e.g., immediately, only after a determination of a violation)?
9. What expertise is required in order to determine a violation?
10. Which regulatory body possesses this expertise?
11. What expertise is required in order to determine the appropriate remedies?
12. Which regulatory body possesses this expertise?
13. Should the Planning Board be determining whether an applicant violated a condition or requirement mandated by the Board?
14. Does the Planning Board want to pursue a single approach to enforcement of its approvals or is the Planning Board satisfied with the application of the two approaches currently set forth in § 50-41 and § 59-D-3.6 of the County Code?

Issue 8: Hearing Examiner/Officer

Reason for Issue: ZTA 05-20 contains provisions that authorize the Planning Board to designate a hearing officer to hold a public hearing on site plan applications as well as site plan amendments. This is in addition to the provisions authorizing the Planning Board to designate a hearing examiner/officer to hold hearings on site plan violations.

Current Process: Currently, the Planning Board holds all hearings on site plan applications and amendments. There exists no provision to authorize the Planning Board to designate any other body to hold public hearings on site plans.

Proposed Legislation: ZTA 05-20 proposes that 1) “The Planning Board, or a hearing officer designated by the Board, must hold a hearing on each site plan application;”²⁵ and 2) “The Planning Board may approve any proposed site plan amendment after giving the applicant and any other affected person an opportunity for a public hearing before the Planning Board or a hearing officer designated by the Board.”²⁶

²⁵ ZTA 05-20, p. 5, lines 99-101 (emphasis added).

²⁶ ZTA 05-20, p. 10, lines 233-236 (emphasis added).

Staff Recommendation: Staff recommends that the Planning Board oppose any legislation that would authorize the Board to designate another body to conduct hearings on site plan applications and amendments. While Staff recognizes that this legislation is enabling only, in Staff's opinion the Planning Board is the appropriate body for conducting public hearings on site plan applications and amendments and, thus, recommends against even the enabling legislation. Having a hearing examiner jeopardizes the concept of a citizen or lay board. The key qualification for a lay planning board member is a capacity of leadership in city planning, not any particular type of professional or technical training. The other advantage of a lay board is its freedom from the pressures of purely current problems. Although regulatory issues have become more complicated over the years, the basic needs to resolve conflicting interests and provide due process are still best accomplished by a lay board. This concept was originated in the Standard City Planning Enabling Act of 1920 (part of the original federal legislation enabling local zoning) and is still considered a best practice. It is recommended in the most recent guidebook for legislative reform in planning (*Growing Smart: Legislative Guidebook 3*).

Questions for Planning Board Consideration:

1. Whether the Planning Board wants to be able to designate a hearing office to hold public hearings on site plan applications and/or amendments?
2. What problem would be resolved by designating a hearing officer to hear site plan applications and/or amendments?
3. Which applications and/or amendments would be heard by the hearing officer?
4. What would the process be to refer hearings to the hearing officer?
5. How would the hearing officer's hearings be conducted?
6. What kind of expertise is needed to conduct public hearings on site plan applications and/or amendments?

CONCLUSION

Staff will work with Council Staff in implementing the decisions reached by the Planning Board at its hearing on January 12, 2006, on the issues discussed above.