



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

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OFFICE OF
 THE GENERAL COUNSEL



FAX TRANSMITTAL SHEET

To: Karen Blansky,
Director
OLO

at Fax Number: 240-777-
2879

From: Adrienne R. Gardner

Date: 8/9/05

Number of pages, including this one: 10

Comments: Re: Clarkburg Town
Center

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August 9, 2005

VIA FACSIMILE 240-777-7879

Ms. Karen A. Orlansky
Director
Office of Legislative Oversight
Montgomery County Council
100 Maryland Avenue
Rockville MD 20850

Dear Karen:

Once again, thank you so much for meeting with Trudye M. Johnson and me last Friday to discuss your important work investigating the regulatory process relating to the Clarksburg Town Center development project. As I said, the Commission staff stands ready, willing and able to provide you with any information you deem necessary or advantageous to complete your charge. In addition, the Montgomery County Planning Board is also prepared to accommodate your request for an interview.

That being said, however, my job is to alert you to some important consequences that are certainly unintended. For example, we discussed our concern with preserving privileged communications between Commission attorneys and various clients. This concern is particularly important to protect the public interest if we are called upon to defend our actions in a future civil litigation. As I also mentioned, our Planning Board's Rules of Procedure (attached) generally prohibit the Planning Board from entertaining *ex parte* discussions concerning the subject matter of a pending quasi-judicial proceeding. In the Clarksburg Town Center case, several factual allegations, findings, and ultimate regulatory dispositions are currently under the Board's advisement. For all of these reasons, I am asking you to recognize the very real tension between immediately providing you with every nit and grit of detail that may ultimately be dispensable to support your valid conclusions, on the one hand, and the best interest of our citizens in proceeding "by the book," on the other. We have absolutely nothing to hide from your scrutiny, but must make every effort to save the procedural baby from the same fate as the investigator's bathwater.

With all of that as background, the gist of our meeting involved exploring the possibilities of the best of both worlds; that is, to get you all the information you would like without sacrificing any competing benefit. Most importantly, you indicated that we would re-visit your request to interview Commission lawyers and the Planning Board

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after you have had an opportunity to review our transcripts and/or audiotapes from the two Clarksburg violation hearings. In addition, we considered the significance of the legal questions you posed in your memorandum to Charles Loehr dated July 26, 2005. I am very hopeful that these materials can be supplemented in some fashion that makes you entirely comfortable without compromising the Commission's ability to resist any third-party claims.

I trust this letter accurately captures the most important elements of our discussion, and I will be available to assist you in every way possible in any event.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'A. Gardner', written over a horizontal line.

Adrian R. Gardner
General Counsel

Cc: Trudye M. Johnson, Executive Director
Charles Loehr, Director

Revised January 13, 2005

**THE RULES OF PROCEDURE
FOR THE
MONTGOMERY COUNTY PLANNING BOARD
MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION**

SECTION 1 - PURPOSE

The purpose of these rules is to establish procedures for the conduct of hearings in all cases in which a final decision is made by the Planning Board after a hearing required by law. The following matters shall be subject to these rules:

- A. Cluster Development - Pre-preliminary plans of subdivision.
- B. Preliminary plans of subdivision.
- C. Site plan review.
- D. Central Business District - Optional Method of Development*.
- E. Building permits subject to Article IV, Chapter 8, Montgomery County Code, which require a timely adequate public facilities determination by the Planning Board.

SECTION 2 - NOTICE

Unless otherwise provided herein or required by law, regulation or ordinance, notice of all the proceedings undertaken pursuant to these rules shall be made as provided below.

A. (1) Notice of the Filing of an Application -

The applicant shall obtain the names and addresses of the confronting and adjacent property owners, and shall mail them a notice of application as soon as possible, but not later than 10 calendar days after the date of application. When a confronting or adjacent property includes a multi-unit building, notice shall be sent to the property owner, the building management company and, where appropriate, the condominium association. When a confronting or adjacent property is common open space for a cluster-type development, notice shall be sent to the homeowner's association and to any individual property owner located within 300 feet of the subject application.

The list of notified property owners shall be submitted to the Planning Department staff at the same time that notice is mailed. The staff shall send notices to the appropriate civic associations within the same period. All notices required under this section must state that an application has been filed with the Planning Board, and shall include the following descriptive material:

- (a) the application reference number;
- (b) reference to the statutory authority regulating review of the application;

*Separate rules for CBD Optional Method applications were adopted previously and remain in effect.

- (c) a brief description of the location and character of the project proposal, and
- (d) a copy of the proposed land plan.

If an application is pending for more than one year, or if an amendment to a previously approved application is requested, the applicant is responsible for updating the list of owners, notifying any new adjacent and confronting property owners, and providing a copy of the updated list to the Planning Department.

(2) Required Notice Due to Off-Site Public Facility Improvements -

In addition to the foregoing, the Planning Board staff in the course of reviewing an application subject to these rules may reasonably determine, as provided below, that additional notice must be directed to certain potentially interested parties not otherwise afforded notice of the filing of such application. This requirement ordinarily shall arise in the context of a review of a preliminary plan application, the approval of which could require the construction of or improvements to certain public facilities (especially transportation facilities) not adjacent or in close proximity to the subject property, which construction or improvements:

- (a) are not contemplated by the pertinent Master Plan; or
- (b) in the exercise of reasonable discretion, as solely determined by staff, are deemed to have a potentially significant and previously unforeseeable impact on property adjacent to or in the vicinity of the public facility.

If a determination is made that notice must be made, staff shall then determine which, if any, registered common ownership associations confront or adjoin the area of the facility and which, if any, registered "localized" umbrella civic associations (typically confined to the boundaries of the pertinent planning area) may embrace the area of the facility. Staff shall provide this information to Applicant and Applicant shall provide notice of the possible construction to such entities.

The notice must contain the descriptive material described in paragraph (A)(1) above, together with other available descriptive material detailing the contemplated construction of or improvement to the public facility. The notice must be directed to each designated association no later than 20 days prior to a public hearing on the application.

Each association identified pursuant to this subsection must also be provided written notice of the date and time for a public hearing on the application, which notification may be incorporated in the notice of the application and possible public facility construction provided for above if the date and time of the hearing is then known.

B. Establishment of Application Date and Scheduling of Planning Board Hearing -

An application shall not be considered complete and the statutory review time limit shall not commence until all supporting materials, as listed on a published application checklist for submission requirements, are made available to the Planning Board staff for review. The Subdivision Coordinator or his designee will make the final determination at the Subdivision

Review Committee meeting as to whether or not an application was complete as originally submitted. If complete as submitted, the application date is the date of original submission. If not complete as submitted, the application date will be the date the required information is submitted. New or updated information submitted after an application date has been established does not change the application date.

An application will not be considered complete for purposes of this rule if a rezoning or special exception is required to implement the plan as proposed. However, if a plan is accepted as complete under the "old" zoning, and a rezoning occurs, a revised plan may be submitted under the "new" zoning and retain the previous application date for whatever number of trips were included in the first plan. Any additional trips resulting from the rezoning will receive a new application date when updated information is submitted. In cases requiring project plan approval for optional method development in CBD zones, a preliminary plan will not be considered complete until a project plan application is accepted. Special exceptions permitted under CBD optional method of development need not be approved in order to consider an application complete. In cases where a site plan is submitted subject to the requirements of Article IV, Chapter 8 Montgomery County Code requiring a timely adequate public facilities determination by the Planning Board prior to the issuance of a building permit, the site plan application will not be considered complete until a local area transportation review and a traffic mitigation plan has been reviewed by the planning staff.

In certain limited cases, some requirements of the application checklist may be waived, by the Planning Board staff, for reasons of hardship or good cause, as demonstrated by the applicant prior to the scheduling of the public hearing.

C. Hearing Date, Notice of Hearing, Staff Reports -

Ten (10) calendar days prior to the public hearing on the application, the Planning Board staff shall mail notices of the date and location of the hearing. This notice shall be sent to all parties previously notified, and to all additional parties of record. Parties of record shall be anyone who communicates in writing concerning the case.

Staff reports, when prepared in advance of the hearing, will be available, upon request, to any party of record and to the public generally, at the time they are transmitted to the Board.

Written reports may not always be prepared for all cases, and in some instances a written report may not be available until the time of the hearing. (For notification under the CBD Optional Method, see attached Optional Method Rules and Procedures.)

SECTION 3 - PRELIMINARY ACTION

Upon convening the hearing, a brief explanation of the purpose of the hearing shall be presented, together with any information or data, which has been received, before public discussion and comments begin. The case file shall be a part of the record and shall be available to the public at reasonable times.

SECTION 4 - INFORMATION FROM THE PUBLIC

Each speaker at a public hearing shall state: (a) name, (b) home address, and (c) person or organization he represents, or that he/she is speaking as an individual. The presiding officer may announce reasonable registration requirements for speakers.

SECTION 5 - QUESTIONING OF OTHER WITNESSES

The Chairman, upon request, may permit any party to ask questions of a witness at the conclusion of that witness' testimony. Questions should be limited to information presented by the witness. In other words, it is not appropriate for a person to begin his own testimony at this time, nor to question a witness on a subject not presented into the record by that witness. The Chairman may limit the number of questioners to a single representative of each side.

SECTION 6 - TIME GUIDELINES

The following guidelines shall serve as maximums permitted unless the Chairman in his/her discretion determines to expand or suspend any time limit. Requests to expand or suspend time guidelines should be received by the Chairman as far in advance of the public hearing as possible.

Presentation by Staff	10 minutes
Presentation by Applicant	10 minutes
Government Officials	7 minutes
Comment by other interested parties	3 minutes per person/ 5 minutes per group
Rebuttal	5 minutes
Summation (when requested)	2 minutes (in total)

SECTION 7 - RECESS TO ANOTHER TIME AND PLACE

Any public hearing may be recessed to a time and place, which is announced, or posted at the time and place for which notice originally has been given, and no further notice or publication shall be necessary.

SECTION 8 - EVIDENCE

Although not guided by formal rules of evidence, certain rules will be followed, such as:

- A. Hearsay evidence, if relevant, will normally be accepted into the record.
- B. Objections to testimony will only be sustained for the most compelling reasons so that the purpose of providing wide latitude to witnesses will be served.
- C. Objections to testimony must be made at the time the information is presented or they will be considered waived.
- D. The Board may take administrative notice of matters in common knowledge or expertise in reaching a decision on a case.

SECTION 9 - CLOSING THE RECORD

Unless otherwise determined by the Board, the record will remain open until the final decision is made. Once the record is closed, no additional information will be received except for good cause shown and a showing that it is material.

SECTION 10 - EX PARTE COMMUNICATION

- A. No member of the Planning Board may communicate ex parte, or outside of the record, with any person regarding the merits of a contested case. The members may, however, communicate with each other, or with legal counsel concerning legal matters.
- B. Any member of the Planning Board who receives an ex parte communication as defined in subsection (a) shall place on the record all written communications received, a memorandum stating the substance of all oral communications received and responses made and shall arrange notification to all parties of record that such communication has been filed. After the public hearing, any party desiring to rebut the ex parte communication shall be allowed to do so upon request made within five (5) days after notice of the communication.

SECTION 11 - RECONSIDERATION

- A. A request to reconsider may only be made by a party of record, must be in writing, and unless waived by the Board for just cause must be received by the Planning Board within 10 days of the date of the final decision. The request must specifically state the basis upon which the requesting party believes the Board's decision should be reconsidered. The Board may review a request to reconsider, provided sufficient grounds are demonstrated. Such grounds may include:
 - (1) a clear showing that the action of the Board did not conform to relevant law or its rules of procedure; or
 - (2) evidence indicating that certain pertinent and significant information relevant to the Board's decision was not presented at the public hearing before the Board or otherwise contained in the record, together with a statement detailing why such information was not timely presented; or
 - (3) such other appropriate compelling basis as determined by the Board.

The fact that a party raises an issue worthy of reconsideration does not itself require the Board to reconsider a prior action.

- B. If a request is timely received, staff, without need for formal notice, shall present the written request for reconsideration to the Board during the next possible regular meeting of the Board. Board members may question staff or any interested party then present to clarify points raised in the written request, otherwise testimony need not be received. At such time Board members shall determine whether the

written request raises a proper and sufficient basis for reconsideration. Any Board member who:

- (1) voted in the majority on the action drawn into question; and
 - (2) believes an issue warranting reconsideration has been raised, may then move to reconsider the action. If no such member remains on the Board, the motion may be made by the Chairman on his/her own initiative or at the request of any Board member.
- C. If a motion to reconsider has been duly adopted, the prior final decision shall become void. Staff will then schedule a new hearing for a subsequent date and time, providing all parties of record at least 10 days advance written notice of the new proceeding. The record shall be reopened to allow the Board the opportunity to hear further relevant testimony on any issue involving the subject application. The record of the prior hearing may be incorporated as part of the record of the subsequent public hearing.
- D. A request for reconsideration shall not operate to extend any appeals times provided by applicable law.

SECTION 12 - ORDER OF PRESENTATION

Unless otherwise determined by the Chairman, the following order of presentation shall apply in pre-preliminary plans of subdivision, preliminary plans of subdivision, and site plan review case hearing:

- A. Presentation of staff report and recommendation
- B. Public agency comments
- C. Applicant's case
- D. Opposition's case
- E. Rebuttal by applicant
- F. Summation by each side and staff

(For order of presentation for the Optional Method, see attached Optional Method Rules of Procedures.)

SECTION 13 - RULES, CHANGES AND SUPPLEMENTS

- A. Suspension of Rules.-

The suspension of any rule shall require the concurrence of four (4) members of the Board. This motion is debatable, but does not permit discussion of the main question. It can neither be reconsidered, tabled, nor postponed indefinitely, and while it is pending, no motion can be made except to adjourn. A separate suspension of the rules shall be necessary for each proposition.

B. Repeal or Amendment of Rules -

No motion, order, or resolution to repeal or amend a rule of the Board shall be considered or acted upon unless it shall have been submitted in writing to the Board at least two (2) weeks prior thereto, together with the written text of any proposed amendment. The repeal or amendment of any rules of the Board may be by majority vote of those members present and voting.

C. Robert's Rules of Order -

The rules of parliamentary practice and procedure as set forth in the latest published edition of Robert's Rules of Order, as amended, shall govern the Board in all contested cases to which these Rules of Procedure apply.