

M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppc.org

September 12, 2005

MEMORANDUM

TO: Karen Orlansky, Director
Office of Legislative Oversight

FR: Charles R. Loehr, Director 
Montgomery County Department of Park and Planning

RE: Responses to Certain Legal Issues Related to OLO's Clarksburg
Town Center Fact-Finding Review

Attached please find the Commission's response to Question 9 as set forth in your Memorandum to me dated August 1, 2005. The answers to the remaining questions are forthcoming.

Attachment

Cc: Adrian R. Gardner, General Counsel
Michele Rosenfeld, Associate General Counsel

Responses to Question 9
Legal Issues Related to OLO's Clarksburg Town Center
Fact-Finding Review

9. **Enforcement authority.** How do State and County law, regulations, and other governing documents specify the roles and responsibilities of the Planning Board or Planning staff to investigate and enforce alleged violations of preliminary plans, project plans, and site plans? What definitions, procedures, and enforcement tools are established in law, regulations, or other governing documents, and does the law specify when or how each of these tools should be used? Does the law establish any procedures for responding to or investigating a complaint filed by a citizen or other party? How does the process to enforce a site plan enforcement agreement differ, in law and in practice, from the Planning Board's exercise of its civil citation authority? How does the Planning Board's authority to issue a stop work order or revoke a site plan agreement differ from and relate to DPS's enforcement authority?

Response: The enabling authority for the Planning Staff and Planning Board to enforce alleged violations of project plans, preliminary plans, and site plans is found in § 7-116(h) of Article 28, which states, in full, as follows:

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

(ii) This subsection applies to violations of:

1. Titles 7 and 8 of this article;
2. Montgomery County subdivision regulations and zoning ordinances;
3. Any laws or regulations which the Commission or the planning board is exclusively authorized to administer; or
4. Any decision made by the Commission or planning board under its authority.

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

(3) The district council may provide that the planning board may enforce the imposition of fines and penalties in a manner consistent with the process requiring certain notification and hearing under

Article 66B, § 7.02 of the Code. The imposition of fines and penalties under this subsection may not be subject to an appeal to the Board of Zoning Appeals.

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

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

Under this enabling authority, the District Council enacted § 50-41 (Enforcement) of the Montgomery County Code, which provides the statutory authority for the Planning Board to issue citations and levy fines, as well as stop work orders and corrective orders, against any person who violates a Planning Board action. A "Planning Board Action" is defined in § 50-41(a)(5) as follows:

A final decision, on a preliminary plan, site plan, project plan, supplementary plan, water quality plan or other plan, including all associated terms, conditions, requirements and other obligations or limitations made by the Planning Board pursuant to its authority under Article 28, Titles 7 and 8, Maryland Code Annotated and Chapters 50 and 59 of the Montgomery County Code including any regulations promulgated pursuant to this authority. A final decision for purposes of this section does not include a decision made by the Planning Board pursuant to Chapter 22A.¹

Any challenge to a Planning Board citation issued pursuant to § 50-41 is appealed to the District Court of Montgomery County for trial.²

Section 59-D-3.6 of the Montgomery County Code provides the Planning Board additional authority to require compliance with site plan approvals. Section 59-D-3.6 states, in full, as follows:

If the Planning Board finds, for any plan approved under this section, on its own motion or after a complaint is filed with the Planning Board or the Department, that any of the terms, conditions or restrictions upon which the site plan was approved are not being complied with, the Planning Board, after due notice to all parties concerned and a hearing, may revoke its approval of the site plan or approve a plan of compliance which would permit the applicant to take corrective action to comply with the site plan. If at the end of the term of the plan of

¹ Chapter 22A of the Montgomery County Code is the County's Forest Conservation Law.

² See § 50-41(d).

compliance sufficient corrective action has not taken place to cause compliance, the Planning Board may revoke its approval of the site plan or take other action necessary to ensure compliance, including imposing civil fines, penalties, stop work orders and corrective orders under Chapter 50. The Planning Board may request and obtain investigations and reports as to compliance from appropriate County or State agencies.

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

The Planning Board's statutory authority to enforce its approvals under § 50-41 and § 59-D-3.6 of the Montgomery County Code do not require that one provision be applied over another in any particular case. In fact, § 50-41 expressly states that any and all methods of enforcement provided under the law may be pursued concurrently. Specifically, § 50-41(j) states, in full, as follows:

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

Section 59-D-3.6, as set forth fully above, provides that if a plan of compliance is not sufficiently executed, the Planning Board "may revoke its approval of the site plan or take other action necessary to ensure compliance, including imposing civil fines, penalties, stop work orders and corrective orders under Chapter 50."³

With respect to the Planning Board's authority to enter into site plan enforcement agreements, Article 28, § 7-116(c)(1) states, in pertinent part, that "the planning board of the Commission or its designee may enter into regulatory plan enforcement agreements, declarations, easements, covenants, and other instruments, with appropriate persons or entities regarding any action it is authorized to take under this article."

In order to enforce a site plan enforcement agreement, the Planning Board must file a breach of contract action in the Circuit Court for Montgomery County.

With respect to the Planning Board's authority to inspect developments in order to determine whether they are in conformance with Planning Board approvals, Article 28, § 2-116 provides, in full, as follows:

³ (Emphasis added.)

In the performance of the functions and duties of the Commission, any member or any employee or agent of the Commission may enter at all reasonable hours upon any private premises and into any building in the Maryland-Washington Metropolitan District or in the Maryland-Washington Regional District, in order to make examinations and surveys and to place and maintain necessary monuments and marks thereon. Any restraint or hindrance offered to the entry, examination, survey, or placing or maintenance of monuments or marks by any owner or tenant or agent of an owner or tenant is a misdemeanor, punishable as such under the general penalty provisions of this article.

When an inspection shall occur in connection with an approved site plan must be set forth in the development program accompanying the site plan, in accordance with § 59-D-3.23 of the Montgomery County Code. Section 59-D-3.23 provides that a development program must provide for “the sequence in which all structures, open spaces, vehicular and pedestrian circulation systems, landscaping and recreational facilities are to be developed.” In addition, § 59-D-3.23 requires that “[t]he applicant shall designate the point in the development program sequence when the applicant will notify the planning board to request inspection for compliance with the approved site plan.”⁴

The enabling authority for the Department of Permitting Services’ (“DPS”) enforcement authority is found in Article 28, § 8-120, which states, in pertinent part, as follows:

(a) In Montgomery County, the construction, reconstruction, erection, structural alteration, or use of any building or other structure or the use of land or premises in violation of any of the provisions of this title or of any of the provisions of any regulation enacted under this title or of any decision made under this title, is a misdemeanor. The willful issuance of a building, use, or occupancy permit in violation of any such provision or decision is a misdemeanor. The County Council of Montgomery County or the prosecuting official of Montgomery County may prosecute any violation.

* * * *

(c)(1) In addition to all other remedies provided by law, the governing body of Montgomery or Prince George's County may provide by ordinance for the imposition of civil monetary fines or penalties for violations of the provisions of this title, or

⁴ Section 59-C-18.104(b)(9) mirrors verbatim this requirement that the time for inspection be set forth in the development program in connection with site plans approved under the Wheaton Central Business District Overlay Zone.

of any of the regulations enacted under this title, or any decision made under this title, or of any zoning text amendment adopted under this title.

(2) The governing body may provide for the enforcement of the ordinance:

(i) As provided in Article 66B, § 7.02 of the Code, and not subject to an appeal to the board of zoning appeals; or

(ii) By a hearing by an official, board, or agency of the county, and providing for an appeal from that hearing.

(3) The governing body may provide for the county attorney to prosecute violations for which civil monetary fines or penalties are imposed.

(d) In addition to all other remedies provided by law, the governing body of Montgomery County or Prince George's County, public officials of any municipality or political subdivision within the regional district, or any neighboring property owner or occupant may institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful construction, reconstruction, erection, alteration, or use. Any court of competent jurisdiction has jurisdiction to issue restraining orders and temporary or permanent injunctions or mandamus or other appropriate forms of remedy or relief.

In connection with the issuance of building permits, it appears that § 8-22 of the Montgomery County Code provides the process for enforcing violations. Section 8-22 states, in full, as follows:

(a) *Notice of violation.* The director shall serve a notice or order on the person responsible for the erection, construction, alteration, extension, repair, use or occupancy of a building or structure in violation of the provisions of this chapter or any other applicable federal, state or local law or regulation or in violation of a detail statement or a plan approved there under or in violation of a permit or certificate issued under the provisions of this chapter; and such order shall direct the discontinuance of the illegal action or condition and the abatement of the violation.

(b) *Prosecution of violation.* If the violation cited in the notice or order is not abated within the period set forth in said notice or order, the director may institute the

appropriate proceeding at law or in equity to restrain, correct or abate such violation or to require the removal or termination of the unlawful use of the building or structure in violation of the provisions of this chapter or of the order or direction made pursuant thereto.

(c) *Violation penalties.* Any person who violates a provision of this chapter or fails to comply with any of the requirements thereof or who erects, constructs, alters or repairs a building or structure in violation of an approved plan or who refuses, ignores or violates an order of the director or a condition of permit or certificate issued under the provisions of this chapter shall be subject to punishment for a class A violation as set forth in section 1-19 of chapter 1 of the County Code. Each day a violation continues to exist shall constitute a separate offense.

In addition, DPS is granted the ability to enter upon property for the purpose of enforcing its authority to grant building permits through § 8-18 of the Montgomery County Code, which provides, in full, as follows:

(a) *Generally.* In the discharge of his duties, the director or his authorized representative shall have the authority to enter at any reasonable hour any building, structure or premises in the county for which a permit has been issued to enforce the provisions of this chapter.

(b) *Municipal cooperation.* The assistance and cooperation of police, fire, and health departments and all other county officials shall be available to him as required in the performance of his duties.

The Planning Board's and DPS' enforcement authority are completely independent of each other.