

M E M O R A N D U M

June 10, 2010

TO: Planning, Housing, and Economic Development Committee
FROM: Jeff Zyontz, ^{JK}Legislative Attorney
SUBJECT: Planning Board Regulation – Enforcement Rules

On April 28, 2010 the Planning Board transmitted Enforcement Rules to the Council under the method 2 regulation process. Under this process the County has the authority to approve or disapprove the regulation. The Council can not amend the regulation. If no action is taken by the County the regulation becomes effective on June 28.

On March 24 the Committee raised the concerns about the proposed regulations in a letter to the Planning Director. In the opinion of Committee the proposed regulations:

- 1) applied the ex parte rules to the Hearing Officer but not to the Planning Board;
- 2) allowed aggrieved persons (who may be non-parties) to file exceptions to the Planning Board's order but does not require the testimony of aggrieved parties before the Hearing Officer; and
- 3) would have established multiple filing offices.

In addition, the definition and text in the proposed regulation were less than clear. The regulations:

- 1) provided some definition but refers the reader to other definitions in the Planning Board rules of procedure
- 2) used different definitions for the same term than are found in the Planning Board Rules of Procedure; and
- 3) did not conform to plain English standards and did not use a consistent outline format.

The Planning Staff responded to those problems and agreed to recommend Planning Board approval of the attached amended regulations. If it is amended as proposed, staff would recommend approval.

The Planning Staff would like to know if the Committee recommends any further changes.

This packet contains

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Proposed Amended Planning Board Regulations

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MONTGOMERY COUNTY PLANNING BOARD

ENFORCEMENT RULES

CHAPTER 1: SCOPE

1.1 Scope and Effectiveness of Rules. These rules govern all proceedings for the enforcement of violations within the Planning Board's jurisdiction under:

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(a) Section 50-41, Chapter 59, Chapter 19, Chapter 22A, Chapter 25A, and Chapter 25B of the Montgomery County Code; and

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(b) any other enforcement provisions of the Montgomery County Code administered by the Board approved after 2010.

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1.2 Definitions.

1.2.1 Applicability.

In these rules and regulations, the following terms have the meanings indicated.

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1.2.2 Definitions

(a) *Board or Planning Board.*

"Board" or "Planning Board" means the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission.

(b) Chairman

"Chairman" means the chairman of the Planning Board or another member of the Planning Board presiding in that capacity.

(c) Citation.

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"Citation" means a citation issued for violation of a Planning Board Action or a law or regulation under the Planning Board's jurisdiction.

(d) Day

"Day" means a calendar day.

(e) Enforcement Agent.

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"Enforcement Agent" means the Planning Director or his or her designee(s) responsible for determining compliance with a Planning Board Action or with any law or regulation that the Planning Board administers.

(f) Hearing Officer.

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"Hearing Officer" means an individual designated by the Planning Board, including itself, to conduct hearings or proceedings. In the context of these rules, such a designee could be a Hearing Officer from the State Office of Administrative Hearings.

(g) Notice of Hearing.

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"Notice of Hearing" means an administrative notice issued by the Planning Director or the Planning Director's designee that notifies an alleged violator of the location, date, and time that an enforcement hearing before the Planning Board or the Planning Board's designee will be held to address the alleged violation.

(h) Notice of Violation.

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"Notice of Violation" means a notice issued by an Enforcement Agent notifying a person of a violation and the remedial action that must be taken to avoid further enforcement actions.

(i) Party.

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"Party" means an Enforcement Agent or a Respondent.

(j) Person.

"Person" means an individual, receiver, trustee, guardian, personal representative, fiduciary, representative of any kind, partnership, firm, corporation, or other entity.

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(k) Planning Board Action.

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"Planning Board Action" means a final decision on a preliminary plan, site plan, project plan, supplementary plan, water quality plan, forest conservation plan or other plan, including all associated terms, conditions, requirements and other obligations or limits, made by the Planning Board under state law or County law, including any regulations issued under state or County law.

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(l) Planning Director.

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"Planning Director" means the Director of the Montgomery County Planning Department of the Maryland-National Capital Park and Planning Commission or the Director's designee.

(m) Respondent.

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"Respondent" means a person charged with an alleged violation through the issuance of a Notice of Violation, Citation, or Notice of Hearing.

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(n) Violation

"Violation" means an unauthorized or unlawful deviation from any term, condition, limit, or requirement of any Planning Board Action that is actionable under § 7-116(h) of the Regional District Act or § 50-41, §59-A-13, §59—D-3, or Chapters 19, 22A, 25A or 25B of the County Code.

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1.3 Filings with Planning Board. All documents permitted or required to be filed with the Planning Board under these Rules must be filed at the office of the Planning Board Chairman.

1.4 Form and Service of Documents

1.4.1 *Captions.* Each document filed with the Board must contain a caption that states:

- (a) the title of the action;
- (b) the property address; and
- (c) a brief descriptive title of the document that indicates its nature.

1.4.2 *Signature*

Every document (other than a Citation, Notice of Violation, or Notice of Hearing) from a Party represented by an attorney must be signed by at least one attorney who has been admitted to practice law in the State of Maryland. Every document (other than a Citation, Notice of Violation, or Notice of Hearing) from a Party who is not represented by an attorney must be signed by the Party.

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1.4.3 *Service.*

- (a) This subsection applies to all documents, except for Citations, Notices of Violations, and Notices of Hearing, that are required to be served on other Parties.
- (b) If service is required on a Party represented by an attorney, service must be made on the attorney.
- (c) Each document must be accompanied by a signed certificate of service that indicates the date and manner of service.

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1.5 Computation of Time.

1.5.1 *In general.*

- (a) In computing any time period under these rules, the day of the act, event, or default is not included.
- (b) If the time allowed is more than 7 days, intermediate Saturdays, Sundays, and legal holidays are counted.
- (c) If the time allowed is 7 days or less, intermediate Saturdays, Sundays, and Commission holidays are not counted.
- (d) If the last day of the time allowed is a Saturday, Sunday, or Commission holiday, the time runs until the next day that is not a Saturday, Sunday, or Commission holiday.

1.5.2 *Mailing.*

When mail is used for service of any document (other than a Citation, Notice of Violation, or Notice of Hearing) on an opposing Party, the opposing Party has 3 additional days to take any action or make any response required or permitted by these rules.

1.6 Appearances.

1.6.1 *Individuals.*

An individual may appear:

- (a) on his or her own behalf; or
- (b) represented by an attorney licensed to practice in the State of Maryland.

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1.6.2 Persons other than individuals

A business entity, non-profit organization, or government agency may appear:

- (a) represented by an attorney licensed to practice in the State of Maryland;
or
- (b) to the extent allowed by law, represented by any authorized officer,
employee, or agent.

1.6.3 *Failure to Appear.*

If a Party fails to attend the hearing, the Hearing Officer or Planning Board may proceed with the hearing in the Party's absence.

1.7 Record.

1.7.1 *Planning Board to keep.*

The Planning Board must maintain files containing all documents, evidence, and other items and information submitted to or produced by a Hearing Officer or the Board during the course of a proceeding.

1.7.2 *Files to be public.*

These files must be available for public inspection under the Maryland Public Information Act.

CHAPTER 2 PRE-HEARING PROCEDURES

2.1 Conflicting Provisions for Pre-Hearing and Hearing Procedures

If the State Office of Administrative Hearings or the County Hearing Examiner is designated as the Hearing Officer and there is a conflict between these rules and the rules that govern the designated Hearing Officer, the Planning Board's Enforcement Rules will prevail.

2.2 Commencement of Proceedings.

All proceedings start with the issuance of a Citation, Notice of Violation, or Notice of Hearing on a form approved by the Board and/or an election for hearing as provided by the Montgomery County Code.

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2.3 Payments.

2.3.1 *In general.*

A Respondent may pay the Civil Fine indicated on the Citation in the manner and time directed by the Citation.

2.3.2 *Effect of payment.*

The payment of a Civil Fine does not prevent the holding of a hearing, imposition of an Administrative Civil Penalty, or requirement of further corrective action.

2.4 **Pre-Hearing Requests to Reschedule.**

2.4.1 *Hearing Officer may grant.*

Upon written request to the Hearing Officer or Planning Board Chairman and for good cause shown, the Hearing Officer or Planning Board Chairman may postpone a scheduled hearing or reschedule the hearing.

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2.5 **Consolidation.**

In the interest of convenient, expeditious, and complete determination of cases involving the same or similar issues or the same Parties, the Hearing Officer may consolidate two or more Citations or Notices of Violation for adjudication at one hearing.

2.6 **Discovery.**

2.6.1 *In general.*

(a) If a written request is received by the opposing Party, at least 14 days before the scheduled hearing, then the requesting Party is entitled to receive from an opposing Party:

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(i) a list of the names of witnesses intended to be called;

(ii) copies of documents intended to be submitted into evidence; and

(iii) copies of relevant documents indicated in the written request that are in the possession of a Party.

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(b) A Party must serve a written response to a request under this section on all Parties within 7 days from the day a request is received.

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2.6.2 *Limitations.*

(a) Pre-hearing discovery is limited to the matters described in §2.6.1(a).

(b) All other applications or motions for discovery, including, but not limited to, depositions by oral examination and subpoenas compelling testimony and/or documents, must be made to the Hearing Officer, and the Hearing Officer may order further discovery as appropriate.

2.6.3 *Supplemental responses.*

Any request for discovery made by a Party is deemed to be continuous, and supplemental responses must be provided by the opposing Party up to the day of the hearing.

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2.6.4 *Sanctions.*

If any Party fails to properly respond to a permissible discovery request or order or wrongfully refuses to answer questions or produce documents, the Hearing Officer may take appropriate action, including, but not limited to, precluding evidence or witnesses of the offending Party or striking the pleadings or defenses of that Party.

CHAPTER 3 HEARING PROCEDURES

3.1 Scheduling; Notice.

3.1.1 *In general.*

The Board or the Hearing Officer shall give all Parties in a contested case at least 30 days' written notice of the original hearing date. Postponements and continuances may be made with less than 30 days' notice.

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3.1.2 *Contents of Notice.*

The Notice of Hearing must indicate:

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(a) the date, time, place, and nature of the hearing;

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(b) the right to call witnesses, and to cross-examine any witness another Party calls, and to submit documents or other evidence under these Rules;

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(c) any applicable right to request subpoenas for witnesses and evidence and indicate the costs, if any, associated with such a request;

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(d) that a copy of the hearing procedure is available;

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(e) that an individual may retain counsel to represent him or her, or may proceed pro se;

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(f) that failure to appear for the scheduled hearing may result in an adverse action against the Party, up to and including entry of a default judgment against the Party; and

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(g) that, unless otherwise prohibited by law, the Parties may agree to a stipulated set of facts and waive their right to appear at the hearing.

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3.2 Timing of Hearing.

3.2.1 Accelerated hearing.

If the Respondent waives the 30 days notice and requests an accelerated hearing, the Planning Director may assign the case for an earlier hearing if all Parties of record agree to the waiver.

3.2.2 Preliminary hearing to determine if Stop Work Order should be continued.

The recipient of a Stop Work Order may request an immediate hearing to determine whether the Stop Work Order should remain in place pending a hearing on the merits. When such a preliminary hearing is requested, the Planning Board must schedule it for within 7 days after the date of request. In the event that a hearing before the Planning Board is not practical as determined by the Enforcement Agent, the matter may be reviewed by the Chairman or Vice-Chairman of the Planning Board. A determination by the Chairman or Vice-Chairman will have the same effect as if the Board acted under this section. The preliminary hearing will be limited to the issue of the Stop Work Order. The Planning Board must continue the Stop Work Order if the Planning Board finds that there is prima facie evidence of a violation and that the public health, safety, or welfare are threatened or may be threatened by the removal of the Stop Work Order.

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3.3 Transcript.

The Hearing Officer must arrange for the transcription of all hearings.

3.4 Order of Proceedings.

(a) A case shall be called to order by the Hearing Officer.

(b) The Hearing Officer must explain the purpose and nature of the hearing.

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(c) The Hearing Officer may allow the Parties to present preliminary matters.

(d) The order of presentation of the evidence will be as follows:

- (i) presentation of opening statements, if any;
- (ii) Enforcement Agent's case in chief, including cross-examination by the Respondent;
- (iii) Respondent's case in chief including cross-examination by the Enforcement Agent;
- (iv) Enforcement Agent's case in rebuttal;
- (v) Respondent's closing argument; and
- (vi) Enforcement Agent's closing argument.

(e) Witnesses must be sworn or put under affirmation to tell the truth.

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3.5 Exclusion of Witnesses

(a) Except as otherwise provided in this section, upon request by a Party, the Hearing Officer must exclude witnesses other than Parties from the hearing room, except when testifying.

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(b) A Party, representative, witness, or spectator may not disclose to a witness excluded under this section the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during that witness' absence.

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(c) A Party that is not an individual may designate an employee or officer as its representative to remain in the hearing room, even though the employee or officer may be a witness.

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(d) An expert witness who is to render an opinion based on testimony given at the hearing may remain during the testimony.

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(e) The Hearing Officer may exclude the testimony of a witness who receives information in violation of this section, or take other appropriate action.

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3.6 General Duties and Powers of Hearing Officer.

3.6.1 *General duties.*

The Hearing Officer has the duty to:

- (a) conduct a fair and impartial hearing;

- (b) take all action to avoid unnecessary delay in the disposition of proceedings; and
- (c) maintain order.

3.6.2 *General powers.*

The Hearing Officer has all powers necessary to carry out his or her duties, including the power to:

- (a) administer oaths and affirmations;
- (b) issue discovery orders and rule on objections to those orders;
- (c) receive evidence;
- (d) regulate the course of the hearing and the conduct of the Parties and their representatives;
- (e) hold conferences for simplification of issues or for any other proper purpose;
- (f) question witnesses;
- (g) consider and rule on all procedural and other motions, including requests for adjournment; and
- (h) make and file recommended decisions with the Planning Board.

3.7 **Ex Parte Communications.**

A Hearing Officer and Planning Board members may not receive any ex-parte communication from any person or Party, other than communications limited to ministerial matters.

3.8 **Impartiality.**

3.8.1 *In general.*

A Hearing Officer and a Planning Board member ~~must~~ recuse him- or herself from any hearing in which his or her impartiality might reasonably be questioned, including any instances in which the Hearing Officer or the Planning Board member:

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- (a) has a personal bias or prejudice about a Party;

- (b) has personal knowledge of disputed evidentiary facts in the proceeding;
- (c) served as a lawyer in the matter in controversy or was professionally associated with another person while that person served as a lawyer in the matter in controversy;
- (d) has been a material witness to the matter;
- (e) has a financial interest in the subject matter in controversy or in a Party to the proceeding;
- (f) has any other interest that could be substantially affected by the outcome of the proceeding; or
- (g) knows that his or her spouse or dependent child:
 - (i) is serving as a lawyer in the matter in controversy or is professionally associated with another person who is serving as a lawyer in the matter in controversy;
 - (ii) is likely to be a material witness in the proceeding;
 - (iii) has a financial interest in the subject matter in controversy or in a Party to the proceeding; or
 - (iv) has any other interest that could be substantially affected by the outcome of the proceeding.

3.8.2 *Motion to recuse.*

- (a) A Party may request that the Hearing Officer recuse him-or herself for good cause shown. The Hearing Officer must rule on the request in the proceeding.
- (b) If the Hearing Officer denies the request, the Party may obtain a brief adjournment to seek review by the Planning Board.

3.8.3 *Notice of recusal.*

When a Hearing Officer recuses him-or herself from a proceeding, he or she must do so on the record and must notify the Planning Director of the recusal.

3.8.4 *Replacement.*

On recusal of a Hearing Officer, the Chairman of the Planning Board must appoint another Hearing Officer to conduct the hearing.

3.9 Maintaining Discipline.

3.9.1 Power of Hearing Officer.

After a warning, the Hearing Officer may bar any person from continued participation in a hearing or from the hearing room if that person refuses to comply with the Hearing Officer's directions or behaves in a disorderly, dilatory, or obstructive manner.

3.10 Amendments to Citation, Notice of Violation, or Notice of Hearing.

3.10.1 Allowable amendments.

The Hearing Officer may allow appropriate amendments to a Citation, Notice of Violation, or Notice of Hearing if doing so will facilitate the determination of a controversy on the merits. Amendments may be subject to conditions necessary to avoid injustice or unfair surprise to a Party.

3.10.2 Conformance to evidence.

When issues reasonably within the scope of a Citation, Notice of Violation, or Notice of Hearing, but not expressly raised by the Citation, Notice of Violation, or Notice of Hearing, are tried by the express or implied consent of the Parties:

- (a) the issues must be treated in all respects as if they had been raised by the Citation, Notice of Violation, or Notice of Hearing; and
- (b) the Citation, Notice of Violation, or Notice of Hearing may be amended at any time as necessary to make it conform to the evidence.

3.11 Burden of Proof.

The Enforcement Agent has the burden of proof to establish by a preponderance of the evidence that the Respondent has committed the violation charged in the Citation, Notice of Violation, or Notice of Hearing.

3.12 Evidence.

3.12.1 In general.

- (a) Except as otherwise provided by these rules, formal rules of evidence and trial procedures do not apply.

- (b) Each Party in a contested case must offer all of the evidence that the Party wishes to have made part of the record.

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3.12.2 *Probative evidence*

The Hearing Officer may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence. Evidence must be admitted, generally, in accordance with State Government Article §10-213, Annotated Code of Maryland.

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3.12.3 *Hearsay*

Evidence may not be excluded solely on the basis that it is hearsay, but the Hearing Officer may give hearsay evidence the weight that it deserves under the circumstances of the case.

3.12.4 *Exclusions*

The Hearing Officer may exclude evidence that is:

- (a) incompetent;
- (b) irrelevant;
- (c) immaterial; or
- (d) unduly repetitious.

3.12.5 *Rules of privilege*

The Hearing Officer must apply a privilege that law recognizes.

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3.12.6 *Scope of evidence*

On a genuine issue in a contested case, each Party is entitled to:

- (a) call witnesses;
- (b) offer evidence, including rebuttal evidence;
- (c) cross-examine any witness that another Party calls; and
- (d) present summation and argument.

3.12.7 *Documentary evidence*

The Hearing Officer may receive documentary evidence:

- (a) in the form of copies or excerpts; or
- (b) by incorporation by reference.

3.12.8 *Official notice of facts*

(a) The Hearing Officer may take official notice of a fact that is:

- (1) judicially noticeable; or
- (2) general, technical, or scientific, and within the specialized knowledge of the Commission.

(b) Before taking official notice of a fact, the Hearing Officer:

- (1) before or during the hearing, must notify each Party; and
- (2) must give each Party an opportunity to contest the fact.

3.12.9 *Evaluation*

The Hearing Officer may use his/her experience, technical competence, and specialized knowledge in the evaluation of evidence.

3.13 Stipulation in Lieu of Hearing.

3.13.1 *Stipulation authorized.*

The Parties may enter into a stipulation instead of further hearing before the Hearing Officer issues a recommended decision and order.

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3.13.2 *Submittal.*

Stipulations may be submitted orally on the record and/or in writing.

3.14 Recommended Decisions.

3.14.1 *Hearing Officer to prepare.*

The Hearing Officer must prepare a recommended decision within 30 days of the day the hearing is completed.

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3.14.2 *Recommended decision.*

The Hearing Officer's decision must state:

- (a) findings of fact and conclusions of law; and
- (b) the Hearing Officer's reasons for its findings on all material issues.

3.14.3 *Recommended Decision.*

If the Hearing Officer recommends that the charges in the Citation, Notice of Violation, or Notice of Hearing be sustained, the Hearing Officer must prepare a recommended decision that includes a recommended Civil Fine, proposed Administrative Civil Penalty and/or any necessary corrective action.

- (a) Recommended Civil Fine.

The Hearing Officer may propose any Civil Fine equal to or less than the amount set on the Citation.

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- (b) Recommended Administrative Civil Penalty

The Hearing Officer may propose any Administrative Civil Penalty permitted by law.

- (c) Recommended Corrective Action.

If the Hearing Officer finds that the Respondent failed to comply with a Planning Board Action, the Hearing Officer must recommend compliance with the Planning Board Action or a compliance plan that may include an amendment to an existing Planning Board Action. Where the Hearing Officer finds that trees have been cut in Violation of a forest conservation plan or the forest conservation law, the Hearing Officer's recommended decision must include corrective measures.

3.14.4 *Filing.*

The recommended decision and record must be filed with the Chairman of the Planning Board. The recommended decision must also be served on all Parties. The Parties may arrange for duplication of the record from the Chairman's office for a reasonable fee.

CHAPTER 4 PLANNING BOARD REVIEW

4.1 Exceptions.

Upon receipt of the Hearing Officer's recommended decision and order the Parties may file written exceptions with the Planning Board.

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4.2 Filing.

The exceptions must be filed within 14 days after the day the recommended decision and order are mailed to the Parties.

4.3 Contents.

(a) The exceptions must contain:

- i. a concise statement of the issues presented;
- ii. specific objections to the findings of fact and conclusions of law in the recommended decision and order; and
- iii. arguments that present clearly the points of law and facts relied on in support of the position taken on each issue.

(b) A Respondent or the Planning Director may request that the Planning Board modify any corrective order, Civil Fine, or Administrative Civil Penalty recommended by the Hearing Officer, including a modification to the plan that the Respondent violated.

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4.4 Answer.

A Party may file an answer opposing any exception within 14 days of the day the exceptions are served.

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4.4.1 Replies.

No replies are permitted unless the Planning Board Chairman otherwise directs.

4.5 Applications to Extend Time.

An application to extend the time for filing exceptions or answers for any reason must be:

- (a) made in writing to the Chairman of the Planning Board; and
- (b) must demonstrate good cause for the requested extension.

4.6 Review to be on Record.

4.6.1 *In general.*

The Board must consider any exception only on the basis of the record developed before the Hearing Examiner.

4.6.2 *Record elements.* For this purpose, the record comprises:

- (a) the Citation, Notice of Violation, and/or Notice of Hearing;
- (b) the transcript of the hearing;
- (c) all briefs filed and exhibits received in evidence; and
- (d) the Hearing Officer's recommended decision.

4.6.3 *Witness credibility.*

The Board must give due regard to the Hearing Officer's opportunity to judge the credibility of any witnesses.

4.7 Public hearing

The Board must hold a public hearing to consider whether to adopt a recommended decision and any exceptions to it.

4.7.1 *Notice*

The Planning Director must provide public notice of the hearing at least 10 days before the hearing.

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4.7.2 *Arguments*

Unless otherwise ordered by the Board, the Enforcement Agent and the Respondent must have up to 10 minutes to present arguments to the Board. Other persons may file a written request with the Chairman's Office for an opportunity to speak at the public hearing.

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4.8 Decision and Order.

The Board may adopt the Hearing Officer's recommended decision and order in whole or in part, or remand the matter for further proceedings in whole or in part, and must issue an Order memorializing its decision. The Planning Board is the final decision maker for purposes of Judicial Review.

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4.9 Reconsideration.

4.9.1 Petition

Any Party may petition the Board to reconsider an Order within 10 days of the date of mailing of the Order. Any request for reconsideration must be in writing and filed with the Chairman's Office. The Chairman of the Planning Board may waive the filing deadline for good cause shown. Any Party who requests reconsideration must serve a copy of its petition on every other Party. The petition for reconsideration must indicate any alleged errors of fact or law and , all grounds for reconsideration because of mistake, inadvertence, surprise, fraud, or other good cause.

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4.9.2 Decision to Reconsider

The Chairman must schedule any petition for reconsideration for Planning Board consideration as soon as practicable. A motion to reconsider may be made only by a member of the Planning Board who voted in the majority on the decision that is subject to reconsideration. The motion passes if it receives the vote of a majority of the Board members present and voting and each member voting on the motion participated in the decision to be reconsidered or read the record of the proceeding. A petition to reconsider:

- (a) does not require notice to the public or the Parties other than by publication on the Planning Board agenda, and
- (b) may be taken without the appearance or testimony of the Parties. If the Planning Board votes to reconsider, the reconsidered Order is void.

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4.9.3 Notice of Hearing

After the Board votes to reconsider an Order, the Chairman must promptly schedule a public hearing. At least 10 days before the hearing, the Planning Director must notify all Parties of:

- (a) the Planning Board's decision to reconsider the Order;
- (b) the date of the hearing; and
- (c) a reasonable summary of the reasons for reconsideration.

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4.9.4 Hearing

The Board must conduct a public hearing as scheduled. The scope of the hearing must include the reason the Board cited for reconsideration of the Order and any other issue that the Board deems to be related.