

M E M O R A N D U M

September 17, 2009

TO: Planning, Housing, and Economic Development Committee
FROM: Jeff Zyontz, Legislative Attorney
SUBJECT: Subdivision Regulation Amendment 09-02, Subdivision Approval – Conflict Resolution

Background

On June 23, 2009 Subdivision Regulation Amendment (SRA) 09-02 was introduced at the request of Councilmember Floreen.

The 2008 Second Annual Report of the Montgomery County Citizens Advisory Committee to the Department of Permitting Services found that resolving conflicts between departments and agencies in the development approval process was a continuing problem. Conflicts often involve long delays, multiple meetings, and unnecessary expenditures of time and effort. SRA 09-02 would establish a procedure in the subdivision process to resolve conflicts between departments and agencies in an efficient manner.

Public Testimony

The Council held a public hearing on July 28, 2009. The Planning Board recommended deferring action on SRA 09-02. In its opinion, the goals of SRA 09-02 can be achieved by streamlining the process in other ways (delegate decision-making authority to staff at the Subdivision Review Committee, and allow the County Executive's Strike Force to get conflicts resolved). In the Planning Board's opinion, these alternatives, which do not require legislation, would allow for faster and more transparent decision making. The Planning Board expressed concern that SRA 09-02 might even increase the time required to get the conflict resolved. The Executive urged the Council to not adopt SRA 09-02 for legal reasons and the reasons given by the Planning Board.

Other speakers for the building industry supported SRA 09-02 more out of frustration than admiration. Testimony suggested:

- 1) having the applicant at the table during any conflict resolution;
- 2) including WSSC;
- 3) binding all agencies to the resolution;
- 4) deadlines for each step in the process; and
- 5) clarifying the meaning of "substantial change".

Joe Davis noted by written testimony that SRA 09-06 is only the latest attempt to resolve conflicts in the development process. In the fall of 1992, a Committee comprised of the M-NCPPC Director of Planning, Directors of the County Departments of Environmental Protection and Transportation, a senior manager of WSSC, and the County Council's Staff Director serving as the Council's observer released a report entitled, The Implementation Report -- Streamlining Montgomery County's Development Authorization Process (DAP), dated November 5, 1992. The DAP included the following recommendations:

- 1) clear assignment of responsibilities (*generally referred to as lead agency decision protocol*);
- 2) clear, current and consistent published development standards, guidelines, and submission requirements;
- 3) successive Review Process Design (*a "funnel" review where subsequent plan reviews narrow issues to be resolved*);
- 4) concurrent reviews where feasible;
- 5) procedural changes to promote effectiveness and efficiency;
- 6) certainty of review times;
- 7) effective system for resolving conflicts;
- 8) efficient means to assimilate, track, and share DAP-related information; and
- 9) an on-going framework and effort to maintain an efficient system.

The introduction of SRA 09-02 and the testimony from the building community is evidence that these recommendations are not all being followed in current practice. The essence of Mr. Davis's recommendations are reflected below.

Issues

Is legislation required?

A subdivision must satisfy numerous laws including, but not limited to, the road code, the fire code, stormwater management, forest conservation, and the subdivision code. The road code is administered by the Department of Transportation. The fire code is administered by the Department of Fire and Rescue Services. Stormwater management is administered by the Department of Permitting Services. The Planning Department administers the forest conservation law and the subdivision code through different divisions. Each law has variance or waiver provisions to allow for special circumstances; however, the variations or waivers from specific regulations are never a preferred solution.

In the past, the Board of Education used the slogan "success for every student." "Success for every subdivision" is not the goal of every department and agency involved in development review. Even so, the applicant should expect a timely response to an application. Diametrically opposed recommendations by agencies should be reconciled in a timely manner. The applicant is owed a means to achieve the ambitions of their application to the extent that it complies with all laws and regulations. This is common sense; few, if any, laws have been successful in mandating common sense.

There are 4 management steps to address the concern of conflicts between departments and agencies:

- 1) recognition by department and agency upper management that a problem exists;
- 2) delegation of authority to staff attending the development review committee to speak for their department;

- 3) staff training across department and agency lines on their collective mission, communication/conflict avoidance, and conflict resolution; and
- 4) agreements by upper management on the speedy identification and resolution of conflicts.

Legislation can only add rigidity, time, and unintended consequences. The subdivision process is complex; a solution for one department may create a conflict with another department. Such conflicts may only surface after the identification of issues at the development review committee. The development process would not be helped by an additional formal step for conflict resolution required by legislation.

The time required to resolve a conflict depends upon the departments involved. The resolution of conflict within the divisions of Park and Planning can take 3 months.¹ (There are no formal time limits before an identified conflict is brought to the Director, but perhaps there should.) It may take longer than 3 months if the conflict is between departments. When the conflict is between Executive departments, the Chief Administrative Office resolves the conflict. Mr. Davis recommended having 1 person from the Planning Department Staff and 1 person from the Executive Staff to resolve issues between the Planning Department and Executive departments.

Conflict resolution is impossible unless the players at the table are empowered to resolve conflict.² The delegation of authority to staff is a management issue. Executive departments must find a way to empower staff, short of Department Directors attending every meeting.³

Upper management was made aware that a problem exists simply by the introduction of SRA 09-02. Both the Executive and the Planning Board testified. They informed the Council of their new mechanism to resolve conflicts between them. If the Committee finds this insufficient, staff could be tasked with drafting a resolution expressing the Council's desire to resolve development review conflicts without turning the developer into a negotiator between regulatory fiefdoms.

What problems were identified in the proposed legislation?

- 1) The mandatory dates increase the time needed to resolve a conflict.
- 2) WSSC would not be at the table.
- 3) The resolution of the conflict would occur without the applicant or the public in the room.
- 4) The public hearing at the Planning Board could not affect the outcome of a resolved dispute.
- 5) The authority of the Planning Board to govern the subdivision process, granted to it by the State, would be limited.
- 6) The phrase "substantial change" lacks definition.

¹ The Chief of the Development Reviews tries to resolve intra-department conflicts with staff as soon as the conflict is identified. If it cannot be resolved at that level, she tries to resolve it with the staff member's division chief. Only the Planning Director can resolve a conflict remaining between division chiefs.

² Staff level empowerment went out of favor after problems were found in Clarksburg.

³ Planning Staff believes that there are problems with the lack of empowerment of the Department of Transportation's representatives.

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Ordinance No.:
Subdivision Regulation Amend. No.: 09-02
Concerning: Subdivision Approval –
Conflict Resolution
Draft No. & Date: 3 - 6/19/09
Introduced: June 23, 2009
Public Hearing:
Adopted:
Effective:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF
THE MARYLAND-WASHINGTON REGIONAL DISTRICT
WITHIN MONTGOMERY COUNTY, MARYLAND**

By: Councilmember Floreen

An Amendment to the Subdivision Regulations to:

- (1) resolve certain conflicts between departments and agencies concerning the conditions of the approval of a preliminary subdivision plan; and,
- (2) generally revise the requirements for the approval of preliminary subdivision plan.

By amending:

Montgomery County Code
Chapter 50, Subdivision of Land
Section 50-35

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Section 50-35 is amended as follows:**

2 **50-35. Preliminary subdivision plans-Approval procedure.**

3 * * *

4 (c) *Subdivision Review Committee.*

5 (1) The Board must establish a [subdivision review committee]
6 Subdivision Review Committee consisting of Planning
7 Department staff and staff of any County agency to which a
8 given plan has been referred, to meet with applicants and other
9 interested persons to facilitate agency review of the plan[,] or to
10 reconcile conflicting requirements by different agencies. Each
11 County agency to which a preliminary subdivision plan is
12 referred must designate a representative to the subdivision review
13 committee. For the purpose of plan review, the head of any
14 participating County agency must delegate authority to a
15 representative to speak for the agency.

16 (2) After receiving the comment of each agency and any
17 recommendation from members of the [subdivision review
18 committee] Subdivision Review Committee, the Planning
19 Department staff must prepare its recommendation to the Board
20 with regard to public requirements for the subdivision, the
21 reconciliation of conflicting agency comments, and any other
22 issue regarding compliance with applicable law and regulations.

23 (3) If any recommendation or requirement of a County agency or
24 other Committee participant conflicts with any other
25 recommendation or requirement or with any recommendation of
26 the Planning staff, and the conflict is not resolved within 30 days

27 after the Subdivision Review Committee meeting at which the
28 conflict arose, the Planning Director must submit the conflict
29 within 35 days after that Subdivision Review Committee meeting
30 to a meeting of the Directors of all County Departments which
31 are represented at the Subdivision Review Committee. The
32 meeting must include the Director of:

33 (A) each appropriate County Department;

34 (B) the Planning Department; and

35 (C) if necessary to resolve the conflict, the Washington
36 Suburban Sanitary Commission.

37 (4) The Planning staff must document each issue submitted to the
38 Department Directors in the record of the subdivision plan.

39 (5) The Department Directors must meet to resolve each conflict
40 within 30 days after the conflict was submitted to them.

41 (6) The Department Directors must resolve each conflict and must
42 report their resolution of the conflict to the Planning Board within
43 5 days after their meeting.

44 (7) The Planning Staff must distribute the Department Directors'
45 report to the parties of record within 2 days after the Board
46 receives the report.

47 (d) *Road grade and road profile.* Before the Board finally approves a
48 preliminary plan, the subdivider must furnish road, and pedestrian path
49 grades and a street profile approved in preliminary form by the County
50 Department of Transportation.

- 51 (e) *Wells and septic systems.* Before the Board approves a plan for lots
52 with individual wells or septic systems, the plan must be approved by
53 the Department of Permitting Services.
- 54 (f) [*Presentation of plan to*] *Board action.* Every preliminary plan must be
55 presented to the Board for its review and action at the earliest regular
56 meeting after the Planning staff has completed its study and is ready to
57 make its recommendation, but not later than the first regular meeting
58 which occurs after 60 days after the Planning staff accepted the
59 application as complete. Any extension of time granted for review by
60 other agencies or for resolution of a conflict by the relevant Department
61 Directors must be added to the 60 days. The Board must take one of the
62 following actions:
- 63 (1) Approve, if the plan conforms to the purposes and other
64 requirements of this Chapter.
- 65 (2) Approve, with any conditions or modifications necessary to bring
66 the proposed development into compliance with all applicable
67 requirements.
- 68 (A) If it approves a preliminary plan for a cluster or MPDU
69 optional method development, the Board may require that,
70 to resolve specific environmental or compatibility issues,
71 certain detached dwellings must not be included in an
72 application for a record plat until a site plan is approved
73 under Division 59-D-3, and as required in Sections 59-C-
74 1.521 and 59-C-1.63.
- 75 (B) Any modification of a road or grades must be approved by
76 the County Department of Transportation.

77 (C) If the Board approves a preliminary plan that involves a
78 conflict which was resolved under subsection (c), the
79 resolution of the conflict must be made a condition of
80 approval and is binding on each participating department
81 or agency.

82 (3) Disapprove, if contrary to the purposes and other requirements of
83 these regulations, [, said] Any disapproval [to be by written
84 notice to the applicant stating the reasons therefor] must specify
85 each reason in writing and be sent to the applicant. The Board
86 must not disapprove a plan because of any resolution of a conflict
87 submitted to it under subsection (c).

88 [Following approval of] After the Board approves a preliminary plan
89 [by the Board], [no] another agency [shall] must not require a
90 substantial change in the plan[,] other than [those] a change which [may
91 be] is required by [conditions] a condition of approval specified by the
92 Board, [except upon amendment of] or as the Board later amends the
93 plan[, approved by the Board,] or [under procedures for revocation of a
94 plan as provided by] revokes its approval under subsection (i) [of this
95 section, title, "revocation of approval."].

96 *Approved:*

97
98

99 _____
Isiah Leggett, County Executive Date

100 *This is a correct copy of Council action.*

101
102

103 _____
Linda M. Lauer, Clerk of the Council Date



MONTGOMERY COUNTY PLANNING BOARD
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIRMAN

2 13

MONTGOMERY COUNTY PLANNING BOARD

The Maryland-National Capital Park and Planning Commission

July 23, 2009

TO: The County Council for Montgomery County, Maryland, sitting as the District Council for the Maryland-Washington Regional District in Montgomery County, Maryland

FROM: Montgomery County Planning Board

SUBJECT: Subdivision Regulation Amendment No. 09-02

BOARD RECOMMENDATION

The Montgomery County Planning Board of The Maryland–National Capital Park and Planning Commission reviewed Subdivision Regulation Amendment No. 09-02 at its regular meeting on July 23, 2009. After careful review of the material of record, the Board provides the following comments.

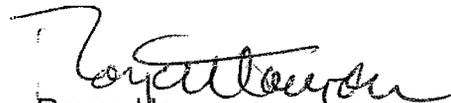
The Board does not believe that the subject SRA should move forward at this time. The Board believes that the aim of the SRA is to ensure a more timely hearing of a development review application, but that this can be better done by streamlining the review process in other ways. Chief among these are examining the steps and requirements of the current review process to determine ways to shorten it, and revisiting the recommendations made as part of the last streamlining effort. For example, it is difficult to resolve conflicts when departments and agencies do not delegate decision-making authority to staff that attend the Subdivision Review Committee. Until this more comprehensive effort is completed, in those cases where conflicts cannot be resolved at the Subdivision Review Committee stage, lead agency protocol, supplemented by the newly created County Executive's Strike Force, will allow conflicts to move up to the appropriate decision maker as necessary. The Board further believes that the SRA should not move forward at this time because it would exclude the public from participating in matters that were subject to the dispute resolution process envisioned by the SRA.

The Planning Board also has major concerns with the language of SRA 09-02. The language greatly encroaches upon the Board's authority, since it states in Section 50-35(f)(2)C that when the Department Directors' group resolves an issue, that resolution must be made a condition of the Planning approval and the Board must not disapprove a plan because of any Board's resolution so reached. Under the County Code, the Planning Board has authority to make final decisions in many instances and this language would supersede that authority. In matters on which the Planning Board has decision-making authority, the Department Directors' resolution of a conflict should be considered like all other staff recommendations concerning the case.

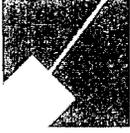
If the County Council decides to approve the proposed legislation, the Board recommends modifications to the proposed SRA to better reflect what we believe is a more realistic way to address the Council's intent.

CERTIFICATION

This is to certify that the attached report is a true and correct copy of the technical staff report and the foregoing is the position taken by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission at the Board's regular meeting held in Silver Spring, Maryland, on Thursday, July 23, 2009.


Royce Hanson
Chairman

RH: GR



MONTGOMERY COUNTY PLANNING DEPARTMENT
 THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB
 Item #9
 7/23/09

DATE: July 20, 2009
TO: Montgomery County Planning Board
VIA: Rose Krasnow, Chief, Development Review *RK*
 Ralph Wilson, Zoning Supervisor
FROM: Greg Russ, Zoning Coordinator *GR*
 Cathy Conlon, Subdivision Supervisor *CC*
REVIEW TYPE: Subdivision Regulation Amendment
PURPOSE: Generally amend the Subdivision Regulations to resolve certain conflicts between departments and agencies concerning the conditions of the approval of a preliminary subdivision plan.

SUBDIVISION REGULATION AMENDMENT: 09-02
INTRODUCED BY: Councilmember Floreen
INTRODUCED DATE: June 23, 2009

PLANNING BOARD REVIEW: July 23, 2009
COUNCIL PUBLIC HEARING: July 28, 2009; 1:30pm

STAFF RECOMMENDATION Staff provides the following comments on SRA 09-02:

- Staff does not believe that the subject SRA should move forward at this time. Staff believes that the aim of the SRA is to ensure a more timely hearing of a development review application, but that this can be better done by streamlining the review process in other ways. For example, it is difficult to resolve conflicts when departments and agencies do not delegate decision-making authority to staff that attend the Subdivision Review Committee. In those cases where conflicts cannot be resolved at the Subdivision Review Committee stage, lead agency protocol, supplemented by the newly created County Executive's Strike Force, will allow conflicts to move up to the appropriate decision maker as necessary. Staff further believes that the SRA should not move forward at this time because it would exclude the public from participating in matters that were subject to the dispute resolution process envisioned by the SRA.
- If the County Council decides to approve the proposed legislation, staff recommends modifications to the proposed SRA to better reflect what we believe is a more realistic way to address the Council's intent.

(S)

BACKGROUND/ANALYSIS

Councilmember Floreen introduced SRA 09-02 in response to the 2008 Second Annual Report of the Montgomery County Citizen Advisory Committee to the Department of Permitting Services. The committee identified that resolving conflicts between departments and agencies in the development approval process was a continuing concern, and that the Development Authorization Process (DAP), created in 1992, was no longer effective. The intent of SRA 09-05 is to establish a procedure in the subdivision process to resolve conflicts between departments and agencies in an efficient manner.

Existing Requirements

Section 50-35 of the Subdivision Regulations (Chapter 50 of the Montgomery County Code) contains the procedure for approval of preliminary subdivision plans, including the requirement that the plans be referred to specific agencies that may have a direct interest in the installation or maintenance of facilities or services that will serve the proposed subdivision to obtain their recommendations concerning the plan prior to Planning Board action. The proposed amendment modifies subsections 50-35(c) and 50-35(f) of this procedure.

Subsection 50-35(c) requires the Board to establish a Subdivision Review Committee to facilitate plan review and reconcile any conflicting requirements by the different agencies that receive the plan. The committee must include agency representatives who have been delegated authority to speak for the agency by the appropriate agency head, and the agency comments and recommendations from these representatives must be considered by Planning Department staff in the preparation of its recommendations to the Board concerning the plan. This committee, now known as the Development Review Committee (DRC), is established and has been reviewing plans for many years.

Subsection 50-35(f) contains the requirements for the presentation of plans to the Planning Board for its review and action. These include: the timeframe in which the plan must be presented, the types of actions the Board may take, and the provision that no agency may require a substantial change to a plan following Board approval unless the change was required by the conditions of approval that were specified by the Board.

Analysis of Proposed Legislation

The proposed amendments would establish a procedure by which conflicts between the recommendations or requirements of the DRC participants could be resolved by the Directors of all the agencies or departments that are represented at the DRC. Under this procedure, if recommendations or requirements made at a DRC meeting conflict, and the conflict is not resolved by the agencies or departments involved within 30 days after the meeting at which it arose, the conflict must be submitted to the Department Directors. The Directors must meet and resolve the conflict within 30 days after it was submitted to them, and report their resolution to the Board within 5 days after the meeting. The amendment also allows the timeframe in which a plan must be presented to the Planning

Board to be extended to facilitate such a Directors meeting, and requires that the Directors' resolution of a conflict be made a condition of the Planning Board's approval and be binding on each department or agency that participates in the DRC. Finally, the amendment prohibits the Board from disapproving a plan because of dissatisfaction with the way in which a conflict has been resolved by the Directors.

The laws, regulations and policies that apply to development in Montgomery County are admittedly very complex and often conflict. So it is not surprising that there are conflicts between the recommendations of the agencies and departments charged with applying these requirements as part of the DRC. It is important to remember that many factors other than an ability to get the parties to agree can slow down the resolution of many of these conflicts. Frequently, the agency or department that has authority over a decision is not able to make it in a timely manner because applicants are slow to provide necessary information, or are asking for waivers or exceptions that they haven't justified with enough background material. On some occasions, a decision by one agency creates a new conflict with the requirements of another agency, which necessitates further review by all well after the original DRC meeting. The process is also slowed because many of the representatives at the DRC meetings do not have authority to make decisions. Instead, they are present only to transmit the comments of the individual plan reviewer or the department review team, and therefore, it's almost guaranteed that, when areas of conflict are identified at a DRC meeting, the individuals present will not be able to work out a solution because they are required to take the matter back so it can be resolved by others in the department's chain of command.

Staff agrees that especially contentious issues between agencies or departments should be elevated to higher levels of authority for decision. Such a policy has long been in place for conflict resolution within the Planning Department, itself, and the County Executive's new strike force is designed to bring resolution to particularly contentious disputes among agencies. The proposed amendment codifies the strike force idea, however, it seems to go too far in that it creates a review timeframe that would elevate issues that may well be amenable to a solution before they have had a chance to be successfully resolved, and it significantly takes away the Planning Board's decision-making authority. And in taking away the Board's authority with respect to a matter addressed through the dispute resolution process, it precludes the public from providing input to the Board, and the Board considering such input in its decision. Finally, the proposed amendment fails to address the more common causes for delay which, in staff's opinion, should be the primary focus of any effort to improve the overall review process. Therefore, staff recommends modification to the language of the proposed amendment if the County Council chooses to approve it, and also, additional steps that we believe should be taken to improve other areas of the process.

Staff Recommended Modifications to SRA 09-02

The language of proposed subsection 50-35(c)(3) creates a requirement that any agency or department conflict that is not resolved after 30 days from the DRC meeting must be submitted to the Department Directors for resolution. Staff recommends that this

language be modified so that the 30 days is not measured from a DRC meeting, but rather, from any point in the review of an application when an applicant has provided sufficient information for agencies or departments to make the decision but the agencies or departments have not done so. This change addresses the fact that not all contentious issues arise at the DRC meeting, and the fact that some decisions are delayed by an applicants' failure to provide necessary information.

Proposed subsection 50-35(c)(6) requires that the Department Directors report their decision on a conflict resolution to the Planning Board within 5 days of their meeting, and subsection (c)(7) requires Planning staff to distribute that decision to all parties of record in the next 2 days. Staff recommends deletion of proposed subsection (c)(7) because it is unnecessary and expensive to send specific notice to the parties of record when the decision will become a part of the case file, and all information in the case files are part of the public record and readily available for review.

Finally, staff strongly recommends deletion of subsection 50-35(f)(2)(C) which requires that any resolution of a conflict by the Department Directors be made a condition of the Planning Board's approval, and the language in subsection 50-35(f)(3) that prohibits the Board from disapproving a plan because of any resolution of a conflict submitted by the Department Directors. Under the County Code, the Planning Board has authority to make final decisions in many instances and this language would supercede that authority. In matters on which the Planning Board has decision-making authority, the Department Directors' resolution of a conflict should be considered like all other staff recommendations concerning the case.

Additional Staff Recommendations

In the early 1990's, the County Council, County Executive and the Planning Board also had concerns that the development review process had become too time consuming. To address the issue, the Council established a high level, interdepartmental committee composed of several key department heads that was charged with finding ways to streamline the process. The committee made ten specific recommendations that were published in the 1992 *DAP Implementation Report*. Among them was the recommendation for the clear assignment of responsibilities among reviewers, otherwise referred to as "lead agency" designation.

For several years, the participating DRC departments worked to implement the DAP recommendations and the steering committee continued to meet to track the progress being made. At that time, the consensus was that the process had improved. However, by early 2001, when Planning Department staff revisited the recommendations in a series of meetings with other DRC participants, they noted that some of the original problems were reoccurring. As a result of staffing changes, reorganizations and procedural changes in all the DRC-participant agencies, many were no longer operating under the ethic of the original recommendations. As recently as 2004, this problem was reconfirmed during the inter-agency discussions that occurred as part of the Planning Department's Management Improvement Program (MIP) study.

In staff's opinion, if the agencies and departments that participate in the DRC followed already existing lead-agency protocol and empowered their representatives to make decisions on their behalf, issues would be resolved more quickly. Therefore, we believe that an effort to revisit the tenets that were adopted as part of the 1992 *Implementation Report* would be a more meaningful way to address the current concerns about review times than the proposed amendment.

Moreover, Development Review staff is currently reexamining the review process in an effort to shorten it, provide greater certainty with respect to timing, and put in requirements that would prevent new issues from being raised late in the game. This streamlining effort, coupled with the zoning code rewrite, should go far in making the process a better one for all parties involved. Therefore, staff believes this SRA should be tabled until the streamlining effort has had a chance to achieve many of the same aims.

CC/GR

Attachments

1. Proposed SRA No. 09-02

#13
#1

Subdivision Regulation Amendment 09-02, Subdivision Approval – Conflict Resolution

Testimony on behalf of County Executive Isiah Leggett

July 28, 2009

Good Afternoon. I am Kathleen Boucher, Assistant Chief Administrative Officer for Montgomery County and I am pleased to provide testimony on behalf of County Executive Leggett on Subdivision Regulation Amendment (SRA) 09-02. This amendment is directed at resolving conflicts that may arise during the interagency review of subdivision plans. The County Executive believes that the amendment is unnecessary and, on advice of the County Attorney's Office, that there may be legal issues with the proposed amendment.

Executive staff have been actively working with Planning Board staff to both coordinate comments on subdivision projects and address any conflicts that arise in the interagency coordination process. As a part of that process, we have established a "strike team" approach in the event there is a development review conflict at the staff level. Specifically, Park and Planning's Chief of Development Review, on a monthly basis, provides an Assistant Chief Administrative Officer (ACAO) with a list of projects that have unresolved development review issues. The ACAO then circulates the list to the appropriate Department Directors. A meeting among the Directors, the ACAO, the Chief of Development Review and staff follows to resolve any outstanding issues.

Following the initiation of this process, a list was provided to ACAO Diane Schwartz Jones. The list was circulated to appropriate Directors and a follow-up meeting was held. The Directors actually resolved the outstanding issues in advance of the meeting. The process was thus very successful. Since that time, there have been no other conflicts that have needed to be brought to the "strike team." Nonetheless, the members of the team retain a hold on their calendars for future meetings if necessary.

It is also worth pointing out that with the adoption of the Context Sensitive Road Design Standards, and the incorporation of these standards into regulations, greater detail and clarity is provided to applicable parts of the development review process.

Given the legal concerns of the County Attorney's Office and the establishment of a cooperative process to address conflicts that may arise, the County Executive believes that the SRA 09-02 should not be adopted. Thank you for the opportunity to share County Executive Leggett's position on SRA 09-02.

#13
#4

Subdivision Regulation Amendment No. 09-02

Testimony of William Kominers

(July 28, 2009)

Good Afternoon President Andrews and Members of the Council. My name is William Kominers. I am attorney with Holland & Knight in Bethesda, and I am here today speaking as an individual.

The legislation before you today is spawned by frustration. Frustration with a process that is so laborious, that even making obvious and correct decisions takes too long and costs too much. This translates into high costs to the ultimate consumer. But it also results in some people saying "enough" -- "I'm not looking in Montgomery County any longer. The wall is stronger than the head I have been beating against it."

This legislation is unfortunately necessary because the natural tendency of each government agency to want to achieve 100% of its own goals. Conflicts then arise because there is reluctance to look at the big picture, moderate that 100% to balance competing needs, and make that judgment of balance while keeping in mind the production of a particular product for a particular market at a particular point in time.

I want to provide examples of this problem -- two real, two hypothetical.

Each of these real conflicts did reach a solution. Each was worked on diligently by the government agencies involved. But the time and cost to reach solution was far out of proportion to the problem presented. Let me emphasize -- the problem is with the process of resolution, not the people making the decisions.

The two real examples involve the issue of driveway separation.

The Department of Transportation has a policy -- not a law, a policy -- that calls for 100 feet of separation between adjoining driveways. That sounds reasonable in theory, but how does it operate in practice?

1. The first case involves a plan in an urban area with a driveway that is within probably 25 feet of a driveway to a County facility. The plan is already approved. Applicant sought to amend the plan. In doing this, the approved driveway was very slightly relocated and modified. At that point, we were advised that the driveway violates the separation policy and has to be moved to provide 100 foot separation. Now, the site doesn't have much more than 100 feet of frontage altogether. Further, the building design (which was not changing very much) wanted access to the underground parking at the location where it had been designed previously. The design was trying to provide more

uninterrupted streetscape for pedestrians. Most importantly, the basic driveway location had already been approved in the earlier plans that were being amended. The driveway was moving only a couple of feet.

Resolution of this matter required submission of a waiver request, revisions, traffic studies, other detailed engineering, and, most of all, time.

2. The second example involves some old, small, urban lots, each of which is about 50 feet wide, each with an existing driveway. The project involved assembling and redeveloping two such adjoining lots.

Due to streetscape and pedestrian goals, the applicant proposed access from location other than the street, so that both existing driveways could be eliminated. Planning Board Staff supported this idea. DOT wanted the driveway entrance from the street, not an alternate location. However, if access was provided from the street, it would need a waiver from the driveway separation requirement, because the new driveway would not be 100 feet from each of the adjacent driveways. (Remember, the lots on either side are also only 50 feet wide.) When the applicant inquired about using one of the existing driveways to satisfy the requirement, DOT indicated that a waiver would also be required to use that existing driveway, because it is already too close to the driveways on either side. Resolving this resulted in more process, a waiver request, traffic studies and analysis, meetings, and, again, time.

3. Hypothetical. The Planning Board approves a preliminary plan with a certain street configuration and cross-section. DOT will not issue the permit for construction because DOT does not approve of the road cross-section that the Planning Board approved. DOT is the lead agency for roadway matters.

4. A final hypothetical example. DOT may agree on a reduced width cross-section in order to preserve trees along the road (as might be requested by the Planning Board), but the Fire Marshal then will not approve the permit for construction because the road is not wide enough for emergency equipment.

In the middle of each of these disputes is the applicant -- trying to get the agencies together to make a balanced decision. Often times, the applicant is willing to do whatever either agency wants, so long as both will agree. This process needs to be fixed. But it needs higher level input for resolution than just the DRC. There needs to be a perspective on the bigger picture of balancing competing priorities.

Attached is a mark up of the legislation with specific comments, including the following:

1. Lines 39 through 40. The applicant should be able to attend the conflict resolution meeting, present its proposal for resolution, and comment upon any other proposals. The applicant is critical to this process, just as the applicant's participation in the DRC is important.

2. Lines 35 – 36. Add the utility companies to the group included in the conflict resolution, in addition to the Washington Suburban Sanitary Commission. Often, utility intransigence on standards precludes consensus solutions.

3. Lines 31, 38 and 42. As materials are submitted to the Directors, there should be a concurrent submission of such information to the applicant (Lines 31 and 38). Similarly, when the Directors advise the Planning Board of the resolution of the conflict, the applicant should also be advised. To this end, the phrase "and the applicant" should be inserted in Line 42.

4. Line 80. The decision reached through the conflict resolution process must bind all agencies with respect to future actions (e.g., permits). Once the conflict is resolved, and approved by the Planning Board, all other agencies must be bound to that solution for purposes of future plan review and permit issuance.

Delete the word "participating" in Line 80. Without this deletion, an agency could avoid the need to follow the decision by simply being absent and not "participating" in the decision making process.

5. Lines 88 – 95. This section indicates that once the Board approves a preliminary plan, other agencies must not require "a substantial change in the plan" (other than those that arise from Planning Board conditions).

This raises at least two questions. First, what is the meaning of "substantial" in this context and how much leeway is provided to allow an agency to consider a change a "substantial change" so as to no longer be bound to the original plan decision? Second, how binding is this provision on the Planning Board itself and its Staff in review of subsequent actions, such as project plan and site plan? Is the Board and its Staff also bound to these decisions so as not to require a "substantial change" in the review of a later plan?

6. As part of making this legislation effective, Council, Staff and all the affected agencies should look at what other legislation is required in order to allow modifications of other organic standards for each of the agencies, so that each agency has the ability to compromise so as to resolve conflicts pursuant to SRA No. 09-02.

Attachments

8734478_v1

1 **Sec. 1. Section 50-35 is amended as follows:**

2 **50-35. Preliminary subdivision plans-Approval procedure.**

3 * * *

4 (c) *Subdivision Review Committee.*

5 (1) The Board must establish a [subdivision review committee]
6 Subdivision Review Committee consisting of Planning
7 Department staff and staff of any County agency to which a
8 given plan has been referred, to meet with applicants and other
9 interested persons to facilitate agency review of the plan[,] or to
10 reconcile conflicting requirements by different agencies. Each
11 County agency to which a preliminary subdivision plan is
12 referred must designate a representative to the subdivision review
13 committee. For the purpose of plan review, the head of any
14 participating County agency must delegate authority to a
15 representative to speak for the agency.

16 (2) After receiving the comment of each agency and any
17 recommendation from members of the [subdivision review
18 committee] Subdivision Review Committee, the Planning
19 Department staff must prepare its recommendation to the Board
20 with regard to public requirements for the subdivision, the
21 reconciliation of conflicting agency comments, and any other
22 issue regarding compliance with applicable law and regulations.

23 (3) If any recommendation or requirement of a County agency or
24 other Committee participant conflicts with any other
25 recommendation or requirement or with any recommendation of
26 the Planning staff, and the conflict is not resolved within 30 days

A COPY OF SUCH SUBMISSION, INCLUDING THE DATE OF SUBMITTAL, SHALL BE CONCURRENTLY PROVIDED TO THE APPLICANT.

SRA No. 09-02
Revised

27 after the Subdivision Review Committee meeting at which the
28 conflict arose, the Planning Director must submit the conflict
29 within 35 days after that Subdivision Review Committee meeting
30 to a meeting of the Directors of all County Departments which
31 are represented at the Subdivision Review Committee. ↓ The
32 meeting must include the Director of:

33 AND CONCURRENTLY
34 SUBMIT SUCH
35 INFORMATION
36 TO THE
37 APPLICANT.

- (A) each appropriate County Department;
(B) the Planning Department; and
(C) if necessary to resolve the conflict, the Washington
Suburban Sanitary Commission, AND ANY UTILITY COMPANIES.

37 (4) The Planning staff must document each issue submitted to the
38 Department Directors in the record of the subdivision plan. ↓

39 (5) The Department Directors must meet to resolve each conflict
40 within 30 days after the conflict was submitted to them. ←

41 (6) The Department Directors must resolve each conflict and must
42 report their resolution of the conflict to the Planning Board, within
43 5 days after their meeting. AND THE APPLICANT →

44 (7) The Planning Staff must distribute the Department Directors'
45 report to the parties of record within 2 days after the Board
46 receives the report.

47 (d) *Road grade and road profile.* Before the Board finally approves a
48 preliminary plan, the subdivider must furnish road, and pedestrian path
49 grades and a street profile approved in preliminary form by the County
50 Department of Transportation.

THE APPLICANT MAY ATTEND SUCH MEETING AND PRESENT ITS PROPOSAL FOR RESOLUTION OF THE CONFLICT AND MAKE COMMENT ON OTHER PROPOSALS.

- 51 (e) *Wells and septic systems.* Before the Board approves a plan for lots
52 with individual wells or septic systems, the plan must be approved by
53 the Department of Permitting Services.
- 54 (f) [*Presentation of plan to*] Board action. Every preliminary plan must be
55 presented to the Board for its review and action at the earliest regular
56 meeting after the Planning staff has completed its study and is ready to
57 make its recommendation, but not later than the first regular meeting
58 which occurs after 60 days after the Planning staff accepted the
59 application as complete. Any extension of time granted for review by
60 other agencies or for resolution of a conflict by the relevant Department
61 Directors must be added to the 60 days. The Board must take one of the
62 following actions:
- 63 (1) Approve, if the plan conforms to the purposes and other
64 requirements of this Chapter.
- 65 (2) Approve, with any conditions or modifications necessary to bring
66 the proposed development into compliance with all applicable
67 requirements.
- 68 (A) If it approves a preliminary plan for a cluster or MPDU
69 optional method development, the Board may require that,
70 to resolve specific environmental or compatibility issues,
71 certain detached dwellings must not be included in an
72 application for a record plat until a site plan is approved
73 under Division 59-D-3, and as required in Sections 59-C-
74 1.521 and 59-C-1.63.
- 75 (B) Any modification of a road or grades must be approved by
76 the County Department of Transportation.

77 (C) If the Board approves a preliminary plan that involves a
78 conflict which was resolved under subsection (c), the
79 resolution of the conflict must be made a condition of
80 approval and is binding on each participating department
81 or agency.

82 (3) Disapprove, if contrary to the purposes and other requirements of
83 these regulations, [, said] Any disapproval [to be by written
84 notice to the applicant stating the reasons therefor] must specify
85 each reason in writing and be sent to the applicant. The Board
86 must not disapprove a plan because of any resolution of a conflict
87 submitted to it under subsection (c).

88 [Following approval of] After the Board approves a preliminary plan
89 [by the Board], [no] another agency [shall] must not require a
90 substantial change in the plan[,] other than [those] a change which [may
91 be] is required by [conditions] a condition of approval specified by the
92 Board, [except upon amendment of] or as the Board later amends the
93 plan[, approved by the Board,] or [under procedures for revocation of a
94 plan as provided by] revokes its approval under subsection (i) [of this
95 section, title, "revocation of approval."].

OR THE
PLANNING
BOARD
ITSELF

96 *Approved:*

99 _____ Date

Isiah Leggett, County Executive

100 *This is a correct copy of Council action.*

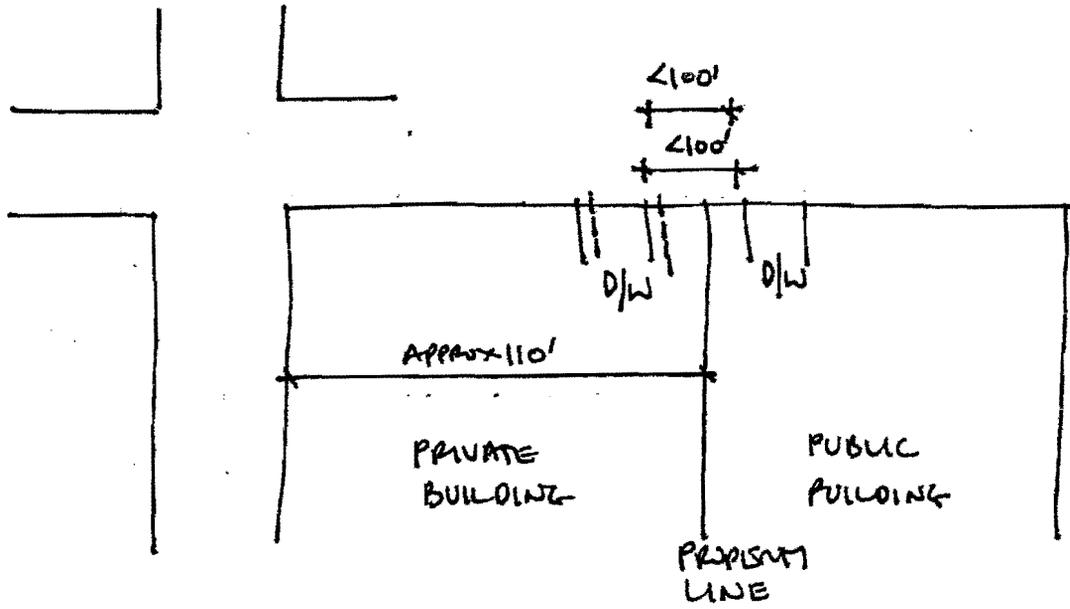
101

102

103 _____ Date

Linda M. Lauer, Clerk of the Council

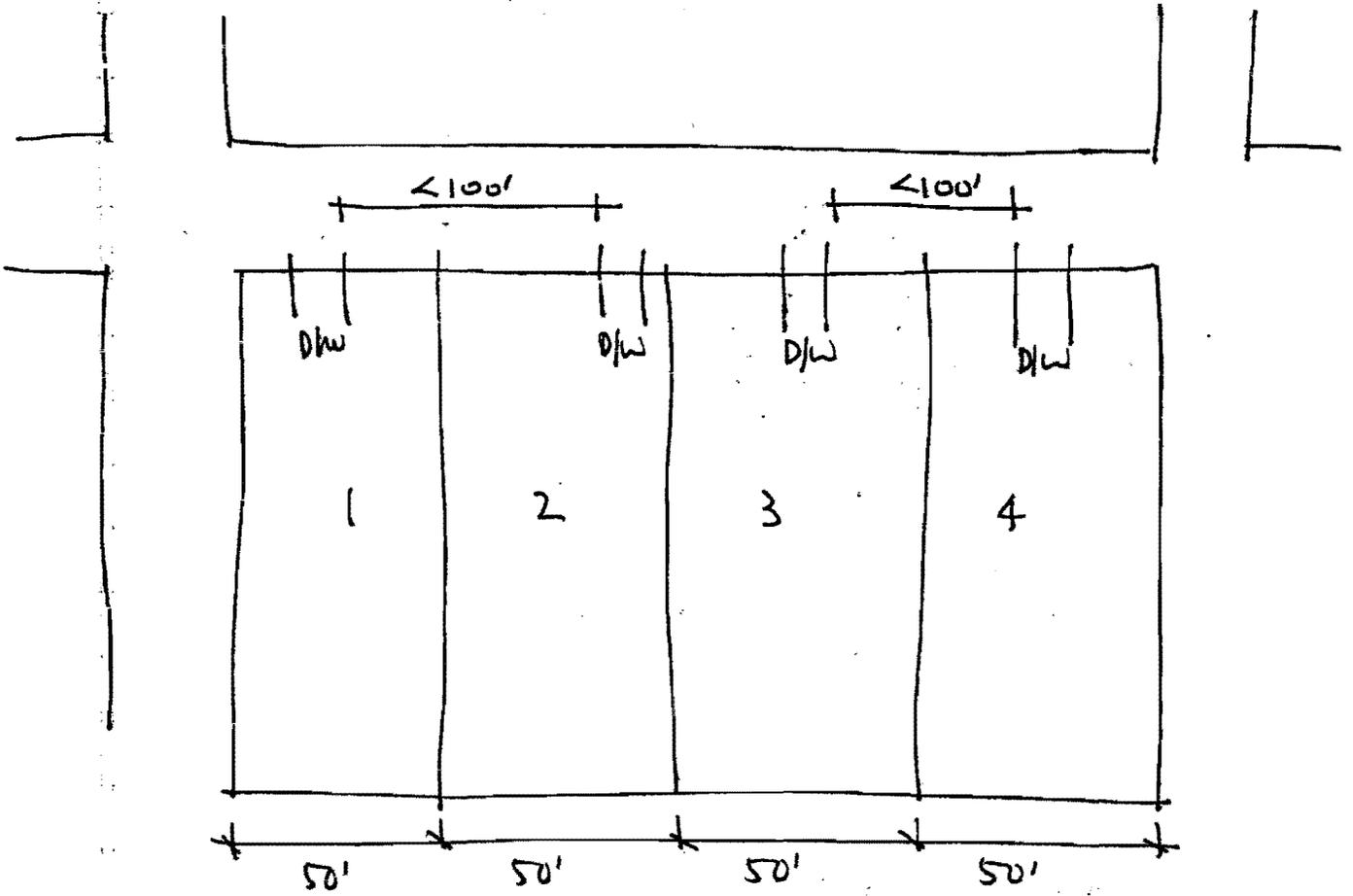
EXAMPLE NO. 1



|| ORIGINAL DRIVEWAY

|| AMENDED DRIVEWAY

EXAMPLE NO. 2



Statement for the Record

TO: County Council

FROM: Michael Carey, DPS Advisory Committee Chair

SUBJECT: DPS Advisory Committee statement regarding SRA 09-02, Subdivision Approval - Conflict Resolution

DATE: July 28, 2009

in early 2008, and at the request of Carla Reid, Director, Department of Permitting Services (DPS), the DPS Advisory Committee was asked to review the issue of Lead Agency. Our recommendations were presented to the County Executive on February 17th, 2009 and are attached for your review and consideration (specifically reference pp. 1-7).

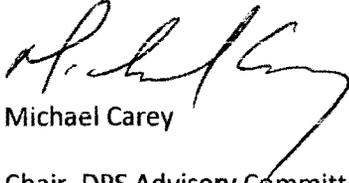
The DPS Advisory Committee has reviewed SRA 09-02 (Draft #3, 6/19/09) and offers the following:

- 1) The importance of institution deadlines for each step of conflict resolution is paramount to the task at hand, which is to reduce the amount of time it currently takes to resolve the conflicts. Were the legislation to reach its final form without firm, fixed durations for each step of the process, the proposed changes would be meaningless.
- 2) The Advisory Committee agrees with the approach outlined whereby, in the event of an impasse by the appointed representative members of the Subdivision Review Committee (SRC) cannot reach an agreement, the Planning Director must require the various Directors of the Departments affected to reach a conclusion and report back. Any other resolution to an impasse by the SRC would ultimately result in no benefit to the county, the applicant, or the process as a whole, especially if the decision defaults back to the Planning Board having the final say.
- 3) The Advisory Committee agrees with the proposed legislation in that any resolution to conflicts becomes binding for all participating departments.

- 4) The Advisory Committee also agrees that the Planning Board may not deny a plan based on the resolution agreed to by the SRA.
- 5) The Advisory Committee would like clarification on lines 88 - 95 as to its intent. We understand the proverbial "second bite at the apple" referenced in lines 88 - 90, but find the second half confusing and possibly contradictory. Lines 90 - 95 should be clarified to include language that the Planning Board may not alter the requirements of a plan in any way that alters any resolution reached by the SRA.

In summary, the DPS Advisory Committee supports the intent of SRA 09-02, however recommends further development to include items described earlier that are currently absent from the bill. We emphatically support the inclusion of deadlines for each step of the process since they are part and parcel to resolving the problems identified that were the very catalyst for the proposed legislation in the first place.

Respectfully submitted,



Michael Carey

Chair, DPS Advisory Committee

September 8, 2009

Joseph R. Davis
1037 Tanley Road
Silver Spring, Maryland 20904

The Honorable Nancy Floreen, Esq.
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Dear Councilmember Floreen:

Thank you for taking the time to meet with me on Wednesday, September 2nd to discuss several development issues affecting Montgomery County. In particular, I am very interested in pending legislation (Subdivision Regulations Amendment 09-02) concerning conflict resolution among agencies involved in the development approval process. I share your concern that the current process lacks necessary certainty and predictability for all participants involved. As you know, there have been a number of efforts through the years to address issues affecting the review process, but it has been over seventeen years since the last comprehensive effort to improve the County's development approval process, known as the "DAP".

As introduced, SRA 09-02 proposes to add new requirements to the subdivision plan approval procedures to provide a mechanism to resolve conflicting recommendations between departments and agencies. The legislation proposes that within 30 days following the Subdivision Review Committee (SRC) meeting, any unresolved conflicts between department/agency requirements must be resolved or the issue must be referred to the directors of all County departments represented at the SRC. The referral must be made by the Planning Director within 35 days of the SRC meeting. The department directors must then meet within 30 days of receipt of the referral; they must resolve the conflict within 5 days after their meeting; and, finally, report their decision to the Planning Board. The planning staff must then report the decision to the parties of record within 2 days of receiving the department heads' report. This legislation can add 72 days to the subdivision approval process.

The legislation also proposes to bind the Planning Board to accept the decision of appropriate County departments and to include the resolution of the conflict as a condition of preliminary plan approval. In addition, the Board would be precluded from disapproving a plan because of any resolution of conflict submitted under the new provisions of the legislation. In addition, no agency or department can significantly change an approved plan after Planning Board approval which includes the Department resolution of conflict.

I see several problems with this legislation. First, the SRC has functionally existed as the Development Review Committee (DRC) since the early 1990's. This change in the Committee's name was made administratively to recognize the fact that the Committee reviews a variety of plans including Division 59-D-1 zoning development plans and schematic plans, Division 59-D-2 project plans, Division 59-D-3 site plans and certain other types of plans such as mandatory

referrals. The Committee's name was not changed in the Subdivision Regulations because it was viewed as a minor detail that could be corrected at a later time, as part of a general cleanup of the Regulations which obviously has not occurred. This legislation would have no effect on any plan other than a preliminary plan of subdivision.

Another problem with the SRA 09-02 includes the apparent administrative predetermination that a conflict resolution decision by the County department heads becomes binding on the Planning Board, and now must be included as a condition of approval; or stated another way, such decisions could not be a basis for not approving or denying a plan. Related to this is the substantial delegation of authority to the department heads to resolve conflicts that, as a group, they may not understand or have any technical or policy basis to judge. Stated another way, some of the issues may be too technical for "management minds" used to big picture issues like budget, personnel and work programs. (I apologize for any perceived offense to County department heads and certainly no offense is intended by my comment.) I believe that this "predetermination" and "delegation of authority" away from the Planning Board raises legal problems and important policy concerns that must be addressed before the legislation can be approved. I understand that the Planning Board shares these procedural concerns and addresses them in their recommendations.

I would be surprised if community groups do not object to this "delegation" to the department heads absent any public input as being a clear conflict of public interest as it affects written policies or regulations. The final issue that I see is the addition of over two months to the approval process with no assurance that the issue is resolved to anyone's satisfaction including the applicant, community members, the planning Board and departments/agencies. Potentially no one "wins" with this legislation.

As a positive note, I believe that the need for a more streamlined development approval process with more certainty and predictability for all participants is an important public interest goal. As a former Montgomery County Director of Redevelopment Programs working primarily in downtown Wheaton, I can tell you first hand of frustrations in trying to move worthwhile projects through the development approval process. The new HOC residential development located above the Wheaton Transit Station was a virtual "hostage" in the preliminary plan approval process for a lengthy period. A lot of effort by many persons, including the Wheaton Redevelopment Advisory Committee, was expended to keep the project moving forward.

I think that the issues that this legislation tries to address can be resolved by administrative means other than legislation that appears to create more issues than it resolves. The remainder of my letter focuses on some important background for the Council to consider and some suggested administrative changes to improve the development approval process. I believe that the real solution to improving the process is by redefining the leadership responsibilities. The clear assignment of responsibility to key leadership staff to make the necessary decisions to move an application forward to the Planning Board for public hearing and action in accordance with established procedures and longstanding public policy would benefit all participants in the process.

BACKGROUND

In the early 1990's the various agencies involved in the DAP met at the direction of the County Council, County Executive and the Planning Board to systematically address ways to improve and to streamline the process. On January 28, 1992, the County Council approved County Council Resolution 12-532 directing a timeline for delivering findings and recommendations to improve the DAP including preparation of a policy-option report to the Council to be followed by an implementation report by the fall of 1992. The effort was led by a steering committee composed of the MNCPPC Director of Planning, Directors of the County Departments of Environmental Protection and Transportation, a senior manager of WSSC and the County Council's Staff Director serving as the Council's observer. After extensive review and discussion of process issues, the Development Review Steering Committee developed two reports to address the problems and issues.

Late in the last century, while I was the Subdivision Supervisor at MNCPPC, I had the privilege of working with the Steering Committee in analyzing the many issues before the Committee. I was selected by the Steering Committee to present to the County Council the Steering Committee's findings and recommendations contained in the their Policy Level Report dated April 15, 1992 (copies of this earlier report should still be available in the Planning Department). The Steering Committee developed a set of ten recommendations that became the cornerstone of process changes, which I affectionately refer to as the "DAP ethic". In the fall of 1992, the Steering Committee released their final report entitled, The Implementation Report--Streamlining Montgomery County's Development Authorization Process, dated November 5, 1992 (copies of that Report should also be available in the Planning Department). The 10 recommendations as identified in the 1992 Implementation Report are presented below and are explained in the two Reports:

1. Clear assignment of responsibilities (*generally referred to as lead agency decision protocol*)
2. Clear, current and consistent published development standards, guidelines and submission requirements
3. Successive Review process Design (a "*funnel*" review where subsequent plan reviews narrow issues to be resolved)
4. Concurrent reviews where feasible
5. Procedural changes to promote effectiveness and efficiency
6. Certainty of review times
7. Effective system for resolving conflicts
8. Efficient means to assimilate, track and share DAP-related information
9. An on-going framework and effort to maintain an efficient system
10. Self-supporting fee structure

Implementation of the ten recommendations was fully supported by the Council, the County Executive and the Planning Board. The very clear message to the departments and agencies was to "get the job done" by implementing, as high priority, the changes needed within each department/agency to accomplish the recommendation of the Steering Committee. It is

interesting to note that this effort was the beginning of the County's push to create a development tracking system to manage and monitor the status of applications; it initiated discussion of a self-supporting fee structure for application processing; and provided a "customer service" approach to plan and permit processing. The lead agency designations were an attempt to address department/agency conflicts that is the subject of SRA 09-02. The process approved in 1992 was clear policy direction to improve the DAP and to streamline review times.

For several years there was marked improvement in the DAP with departments/agencies showing their commitment to implement the ten recommendations identified by the Steering Committee. Cooperation between staffs of the various departments and agencies was especially noteworthy. There was even some improvement in review times for some applications which was a major goal of the Steering Committee. (NOTE: The streamlining of review times has always been a problem because staff resources available to review plans, particularly in good economic times, has not been able to keep pace with the number of applications to be reviewed. Also, the proliferation of new laws and regulations that are added to the process usually do not include increases in operating funds to add new staff to address them as part of the operating budget.)

As the Chief of the Development Review Division at MNCPPC from 1998 to March of 2004, I was keenly aware of and committed to the process improvements recommended in the 1992 Implementation Report. However, by about 2002 we began to see some slippage in the departments/agencies efforts to maintain the "DAP ethic" due in large part to a 100% turnover in department heads involved in the DAP process since 1992. In 2002, then Planning Director Charles Loehr hosted a meeting of the Steering Committee consisting of the new Department heads to acquaint them with the DAP recommendations and to seek their support for the "DAP ethic". With Steering Committee support, I was tasked with leading a series of seminars with review staff of the departments/agencies that are represented on the Development Review Committee to make sure that they understood the ten recommendations of the 1992 Implementation Report. Marty Klauber, the director of the Office of People's Counsel, worked with me in presenting the "DAP ethic" to staff. With new staff arriving through normal staff turnover, it was recognized that an ongoing effort would be needed to maintain the "DAP ethic" and process improvements.

Now, seven years since the 2002 temporary re-establishment of the Steering Committee and the staff seminars it appears obvious to many observers, particularly within the development community, that the "DAP ethic" is no longer adhered to or is not understood by the departments/agencies. With my comments above as background, I would like to suggest some changes that could re-establish the "DAP ethic" in the departments/agencies to be adhered to in their review of the various types of development plans. I would like to suggest an alternative approach to SRA 09-02 that could be accomplished administratively by a Council resolution, as was done in 1992. I provide the following suggestions for discussion recognizing that there may be other alternatives or modifications to my suggestions worthy of consideration.

RECOMMENDATION

I continue to believe that the 1992 Steering Committee recommendations are still as applicable today as they were then. However, I also believe that it is necessary to reestablish the "DAP ethic" and improve upon it as conditions now warrant. The lead agency designations and lead agency authority needs to be re-established as a way to reduce rather than enhance department and agency disputes. Also, certainty of review times must be adhered to and review times monitored in all departments/agencies. The written submission requirements, guidelines and regulations must be up to date and adhered to by applicants and staff. These improvements should help to address some or most of the current problems that SRA 09-02 attempts to address.

I recommend, as a new process improvement specifically intended to address conflict resolution, that there should be one person at MNCPPC with authority to resolve disputes within that agency (I recommend the Chief of the Development Review Division). Also, there should be one person within the Executive Branch to resolve disputes within County government. (I recommend that an assistant chief administrative officer be authorized to resolve inter-departmental disagreements in the Executive Branch). Those two individuals (existing, funded positions) should also be authorized to resolve inter-agency disputes such as conflicts involving MNCPPC environmental staff and, say, staff at the County Department of Permitting Services. If they cannot resolve the issue (a one-to-one tie), then at the request of an applicant, the issue could be presented to the MNCPPC Planning Director and the County's Chief Administrative Officer (CAO) for resolution. If there is no resolution at either of these levels then, at the request of the applicant, the issue should be presented to the Planning Board as part of the application public hearing with the differing recommendations of MNCPPC and the County government clearly noted.

The Planning Board is the administrative body empowered to approve subdivisions, project plans and site plans. The Planning Board's action should serve to over-ride a department policy and also serve as basis for a department's approval of a waiver where a department has such discretion. An example could be a waiver of a road standard where a waiver is authorized by the Code and a waiver is recommended by the Planning Board as a condition of plan approval. Legislation may be necessary to achieve this and there are legal questions that would have to be answered, but I defer to attorneys to address such procedural or legal matters. This would involve a delegation of authority from departments to the Planning Board, which could be construed as the same issue in reverse that I identified earlier in this letter. The attorneys need to look at this issue from both perspectives!

I think that my suggestion for a conflict resolution process has merit as you look at the normal process for approving a subdivision, project plan or site plan application. Normally, any divisional, inter-departmental or inter-agency disagreement should be noted at the pre-DRC meeting which occurs before the official DRC meeting. In fact, this is why pre-DRC meetings were established. It was intended to identify conflicts between departments/agencies and then task them with resolving the problem. Prior to 1992, applicants had to resolve such disputes themselves meeting with the disputing departments/agencies. The typical DRC comment to an applicant in this predicament was "... Come back and see us after you work with the agencies to resolve your problem..." The DAP ethic of 1992 requires the departments/agencies to take the

initiative and responsibility for resolving such problems. At the time, this change was widely (or wildly) supported by the development community.

If the issue is not resolved at the DRC meeting then, I propose that the MNCPPC Subdivision Supervisor or Site Plan Supervisor must immediately (within 2 days) notify the MNCPPC Chief of the Development Review Division and the designated Assistant CAO that there is an issue that may come to them for resolution within two weeks, if not resolved at staff level. That gives two weeks from DRC for resolving the issue at the staff level. If the issue is not resolved within two weeks, then the matter must be presented to the Chief of Development Review and to the assistant CAO who must then meet and try to resolve the issue within two weeks. If they cannot resolve the matter, then the applicant should have discretion to be able to request intervention by the Planning Director and the County CAO or, alternatively, to request that the application be presented directly to the Planning Board for resolution. The option for this final attempt at administrative resolution or go to the Planning Board should, in my view, rest with the applicant. These timelines must assume that the applicant has provided all necessary information to the departments/agencies to enable a decision to be made. In other words, the application must be complete and not lacking required information as stipulated on the written submission requirements for applications.

I believe that my suggested approach will give MNCPPC and the County one month to resolve an inter-governmental issue. The applicant would then have the ability to request that the matter be resolved by the Planning Director and County CAO, if practical, or go directly to the Planning Board for a decision. The Planning Board would make the final decision which I believe is important for public input and maintaining a "transparent" approval process.

Again, thank you for meeting with me and providing me the opportunity to share with you and the other Council members my thoughts on this legislation. I am concerned that SRA 09-02, as written, will not improve the process, as intended, and may actually add more time without resolving issues. I believe that the best fix for resolving inter-governmental conflict is to specifically charge persons with the responsibility to make decisions that are fair to department/agencies and also fair to the applicants who are otherwise stuck in the middle of a government conflict. Having the Planning Board make the final decision, with recommendations from appropriate senior level staff, protects the public interest and enables important public input at the public hearing. I apologize for the length of this letter, but the issues are important and deserve full discussion and consideration. I am available to answer any questions that you may have and I can be available to attend the PHED Committee meeting if you think that I can be of further assistance to the Council in this matter.

Sincerely,

Joseph R. Davis