PHED Committee #3
October 11, 2010

MEMORANDUM

October 7, 2010

TO: Planning, Housing, and Economic Development Committee

FROM: Jeff Zyontz, Legislative Attorney

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

At this worksession, the Park and Planning Commission and the Department of Transportation will report on their improved conflict resolution process. The Committee will also have the opportunity to hear from users of the development process. The goal of the worksession is for the Committee to determine if SRA 09-02 should be recommended for adoption by the Council.

The new conflict resolution process has been in use since April 2010. In the view of both departments, the new system documented in their March 2010 report makes the approval of SRA 09-02 unnecessary. With the Council's agreement, parties to the development process are willing to enter into a formal memorandum of understanding.

Francoise Carrier, Art Holmes, Rollin Stanley, Al Roshdieh, and Rose Krasnow will attend this worksession. Two private sector participants, Raquel Montenegro and William Kominers, indicated that they will also attend. Joe Davis submitted a letter in support of the new process and opposed to approval of SRA 09-02.

Report of the Conflict Resolution Workgroup

The new process re-invigorates the lead agency concept[1], attempts to identify conflicts as soon as possible, sets deadlines, and empowers the lead agency to resolve the conflict with the participation of the applicant; however, if the agency with regulatory authority objects to the resolution, the matter is brought to a meeting of the principals from all agencies to resolve the conflict within 4 weeks. The key highlights of the process include the following:

- If conflicts are identified at the Pre-Development Review Committee (DRC) meeting, it is the responsibility of the Lead Agency to convene a meeting of agency stakeholders to attempt to resolve them before the DRC meeting.
- The applicant must be informed of all issues at the DRC meeting, including resolved conflicts.

[1] This was part of the 1992 Development Approval Process (DAP) streamlining effort. See Appendix D of the Conflict Resolution Report.

- Any unresolved issues from the DRC meeting are the responsibility of the Lead Agency, which will have 4 weeks to resolve the issue with the applicant and other agency stakeholders. The Lead Agency makes a "decision" if a mutually agreed upon solution can not be reached.
- If the agency (or agencies) with regulatory authority objects to the "decision", it can raise the issue to the principals of the agencies. Any such meeting must take place within 4 weeks of the "decision"; appropriate staff and the applicant are consulted in this process.

The draft Memorandum of Understanding (MOU) is comprehensive in terms of the entities involved; it includes all parties involved in a successful subdivision, including WSSC and PEPCO. It does not remove the Planning Board's authority to deny a plan. It acknowledges that if agreement is NOT achieved between the Planning Board's position and the Lead Agency decision, the plan as submitted is not approvable.[2] In this instance, the applicant may choose to redesign or withdraw their application.

Lead Agencies are identified for specific issues in Appendix F of the Conflict Resolution Workgroup Report. A flow chart of the process is in appendix G.

Staff Recommendation

Staff recommends that Council "bless" the draft MOU with 2 additions:

1) Representatives sent to the DRC should have the authority to state a position on behalf of their respective agencies.
2) Representatives sent to the DRC should be trained sufficiently to understand and implement the conflict resolution process.

The concerns for staff authority and staff training were issues raised in testimony on SRA 09-02. Staff empowerment leads to a faster identification of conflicts and the possibility of a faster resolution of those conflicts. The list of workgroup participants included all key actors currently involved in the subdivision process. Training recognizes the possibility of staff turnover.

Staff does not recommend the approval of SRA 09-02. Legislation can only add rigidity, time, and unintended consequences. The process under the draft MOU is designed to resolve a conflict within 8 weeks in the worst case.

Background

Introduction

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

[2] Although "success for every student" is a goal of the school system, "success for every subdivision" is not the goal of the development review process.

procedure in the subdivision process to resolve conflicts between departments and agencies in an efficient manner.

Public Hearing

On July 28, 2009 the Council held a public hearing. 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.

Prior PHED Worksessions

On September 21, 2009 the Committee held its first worksession. The Committee agreed to defer any further action on SRA 09-02. The Planning Board Chair and the Director of the Department of Transportation agreed to meet with building industry representatives and other interested parties at their discretion to:

1) establish principles for improving conflict resolution in the development review process that may include a renewal of the lead agency concept;
2) review internal deadlines or other ideas to speed the review of projects; and
3) identify legislative impediments to a timely review of applications.

On October 13, 2009 the Committee accepted the October 5, 2009 joint statement on cooperation to resolve the issue that precipitated SRA 09-02 from Dr. Hanson and Mr. Holmes, and urged them to proceed with a complete recommendation before the end of January 2010. The January deadline was then extended at the request of the principals until March 2, 2010.

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.

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

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

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

50-35. Preliminary subdivision plans-Approval procedure.

* * *

(c) *Subdivision Review Committee.*

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

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

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

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

(A) each appropriate County Department;

(B) the Planning Department; and

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

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

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

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

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

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

MEMORANDUM OF UNDERSTANDING

IMPLEMENTATION OF THE MARCH, 2010 REPORT OF THE CONFLICT RESOLUTION WORKGROUP ON WAYS TO IMPROVE THE DEVELOPMENT APPROVAL PROCESS IN MONTGOMERY COUNTY, MARYLAND

This Memorandum of Understanding (the "MOU") is made this __ day of _____, 2010 between the Montgomery County Planning Board ("MCPB"), the Montgomery County Department of Transportation ("MCDOT"), the Montgomery County Department of Permitting Services, the Montgomery County Fire and Rescue Service, the Montgomery County Department of Environmental Protection, the Montgomery County Department of Housing and Community Affairs, the Montgomery County Department of General Services, the Washington Suburban Sanitary Commission, and the Potomac Electric Power Company – collectively the "Parties."

WHEREAS, the February 17, 2009 Second Annual Report to the County Executive by the Department of Permitting Services Citizens Advisory Committee contained a recommendation to review and codify the Lead Agency portion of the circa 1992 Implementation Report for Streamlining the Development Authorization Process.

WHEREAS, on July 28, 2010, the Montgomery County Council held a Public Hearing on Subdivision Regulation Amendment 09-02 ("Subdivision Approval – Conflict Resolution"). The Council heard testimony and received written statements from the MCPB, the County Executive, and development community representatives about different ways to facilitate conflict resolution and streamline the development approval process.

WHEREAS, on September 21, 2009, the Montgomery County Council's Planning, Housing, and Economic Development Committee ("PHED") held a worksession on SRA 09-02. During that worksession, the representatives from MCPB and MCDOT recommended against a legislated solution to the situation and advocated a more flexible approach to achieve the desired results. The PHED Committee requested a written statement from the Chairman of MCPB and the Director of MCDOT to address the Council's concern about the need for timely resolution of development-related conflicts.

WHEREAS, on October 5, 2009, the Chairman of MCPB and the Director of MCDOT submitted a jointly signed letter to indicate establishment of a working group (composed of key agency representatives and other stakeholders) to prepare a report to the Planning Board, County Executive and other agencies by the end of January, 2010.

WHEREAS, the work program for that report was to include at a minimum:

- Redefine and re-establish lead agency roles based on current agency structure
- Analyze and recommend ways to reduce the delays caused by the need for conflict resolution
- Develop a procedure for resolution of disagreements within and among agencies, and between applicants and an agency
- Analyze the current operation of the Development Review Committee to determine where improvements can be made

WHEREAS, on January 11, 2010, the Chairman of MCPB and the Director of MCDOT requested a sixty-day extension until the end of March, 2010 to complete the workgroup's deliberations. On January 26, 2010, the County Council President granted an extension to March 2, 2010 to submit the completed report.

WHEREAS, the workgroup actively met between October 2, 2009 and February 24, 2010. During this period, the workgroup members consulted among themselves and with representatives of the development community to identify examples of recurring conflicts, develop five updated and/or new Lead Agency Designations tables, set up a flowchart with timelines for resolving inter-agency review conflicts with participation by the development applicant, and prepare the Report to the County Council.

WHEREAS, on March 2, 2010, the completed Report was delivered to the County Council President for the Council's consideration. The March 2, 2010 transmittal letter acknowledged two issues that arose at the February 25, 2010 MCPB worksession on the DRAFT Report and indicated the workgroup would reconvene to address those topics.

WHEREAS, on March 10, 2010, the workgroup met to discuss the MCPB comments and identify changes to the Report to remedy those concerns.

WHEREAS, on April 2, 1010, the amended Report was distributed to stakeholders and workgroup members. The transmittal letter noted the changes made to address the MCPB comments, requested all parties to immediately follow the new procedures, noted the new process would be memorialized in a MOU, and indicated the workgroup would reconvene in six months to review progress and recommend further refinements to the new procedures.

NOW, THEREFORE, in consideration of the foregoing Recitals, the parties hereby agree as follows:

1. The Parties agree to adopt and immediately implement the Lead Agency Designations and Flowchart with timelines for resolving inter-agency review conflicts as identified in the March 2010 "Report of the Conflict Resolution Workgroup on Ways to Improve the Development Approval Process in Montgomery County, Maryland."

2. Lead Agencies (to resolve a specific conflict) and supporting Stakeholder Agencies with input in those decisions are identified in the Lead Agency Designations tables in

the March 2010 Report. Supporting Stakeholder Agencies with regulatory authority that affect Lead Agency decisions have also been identified in those tables.

3. If inter-agency review comment conflicts are identified at the Pre-Development Review Committee ("PRE-DRC") meeting, the Lead Agency shall convene a meeting of the affected Stakeholder Agencies to discuss and attempt to resolve the conflicts before the Development Review Committee ("DRC") meeting.

4. At the time of the DRC meeting, the applicant will be notified of all inter-agency review comment conflicts, including those that have already been resolved.

5. The Lead Agency staff will have four weeks from the DRC meeting to discuss any unresolved issue with the Applicant and other Stakeholder Agencies. If the Applicant and the Parties are unable to reach a mutually agreed-upon solution for an issue, the Lead Agency for that issue is charged with making the recommendation to the Planning Board. The Applicant can request a time extension to submit additional information before that recommendation is finalized.

6. If the Lead Agency decision (for no. 5) conflicts with the regulatory authority of another Lead Agency, the Principals of the conflicting agencies shall meet within four weeks of the decision (for no. 5); the Applicant and appropriate staff will be consulted.

7. The Staff Report to the MCPB will identify inter-agency review comment conflicts and the process used by the Lead Agency(s) to resolve the conflicts.

8. If the MCPB agrees with the Lead Agency recommendation or the disagreement does not contradict any legal or regulatory requirements, the plan is approved.

9. If the MCPB difference with the Lead Agency recommendation contradicts any legal or regulatory requirement, the MCPB decision on the plan will be deferred. The MCPB shall refer the matter back to the Principals of the Lead Agency for reconsideration. The Applicant and appropriate staff will be consulted. The Lead Agency will complete their review within three weeks of the MCPB hearing.

10. If agreement or compromise is reached between the MCPB position and the Lead Agency decision, the plan will be returned to the MCPB for final decision. An amended Staff Report will be prepared which will document the additional analysis.

11. If agreement or compromise is NOT achieved between the MCPB position and the Lead Agency decision, the plan as submitted is not approvable. The Applicant may choose to redesign or withdraw their application.

12. The workgroup and development community representatives will reconvene in late fall of 2010 to determine if additional changes are needed to these procedures.

Further changes may be necessary to address future comments from the County Council.

IN WITNESS WHEREOF, the Parties hereby set their hands and seals on the day and year first written above.

Approved as to legal form
and sufficiency:

By: _____
M-NCPPC Associate Counsel

The Maryland-National Capital
Park and Planning Commission

By: _____
Royce Hanson, Ph.D.
Chairman
Montgomery County Planning Board

Approved as to legal form
and sufficiency:

By: _____
Associate County Attorney
Office of the County Attorney

Montgomery County, Maryland

By: _____
Arthur Holmes, Jr.
Director
Department of Transportation

By: _____
Carla Reid
Director
Department of Permitting Services

:By: _____
Richard Bowers
Fire Chief
Montgomery County Fire and
Rescue Service

By: _____
Robert G. Hoyt
Director
Department of Environmental Protection

:By: _____
Richard Y. Nelson, Jr.
Director
Department of Housing and
Community Affairs

DRAFT

By: _____

David E. Dise
Director
Department of General Services

:By: _____

Jerry N. Johnson
General Manager
Washington Suburban Sanitary Commission

By: _____

Joseph M. Rigby
Chairman & Chief Executive Officer
PEPCO Holdings, Inc.

DRAFT

10

October 7, 2010

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

The Honorable Nancy Floreen
President, Montgomery County Council
Stella Werner Office Building
100 Maryland Avenue
Rockville, Maryland 20850

Re: SRA 09-02 -- Concerning Conflict Resolution and Lead Agency Designations

Nancy

Dear Ms. ~~Floreen~~:

Due to a prior commitment, I will not be able to attend the PHED Committee meeting on Monday, October 11, 2010 involving discussion on SRA 09-02. This amendment to the Subdivision Regulations proposes a procedure for resolving conflicts between agencies/departments in the review of subdivision plans. I submitted comments to the Council in a letter dated September 8, 2009 recommending that the legislation not be approved. I share your concerns that changes are needed in the development approval process (DAP) to assure that a faster and more predictable process is established for all participants. In addition, lead agencies must be charged with making timely decisions and resolving potential conflicts with other agencies or departments in an open and collegial manner. The last comprehensive review of the DAP occurred over 18 years ago, and the adding of new requirements and significant turnover in review staff over the intervening years has negated many of the process improvements implemented in 1992.

After the public hearing on SRA 09-02, I was invited to participate in several meetings with the inter-agency working group that you established to discuss lead agency protocol and the myriad requirements that must be resolved before an application can be presented to the Planning Board for a public hearing and action. I also attended the Planning Board's meeting discussing the Lead Agency Designations earlier this year.

After reviewing the working group's final lead agency designations recently submitted to the County Council, I conclude that the updated protocol being presented to you is a significant improvement to the DAP and should provide better certainty that issues can be resolved in a timely manner and in the public interest. I believe that all agencies/departments must agree to adhere to the lead agency protocol and should endeavor to resolve issues with open discussion of concerns. The designation of lead agency for a particular issue provides clear authority for who is responsible for deciding appropriate action and moving the application forward in a timely manner. The updated lead agency designations are essential improve the DAP and to address the changes in laws and regulations that have been added to address development issues over the last twenty years.

The working group's proposals should enable better cooperation between the public agencies and should provide more certainty and predictability in the DAP. I think that it is also important to recognize that the Planning Board has the ultimate authority to decide subdivision and other plan approval procedures as established Subdivision Regulations and the Zoning Ordinance. The Planning Board may refer an application back to an agency/department for further analysis if they disagree with a lead agency decision. This provides an important safeguard to the public that issues or concerns can be addressed by the Planning Board, as intended by the plan approval procedures.

I recommend that SRA 09-02 not be approved and that the County Council should encourage the agencies/departments to work cooperatively to implement the new protocol. If, in the future, it is determined that the new lead agency protocol is not working, as intended, then new legislation may be appropriate to address the specific problems. I thank you for the opportunity to participate in this important effort. If you have any questions, please contact me at your earliest convenience.

Sincerely,

Joe Davis

Joseph R. Davis

cc: Rose Krasnow, MNCPPC
Al Roshdieh, MCDOT