

A STUDY OF
MODERATELY PRICED DWELLING UNIT
PROGRAM IMPLEMENTATION



OFFICE OF LEGISLATIVE OVERSIGHT
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OVERVIEW

Montgomery County's Moderately Priced Dwelling Unit (MPDU) program requires developers to set aside a percentage of housing units in new construction projects for moderate-income households. Since 1974, more than 12,000 MPDU housing units have been built in the County.

In 2004, the County Council amended the MPDU law (County Code Chapter 25A). Among other things, the amendments, subjected additional zones and smaller subdivisions to the MPDU requirement, and modified developers' options for meeting MPDU requirements. The amendments went into effect on April 1, 2005.

This year, the Council asked the Office of Legislative Oversight (OLO) to review the implementation of the MPDU law following the 2004 amendments, with a focus on procedures and practices of County Government and Maryland-National Park and Planning Commission. OLO examined six elements of MPDU program implementation:

- The number of MPDUs in a subdivision;
- The location of MPDUs in a subdivision;
- The staging of MPDU construction;
- The design and size of MPDUs;
- The pricing of MPDUs; and
- The Alternative Review Committee

NUMBER OF MPDUS IN A SUBDIVISION

The MPDU program produces affordable housing units as a by-product of the development of new market rate housing. For most subdivisions of 20 or more units, the MPDU law requires developers to set aside a minimum of 12.5 percent of total units as MPDUs. In the last two years, the Planning Board approved new site plans containing more than 2,900 residential units, including approximately 400 MPDUs. Several different factors, described below, affect the number of MPDUs in a subdivision.

MPDU Optional Method of Development. For many one-family zones, MPDU optional method development standards yield project densities up to 40 percent greater than achievable under base zone standards. Increased overall project density, in turn, increases MPDU generation in a subdivision.

Density Bonus and the Number of MPDUs. The MPDU law allows increased project density in exchange for increased production of MPDUs and requires the number of MPDUs to vary "according to the amount by which the approved development exceeds the normal or standard density for the zone" However, based on the density bonus formula in the MPDU law, the Planning Board, in one recent case, approved additional market rate units without additional MPDUs.

The MPDU Program and Other Density Policies. The County lacks guidelines for coordinating the implementation of the MPDU program with other policies that affect development density. For example, different master plans provide different guidance on resolving potential conflicts between density limits and the MPDU density bonus provision. As another example, no guidelines exist on how to implement transferable development rights and MPDU requirements on the same property.

The complete OLO Report 2007-9 is available at: www.montgomerycountymd.gov/olo.

NUMBER OF MPDUS IN A SUBDIVISION (CONTINUED)

Zoning Reclassifications. The Zoning Ordinance requires an applicant for certain zoning reclassifications to prepare a development plan indicating the number of MPDUs in a proposed project. If the Council approves the zoning reclassification, the subsequent site plan must conform to the approved development plan. MPDU decisions in a development plan remain fixed throughout the subsequent stages of the land use approval process. In a recent case, an approved development plan included a higher ratio of market rate units to MPDUs than allowed by law.

Reducing or Eliminating MPDUs Through "Buyouts" or Waivers. The MPDU law allows a developer to request an alternative payment agreement (or "buyout") or a waiver to reduce the number of MPDUs in a project. Presently, alternative payments and waivers are extremely rare occurrences. There has been only one alternative payment agreement since April 1, 2005 for one MPDU. The Planning Board has approved only two MPDU waivers in the last decade.

LOCATION OF MPDUS IN A SUBDIVISION

The County Code, the County Zoning Ordinance, and the MPDU Executive Regulation establish no rules or standards regarding the location of MPDUs within a development. OLO's survey of recently approved site plans for single-family developments found some that cluster MPDUs together and some that disperse MPDUs among market rate units throughout a subdivision.

The 2004 amendments to the MPDU law authorize the Department of Housing and Community Affairs (DHCA) Director to allow a developer of a high-rise residential project to build some or all of the required MPDUs at another location in the same planning policy area. Since 2005, DHCA received one request to locate MPDUs at an off-site location; the DHCA Director denied the request.

STAGING OF MPDUS

"Staging" of MPDUs refers to the sequence in which MPDUs are built relative to market rate units in a development. The MPDU law establishes staging criteria to assure that the construction of MPDUs occurs concurrent with the construction of market rate units.

Agreements to Build MPDUs. The MPDU law requires that an "Agreement to Build MPDUs" signed by the developer and DHCA adhere to the staging criteria in the MPDU law. DHCA enforces MPDU staging based on construction start and completion dates entered into the staging plan of an Agreement to Build. A developer complies with the staging plan if the MPDUs required for each phase are completed before the completion date listed in the Agreement to Build. In practice, for many projects, market conditions extend the timing and pace of construction beyond the schedule included in an Agreement to Build.

Staging and Site Plans. The MPDU law requires DHCA to execute Agreements to Build that both follow the MPDU staging criteria and are consistent with approved site plans. This can create a conflict if the Planning Board approves a disproportionately high percent of MPDUs in later phases of a project. In such a case, if an Agreement to Build is consistent with the site plan, it may run afoul of MPDU staging requirements. On the other hand, if DHCA adjusts the planned sequencing of construction, the Department may violate the requirement that the Agreement to Build be consistent with the site plan.

DESIGN AND SIZE OF MPDUS

County laws and regulations do not establish any MPDU design standards. In some cases, a Planning Board resolution, Planning Department staff report, or certified site plan has established design standards specific to MPDUs.

The MPDU law sets requirements for the minimum number of bedrooms in one-family MPDUs. Although the law mandates that each one-family MPDU must have at least three bedrooms, neither certified site plans nor Agreements to Build indicate the number of bedrooms that will be built in one-family MPDUs. Consequently, no mechanism exists to enforce the minimum bedroom requirement.

PRICING OF MPDUS

The MPDU regulation directs DHCA to set MPDU sale prices based on unit construction costs and MPDU rental prices based on affordability to program participants. Setting MPDU sale prices involves a complex, multi-step process that requires DHCA to consider, among other things, construction and land development costs, loan financing, marketing costs, builder's overhead, and costs incurred to achieve architectural compatibility. Based on a DHCA affordability model that assumes households can contribute 30% of monthly gross income to housing, about one-quarter of MPDUs offered for sale since April 2005 have been "unaffordable" to households eligible to participate in the MPDU program.

ALTERNATIVE REVIEW COMMITTEE

In 2004, the Council created an Alternative Review Committee (ARC) to review requests for certain "alternative compliance measures." These measures allow developers in some circumstances to alter whether or how they provide MPDUs in a development. ARC membership consists of the DHCA Director, the Planning Director, and the Housing Opportunities Commission Executive Director.

ARC Procedures. Provisions in County Code require the ARC to apply legal standards and make findings when reviewing projects. However, the Code provides no definitions for or guidance on interpreting these legal standards. Consequently, the ARC has formulated its own criteria for evaluating these standards. Staff to the ARC report that there has been uncertainty regarding when developers must submit projects to the ARC and what factors trigger ARC review of projects.

ARC Decisions. The County Code gives the ARC the responsibility to make findings about financial elements of certain projects. The ARC's interpretation of its authority under the law has evolved over the course of the seven cases it has reviewed. In four of its first five decisions, the ARC made findings and also made recommendations for subsequent action by other decision-makers. In subsequent decisions, the ARC included only its findings.

IMPACT OF THE CLARKSBURG TOWN CENTER PROJECT ON IMPLEMENTATION OF THE MPDU LAW

The events surrounding the Clarksburg Town Center project brought to light deficiencies in the County's enforcement of the MPDU law. Two years ago, no system existed to enforce the legal requirement that the County not issue building permits before execution of an Agreement to Build MPDUs. In addition, County officials did not conduct field inspections to enforce the MPDU elements of certified site plans. Since September 2005, County agencies have undertaken several initiatives to remedy these deficiencies. DHCA and Department of Permitting Services now coordinate execution of the MPDU program with the building permit process. DHCA added two staff members to conduct field inspections and otherwise enforce the MPDU law.

OLO offers ten recommendations to the Council to improve implementation of the MPDU program.

ADVANCING PROGRAM POLICY OBJECTIVES

- #1 Ask the Executive to amend the MPDU regulation to calculate MPDU sale prices based on affordability to program participants.** Using the current practice of basing sale prices on unit construction costs, about 25% of MPDUs offered for sale since April 2005 were unaffordable to households eligible to participate in the MPDU program.
- #2 Amend the MPDU law to require that use of the MPDU density bonus result in at least one additional MPDU.** In one recent case, current law allowed a developer to receive a density bonus of three additional market rate units without providing additional MPDUs.
- #3 Support continued DHCA participation in Development Review Committee (DRC) evaluation of preliminary, project, and site plans.** DHCA involvement in DRC meetings fosters integration of MPDU policies into the land use approval process.
- #4 Ask the County Executive and Planning Board to adopt a process that results in the drafting of Agreements to Build MPDUs concurrent with the site plan approval and certification process.** This approach will allow for better coordination of MPDU policies, such as building MPDUs and market rate units concurrently, with site plan decision-making.
- #5 Convene a working group to evaluate and make recommendations to clarify the rules and procedures related to the Alternative Review Committee.** The sections of the law empowering the ARC to review projects seeking alternative compliance measures lack specificity, which has led to inconsistent implementation of the law.
- #6 Decide whether to establish standards for the location and design of MPDUs.** There are no standards for location and design of MPDUs. The Council should examine the advantages and disadvantages of establishing MPDU location and design standards.

STRENGTHENING ENFORCEMENT

- #7 Ask the County Executive to draft a regulation to use the building permit process as a mechanism to enforce MPDU staging requirements.** DHCA uses calendar dates in Agreements to Build to monitor whether MPDU construction keeps pace with market rate construction in a project. DHCA often cannot enforce MPDU staging requirements because market conditions often delay MPDU and market rate construction beyond the calendar dates specified in the Agreement to Build.
- #8 Ask the County Executive to enter into Agreements to Build MPDUs that allow for enforcement of the minimum bedroom requirement set in the MPDU law.** Under current practice, no mechanism exists to enforce the minimum bedroom requirement in single-family MPDUs.

IMPROVING CONSISTENCY OF PROGRAM IMPLEMENTATION

- #9 Direct the Planning Board to establish written guidelines to address the relationship between the MPDU program and other County policies that affect development density.** Presently, no uniform guidelines exist for coordinating implementation of the MPDU law with the TDR program and with master plan height and density limits.
- #10 Request an analysis of MPDU requirements when considering zoning reclassifications.** MPDU requirements in reclassification development plans remain fixed throughout the land use approval process. In a recent case, the Planning Board was compelled to approve a project with too few MPDUs because the approved development plan included a calculation error.

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CHAPTER I. AUTHORITY, SCOPE, AND ORGANIZATION OF REPORT

A. Authority

Council Resolution 15-1554, *FY 2007 Work Program of the Office of Legislative Oversight*, adopted July 25, 2006.

B. Purpose and Scope of Report

In November 2004, the County Council approved comprehensive revisions to the moderately priced dwelling unit (MPDU) law, Chapter 25A of the Montgomery County Code (hereinafter “MPDU law”). The County Council requested that the Office of Legislative Oversight (OLO) assess the implementation of the revised MPDU law, with a focus on the monitoring and enforcement of developer adherence to the MPDU law and regulation. The scope of OLO’s study includes:

- Review of the laws, regulations, and guidelines governing the MPDU program;
- Examination of agency practices and procedures for implementing the MPDU program;
- Assessment of public and building industry perspectives on implementation of the MPDU program; and
- Examination of recent building projects in the County that contain MPDUs.

OLO limited the scope of this report to MPDUs. This report does not examine housing units generated through the affordable housing exception in the County’s Growth Policy.

C. Organization of Report

Chapter II, Overview of the Moderately Priced Dwelling Unit Program, describes the structure and the goals of the MPDU program.

Chapter III, Legal Framework, provides an overview of the laws and regulations establishing the MPDU program.

Chapter IV, Number of MPDUs in a Subdivision, examines the law and process for determining the number of MPDUs in a building project.

Chapter V, Staging of MPDUs, describes the law and practice for developing and implementing a staging plan for building MPDUs in a development.

Chapter VI, Location of MPDUs, examines the law and process for determining the location of MPDUs in a development.

Chapter VII, Design and Size of MPDUs, reviews the law and practice associated with designing MPDUs.

Chapter VIII, Pricing of MPDUs, examines the law and practice for determining sales and rental prices for individual MPDUs.

Chapter IX, Alternative Review Committee, describes the law establishing the Alternative Review Committee and its decision-making process.

Chapter X, Related Issues, describes additional topics related to the implementation and enforcement of the MPDU law that are beyond the scope of this report.

Chapter XI presents **OLO's Findings and Recommendations**.

Chapter XII presents **Agency Comments** received on a final draft of this report.

D. Methodology

Office of Legislative Oversight staff members Aron Trombka and Leslie Rubin conducted this study. OLO gathered information through general research, document review, and individual and group interviews. OLO worked primarily with staff from:

- The Department of Housing and Community Affairs (DHCA);
- The Maryland-National Capital Park and Planning Commission (M-NCPPC);
- The Department of Permitting Services (DPS);
- The Housing Opportunities Commission (HOC); and,
- The Office of Zoning and Administrative Hearings (OZAH).

OLO also attended meetings with building industry representatives and Montgomery County civic organization representatives.

E. Acknowledgements

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CHAPTER II. OVERVIEW OF THE MODERATELY PRICED DWELLING UNIT PROGRAM

This chapter provides an overview of the Moderately Priced Dwelling Unit (MPDU) program including a description of program purpose, history, and goals. This chapter also describes the roles of the government organizations and private entities involved in the implementation, administration, and enforcement of the MPDU program.

The chapter includes two sections:

- **Section A**, MPDU Program Purpose, History, and Goals
- **Section B**, MPDU Program Implementation, Administration, and Enforcement

A. MPDU Program Purpose, History, and Goals

Montgomery County's MPDU program was the first successfully implemented inclusionary zoning program in the country. Inclusionary zoning requires making a percentage of housing units in residential developments available for low- and moderate-income households. In exchange for building affordable housing, a residential developer is eligible to receive benefits, such as a density bonus or more flexible development standards. The purpose of inclusionary zoning is to routinely create affordable housing dispersed wherever new residential development occurs.

In 1972, the County Council approved legislation creating what is now Chapter 25A of the County Code, the MPDU law. County Executive Gleason vetoed the bill citing concerns about the legislation's constitutionality and invasiveness. In 1973, the County Council overrode the Executive's veto and the MPDU law took effect the following year. In originally enacting the MPDU law, the Council declared seven public policy goals:

- (1) Implement the Montgomery County housing policy and the general plan goal of providing for a full range of housing choices, conveniently located in a suitable living environment, for all incomes, ages and family sizes;
- (2) Provide for low- and moderate-income housing to meet existing and anticipated future employment needs in the County;
- (3) Assure that moderately priced housing is dispersed within the County consistent with the general plan and area master plans;
- (4) Encourage the construction of moderately priced housing by allowing optional increases in density in order to reduce land costs and the costs of optional features that may be built into such moderately priced housing;
- (5) Require that all subdivisions of 50 or more dwelling units include a *minimum* number of moderately priced units of varying sizes with regard to family needs, and encourage subdivisions with fewer than 50 units to do the same;¹

¹ A 2004 amendment to the MPDU law reduced the minimum subdivision size to 20 units.

- (6) Ensure that private developers constructing moderately priced dwelling units under this Chapter incur no loss or penalty as a result thereof, and have reasonable prospects of realizing a profit on such units by virtue of the MPDU density bonus provision of Chapter 59 and, in certain zones, the optional development standards; and
- (7) Allow developers of residential units in qualified projects more flexibility to meet the broad objective of building housing that low- and moderate-income households can afford by letting a developer, under specified circumstances, comply with this Chapter by contributing to a County Housing Initiative Fund.²

The above policy goals have remained essentially unchanged over the three and a half decades since the inception of the MPDU program. Over the years, the Council has amended the MPDU law on several occasions. The MPDU program in its current form is the product of a comprehensive review of the MPDU law by the Council in 2004. This review led to amendments to the law that took effect in 2005. The 2004 amendments, among other things:

- subjected additional zones to the MPDU requirement;
- altered the duration of price control periods for sale and rental MPDUs;
- amended the minimum subdivision size subject to the MPDU law; and
- modified requirements and processes for alternative agreements.

Since 1974, the MPDU program has produced more than 12,000 affordable units in the County, far more than any other community in the country. OLO notes that the MPDU program is only one element of the County's affordable housing strategy. The MPDU program primarily serves households that earn between 60 and 70 percent of area median income. The program is not designed to serve the housing needs of households at lower income levels.

B. MPDU Program Implementation, Administration, and Enforcement

Multiple government organizations as well as the private sector are involved in various aspects of the implementation, administration, and enforcement of the MPDU program. This section describes the role of each of these entities.

1. Department of Housing and Community Affairs

The Montgomery County Department of Housing and Community Affairs (DHCA) is responsible for the day-to-day administration of the MPDU program. Department staff engage in an assortment of activities in support of the MPDU program, including:

- Applicant Services: The Department sets MPDU eligibility standards, provides information to potential program participants, conducts MPDU orientation seminars,

² Montgomery County Code § 25A-2 [hereinafter "MCC"].

accepts and processes program applications, publicizes the availability of specific MPDUs, and conducts the lottery for MPDU sale units.

- Data and Inventory Management: DHCA modernized its data management system over the past year. DHCA developed a computer database that tracks information about program participants (e.g., application status), tracks detailed information about MPDUs (e.g., unit size, type, price, remaining time under price control), and links program participants to individual units. DHCA updated its web site to provide information about specific units and to allow program participants to access and update information online.
- Agreements to Build: DHCA enters into a contract known as an “Agreement to Build MPDUs” with the developer or builders of a subdivision. The Agreement to Build spells out the duties and obligations of the developer or builder to build MPDUs; specifies the number of MPDUs and market rate units to be built in a subdivision; identifies MPDUs by address; and establishes a construction schedule for all units in a subdivision.
- MPDU Pricing: DHCA establishes the maximum pricing levels for rental and sale MPDUs. For sale units, the Department enters into an “offering agreement” with the developer or builder that sets the maximum sale price for each MPDU. Chapter VIII describes the legal framework and practices associated with the pricing of MPDUs.
- Planning and Project Review: DHCA recently hired a Senior Planning Specialist to perform program planning and to review pending projects. The responsibilities of this position include working with the Planning Department to coordinate the implementation of MPDU requirements; to serve on the Development Review Committee (see Section B.3 below) and provide comments regarding pending development projects; to review project proposals for conformance with the requirements of the MPDU law and regulation; and to evaluate the rules and policies of the MPDU program.
- Site Plan Compliance and Enforcement: DHCA is responsible for enforcing the MPDU elements of an approved site plan. Earlier this year, DHCA created and filled a new position, the MPDU Compliance Monitor. The Compliance Monitor is responsible for the enforcement of Agreements to Build as well as MPDU-related conditions of approved site plans. DHCA currently is establishing procedures for the new Compliance Monitor to enforce developer MPDU obligations, including those relating to location, design, and staging of MPDUs. The new Compliance Monitor will conduct field inspections to verify that MPDU construction meets all requirements of the Agreement to Build and site plan.
- Alternative Agreements: By law, the DHCA Director reviews requests for “alternative compliance measures” either independently or as a member of the Alternative Review Committee (ARC). DHCA personnel provide staff support to the ARC. See Chapter IX for a complete discussion of alternative compliance measures and the ARC.
- Occupancy and Resale: DHCA monitors and enforces resident compliance with MPDU occupancy standards as delineated in law and regulation. DHCA also oversees the process for resale of price-controlled MPDUs including management of the shared profit resulting from the first sale after the expiration of the control period.

2. Planning Board/Planning Department Staff

Through the land use approval process, the Planning Board and Planning Department staff play a primary role in determining the application of the MPDU law to specific development projects.

- Planning Department Staff Reports: Planning Department staff prepare written reports for the Planning Board's consideration of preliminary plans of subdivision,³ project plans, and site plans. Typically, the staff report includes text and/or a table showing the number of MPDUs in the project. A staff report often includes a drawing or plan that shows the location of MPDUs within a project. The staff report also may include comments on design standards for MPDUs, particularly when they differ from the standards for market rate units. For multi-phase projects, staff reports show the number and location of MPDUs within each phase of the project. Staff also prepares conditions of approval requiring the applicant to place the MPDUs on-site, in accordance with the MPDU law.
- Planning Board Resolutions: The Planning Board issues "resolutions," which are written approvals of preliminary plans, project plans, and site plans. The Planning Board Resolution itself may include information about the number, location, and design of MPDUs or may include by reference MPDU requirements mentioned in the staff report.

The Planning Board also approves a series of large plans and drawings associated with its resolutions. These plans and drawings are known as "Certified Site Plans," previously referred to as "signature sets," and frequently include information about the number, location, and design of MPDUs. Within the past two years, the Planning Board has begun to print its written resolution as part of the Certified Site Plan.

- Alternative Review Committee: The Planning Department Director reviews requests for alternative compliance measures as a member of the Alternative Review Committee (see Chapter IX).

3. Development Review Committee

Chapter 50 of the County Code requires that the Planning Board establish a "Subdivision Review Committee,"⁴ also known as the "Development Review Committee" or DRC. The DRC is an interagency task force composed of representatives from County Government departments, County agencies, State agencies, and public utilities that reviews preliminary plans, project plans, and site plans prior to Planning Board consideration and action. Planning Department staff chair DRC meetings, which occur approximately once every three weeks. Planning Department staff assemble written comments from DRC participants for inclusion in the applicant file. DHCA participates in and submits comments to the DRC.

³ Preliminary plans of subdivision are commonly known as "preliminary plans."

⁴ MCC § 50-35(c).

4. Department of Permitting Services

The Department of Permitting Services (DPS) is the County Government agency responsible for issuing building permits. The MPDU law prohibits DPS from issuing building permits for a development prior to execution of the Agreement to Build.⁵ Moreover, the MPDU law authorizes DPS to withhold building permits for a later stage of a subdivision when the developer has not constructed the earlier stages of the subdivision in accordance with the Agreement to Build.⁶

5. Housing Opportunities Commission and Non-Profit Housing Organizations

The Housing Opportunities Commission (HOC) serves as the public housing agency for Montgomery County. HOC develops and finances affordable housing as well as owns and manages public housing. In addition to HOC, several non-profit organizations develop, renovate, and manage affordable housing in the County. The MPDU law requires that 40 percent of MPDUs be offered for sale to the HOC and non-profit housing agencies for use by low- and moderate-income families.⁷

The HOC Executive Director also reviews requests for alternative compliance measures as a member of the Alternative Review Committee (see Chapter IX).

6. Developers, Builders, and Property Owners

Private development triggers MPDU production. By design, the MPDU program produces affordable housing units as a by-product of the development of new market rate housing.

In putting together a project proposal, a developer makes several MPDU-related decisions. For most projects (other than high-rise), a developer must decide whether to request approval to build the subdivision using the MPDU optional method development standards specified in the County Zoning Ordinance. MPDU optional method development standards provide more flexibility with regard to unit type, lot size, setback, and other factors than permitted under the base zone. The MPDU law also provides a developer with an option to provide 12.5 percent of project units as MPDUs at the base density or to provide a higher percentage of MPDUs (up to a maximum of 15 percent) in exchange for additional project density.

DHCA sets sale or rental prices for MPDUs. Builders construct, market, and sell for-sale MPDUs to eligible buyers certified by DHCA. Rental property owners (or their management companies) accept applications and verify eligibility for individuals interested in renting an MPDU.

⁵ MCC § 25A-5(h).

⁶ MCC § 25A-5(j).

⁷ MCC § 25A-8(b)(1). The law limits HOC's acquisition to 33 percent of total units in an offering.

CHAPTER III. LEGAL FRAMEWORK

This chapter provides a broad overview of the laws, regulation, and written guidelines that govern the implementation of the MPDU program. Chapters IV through IX provide more detailed explanations of the law related to specific MPDU topics.

Chapter 25A of the Montgomery County Code (hereinafter “the MPDU law”), establishes the goals, standards, and fundamental rules of the MPDU program. The County Executive prepares regulations to administer the MPDU program. In addition, written policies and guidelines from different government agencies provide further direction for implementation of the law.

This chapter includes three sections:

- **Section A**, County Law
- **Section B**, Executive Regulation
- **Section C**, Written Policies and Guidelines

A. County Law

The MPDU law establishes the MPDU program, sets criteria for implementing certain parts of the law, and directs the County Executive to create regulations for the administration of other parts of the law.

The MPDU law describes several components of the process for determining when MPDUs must be built. These include:

- Under what circumstances a subdivision is subject to an MPDU requirement;¹
- The method for determining the required number of MPDUs in a development;² and,
- Alternative methods for developers to meet the MPDU requirements of a development.³

The MPDU law establishes processes for administering the sale or rental of MPDUs, including:

- A process for offering MPDUs for sale or rental to program participants;⁴
- A process for offering a certain percentage of MPDUs for sale to the Housing Opportunities Commission and “other designated agenc[ies] or corporation[s]; and,”⁵
- The period of time that MPDUs remain under price controls.⁶

¹ See MCC § 25A-5(a).

² MCC §§ 25A-5(c); 25A-6(a).

³ MCC §§ 25A-5B; 25A-5(f)(1); 25A-6(b); 25A-5A(a); 25A-5(d)(1). Developers present their proposals for one of the alternative options in a development plan, project plan, or preliminary plan. This option is described in the Zoning Ordinance and the Subdivision law. See MCC §§ 59-D-1.61(a); 59-D-2.42(b); 50-35(l).

⁴ MCC § 25A-8(a).

⁵ MCC § 25A-8(b).

⁶ MCC § 25A-3(g).

In addition, the MPDU law describes the responsibilities of the County, developers, and MPDU occupants, including:

- The form and substance of the Agreement to Build – a contract between a developer and the County that specifies the conditions and obligations of the developer to provide MPDUs in a subdivision;⁷
- A requirement for a developer to execute and record covenants for MPDUs that set forth in the County land records what restrictions apply;⁸ and
- Occupancy requirements for owners and renters of MPDUs.⁹

Under the MPDU law, the County Executive must issue regulations regarding certain parts of the program and has the option of setting regulations for other parts. For example, the law requires the County Executive to set standards to determine who is eligible to buy or rent an MPDU based on household income,¹⁰ to establish sale and rental prices for MPDUs,¹¹ and to promote compliance with requirements for the sale and rental of MPDUs.¹² The law allows, but does not require, the County Executive to set regulations to establish a selection system for choosing which program participants may buy or rent MPDUs offered by developers.¹³

One section of the MPDU law restricts the latitude of the Planning Board in the land use approval process by prohibiting the approval of a preliminary plan or site plan “unless it meets the requirements of” the MPDU law.¹⁴ Furthermore, a preliminary plan or site plan may be “suspended or revoked upon the failure to meet any requirement of” the MPDU law.¹⁵

In addition to the MPDU law, portions of Montgomery County’s Zoning Ordinance (Chapter 59) and Subdivision law (Chapter 50) affect the implementation of the MPDU program. The Zoning Ordinance provides information such as the height and density allowed in a project and other development standards for projects containing MPDUs. The Zoning Ordinance also establishes the rules and procedures that lead to rezonings and land use approvals. The Subdivision law requires the Planning Board to establish an interagency committee to review land use plans, including ones that contain MPDUs, prior to Planning Board consideration and action.

⁷ MCC § 25A-5(b), (e), (g), (i).

⁸ MCC § 25A-5(k).

⁹ MCC § 25A-8(a)(7) to (11).

¹⁰ MCC § 25A-4.

¹¹ MCC § 25A-7(a), (b).

¹² MCC § 25A-9(b).

¹³ MCC § 25A-8(a)(4).

¹⁴ MCC § 25A-10(b).

¹⁵ *Ibid.*

B. Executive Regulation

In 2005, the County Executive prepared and the Council approved Executive Regulation 13-05AM, which superseded previous MPDU regulations. The regulation establishes the policies and procedures for the administration of the MPDU law.

The MPDU regulation:

- Establishes the process for certification of eligibility for the MPDU program;¹⁶
- Outlines MPDU occupancy requirements;¹⁷
- Establishes methods for calculating sale and rental prices for MPDUs;¹⁸
- Specifies procedures for selling and renting MPDUs to program participants, to the HOC, and other eligible entities;¹⁹ and
- Specifies procedures for reselling MPDUs during and after the price control period.²⁰

The regulation applies to “subdivisions having a[n] . . . MPDU requirement, to MPDUs which are sold, resold, or rented through the program, and to persons or households applying for eligibility to purchase or rent an MPDU.”²¹

C. Written Policies and Guidelines

The County Council, DHCA, and the Planning Board have issued or approved written guidelines that affect the implementation of the MPDU program. These different guidelines are described below.

Master Plans and Sector Plans. Master and Sector plans are approved by the County Council and adopted by the Planning Board. A master plan is the document that County Government uses to guide the development and use of land. Sector plans detail land use recommendations for small areas such as central business districts or areas immediately adjacent to a transit (Metro) station. By setting the framework for overall land use policy in specific geographic areas of the County, master and sector plans affect the production and location of MPDUs.

Site Plan Guidelines. To assist in the review of site plans containing MPDUs, in June 1995 the Planning Board approved *Site Plan Guidelines for Projects Containing MPDUs*. These guidelines assist Planning Department staff in evaluating site plan proposals submitted by developers, but do not contain binding requirements.

¹⁶ Executive Regulation 13-05AM § 25A.00.02 [hereinafter “MPDU Regulation”].

¹⁷ MPDU Regulation § 25A.00.02.

¹⁸ MPDU Regulation § 25A.00.05.

¹⁹ MPDU Regulation §§ 25A.00.06; 25A.00.07.

²⁰ MPDU Regulation § 25A.00.08; MPDU Regulation § 25A.00.09.

²¹ See MPDU Regulation Background Information.

Alternative Review Guidelines. In the development process, developers may seek to alter whether or how they are required to build MPDUs in a development. The County Code contains six “alternative compliance measures” that outline a developer’s options, and all six options require approval from the District Council, the Planning Board, or the Director of DHCA. DHCA created a document, effective April 1, 2005, entitled *Procedure for the MPDU Alternative Review Process*, which outlines how a developer can apply and seek approval for an alternative compliance measure.

Construction and Pricing Guidelines. DHCA has created two guidance documents for developers building MPDUs. The *MPDU Pricing Standards*, effective July 2, 2005, establishes minimum and maximum unit sizes for different types of MPDUs (i.e., single-family detached homes, townhouses, condominiums), provides pricing information to set maximum sale prices for units, and contains other information to assist in setting sale prices for units. The *Minimum Specifications for MPDUs*, effective July 2, 2005, provides information such as the types of appliances that all MPDUs must have, the minimum number of bathrooms for different size units, and other required elements.

Guidelines for Calculating MPDU Rental Rates. DHCA created a document entitled *Calculating Rental Rates for MPDUs* that provides, among other things, methodology for calculating standard monthly rents and annual rent increases and DHCA’s policy for utility costs and other service charges.

CHAPTER IV. NUMBER OF MPDUS IN A SUBDIVISION

This chapter describes the legal framework and practices that determine the number of MPDUs required in a subdivision.

This chapter includes six sections:

- **Section A**, Calculation of the MPDU Requirement
- **Section B**, MPDUs and Master Plan Height and Density Limits
- **Section C**, Relationship between MPDUs and Transfer of Development Rights
- **Section D**, MPDU Requirement Established through Zoning Classification
- **Section E**, Alternative Payments and Waivers
- **Section F**, Number of MPDUs – Recent Experience

A. Calculation of the MPDU Requirement

Legal Framework: The MPDU law currently requires most subdivisions with 20 or more units to include an amount of MPDUs that is at least 12.5 percent of the total number of units in the subdivision.¹ As originally enacted in 1974, the MPDU requirement applied to each subdivision with 50 or more dwelling units. In 2002, the Council amended the law to extend the MPDU requirement to most subdivisions with 35 or more dwelling units. In 2004, the Council reduced the minimum subdivision size to 20 units.

The MPDU law allows increased density in exchange for increased production of MPDUs. The Planning Board may approve a site plan that increases density above the base zone density in exchange for building more MPDUs than the minimum 12.5 percent requirement. The maximum density bonus is 22 percent, which may be achieved if a development includes 15 percent MPDUs. Table 4-1 on the next page shows the MPDU requirement (measured as a percent of total project units) associated with density bonus levels ranging from zero to 22 percent.

The MPDU law uses the phrase “not less than” in describing the percent of MPDUs required in a development project.² The Planning Board has interpreted this phrase as meaning that any MPDU calculation that results in a fraction must be rounded up to the nearest whole number to determine the number of MPDUs required in a project. In contrast, the MPDU law uses the phrase “up to” in describing the density bonus achieved by the developer when providing more than 12.5 percent MPDUs.³ The Planning Board has interpreted this phrase as meaning that any bonus density calculation that results in a fraction must be rounded down to the nearest whole number to determine the total number of units in a subdivision.

¹ MCC § 25A-5(a)(1), (c).

² MCC § 25A-5(c)(3).

³ Ibid.

Table 4-1
Formula for Determining Density Bonus
and Number of MPDUs in Development

<i>Achieved Density Bonus</i>	<i>MPDUs Required</i>	<i>Achieved Density Bonus</i>	<i>MPDUs Required</i>
Zero	12.5%	Up to 11%	13.6%
Up to 1%	12.6%	Up to 12%	13.7%
Up to 2%	12.7%	Up to 13%	13.8%
Up to 3%	12.8%	Up to 14%	13.9%
Up to 4%	12.9%	Up to 15%	14.0%
Up to 5%	13.0%	Up to 16%	14.1%
Up to 6%	13.1%	Up to 17%	14.2%
Up to 7%	13.2%	Up to 18%	14.3%
Up to 8%	13.3%	Up to 19%	14.4%
Up to 9%	13.4%	Up to 20%	14.5%
Up to 10%	13.5%	Up to 22%	15.0%

Source: MCC § 25A-5(c)(3).

For developments between 20 and 49 units, the law allows the Planning Board to reduce the MPDU requirement upon finding that achieving a bonus density of 20 percent or more at that location:

- (A) would not allow compliance with applicable environmental standards and other regulatory requirements, or
- (B) would significantly reduce neighborhood compatibility.⁴

For developments with more than 34 but fewer than 50 units that receive a density bonus of at least 20 percent, the Planning Board must reduce the number of MPDUs by one unit if necessary to allow a minimum of one bonus market rate unit in addition to the number allowed under the base zoning.⁵

For many one-family zones,⁶ the County Zoning Ordinance couples the MPDU requirement with optional method development standards that allow variations in unit types and lot dimension requirements.⁷ The flexibility of these standards often lets a developer fit more units on a site than would be allowed by the base zone. A 2004 County Council staff report found that MPDU development standards for one-family

⁴ MCC § 25A-5(d)(1).

⁵ MCC § 25A-5(d)(2).

⁶ The term "one-family zone" is also known as "single-family zone."

⁷ The Zoning Ordinance does not provide special MPDU development standards for most high-rise zones.

projects yielded actual project densities up to 40 percent greater than what could be achieved under the base zone development standards.⁸ Increased overall project density in turn increases MPDU generation in a subdivision.

Practices and Procedures: The Planning Board establishes the number of MPDUs in a development through the preliminary plan and site plan processes. The Planning Board applies the MPDU formula in the County Code to determine the number of MPDUs required in a project at a given allowed density. The number of MPDUs required in a project is a direct function of the total number of units (including market rate) approved for the project. Acreage and physical characteristics (e.g., environmental constraints), coupled with zoning requirements, influence how many units a given site can accommodate. Throughout the site plan review process, changes in the overall number of units in a project likely will result in a change in the required number of MPDUs.

B. MPDUs and Master Plan Height and Density Limits

Legal Framework: The Zoning Ordinance establishes density and/or building height limits for most zones in the County. In some cases, master (or sector) plans establish separate density or height limits below the level allowed in the zone. The master or sector plans limit density or height to promote compatibility of development with surrounding land uses and to promote master plan objectives for an area.

At times, master and sector plan height and density restrictions prevent a developer from achieving additional density that would be allowed through an optional method of development or through the MPDU density bonus. In this way, master and sector plan density and height limits influence the number of both market rate units and MPDUs in a project. The Zoning Ordinance and Subdivision law describe a process for considering whether the combination of density and height limits and MPDU requirements affect the financial feasibility of certain developments. This topic is addressed in detail in Chapter IX.

Practices and Procedures: While reviewing recent master and sector plans, the Planning Board and the Council have considered the interaction between the MPDU requirement and density or height limits. The Council has approved plans that address whether a project may exceed a master plan density or height limit in order to accommodate MPDU bonus density. For example, in the case of the 2006 *Woodmont Triangle Amendment to the Sector Plan for the Bethesda CBD* (hereinafter “*Woodmont Triangle Sector Plan*”), the approved Plan establishes one set of height limits for projects that provide the minimum number of MPDUs (12.5 percent) and another set of height limits for projects that provide MPDUs above the minimum requirement. Exhibit 4-1 shows recommended zoning and height limits by block in a table taken from the approved *Woodmont Triangle Sector Plan*. Earlier master and sector plans do not give similar guidance on how to resolve a potential conflict between density limits and the MPDU density bonus provision.

⁸ *Strengthening the Moderately Priced Dwelling Unit Program: A 30 Year Review: A Report to the Montgomery County Council on Future Program and Policy Options*, February 2004, page 2-3.

Exhibit 4-1
Building Height Limits in the Approved Woodmont Triangle Sector Plan

Recommended Zoning by Block				
Block	Zoning	FAR	Height in Feet with 12.5% MPDUs	MPDU Bonus Height in Feet (up to 22% greater than otherwise allowed but not greater than indicated below)
8	CBD-1	3.0	90	110
9	CBD-1	3.0	90 ¹	110 ¹
10	CBD-1	3.0	90 ²	110 ²
	CBD-R2	5.0	143	174
11	CBD-1	3.0	118	143
12	CBD-R2	5.0	143	174
13 ³	CBD-R2	5.0	143	174
14 ³	CBD-R2	5.0	143	174
15	CBD-1	3.0	90	110
	CBD-R1	3.0	118	143
	CBD-R2	5.0	143	174
20, 21, 22, 23	CBD-1	3.0	50-90	50-110
44	CBD-2	5.0	143	174
45	CBD-R2	5.0	143	174
	CBD-2	5.0	143	174

The height on Parcel 646 may be increased up to 118 feet with 12.5 percent MPDUs or 143 feet with a 22 percent MPDU bonus.
²The height limit on the Plank, Inc. and Troiano properties is 118 feet with 12.5 percent MPDUs or 143 feet, with 22 percent a MPDU bonus.
³Small portions along Norfolk Avenue of Blocks 13 and 14 are zoned CBD-1 and have FAR limits of 3.0, height limits of 90 feet or 110 feet with a 22 percent MPDU bonus.

Source: *Woodmont Triangle Amendment to the Sector Plan for the Bethesda CBD*, page 22 (March 2006).

C. Relationship between MPDUs and Transfer of Development Rights

In certain cases, a developer may increase density for a receiving property by both applying purchased development rights and at the same time invoking the density bonus provision of the MPDU law.

Legal Framework: The Transfer of Development Rights (TDR) program is a program to provide compensation to land owners for a 1980 down-zoning in the County's Agricultural Reserve. Under the TDR program, property owners in the Agricultural Reserve may sell a portion of their development rights to a buyer who could apply those development rights to a property in another part of the County.⁹ The County has designated "receiving areas" that are deemed capable of absorbing density transferred from the Agricultural Reserve.

Practices and Procedures: When a developer requests MPDU bonus density for a subdivision in a TDR receiving area, a question arises as to whether the developer must purchase TDRs for MPDUs. At present, no guidelines exists outlining how to concurrently implement TDR and MPDU requirements in a single property. The Planning Board and Planning Department consider the issue of concurrent application of TDR and MPDU requirements based on the specific characteristics of each case.

⁹ MCC § 59-C-9.

D. MPDU Requirement Established through Zoning Classification

This section discusses the relationship between the zoning reclassification process and the number of MPDUs in a project.

Legal Framework: When requesting a zoning reclassification for certain zones, an applicant must submit a “development plan” that indicates how the proposed development would meet the standards and purposes of the applicable zone.¹⁰ The Zoning Ordinance specifies the required elements of a development plan, including the following two elements that directly relate to MPDUs:

- “The general locations of all residential buildings by dwelling unit type, including moderately priced dwelling units that are the responsibility of the applicant in accordance with the requirements of chapter 25A, and the general location of parking areas.”
- “The proposed development sequence of residential areas, including moderately priced dwelling units, and nonresidential uses.”¹¹

If the District Council approves the reclassification, the subsequent site plan must conform “to all non-illustrative elements of the approved development plan”¹² Therefore, in some cases, the number of MPDUs required in a subdivision may originate in the zoning reclassification process that precedes the preliminary plan and site plan processes.

Practices and Procedures: The District Council considers zoning reclassifications after receiving recommendations from Planning Department staff, the Planning Board, and the Hearing Examiner. Most commonly, these parties evaluate the MPDU component of a development plan in the context of the MPDU formula specified in the law. In one case, the District Council approved a development plan that provided a greater number of MPDUs than required under the MPDU formula (see Section F below).

E. Alternative Payments and Waivers

The MPDU law offers several possible methods for a developer to request a reduction in the number of MPDUs required to be built in a project. This section addresses alternative payments and waivers of the MPDU requirement.

Legal Framework – Alternative Payments: The MPDU law allows the DHCA Director to approve an alternative agreement that permits a developer to make a payment to the Housing Initiative Fund in lieu of providing some or all of the MPDUs required in a

¹⁰ MCC §§ 59-D-1.1; § 59-D-1.3.

¹¹ MCC § 59-D-1.3.

¹² MCC § 59-D-1.2.

subdivision.¹³ The DHCA Director may agree to an alternative payment, commonly referred to as a “buyout,” only if the Alternative Review Committee (consisting of the DHCA Director, the Housing Opportunities Commission Executive Director, and the Director of the Department of Planning) finds that (1) either the cost of mandatory resident services would render the unit unaffordable to MPDU eligible households, or environmental constraints would render the building of all required MPDUs economically infeasible; and (2) the public benefit of the alternative payment would outweigh the value of requiring that MPDUs be built in the subdivision.¹⁴

Prior to April 2005, approval of an alternative payment agreement had been at the sole discretion of the DHCA Director. Effective April 1, 2005, the MPDU law gives the Director this discretion only with the consent of the ARC.

Practices and Procedures – Alternative Payments: The ARC adopted a set of procedures for alternative agreement requests including requests to make a payment in lieu of providing MPDUs. An applicant must submit justification for the request based on the particular facts of the case, the legal requirements of the MPDU law, and other relevant project and financial information. The Committee reviews the submitted information and makes a decision by majority vote. The ARC is discussed in detail in Chapter IX of this report.

Legal Framework – Waivers: The MPDU law establishes a process for a developer to request a waiver of all or part of a project’s MPDU requirement.¹⁵ As part of the preliminary plan or site plan process, the Planning Board may approve a waiver if it finds that the developer “cannot attain the full density of the zone because of any requirements of the zoning ordinance or the administration of other laws or regulations.”¹⁶ The MPDU law further stipulates that “any waiver must be strictly construed and limited.”¹⁷

Practices and Procedures – Waivers: The Planning Board considers an MPDU waiver request as part of its consideration of a proposed preliminary plan or site plan.

¹³ MCC § 25A-5A(a); see Chapter IX for details about alternative agreements. Council Bill 13-07, introduced on June 26, 2007, would eliminate the alternative payment agreement provision from the MPDU law.

¹⁴ MCC § 25A-5A(a).

¹⁵ MCC § 25A-6(b).

¹⁶ Ibid. For projects that do not require any Planning Board approval, the MPDU law authorizes the Director of the Department of Permitting Services to approve an MPDU waiver during the building permit process. Ibid.

¹⁷ MCC § 25A-6(b).

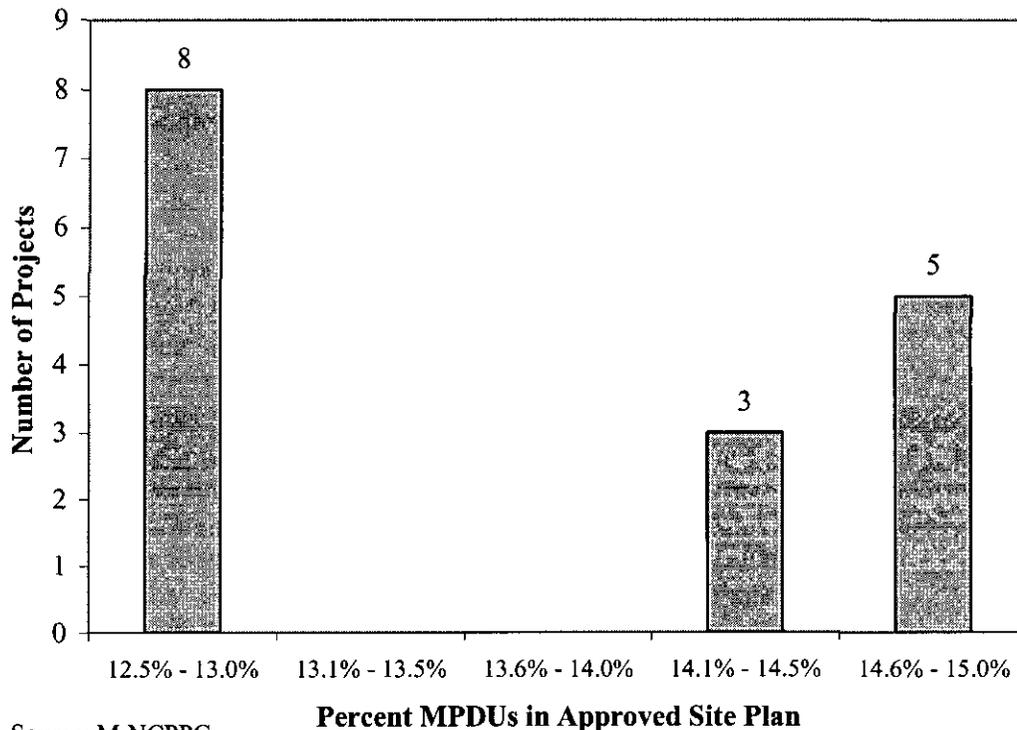
F. Number of MPDUs - Recent Experience

This section describes recent experience regarding the number and percentage of MPDUs produced in residential development projects.

MPDU Production: From April 2005 through April 2007, the Planning Board approved site plans for 16 projects that included MPDUs.¹⁸ Through these site plans, the Planning Board granted approval for the construction of a total of 2,527 market rate residential units and 392 MPDUs.¹⁹ MPDUs comprised 13.4 percent of the combined total units in all of the site plans.

Exhibit 4-2 shows the distribution of approved site plans by the percentage of MPDUs approved in the project. As a result of the practice of rounding up in calculating the required number of MPDUs in a project, some small subdivisions with the minimum 12.5 percent requirement may actually generate a higher percentage of MPDUs.²⁰

Exhibit 4-2
Distribution of Approved Site Plans by Percent MPDUs
April 2005 through April 2007



Source: M-NCPPC

¹⁸ This count excludes amendments to previously approved site plans and projects with approved MPDU alternative agreements.

¹⁹ This calculation is based on the number of units approved from April 2005 through April 2007. Many of the approved units were not yet constructed or occupied during this time period.

²⁰ For example, the minimum 12.5 percent MPDU requirement for a 38-unit subdivision is five units ($38 \times .125 = 4.75$, rounded up to 5 units). Five units are 13.2 percent of 38 units.

Developers use the density bonus provision of the MPDU law to maximize the number of both market rate units and MPDUs. When using the MPDU density bonus, the ratio of market rate units to MPDUs decreases. Nonetheless, the ability to increase overall project density makes the density bonus option attractive for many project developers.

Table 4-2 shows the number of market rate units and MPDUs for a hypothetical project for which the base zoning would permit a total of 80 units. The table shows the total number of market rate units and MPDUs if the project were built with no density bonus and if built with the maximum 22 percent density bonus.

**Table 4-2
Comparison of Market Rate Units and MPDUs
in a Project With and Without a Density Bonus**

	NO DENSITY BONUS (12.5 PERCENT MPDUS)	22% DENSITY BONUS (15 PERCENT MPDUS)
Total Units In Project	80	97
Number of MPDUs	10	15
Number of Market Rate Units	70	82
Market Rate Units per MPDU	7.0	5.5

Source: MCC § 25A-5(c)(3) and OLO calculations.

Additional Density without Additional MPDUs: A recent preliminary plan approved by the Planning Board illustrates a quirk in the MPDU formula that allows a developer to achieve additional density without providing additional MPDUs. In April 2007, the Planning Board considered a project plan and a preliminary plan for the Rugby Condominium project in Bethesda. Under the base CBD-1 zone, the almost half-acre property would have a maximum allowable density of 58 units. Assuming no MPDU density bonus, the developer would have been required to provide eight MPDUs.²¹

The developer requested approval for a six percent density bonus to allow the project to achieve a maximum density of 61 units.²² According to the formula, a six percent density bonus is subject to a 13.1 percent MPDU requirement. In this case, the MPDU requirement (as measured by percent) did not change the actual number of required MPDUs. Even with the density bonus, the number of MPDUs in this project remained at eight units.²³

In describing the formula that allows a developer to achieve a density bonus in exchange for providing more than 12.5 percent MPDUs, the law states that “the required number of MPDUs must vary according to the amount by which the approved development exceeds the normal or standard density for the zone in which it is located.”²⁴ The Planning Board approved the preliminary plan with the density bonus of three additional market rate units and no additional MPDUs.

²¹ MPDU calculation: 58 units x 12.5 percent MPDUs = 7.25, rounded up = 8 MPDUs.

²² Density calculation: 58 units x 6.0 percent density bonus = 61.5, rounded down = 61 total units.

²³ MPDU calculation: 61 units x 13.1 percent MPDUs = 7.99, rounded up = 8 MPDUs.

²⁴ MCC § 25A-5(c)(3).

Alternative Payments and Waivers: From January 2002 through March 2005, the DHCA Director approved 12 alternative payment agreements that relieved developers from providing 312 MPDUs. Since its creation in 2004, the Alternative Review Committee has made the required finding and the DHCA Director has approved one alternative payment agreement for a single MPDU. Over the past decade, the Planning Board has approved an MPDU waiver for two projects. One project, Woodside Courts in Silver Spring, received both an alternative payment agreement and a waiver.

The Woodside Courts property was rezoned from the R-60 to the RT-12.5 zone in 2004 for a proposed project of 26 units. Because the MPDU law at that time did not apply to projects under 35 units, the development plan for this subdivision did not mention any MPDU requirement. However, the developer did not obtain approval of a preliminary plan before the effective date of the 2004 amendments to the MPDU law, which applied the MPDU requirement to subdivisions of 20 or more units. Under the current law, a project of 26 units is required to provide a minimum of four MPDUs.

The Woodside Court developer requested that the Planning Board waive the requirement for all four MPDUs. The developer suggested that the density, environmental, historic preservation, and other limitations of the development plan precluded the possibility of providing MPDUs in the project. The Planning Board approved a waiver for three units, reducing the project's MPDU requirement to a single unit.

The Woodside Court developer then applied to the Alternative Review Committee to make a payment to the Housing Initiative Fund in lieu of providing the one MPDU required in the site plan. The developer claimed that project units were designed and sized based on the development plan requirements and that a substantial loss would be incurred by selling one unit as an MPDU. The developer offered to make a payment in lieu of providing the MPDU. The Alternative Review Committee agreed with the developer and the DHCA Director approved the alternative payment.

The other project that received an MPDU waiver was Jefferson at Inigo's Crossing on the property of the Georgetown Preparatory School in Rockville. In 2002, the property was rezoned from the R-90 to the PD-28 zone. The approved development plan for the project specified that the project would include 53 MPDUs (12.5 percent) added to the market rate unit total (rather than included in the total project unit count). The same MPDU calculation appeared in the preliminary plan that was approved by the Planning Board.

When the Jefferson at Inigo's Crossing project went for site plan approval in 2004, Planning Department staff noted that the MPDU calculation was contrary to the MPDU law and recommended that the project include 66 MPDUs based on the MPDU law density bonus formula. In its site plan decision, the Planning Board acknowledged the unique history of the case, required the developer to provide 53 MPDUs as specified in the development plan, and waived the requirement for 13 MPDUs.

CHAPTER V. STAGING OF MPDUS

“Staging” of MPDUs refers to the sequence in which MPDUs are built relative to market rate units in a development. Staging issues vary depending on development type. High-rise projects generally are built in one continuous phase with most residential units ready for initial occupancy during a relatively short time span. As such, staging is not an issue for high-rise projects.

This report uses the term “phase” to mean geographic subsections of a project as referenced in Planning Board approved plans and agreements between DHCA and a project developer. This report uses the term “stage” or “staging” to describe the sequencing of construction in a development.

This chapter primarily addresses the staging of units in one-family projects. Developers often construct large, one-family projects in multiple sequenced phases. Construction and occupancy of residential units in these projects may span several years.

This chapter describes the legal framework and practices that determine the staging of MPDU construction within a development. This chapter also presents information about the staging of MPDUs in recent development projects and identifies policy and implementation issues related to MPDU staging. This chapter includes four sections:

- **Section A**, MPDU Staging in the Land Use Approval Process
- **Section B**, MPDU Staging in Agreements to Build MPDUs
- **Section C**, MPDU Staging and the Building Permit Process
- **Section D**, MPDU Staging – Recent Experience

A. MPDU Staging in the Land Use Approval Process

For most one-family subdivisions, the first step in determining the number, location, and staging of the MPDUs in a project occurs when a developer submits a development application to the Planning Board. A developer’s application undergoes reviews by Planning Department staff, staff from other organizations, public comment, and ultimately the Planning Board. These reviews may affect the staging of MPDUs in the project.

Legal Framework: The Zoning Ordinance establishes the requirements of land use approval in the County. While the Zoning Ordinance specifies the development standards for projects that include MPDUs, these standards do not address the sequencing of MPDU and market rate construction.

As noted previously, Chapter 50 of the County Code requires that the Planning Board establish a “Development Review Committee” (DRC) to review preliminary plans, project plans, and site plans prior to Planning Board consideration and action. The Code requires that “Planning Department staff 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.”¹ The Code does not identify what specific aspects of the development proposals (for example, MPDU staging) should be the subject of Planning Department staff or other agency’s comments.

Practices and Procedures: When a developer submits an application for a preliminary plan, project plan, or site plan, Planning Department staff review the application and present the proposal to the DRC. DRC participants have an opportunity to comment on the staging of MPDUs in multi-phase projects. The DRC may consider a particular project multiple times as the development moves through the preliminary plan, project plan, and site plan process.

Interviews with DRC participants indicate that the Committee rarely discussed the staging of MPDUs during its review of development proposals. Historically, DHCA representatives did not routinely attend DRC meetings. However, beginning in early 2007, DHCA began to participate in DRC meetings. DHCA staff report that, among other issues, they specifically focus on staging in their comments to the DRC.

Planning Department staff prepare written reports for the Planning Board’s consideration of preliminary plans, project plans, and site plans. For multi-phase projects, Planning Staff reports show the number and location of MPDUs within each phase of the project.

The Planning Board issues written approvals of preliminary plans, project plans, and site plans. The Planning Board also approves a series of large plans and drawings associated with its resolution (known as “certified site plans”). For multi-phase projects, the Planning Board Resolution and the accompanying certified site plans show the number and location of MPDUs within each phase of the project.

Historically, Planning staff reports and Planning Board resolutions did not directly discuss the ratio of MPDUs to market rate units in each phase.² In recent months, however, Planning staff have addressed MPDU staging in reports to the Board. In March 2007, for example, the Planning staff report on the Site Plan Amendment for the Clarksburg Village project recommended increasing the number of MPDUs in the first phase of the project. The previous agreement between DHCA and the developer approved less than 12.5 percent in the first phase.

In the past year, the Planning Board has begun to incorporate a “development program” as a condition of site plan approval. Approved development programs often address overall project phasing but have not specifically addressed the staging of MPDUs.

¹ MCC § 50-35(c).

² In June 1995, the Planning Board approved a one-page document called *Site Plan Guidelines for Projects Containing MPDUs* (see Chapter III). These non-binding guidelines require the “phasing plan contained in [the] site plan to conform to [the staging criteria] of the Montgomery County Code.”

B. MPDU Staging in Agreements to Build MPDUs

DHCA and developers enter into a contract that specifies the conditions and obligations of the developer to provide MPDUs in a subdivision. This contract is known as an “Agreement to Build MPDUs” and describes the staging of a project, as discussed below.

Legal Framework: The MPDU law requires that a developer enter into an Agreement to Build MPDUs with the DHCA Director for each project with MPDUs.³ As stated in the MPDU law, the Agreement to Build must include a staging plan. The law further requires that the staging plan be “consistent with any applicable land use plan, subdivision plan, or site plan.”⁴

The MPDU law specifies that the staging plan in the Agreement to Build must show project development sequencing that adheres to the following four criteria:

- (1) MPDUs are built along with or before other dwelling units;
- (2) no or few market rate dwelling units are built before any MPDUs are built;
- (3) the pace of MPDU production must reasonably coincide with the construction of market rate units; and
- (4) the last building built must not contain only MPDUs.⁵

While the Code requires that an approved preliminary plan or site plan meet the requirements of the MPDU law, the law does not make clear whether the Planning Board must consider the MPDU staging criteria when making its decisions.⁶

Practices and Procedures: The Agreements to Build for each multi-phase project approved since April 2005 include the following text:

The Applicant [developer] must construct MPDUs along with or preceding market rate dwelling units in the subdivision, and the County agrees that compliance with the construction schedule in Exhibit A shall satisfy the MPDU staging requirement

DHCA refers to construction start and completion dates in the Agreement to Build staging plan as the basis for determining whether a project is in compliance with its MPDU staging requirements. “Exhibit A” of each of the Agreements to Build includes a construction schedule table that indicates the number of market rate units and MPDUs in each phase of the development. The table also shows the projected construction start and completion dates for market rate units and MPDUs in each development phase. Exhibit 5-1 shows a blank Agreement to Build construction schedule.

³ MCC § 25A-5(i).

⁴ Ibid.

⁵ Ibid.

⁶ MCC § 25A-10(b).

**Exhibit 5-1
Construction Schedule Table from Agreement to Build Form**

Development Phase	No. of Market Priced Units	Mo. & Yr. Of Constr.1/ Start Of Mkt. Priced Units	Mo. & Yr. Of Constr. 2/ Completion Of Market Priced Units	Number of MPDUs *	Mo. & Yr. Of Constr. Start Of MPDUs	Mo. & Yr. Of Constr. Completion of MPDUs
TOTAL UNITS						

In addition to the construction schedule table, the Exhibit A in the Agreement to Build includes the following text:

MPDUs shall be constructed along with, or preceding, other dwelling units in this subdivision and that failure to comply with this schedule may result in suspension or revocation of any building permit, occupancy permit or subdivision plan The MPDU staging plan must be consistent with the site plan signature set. The applicant must sequence the construction of the MPDUs so that the construction of MPDUs reasonably coincides with the construction of the market rate housing. The last building built must not contain only MPDUs.

Most commonly, DHCA uses the phases from a Planning Board approved site plan to determine the construction schedule phases in a project’s Agreement to Build staging plan. Generally, the number of MPDUs in each phase of an Agreement to Build staging plan is identical to the number of MPDUs in each phase of the approved site plan. In one recent exception to this general rule, DHCA requested that a developer modify the planned sequencing of construction to move the production of some MPDUs earlier in the project. DHCA sought this change to better align the pace of MPDU construction with the pace of market rate construction in the project.

For some projects where the approved site plan does not identify any project phases, DHCA has divided the project into segments for the purpose of creating staging plan phases. As illustrated in Exhibit 5-1, the Agreement to Build construction schedule requires the developer to indicate start and completion dates for MPDUs and market rate

units in each phase of a project. These dates provide DHCA with a tool to monitor and enforce whether MPDU construction occurs concurrent with market rate construction.

The actual pace of project construction often is a product of market conditions. A developer may choose to delay construction of both market rate units and MPDUs in anticipation of more favorable future market conditions. In some cases, developers have built market rate units and MPDUs later than indicated in the Agreement to Build, but at a similar pace. In these cases, DHCA did not find the developer in violation of the staging element of the Agreement to Build.

In some cases, developers have requested that the Agreement to Build construction dates extend several years into the future to accommodate the possibility of a market downturn that might slow project development. Several recent Agreements to Build include construction start and completion dates (for both MPDUs and market rate units) that span a period of four or more years.

As described in Chapter II, DHCA recently created and filled a new MPDU Compliance Monitor position. The Compliance Monitor will conduct field inspections to verify that the pace of MPDU construction meets all requirements of the Agreement to Build and Site Plan.

C. MPDU Staging and the Building Permit Process

The Department of Permitting Services (DPS) is the County Government agency responsible for issuing building permits. DPS interacts with developers, DHCA, and the Planning Department to verify that MPDU requirements have been met prior to the issuance of building permits.

Legal Framework: The MPDU law establishes a link between the Agreement to Build and the issuance of building permits. The law prohibits DPS from issuing building permits for a development prior to execution of the Agreement to Build.⁷ Moreover, the MPDU law stipulates that:

If an applicant [the developer] does not build the MPDUs contained in the staging plan along with or before other dwelling units, the Director of Permitting Services must withhold any later building permit to that applicant until the MPDUs contained in the staging plan are built.⁸

Practices and Procedures: Prior to September 2005, DPS had no system in place to ensure that a developer had an executed Agreement to Build before applying for building permits. OLO's 2005 report, *Fact Finding Review of the Clarksburg Town Center Project*, found that DPS had issued approximately 75 building permits before DHCA and the developer signed the Agreement to Build.

⁷ MCC § 25A-5(h).

⁸ MCC § 25A-5(j).

In September 2005, the Directors of DPS and DHCA approved revised procedures for verifying developer compliance with MPDU staging requirements. At that time, DPS began to require builders to certify that an Agreement to Build has been executed. The developer must provide a copy of an executed Agreement to Build as an attachment to the first building permit application submitted for the development.

In addition, beginning in September 2005, DHCA began to routinely provide DPS and the Planning Department copies of all executed Agreements to Build. DHCA also modified its Agreement to Build form to include site plan numbers and street addresses of all MPDUs in the project. DPS began to provide DHCA with monthly permit approval and building activity reports. DHCA and DPS staff report that these new procedures allow for better tracking by DHCA and DPS of the permitting and construction of MPDUs.

For site plan projects, DPS provides copies of building permit applications to the Planning Department. Planning Department staff review the permits to verify their conformance with site plan conditions. The Planning Department verifies that an Agreement to Build has been executed for the project. Furthermore, within the last year, site plan conditions of approval incorporate language requiring the developer to provide the Planning Department with a copy of an executed Agreement to Build.

Within the past year, DPS has begun to provide DHCA with monthly reports detailing all residential building permits issued. These reports identify units by address to assist DHCA in monitoring the pace of construction of both market rate units and MPDUs.

D. MPDU Staging – Recent Experience

Between April 2005 and April 2007, DHCA executed 14 Agreements to Build MPDUs.⁹ Seven of these Agreements to Build were for high rise developments. As mentioned above, limited opportunity exists to phase the construction and occupancy of units in high-rise projects, and so, these projects generally are not subject to staging requirements. Of the recently executed Agreements to Build for one-family units, one project developed in a single phase while the remaining six projects involved Agreements to Build with multiple development phases.

Tables 5-1a to 5-1f display the planned construction schedules for the six multi-phase projects for which DHCA executed an Agreement to Build between April 1, 2005 and April 1, 2007. The tables show the amount of MPDUs as a percent of total units constructed after the completion of each phase of the project.

The construction schedule phases shown in the tables are those indicated in the Agreement to Build. For projects with multiple phases in the approved site plan, the Agreement to Build used those phases in the staging plan. For other projects, DHCA established staging plan phases in the Agreement to Build.

⁹ This count excludes the National Park Seminary development, which provided all MPDUs in a single multi-family building, and the Regency at Leisure World project, which provided for some MPDUs off-site.

Table 5-1a
Agreement to Build Construction Schedule for Market Rate Units and MPDUs
Eton Square

Agreement to Build Construction Schedule					
	Number Market Rate Units	Percent of Total Market Rate Units		Number MPDUs	Percent of Total MPDUs
Phase 1	69	65.1%		11	68.8%
Phase 2	37	34.9%		5	31.2%
Project Total	106	100.0%		16	100.0%

Source: DHCA

Table 5-1b
Agreement to Build Construction Schedule for Market Rate Units and MPDUs
Fairland View

Agreement to Build Construction Schedule					
	Number Market Rate Units	Percent of Total Market Rate Units		Number MPDUs	Percent of Total MPDUs
Phase 1	6	15.4%		1	20.0%
Phase 2	6	15.4%		1	20.0%
Phase 3	6	15.4%		1	20.0%
Phase 4	6	15.4%		1	20.0%
Phase 5	6	15.4%		0	0.0%
Phase 6	4	11.8%		1	20.0%
Project Total	34	100.0%		5	100.0%

Source: DHCA

Table 5-1c
Agreement to Build Construction Schedule for Market Rate Units and MPDUs
Fraleys Green¹⁰

Agreement to Build Construction Schedule					
	Number Market Rate Units	Percent of Total Market Rate Units		Number MPDUs	Percent of Total MPDUs
Phase 1	32	69.6%		0	0.0%
Phase 2	14	30.4%		7	100.0%
Project Total	46	100.0%		7	100.0%

Source: DHCA

¹⁰ The Planning Board approved the site plan for Phase 1 of this project before the developer acquired the land for Phase 2. No MPDUs were built in Phase 1 because the project did not have enough units to fall under the MPDU law. The developer's acquisition of the adjoining property to build Phase 2 subjected both phases to the MPDU requirement. Consequently, all MPDUs in the subdivision were built in Phase 2.

Table 5-1d
Agreement to Build Construction Schedule for Market Rate Units and MPDUs
Greenway Village

Agreement to Build Construction Schedule				
	Number Market Rate Units	Percent of Total Market Rate Units	Number MPDUs	Percent of Total MPDUs
Phase 1	413	35.6%	41	24.6%
Phase 2	24	2.1%	8	4.8%
Phase 3	106	9.1%	19	11.4%
Phase 4	135	11.6%	0	0.0%
Phase 5	249	21.5%	36	21.6%
Phase 6	76	6.6%	41	24.6%
Phase 7	126	10.9%	22	13.2%
Phase 8	31	2.7%	0	0.0%
Project Total	1,163	100.0%	167	100.0%

Source: DHCA

Table 5-1e
Agreement to Build Construction Schedule for Market Rate Units and MPDUs
Reserve at Fair Hill

Agreement to Build Construction Schedule				
	Number Market Rate Units	Percent of Total Market Rate Units	Number MPDUs	Percent of Total MPDUs
Phase 1	71	62.8%	10	50.0%
Phase 2	42	37.2%	10	50.0%
Project Total	113	100.0%	20	100.0%

Source: DHCA

Table 5-1f
Agreement to Build Construction Schedule for Market Rate Units and MPDUs
Whitehall Square

Agreement to Build Construction Schedule				
	Number Market Rate Units	Percent of Total Market Rate Units	Number MPDUs	Percent of Total MPDUs
Phase 1	32	35.6%	12	75.0%
Phase 2	58	64.4%	4	25.0%
Project Total	90	100.0%	16	100.0%

Source: DHCA

The rate of MPDU production as compared to market rate unit production differs among the projects shown in the tables above. For example, the Agreement to Build for the Eton Square development shows a planned construction schedule in which the pace of MPDU production is almost exactly proportional to the pace of market rate production. The planned construction schedule for Whitehall Square includes a higher proportion of MPDUs in the first of the two project phases. In contrast, the Greenway Village planned construction schedule permits 38 percent of all MPDUs to be built in the final three phases, which include only 20 percent of the market rate units.¹¹

¹¹ While the phases of the Greenway Village Agreement to Build closely resemble the phases of the approved site plan, DHCA required the developer to construct some MPDUs in earlier phases.

CHAPTER VI. LOCATION OF MPDUS

This chapter describes the legal framework and practices that determine the location of MPDUs in a development. This chapter includes three sections:

- **Section A**, Siting MPDUs within a Subdivision
- **Section B**, MPDUs at an Alternative Location
- **Section C**, Location of MPDUs – Recent Experience

A. Siting MPDUs within a Subdivision

This section describes the process for determining the location of MPDUs within a subdivision.

Legal Framework: Neither the MPDU law nor the County Zoning Ordinance establishes requirements regarding the location of MPDUs within a development.¹ Similarly, the Executive Regulation governing the MPDU program does not address the siting of MPDUs in a project.

In June 1995, the Planning Board approved a document called *Site Plan Guidelines for Projects Containing MPDUs*.² The purpose of these non-binding guidelines is to assist Planning Department staff in evaluating site plan proposals submitted by developers. The site plan guidelines encourage locating MPDUs near community amenities and public facilities. In addition, the site plan guidelines address the clustering of MPDUs within a development. The guidelines advise the Planning Board to:

- “Permit townhouse-type buildings containing only MPDUs;”
- “Discourage location of more than 16 back-to-back or piggy-back MPDUs or 30 non-garage townhouse MPDUs adjacent to or confronting each other. Quantities larger than this should be separated from other MPDUs of these two types by market rate buildings. Garage townhouse, duplex, and detached MPDUs would be exempt from limits on aggregation;” and
- “Permit enough clustering of single-family detached and duplex MPDUs to take advantage of production and marketing efficiencies.”

A copy of the complete *Site Plan Guidelines for Projects Containing MPDUs* appears in Appendix A.

¹ As described later in this Chapter, the MPDU law does establish a procedure for the approval of MPDUs at an alternative location.

² Hereinafter *Site Plan Guidelines*.

Practices and Procedures: When a developer submits an application for a preliminary plan, project plan, or site plan, Planning Department staff review the application and present the proposal to the Development Review Committee (DRC).³ Planning Department, DHCA, and HOC representatives to the DRC have an opportunity to comment on the location of MPDUs in a project.

Interviews with DRC participants indicate that the Committee rarely discussed the location of MPDUs during its review of development proposals. Historically, DHCA representatives did not participate in DRC meetings.⁴ Within the past year, DHCA has become a regular participant in DRC meetings.

Dispersal versus Clustering of MPDUs: In speaking to County officials and members of the public, OLO found a prevalent perception that County policy encourages the dispersal of MPDUs within a subdivision. In fact, other than the Planning Board's non-binding MPDU *Site Plan Guidelines*, no written County policy addresses the issue of dispersal or clustering of MPDUs. As detailed later in this chapter, the Planning Board has recently approved some site plans that dispersed MPDUs and others that concentrated MPDUs.

Dispersal of MPDUs achieves several advantageous outcomes. First, scattering MPDUs throughout a development helps integrate MPDU residents within the larger community. Second, the integration of MPDUs and market rate units may allow for more compatible design among all units in a subdivision. Finally, the dispersal of MPDUs among all geographic sections of a project supports the policy goal of concurrent construction of MPDUs and market rate units (see staging requirements described in Chapter V).

Clustering of MPDUs also has its advantages. As mentioned in the Planning Board's MPDU *Site Plan Guidelines*, clustering MPDUs allows a developer to achieve construction and marketing efficiencies, may reduce MPDU production costs, and may assist in keeping MPDUs affordable to program participants (see pricing procedures described in Chapter VII). In addition, clustering of MPDUs (particularly in townhouses) on occasion has resulted in developers advancing the construction of MPDUs to the start of a project when demand slowed for market rate units.

B. MPDUs at an Alternative Location

In the 2004 amendments to the MPDU law, the Council created a new provision allowing, under certain circumstances, a high-rise project developer to build MPDUs at an alternative location.

Legal Framework: The MPDU law authorizes the DHCA Director to allow a developer of a high-rise residential project to build some or all of the required MPDUs at another location in the same planning policy area. The DHCA Director may approve an Agreement to Build for off-site MPDUs upon finding that:

³ See Chapter II for a description of the Development Review Committee.

⁴ An HOC representative has participated in DRC meetings for the past four years.

- (1) the public benefit of locating MPDUs at the proposed alternative location outweighs the value of locating MPDUs in each subdivision throughout the County; and
- (2) building the MPDUs at the proposed alternative location will further the objective of providing a broad range of housing opportunities throughout the County.⁵

Practices and Procedures: DHCA has adopted a set of procedures for alternative compliance requests, including requests for alternative locations. An applicant must submit justification for the request based on the particular facts of the case, the legal requirements of the MPDU law, and other relevant project and financial information.⁶

C. Location of MPDUs – Recent Experience

Location and Distribution of MPDUs: In reviewing recently approved site plans, OLO found a variety of patterns regarding the location and distribution of MPDUs within single-family residential projects. In some projects, MPDUs comprised all the units in a cluster of townhouse sticks surrounding a common parking area. In other cases, MPDUs were the center one or two units in a townhouse stick surrounded on either side by two or three market rate units. In another case, the project included sticks of market rate units with a pair of MPDUs making a perpendicular “T” at one end of the stick. One project included MPDU duplexes designed to look like one-family detached homes.

In high-rise construction, units with similar floor plans (including MPDUs) frequently are stacked one above another. As a result, MPDUs in high-rise projects generally are dispersed among floors.

Alternative Location: Since the 2004 amendment to the MPDU law, the DHCA Director has not approved any requests to locate MPDUs off site. DHCA reports that one developer applied for an alternative location agreement. The DHCA Director denied that request.

⁵ MCC § 25A-5B(a).

⁶ See *Procedure for the MPDU Alternative Review Process*, Appendix B.

CHAPTER VII. DESIGN AND SIZE OF MPDUS

This chapter describes the legal framework and practices that affect the design and size of MPDUs. This chapter includes four sections:

- **Section A**, Lot Size and Unit Type
- **Section B**, Number of Bedrooms
- **Section C**, Design Standards and Specifications
- **Section D**, Design and Size of MPDUs – Recent Experience

A. Lot Size and Unit Type

This section describes the process for determining the lot size and unit type of MPDUs.

Legal Framework: The Zoning Ordinance (Chapter 59 of the County Code) establishes lot size, unit type, and other development standards for land zones in the County. For some one-family zones, the Zoning Ordinance permits development under optional method standards that allow variations in unit types and lot size requirements to facilitate the construction of MPDUs.¹ Table 7-1 compares select development standards for the R-90 base zone and for the R-90 zone under the MDPU optional method.

**Table 7-1
Comparison of Select Development Standards
R-90 Base Zone and R-90 Zone/MPDU Optional Method**

	R-90 (Base)	R-90 (MPDU Optional Method)	
Permitted Unit Types	One-Family Detached	One-Family Detached or Townhouse	
Minimum Lot Area	9,000 sq. ft.	One-Family Detached Market Rate Units	5,000 sq. ft.
		One-Family Detached MPDUs	3,000 sq. ft.
		Townhouses	1,500 sq. ft.
Minimum Front Setback	30 ft.	Market Rate Units	25 ft.
		MPDUs	15 ft.

Source: MCC § 59-C-1.31; § 59-C-1.32; § 59-C-1.62.

¹ MCC § 59-C-1.61.

MPDU optional method development standards apply to all units (including market rate) in a subdivision. The Zoning Ordinance establishes certain development standards specific to MPDUs. For example, for one-family detached MPDUs in the R-90 zone, the Ordinance allows a minimum lot area of 3,000 square feet and a minimum front setback of 15 feet.

As detailed in Chapter VI, the Planning Board approved non-binding site plan guidelines for projects with MPDUs. These guidelines address MPDU unit types, including the following:

- “Encourage a variety of MPDU unit types. Promote, but do not require, duplexes or single-family detached MPDUs in a single-family detached only section of a subdivision. Encourage more than one MPDU unit type in subdivisions with three or more market rate unit types. MPDU unit types and market rate unit types need not be the same.”
- “Prohibit back-to-back townhouse MPDUs unless it can be demonstrated that no other unit type is suitable to the site, that the disadvantages associated with that unit type are eliminated in the site design, and the MPDUs are scattered among market rate back-to-back units.”

A complete copy of the Planning Board’s *Site Plan Guidelines for Projects Containing MPDUs* appears in Appendix A.

Practices and Procedures: For most projects, the Planning Board establishes MPDU lot sizes and unit types through the preliminary plan and site plan processes. Preliminary plan and certified site plans commonly include drawings that depict lot and unit sizes for both MPDUs and market rate units. Following Planning Board approval of a preliminary plan, lot property specifications are “platted” in County land records.

Planning Board approved site plans frequently include design standards for an entire subdivision or for groups of buildings. On some occasions, a Board opinion, Planning Department staff report, or signature set will establish design standards specific to MPDUs. For example, a site plan may specify whether or not a builder must construct MPDUs with a deck or a garage.

B. Number of Bedrooms

This section discusses the minimum number of bedrooms required in MPDUs.

Legal Framework: The MPDU law mandates that each single-family MPDU must have at least three bedrooms.² Prior to the 2004 amendment to the MPDU law, the law required only two bedrooms in a single-family MPDU. In multi-family developments, the law requires that the percentage of MPDUs that are efficiencies and one-bedroom

² MCC § 25A-5(b)(2).

units must not exceed the percentage of market rate units that are efficiencies and one-bedroom units, respectively.³

Before the 2004 amendment to the MPDU law, the DHCA Director had approved alternative agreements that allowed a developer to provide fewer bedrooms than allowed in law. The 2004 amendment precludes the DHCA Director from approving an agreement that reduces the required number of bedrooms in an MPDU.⁴

Practices and Procedures: While site plans frequently indicate the number of bedrooms in MPDUs in multi-family buildings, site plans do not show the number of bedrooms in single-family MPDUs. Agreements to Build signed by DHCA and the project developer do not indicate the number of bedrooms required in single-family MPDUs.

C. Design Standards and Specifications

This section addresses standards and specifications that relate to the design of MPDUs.

Legal Framework: The MPDU law and regulation do not include any standards or specifications regarding the design of MPDUs. The design of MPDUs is addressed in the law and regulation only in the context of setting the sale price of an MPDU. The MPDU law and regulation allow the Director of DHCA to:

- Restrict the design of MPDUs if the associated costs “will lessen the ability of eligible persons to afford the MPDUS;”⁵ and
- Increase the sale price of an MPDU “in exceptional cases” for modifications to the external design of an MPDU “to reduce excessive marketing impact of the MPDUs on the market rate units in the subdivision.”⁶

Practices and Procedures: Two sets of DHCA guidelines, the *Minimum Specifications for MPDUs* and the *MPDU Pricing Standards*, contain requirements and information about certain design aspects in MPDUs.⁷ For example, the *Minimum Specifications for MPDUs* lists certain requirements for all MPDUs, such as:

- Minimum number of bathrooms;
- Minimum size for a hot water heater;
- Required appliances;
- Required specifications for refrigerators and stoves;
- Exterior door requirements; and
- Minimum standards for rough-in plumbing and electrical installation.

³ MCC § 25A-5(b)(3).

⁴ MCC § 25A-5(b)(3).

⁵ See MCC § 25A-7(a)(5); MPDU Regulation § 25A.00.05.1(q).

⁶ See MCC § 25A-7(a)(6); MPDU Regulation § 25A.00.05.1(n). See Chapter VIII for a detailed discussion of allowances for “architectural compatibility” costs.

⁷ See *Minimum Specifications for MPDUs*; *MPDU Pricing Standards*. See Appendix C.

The *MPDU Pricing Standards* primarily address pricing for different components of MPDUs, but do include some design requirements. For example, the *Pricing Standards*:

- Identify minimum and maximum unit sizes in square feet for MPDUs; and
- Require all four bedroom units to have two full bathrooms.

D. Design and Size of MPDUs – Recent Experience

Unit Type and Design: Recently approved site plans include a variety of unit types ranging from high-rise condominiums to garden apartments to townhouses to duplexes. In the past two years, DHCA has approved increased sale prices for MPDUs that reflect costs for “architectural compatibility” features that make the units appear similar to market rate units.⁸ DHCA approved features such as:

- Brick siding;
- Special roof pitch;
- Upgraded trim and lighting;
- Architectural shingles;
- Gables and false dormers;
- Shutters; and
- Upgraded and extra windows.

Unit Size: The size of MPDUs varies greatly depending on the unit type and number of bedrooms. For units offered for sale after April 1, 2005, townhouses ranged in size from 1,050 square feet to 1,590 square feet. Newly constructed condominiums offered for sale during the same timeframe ranged in size from 565 square feet to 1,310 square feet.

Number of Bedrooms: Of the more than 500 new MPDU units that were offered for sale between April 2005 and April 2007, about 25 percent were one-bedroom units, about 43 percent were two-bedroom units, and about 32 percent were three-bedroom units. All one-bedroom units offered in this time period were located in high-rise or garden condominiums. Nearly all the three-bedroom units were townhouses. Table 7-2 shows the number of units offered by number of bedrooms and unit type.

⁸ See Chapter IX for a detailed discussion of architectural compatibility.

Table 7-2
Number of Bedrooms per Unit by Unit Type
MPDUs Offered for Sale: April 2005 through April 2007

Unit Type	One Bedroom	Two Bedrooms	Three Bedrooms	Total Units
Townhouse	0	52	161	213
High-Rise Condominiums	86	20	0	106
Garden Condominiums	43	153	7	203
TOTALS	129	225	168	522

Source: DHCA

DHCA offered 52 two-bedroom townhouses for sale after April 1, 2005, the effective date of the legislation that raised the minimum number of bedrooms in a single-family home to three. These 52 townhouses are located in four subdivisions that each received site plan approval prior to April 1, 2005. The Agreements to Build for these subdivisions did not indicate the number of bedrooms that would be built in specific MPDUs.

CHAPTER VIII. PRICING OF MPDUS

This chapter describes the process for setting prices for MPDU sale and rental units. It examines the law, regulations, policies, and practices involved in establishing these prices. This chapter also identifies and discusses several issues observed in the process for setting prices for MPDU sale units in recent development projects. Finally, this chapter summarizes findings associated with setting sale prices. This chapter includes eight sections:

- **Section A**, Overview of MPDU Sale Prices
- **Section B**, Methodology for Calculating an MPDU Sale Price
- **Section C**, Negotiation of Sale Prices
- **Section D**, Homeowners Association and Condominium Fees
- **Section E**, Overview of MPDU Rental Prices
- **Section F**, Developer and/or Builder Compensation
- **Section G**, Affordability of MPDU Sale Units
- **Section H**, Pricing of MPDUs – Recent Experience

A. Overview of MPDU Sale Prices

Legal Framework: The MPDU law delegates the task of formulating a method to calculate MPDU sale prices to Executive Regulation.¹ By law, the County Executive must consider certain information when issuing MPDU pricing regulations. The County Executive must:

- “[S]eek appropriate information” such as market and economic conditions and current private market housing prices;
- Consult with groups such as the building industry, employers, and citizen groups to “obtain statistical information which may assist in setting a current maximum sale price;”
- Periodically consider changes in income levels of low- and moderate-income individuals; and
- Consider ways to reduce housing costs by limiting amenities, using low-cost building techniques, and only partially finishing certain parts of units (e.g., basements, rough-in bathrooms).²

Additionally, the County Executive must establish, by regulation, a “maximum sale price”³ for MPDUs “including closing costs and brokerage fees”⁴ The law requires this maximum sale price to “continue in effect until changed by later regulation.”⁵

¹ See MCC § 25A-7(a).

² MCC § 25A-7(a)(2).

³ One section of the law refers to “an applicable maximum sale *price*” established by the County Executive. See MCC § 25A-7(a)(1). Another section of the law, however, requires the County Executive to “issue maximum sale *prices* for MPDUs” See MCC § 25A-7(a)(3).

⁴ MCC § 25A-7(a)(1).

The law requires the MPDU sale price regulation to take into account the affordability of MPDUs to program participants, but also directs the County Executive to base the maximum sale price on the cost to produce the housing units. Specifically, the MPDU law states that “[t]he maximum sale prices must be based on the necessary and reasonable costs required to build and market the various kinds of MPDUs by private industry.”⁶ The law also allows annual adjustment of a maximum sale price based on the Consumer Price Index.⁷

While the MPDU law requires the establishment of a “maximum sale price” by regulation, the MPDU regulation itself does not set any maximum sale prices. Instead, the regulation requires DHCA to set pricing standards and minimum specifications “to be used to determine the maximum allowable sales prices of MPDUs.”⁸

The MPDU regulation requires the pricing standards and minimum specifications developed by DHCA to include the following information:

- Basic unit size;
- Minimum and maximum unit sizes;
- Approved maximum cost per square foot construction price;
- Component prices;
- Adjustments;
- Maximum allowable closing costs; and
- Maximum allowable sales commission fees.⁹

Of note, several key pricing terms appear in the MPDU law and regulation without definition. For example, the law and regulation use the following undefined terms in describing MPDU pricing requirements: base sales price, allowable sales price, maximum allowable sales price, allowable structure cost, allowable base cost, and allowable base price.¹⁰

Practices and Procedures: DHCA issued the most recent version of the *MPDU Pricing Standards and Minimum Specifications for MPDUs* (“*Pricing Standards*” or “*Minimum Specifications*”) on July 2, 2005. These documents set pricing and minimum requirements for building MPDUs. For example, for different types of units (e.g., single-family detached, townhouse, high-rise), the *MPDU Pricing Standards* identify information such as:

⁵ MCC § 25A-7(a)(3).

⁶ Ibid.

⁷ MCC § 25A-7(a)(3), (4).

⁸ MPDU Regulation § 25A.00.05.1(a). A different subsection of the MPDU regulation allows the determination of the “maximum allowable sales price” for an MPDU on a case-by-case basis, requiring this price to be “fixed when the offering agreement [offering specific MPDUs for sale] is signed by the Department.” MPDU Regulation § 25A.00.05.1(b).

⁹ MPDU Regulation § 25A.00.05.1(a), (c).

¹⁰ See MPDU Regulation § 25A.00.05.1(d), (h), (f), (n)(2), (n)(3), MCC § 25A-7(a)(6).

- Base, minimum, and maximum unit sizes;
- Allowable costs for construction based on the square footage of a unit;
- Allowable costs for lot development; and
- Allowable costs for additions and subtractions to a unit (e.g., increasing sale price for additional bathrooms, decreasing sale price for not providing a basement).

The *Minimum Specifications for MPDUs* identify builder obligations such as required appliances; required rough-in connections; minimum number of bathrooms; and minimum size for hot water heaters for different types and sizes (based on the number of bedrooms) of units. The *Minimum Specifications* also require builders to provide a list of options and associated prices prior to submitting an offering agreement to DHCA and “[s]election of options must be at the discretion of the purchaser.” DHCA staff report that the most common options offered in MPDUs are: higher grade carpeting and padding, dishwashers, washers and dryers, and sliding shower doors.

See Appendix C for copies of the current *MPDU Pricing Standards* and *Minimum Specifications for MPDUs*.

B. Methodology for Calculating an MPDU Sale Price

Legal Framework: As mentioned above, the MPDU regulation requires DHCA to set pricing standards and minimum specifications to determine maximum MPDU sales prices. DHCA uses a worksheet entitled *Calculation of Sales Prices for MPDUs* (hereinafter “sale price worksheet”) to calculate the sale price of an MPDU. The sale price worksheet incorporates information from the *Pricing Standards*, *Minimum Specifications*, and from other sources as described below.

To arrive at the “Final MPDU Sale Price,” the worksheet calculates a “Base MPDU Sale Price” based on direct construction costs, additional construction and indirect costs, and soft costs. Architectural compatibility costs are then added to the Base MPDU Sale Price to arrive at the Final MPDU Sale Price. See Appendix D for a copy of this worksheet.

- *Direct and Indirect Construction Costs.* The direct construction costs for an MPDU include the cost to build the structure plus additions or deletions identified on the sale price worksheet or in the *Pricing Standards* or *Minimum Specifications*. The structure cost is calculated based on a formula in the sale price worksheet and prices set in the *Pricing Standards*.

Additions and deletions include additional items not required in the *Minimum Specifications* – such as additional bathrooms, charges for end unit townhouses, basement additions or deletions, and garages. Some additions and deletions to the MPDU sales price are based on their actual cost to the builder and some are based on fixed prices in the *Pricing Standards*.

Builders include a variety of items on the worksheet as additional construction costs and indirect costs. Some costs are listed on the worksheet and some are written in by the builder. Examples included on the worksheet are land development costs, water and sewer house connection fees, fire sprinkler system installation costs, site amenities and trails, and rock blast and removal.

- “*Soft Costs.*” The MPDU regulation identifies certain costs – which the DHCA sale price worksheet refers to as “soft costs” – that are always included in the “allowable sales price”¹¹ of an MPDU and “are expressed as a percentage of the base sales price”¹² These soft costs are:
 - Construction loan financing expenses (formula based on the prime rate);
 - Construction loan placement fee (1.5% of base sales price);
 - Legal and closing costs (3.5%);
 - Marketing/Sales commission (1.5%);
 - Builder’s overhead (8%);
 - Engineering and architectural design fees (5%); and
 - General requirements (utilities, permits, etc.) (3%).

These percentages are listed on the sale price worksheet with a formula for incorporating them into the Base MPDU Sales Price. The soft costs total 22.5 percent of the Base MPDU Sale Price plus the construction loan financing expenses.

- *Architectural Compatibility.* The MPDU law allows the Director of DHCA to increase the sale price of an MPDU to allow for a builder’s costs to modify the external design of an MPDU to make it compatible with market rate units in a subdivision.¹³ The MPDU regulation refers to these modifications as “architectural compatibility.”

The law and regulation are inconsistent on the allowable amount of architectural compatibility costs. The law limits the increase in the sales price of an MPDU to up to 10 percent of the “allowable base price” of a unit, if the Director of DHCA finds a justification for the increase “in exceptional cases.”¹⁴ The regulation, however, allows for an increase of 10 percent to the “allowable base cost,” which is then increased by the following soft costs based on a formula in the sale price worksheet:

- Construction loan financing expenses (formula based on the prime rate);
- Construction loan placement fee (1.5%);
- Builder’s overhead (8%);
- Engineering and architectural expenses (5%).¹⁵

¹¹ As described above, neither the MPDU law nor the regulation defines the phrase “allowable sales price.”

¹² MPDU Regulation § 25A.00.05.1(d).

¹³ MCC § 25A-7(a)(6).

¹⁴ MCC § 25A-7(a)(6).

¹⁵ See MPDU Regulation § 25A.00.05.1(n)(3).

As a result, based on the current prime rate of 8.25 percent,¹⁶ builders may increase the sale price of an MPDU by up to 12.1 percent under the MPDU regulation, rather than the 10 percent allowed in the law.

The MPDU regulation allows, and sometimes requires, DHCA to increase or decrease the sales price for an MPDU in certain circumstances on a case-by-case basis. For example:

- DHCA must decrease the allowable sale price by 1.5 percent when HOC or an eligible non-profit purchases a unit;
- DHCA may allow an adjustment to the allowable sale price when a building provides unfinished space for future living areas; and
- DHCA may allow an increase in the allowable sale price when the builder structurally modifies a unit to facilitate access or use by a person with mobility or sensory impairments.¹⁷

Practices and Procedures: DHCA staff report that the final sale price of an MPDU, officially set at the time DHCA and a builder sign a contract offering MPDUs for sale, is established through a combination of using the sale price worksheet and negotiation with builders.

DHCA requires builders to provide documentation supporting information in the sale price worksheet to the Department for review. DHCA staff report that the Department does not have the resources to verify much of the information supplied by builders.

DHCA staff also report that the Department routinely allows builders to include architectural compatibility costs in the sale price of eligible MPDUs.¹⁸ The MPDU sale price worksheet incorporates these costs based on the formula in the regulations, allowing up to 12.1 percent for architectural compatibility costs.

DHCA reports that in recent years the Department has approved architectural compatibility costs that exceeded 10 percent of the base price of an MPDU to encourage builders to design MPDUs that looked like market rate units. According to DHCA staff, within the last year, the Department began limiting architectural compatibility costs to a maximum of 10 percent of the base sale price of an MPDU.

The exhibit on the following page shows an example of how DHCA calculates a final MPDU sale price based entirely on construction costs.

¹⁶ The prime rate has been 8.25% since June 29, 2006.

¹⁷ MPDU Regulation § 25A.00.5.1(f), (h), (l).

¹⁸ Builders cannot include costs for architectural compatibility in high-rise projects or most condominium projects.

Exhibit 8-1

**Example of MPDU Sale Price Calculation Based on DHCA Sale Price Worksheet
(Assuming \$100,000 in direct and indirect construction costs and a prime rate of 8.25%)**

STEP 1: CALCULATION OF SOFT COSTS

Construction loan financing expenses	= (8.25 + 2) x 0.281 = 2.88%
Construction loan placement fee	= 1.5%
Legal and closing costs	= 3.5%
Marketing/Sales commission	= 1.5%
Builder's overhead	= 8.0%
Engineering and architectural design fees	= 5.0%
<u>General requirements (utilities, permits, etc.)</u>	<u>= 3.0%</u>
Soft Cost Percentage	= 25.38%

STEP 2: CALCULATION OF INVERSE RATIO

$$\text{Inverse Ratio} = \frac{100 - \text{Soft Cost Percentage}}{100} = \frac{100 - 25.38}{100} = 0.7462 = 74.62\%$$

STEP 3: CALCULATION OF "BASE MPDU SALES PRICE"

The sale price worksheet uses the inverse ratio to calculate the Base MPDU Sales Price:

$$\text{Base MPDU Sales Price} = \frac{\text{Direct and Indirect Construction Costs}}{\text{Inverse Ratio}} = \frac{100,000}{0.7462} = \mathbf{\$134,012}$$

STEP 4: CALCULATION OF ARCHITECTURAL COMPATIBILITY BASE COSTS

A developer can include up to 10% of the "allowable base price" of a unit in the sale price for architectural compatibility base costs. DHCA uses the Base MPDU Sales Price as the "allowable base price" in this calculation.
Architectural Compatibility Base Costs = \$134,012 x 10% = \$13,401

STEP 5: CALCULATION OF ARCHITECTURAL COMPATIBILITY SOFT COSTS

Construction loan financing expenses	= (8.25 + 2) x 0.281 = 2.88%
Construction loan placement fee	= 1.5%
Builder's overhead	= 8.0%
<u>Engineering and architectural design fees</u>	<u>= 5.0%</u>
Soft Cost Percentage	= 17.38%

STEP 6: CALCULATION OF ARCHITECTURAL COMPATIBILITY INVERSE RATIO

$$\text{Inverse Ratio} = \frac{100 - \text{Soft Cost Percentage}}{100} = \frac{100 - 17.38}{100} = 0.8262 = 82.62\%$$

STEP 7: CALCULATION OF TOTAL ARCHITECTURAL COMPATIBILITY COSTS

$$\text{Architectural Compatibility Costs} = \frac{\text{Base MPDU Sales Price} \times 10\%}{\text{Inverse Ratio}} = \frac{\mathbf{\$13,401}}{0.8262} = \mathbf{\$16,220}$$

(12.1% of base MPDU sales price)

STEP 8: CALCULATION OF "FINAL MPDU SALES PRICE"

Final MPDU Sale Price = Base MPDU Sales Price + Architectural Compatibility Costs

$$\text{Final MPDU Sales Price} = \mathbf{\$134,012 + \$16,220 = \$150,232}$$

As evident from Exhibit 8-1, the process for pricing MPDU sale units involves multiple steps predicated on undefined terms and vague language¹⁹ in the MPDU law and regulation. The requirements in the regulation are subject to interpretation. OLO examined sale price worksheets for 11 recent projects and found some lack of consistency in the pricing calculations.

C. Negotiation of Sale Prices

DHCA staff report that the process for arriving at MPDU sale prices is not based solely on the cost of constructing a unit, but usually involves negotiation with developers on different aspects of the sale price. DHCA staff report that this has been the Department's practice for many years.

D. Homeowners Association and Condominium Fees

Legal Framework: The MPDU law allows the DHCA Director to restrict homeowners and condominium fees and "other costs that reduce the affordability" of MPDUs for purchasers.²⁰ The regulation states that the DHCA Director can "restrict facilities, services or design costs" that will result in "excessive mandatory homeowner or condominium fees" for MPDU owners.²¹ Furthermore, the DHCA Director may require MPDU sellers to make swimming pool, recreation, or health club membership and maintenance fees optional to MPDU purchasers if the Director determines "that obligatory participation or inclusion of these items will significantly reduce the affordability of the MPDU."²²

Practices and Procedures: In practice, DHCA staff report not using these provisions in the MPDU law and regulation to reduce costs or fees associated with MPDUs.

E. Overview of MPDU Rental Prices

Legal Framework: The MPDU law requires the County Executive to issue regulations setting maximum rental prices for MPDUs.²³ The regulations must set different maximum prices for rent based on whether utilities are paid by the renter or by the owner and included in the rental price.²⁴ The regulations may also set different rental prices for age-restricted MPDUs and for MPDUs in high-rise buildings.

¹⁹ See Section A of this chapter.

²⁰ MCC § 25A-7(a)(5).

²¹ MPDU Regulation § 25A.00.05.1(q).

²² MPDU Regulation § 25A.00.05.1(q).

²³ MCC § 25A-7(b)(1).

²⁴ MCC § 25A-7(b)(1); MPDU Regulation § 25A.00.05.2(b).

The law lists nine criteria the County Executive must consider when setting rental prices, including:

- The current cost of building MPDUs;
- Current market rates of return [on] investments in residential rental properties;
- Operating costs; and
- The extent to which the cost of rental housing can be reduced by the elimination of amenities.²⁵

Unlike the process for establishing MPDU sale prices, which is based on the actual construction cost for an MPDU, the MPDU regulation requires that MPDU rental prices be based on maximum income levels of MPDU participants to ensure that the units are affordable to program participants. To calculate monthly rent for a unit with no utilities included in the rent, the regulation takes 25 percent of the applicable annual household income and divides it by 12.²⁶ To calculate monthly rent for a unit with utilities included in the rent, the regulation takes 30 percent of the applicable annual household income and divides it by 12.²⁷

Practices and Procedures: DHCA calculates rental prices for MPDUs in garden apartments based on households earning 65 percent of area median income (AMI) and in high-rise buildings based on 70 percent of AMI.²⁸ Table 8-1 lists the maximum rental price for MPDU rental units without utilities in FY07.

**Table 8-1
Maximum Rental Prices Not Including Utilities for MPDUs in FY07**

Rental Unit Type	Efficiency	1 Bedroom	2 Bedroom	3 Bedroom
Garden Apartment (65% of area median income)	\$896	\$958	\$1,156	\$1,333
High-rise (70% of area median income)	\$969	\$1,036	\$1,240	\$1,432

Source: DHCA; MPDU Regulation § 25A.00.05.2.

See Appendix E for a copy of DHCA's *Calculating Rental Rates for MPDUs*.

²⁵ MCC § 25A-7(b)(2).

²⁶ MPDU Regulation § 25A.00.5.2(d)(5). This amount is rounded to the next highest whole number divisible by 5. Ibid.

²⁷ MPDU Regulation § 25A.00.5.2(d)(6). This amount is rounded to the next highest whole number divisible by 5. Ibid.

²⁸ Median income levels are taken from data published by the U.S. Department of Housing and Urban Development. AMI is calculated based on the median income for a household of four people, rounded to the nearest \$500. The MPDU regulation includes adjustment factors to allow DHCA to calculate the maximum income level for households with fewer or more than four people. See MPDU Regulation § 25A.00.02.2(b).

F. Developer and/or Builder Compensation

Establishing sale prices for MPDUs impacts two aspects of the MPDU program: (1) affordability of units for program participants and (2) the compensation received by the builders for constructing an MPDU.

As stated explicitly in the MPDU law, it is the County's policy that builders incur no loss as a result of building MPDUs. The MPDU law does not characterize this policy in terms of guaranteeing that builders receive full compensation for the cost of constructing each MPDU. Instead, it establishes the policy in the context of the MPDU density bonus and optional method development standards that apply to an entire subdivision:

The County Council hereby declares it to be the public policy of the County to . . . Ensure that private developers constructing moderately priced dwelling units under this Chapter incur no loss or penalty as a result thereof, and have reasonable prospects of realizing a profit on such units by virtue of the MPDU density bonus provision of Chapter 59 and, in certain zones, the optional development standards²⁹

As discussed above in Chapter IV, when a developer includes MPDUs in a project, the developer can also increase the number of market rate units in the development through the MPDU density bonus and/or through optional development standards in certain zones. A 2004 County Council staff report concluded that when developers used the MPDU optional development standards but not MPDU density bonuses, they "generally achieved actual densities up to 40 percent greater than similarly zoned subdivisions without MPDUs."³⁰

Not all zones, however, include MPDU optional development standards. In those zones, a developer can only achieve greater density in a project through the MPDU density bonus by providing more than 12.5 percent and up to 15 percent MPDUs. In high-rise developments, MPDU optional development standards to achieve increased density are not available. In some instances, master plan and sector plan height and density limits constrain the ability of high-rise developers to achieve some or all of the MPDU density bonus.

G. Affordability of MPDU Sale Units

The maximum income that an MPDU program participant may earn is 70 percent of AMI.³¹ Table 8-2 lists the current maximum income levels calculated by DHCA for program participants who buy and rent MPDUs.

²⁹ MCC § 25A-2(6).

³⁰ *Strengthening the Moderately Priced Dwelling Unit Program: A 30 Year Review: A Report to the Montgomery County Council on Future Program and Policy Options*, February 2004, page 2-3.

³¹ MPDU Regulation § 25A.00.02.2(a).

Table 8-2
Maximum Income Levels for MPDU Purchasers as of June 2006

	1 Person Household	2 Person Household	3 Person Household	4 Person Household	5 Person Household
Maximum Income for MPDU Purchasers (based on 70% of area median income)	\$44,000	\$50,500	\$57,000	\$63,000	\$68,500

Source: MPDU Regulation § 25A.00.02.2(a), (b); DHCA.

Based on these income levels and certain assumptions about the terms of a home purchase, DHCA can calculate the maximum price that an MPDU participant can afford to pay to purchase an MPDU.³² Table 8-3 lists the *maximum* price that MPDU participants can afford to pay when purchasing a unit at different interest rates.

Table 8-3
Maximum Affordable Purchase Prices for MPDU Eligible Households
Based on June 2006 Income Levels

	Household Size Assumption	Interest Rate			
		6.00%	6.25%	6.50%	7.00%
0 BEDROOMS	1 person	\$129,897	\$127,500	\$124,625	\$119,526
1 BEDROOM	1.5 people	\$135,052	\$132,500	\$129,518	\$124,331
2 BEDROOM	3 people	\$162,543	\$159,000	\$155,781	\$149,601
3 BEDROOM	4.5 people	\$181,443	\$177,500	\$174,051	\$166,964

Source: DHCA and OLO calculations.

H. Pricing of MPDUs – Recent Experience

The process set in the MPDU regulations for calculating MPDU sale prices is based on the cost of building an individual MPDU. Unlike the process for setting MPDU rental prices, the process for setting MPDU sale prices is not predicated on the affordability of the units for MPDU program participants.

When developers cannot sell all MPDUs in a development to MPDU program participants and DHCA “determines that no additional eligible persons are available to purchase the MPDUs,” developers may offer the MPDUs for sale to members of the general public of any income level at the MPDU sale price.³³ According to DHCA, after

³² To calculate affordability levels, DHCA make the following assumptions: participants can contribute 30% of monthly income to housing; participants make a 3% down payment when purchasing an MPDU; homeowners insurance costs \$200 per year; property taxes cost 1% of the property value per year; private mortgage insurance costs 0.78% of the property value per year; condominium fees are \$3.00 per square foot; and households have 1.5 people per bedroom (studio units with no bedroom are based on 1 person households).

³³ These units are subject to all MPDU laws and regulations, including price controls and resale limitations. See MPDU Regulation § 25A.00.06.2(f).

April 1, 2005, developers were permitted to offer MPDUs for sale to members of the general public in five of the thirteen developments where MPDU sale prices were unaffordable to households earning 70 percent of AMI.

Since April 1, 2005, developers have offered new MPDUs for sale in 20 developments. Table 8-4 shows the number of MPDUs in each of these developments. This table also provides information on the unit type, number of bedrooms, and sale prices for the MPDUs in the developments. In addition, the table indicates the affordability level of the MPDUs in relation to area median income (AMI).

As shown in Table 8-4, basing MPDU sale prices on construction costs has produced many units that are not affordable to most or all eligible households. Of the over 500 MPDUs offered for sale since April 1, 2005:

- 27 percent were unaffordable for all households eligible to participate in the MPDU program;
- 44 percent were affordable to highest earning MPDU households (with incomes between 65 percent and 70 percent of AMI); and
- Only 29 percent of MPDU sale units were affordable to households making below 65 percent of AMI.

The affordability calculations in Table 8-4 are based on a model that assumes households can contribute 30 percent of monthly income to housing. Other affordability models use different assumptions.

In addition, since April 1, 2005, developers have offered new MPDUs for rent in one development. Table 8-5 provides information on this development.

**Table 8-4
Overview of MPDU Sale Offerings Since April 1, 2005**

PROJECT NAME	# OF MPDUS OFFERED FOR SALE	TYPE OF MPDUS		# OF BEDROOMS	SALE PRICE RANGE	MPDUS AFFORDABLE TO HOUSEHOLDS EARNING...
		UNIT TYPE				
Ashmore at Germantown	61	Garden Condominiums		1	\$94,422 to \$94,548	Under 65% AMI
				2	\$115,034	Under 65% AMI
				3	\$117,861	Under 65% AMI
Bethesda Crest	4	Piggyback Townhouse		3	\$152,904 to \$155,280	Under 65% AMI
Buckingham Station (Germantown)	30	Piggyback Condominiums		2	\$155,186	65% to 70% AMI
Clarksburg Town Center	12	Townhouses		3	\$128,482 to \$130,354	Under 65% AMI
Clarksburg Village, Phase 1	20	Piggyback Townhouse		3	\$109,690 to \$118,865	Under 65% AMI
Crescent, The (Silver Spring)	18	High-Rise Condominiums		1	\$160,544 to \$171,539	Over 70% AMI
Eton Square (Germantown)	10	Townhouses		3	\$156,166 to \$163,741	Under 65% AMI
Fraley's Green (Derwood)	7	Townhouses		2	\$144,214	Under 65% AMI
Greenway Village Phases 1, 2 (Clarksburg)	29	Townhouses		3	\$164,284 to \$180,365	Lowest Price Units: Under 65% AMI Highest Price Units: 65% to 70% AMI
Greenway Village Phases 3, 4, 5 (Clarksburg)	19	Townhouses		3	\$164,997 to \$175,702	Lowest Price Units: Under 65% AMI Highest Price Units: 65% to 70% AMI
Kings Crossing / Kings Overlook (Germantown)	102	Garden Condominiums		2	\$149,900 to \$161,900	65% to 70% AMI
Leisure World (Silver Spring)	6	Garden Condominiums		1	\$122,605	Under 65% AMI
				2	\$136,697 to \$140,697	Under 65% AMI

* Affordability levels are based on a formula used by DHCA, 2006 maximum MPDU program income levels, and an assumed borrowing rate of 6.00%.

Table 8-4 (continued)
Overview of MPDU Sale Offerings Since April 1, 2005

PROJECT NAME	# OF MPDUS OFFERED FOR SALE	TYPE OF MPDUS		# OF BEDROOMS	SALE PRICE RANGE	AFFORDABLE TO HOUSEHOLDS EARNING...*
		UNIT TYPE				
Leisure World, Regency at (Silver Spring)	11	Townhouses		3	\$123,638 to \$128,509	Under 65% AMI
Lionsgate at Woodmont Corner (Bethesda)	27	High-Rise Condominiums		1	\$190,575	Over 70% AMI
Meadows at Hurley Ridge (Clarksburg)	41	Townhouses		3	\$171,044 to \$188,963	Lowest Price Units: 65% to 70% AMI Highest Price Units: Over 70% AMI
Montrose Crossing (Rockville)	15	High-Rise Condominiums		1	\$158,375 to \$181,800	Over 70% AMI
Orchard Run (Germantown)	6	Townhouses		2	\$166,054 to \$170,356	Over 70% AMI
Park Potomac (Rockville)	9	Townhouses		2	\$158,400 to \$158,460	65% to 70% AMI
Silverton, The (Silver Spring)	27	Condominiums		1	\$146,864 to \$176,080	Over 70% AMI
				2	\$177,814 to \$183,883	Over 70% AMI
Summerfield Crossing (Clarksburg)	32	Townhouses		3	\$170,242 to \$185,024	Lowest Price Units: 65% to 70% AMI Highest Price Units: Over 70% AMI
White Flint Station (North Bethesda)	33	Garden Condos, converted from rental MPDUs		1	\$144,119	Over 70% AMI
				2	\$160,472 to \$172,020	Lowest Price Units: 65% to 70% AMI Highest Price Units: Over 70% AMI
Whitehall Square (Silver Spring)	16	Townhouses		3	\$152,924 to \$184,838	Lowest Price Units: Under 65% AMI Highest Price Units: Over 70% AMI

Source: DHCA and OLO calculations.

*Affordability levels are based on a formula used by DHCA, 2006 maximum MPDU program income levels, and an assumed borrowing rate of 6.00%.

**Table 8-5
Overview of MPDU Rental Offerings Since April 1, 2005**

PROJECT NAME	# OF MPDUS OFFERED FOR RENT	TYPE OF MPDUS		MONTHLY RENTAL PRICE
		UNIT TYPE	# OF BEDROOMS	
Gables at Rothbury Square (Gaithersburg)	26	Garden Apartments	1	\$730
			2	\$863
			3	\$977

Source: DHCA.

1. Architectural Compatibility Costs

As discussed above, DHCA staff report that the Department routinely approved architectural compatibility costs over the amount allowed by law (10.0 percent of “allowable base price”) or by regulation (12.1 percent). OLO examined pricing worksheets for eight developments that included architectural compatibility costs in the MPDU sale price. Of these eight, five developments included costs at or below the 10 percent allowed in the law and one development included costs at the 12.1 percent level allowed in the regulation.

Two developments included architectural compatibility costs above the 12.1 percent allowed in the regulation. In one development, DHCA allowed architectural compatibility costs that ranged from 14.6 percent to 18.1 percent of the base sale prices. In another development, DHCA allowed developers to include architectural compatibility costs that totaled 39 percent of the base sale price. DHCA staff report that the Department ended this practice within the last year.

2. Workforce Housing Pricing Standards for Sale Units

On July 11, 2006, the Council enacted Bill 30-05 establishing a housing program requiring developers to build housing units affordable to households with incomes at or below 120 percent of AMI in developments with 35 or more market rate dwelling units (hereinafter “Workforce Housing”).

The County Executive published a proposed regulation for the Workforce Housing program in the June 1, 2007 edition of the *Montgomery County Register*. Unlike the MPDU regulation, this proposed Workforce Housing regulation bases the sale price of a Workforce Housing unit on affordability to the participating household.

CHAPTER IX. ALTERNATIVE REVIEW COMMITTEE

In the 2004 amendments to the MPDU law, the County Council created an Alternative Review Committee (ARC) to review requests for certain alternative compliance measures. Alternative compliance measures allow developers in some circumstances to alter whether or how they provide MPDUs in a development. By law, the ARC consists of the DHCA Director, the Planning Department Director, and the Executive Director of the Housing Opportunities Commission (HOC) or their designees. Final authority to agree to an alternative compliance measure varies depending on the measure requested, but rests either with the DHCA Director, the Planning Board, or the District Council.¹

In 2004, the Council increased – from five to six – the number of alternative compliance measures in the law. At the same time, the Council changed the law to make two of the alternative compliance measures contingent on a decision by a majority of the members of an Alternative Review Committee. This Chapter examines the Alternative Review Committee and addresses the following topics:

- **Section A**, ARC Authority
- **Section B**, Alternative Review Committee – Recent Experience

A. ARC Authority

As mentioned above, the Montgomery County Code contains six measures that allow developers, with approval, to alter whether or how they provide required MPDUs in a development. Two of the measures require a developer to submit a project to the Alternative Review Committee. In order for a developer to proceed with a measure that requires ARC approval, a majority of the ARC must make a finding with respect to the project presented. These six measures are described below. The first two measures require ARC approval.

1. **Alternative payment to the Housing Initiative Fund:** The DHCA Director may allow a developer to make a payment to the Housing Initiative Fund (HIF) in lieu of building some or all required MPDUs in a development.² To do so, a majority of the Alternative Review Committee must find that either (1) service and facility fees in a subdivision would make MPDUs unaffordable; or (2) environmental constraints would make the building of all MPDUs on site economically infeasible. In addition, the ARC also must find that the public benefit of the payment would be greater than the value of locating MPDUs in the development.³

¹ State law designates the Montgomery County Council as the “District Council” for the purpose of exercising planning, zoning and subdivision authority in Montgomery County.

² County Council Bill 13-07, introduced on June 26, 2007, would eliminate the alternative payment agreement provision from the MPDU law.

³ MCC § 25A-5A(a)(1), (2).

2. **Additional height or density:** The District Council or the Planning Board may approve a development plan, project plan, or preliminary plan that exceeds height or density limits in a master plan or sector plan if a majority of the ARC finds that the height or density limits make building MPDUs on site financially infeasible.⁴
3. **Alternative Location Agreement:**⁵ This measure is described in Chapter VI.
4. **Land Transfer:** A developer may transfer land designated in an approved preliminary plan or site plan to the County to construct all MPDUs required by law. The County may reject a land transfer “whenever the public interest would best be served thereby.”⁶
5. **Waiver:**⁷ This measure is described in Chapter IV.
6. **Reduction of MPDUs:**⁸ This measure is described in Chapter IV.

The remainder of this chapter focuses on the first two measures, which require ARC approval. Table 9-1 presents information summarizing these two measures.

**Table 9-1
Summary of Measures Requiring ARC Review**

Measure Requiring ARC Review	Applies to:	Final Approval Required From:	Number of Requests Approved Since April 1, 2005
Alternative Payment to the HIF	High service and facility fees	Director of DHCA	ARC agreed with one of two requests.
	Environmental Constraints	Director of DHCA	
Additional Height or Density beyond Master Plan or Sector Plan limits	Zoning Reclassifications with Development Plan	District Council	ARC agreed with all five requests.
	Project Plans	Planning Board	No requests
	Preliminary Plans	Planning Board	No requests

Source: Montgomery County Code; DHCA.

⁴ MCC §§ 50-35(l); 59-D-1.61(a); 59-D-2.42(b).

⁵ MCC § 25A-5B.

⁶ MCC § 25A-5(f).

⁷ MCC § 25A-6(b).

⁸ MCC § 25A-5(d)(1).

1. ARC Application Process

Legal Framework: Neither the MPDU law, the Zoning Ordinance, nor the Subdivision law provides a framework or guidance governing how applicants should bring requests to the ARC. The MPDU regulation provides information for developers seeking to make alternative payments to the HIF, but not for developers seeking additional height or density in a project.

The regulation requires a developer seeking to make an alternative payment to the HIF to submit a written request to the Director of DHCA at least 45 days before submitting a “development application”⁹ for a project.¹⁰ This is the only place in the MPDU law or regulation establishing a procedure for the ARC.

Practice and Procedure: DHCA developed guidelines, effective April 1, 2005, entitled *Procedure for the MPDU Alternative Review Process* (hereinafter *Alternative Review Guidelines*), that outline procedures for developers seeking alternative compliance measures.¹¹ Among other things, these guidelines outline the process for submitting a request for each type of measure.¹² See Appendix B for a copy of the *Alternative Review Guidelines*.

The County’s development review process allows developers to meet with Planning Department staff before filing a development application. The *Alternative Review Guidelines* require developers to make requests for alternative measures during this “pre-application process,” with developers seeking to make an alternative payment to the HIF submitting a request to the Director of DHCA and developers seeking additional height or density submitting a request to the Planning Board.¹³

The *Alternative Review Guidelines* mirror the MPDU regulation’s requirement that developers submit requests to make alternative payments to the HIF at least 45 days before filing a development application.¹⁴ They also require developers to submit requests for additional height and/or density to the Planning Board at least 45 days before filing a development application.¹⁵

The *Alternative Review Guidelines* require requests for alternative payments to the HIF to include the following information: “[a] rationale for why the request should be granted;” evidence to support the request; and information on the economic feasibility of the

⁹ The MPDU regulation defines “development application” as “submitting an original application for a development to the Planning Board (including, but not limited to, a preliminary plan of subdivision, site plan, development plan, or project plan) for approval, or applying to DPS for a building permit when there is no site plan, whichever is applicable.” MPDU Regulation § 25A.00.01.12.

¹⁰ MPDU Regulation § 25A.00.04.4.

¹¹ See *Procedure for the MPDU Alternative Review Process*.

¹² See *ibid.*, pages 2-5.

¹³ *Ibid.*, pages 1, 4, 5.

¹⁴ *Ibid.*, page 4.

¹⁵ *Ibid.*, page 5.

project.¹⁶ Similarly, the *Guidelines* require requests for additional height and/or density to include evidence to support the request.¹⁷

DHCA retains an independent economic advisor on behalf of the ARC to review and evaluate the financial information submitted in each case. The economic advisor provides a confidential written report to the ARC. After receiving requests for ARC review, DHCA staff or Planning Board staff will transmit the request to the ARC and to the outside consultant.¹⁸

2. ARC Review of Projects

Legal Framework: No County law or regulations identify a process for ARC review of projects.

Practice and Procedure: At its first meeting on April 7, 2006, the ARC established a process for its meetings and its review of projects. This process is outlined in a May 1, 2006 memorandum from the DHCA Director to all applicants submitting cases to the ARC. The ARC established the following process:

- An applicant must submit a request for ARC review in writing to the DHCA Director;
- An applicant must submit any supporting documentation and information at least two weeks before an ARC meeting;
- A consultant to the ARC reviews the information submitted by an applicant and writes a report to the ARC;
- Authorized meeting attendees include ARC members or their designees, participating agencies' support staff, participating agencies' consultants, applicant representatives, and applicant's legal counsel;
- A representative of the applicant must attend the ARC meeting to answer any questions from ARC members and staff;
- In a meeting without the applicant present, the ARC reviews the submitted information and makes a decision; and
- The ARC issues a decision memorandum with its findings.

See Appendix F for a copy of this memorandum.

The ARC requires developers to submit detailed financial information about a project that will allow the ARC to make the required determinations under the law. The parties to the ARC report that the ARC requires developers to submit certain standardized information so that the ARC can examine information in a standard format across projects. The *Alternative Review Guidelines* state that financial information submitted by a developer and identified as confidential "will only be available to the minimum number of staff

¹⁶ Ibid., page 4.

¹⁷ Ibid., page 5.

¹⁸ Ibid., page 2, 4, 5.

and/or consultants required to review the information to make a finding of financial infeasibility” and will be kept confidential under the Maryland Public Information Act.¹⁹

Staff to the ARC report that when reviewing projects, the ARC’s economic advisor and ARC members only consider development options presented by developers. The ARC does not suggest or ask for alternative development options.

3. Alternative Review Committee Decisions

As indicated above in Table 9-1 (page 54), a developer must request ARC review of a project when seeking to make an alternative payment to the HIF or when seeking additional building height or residential density beyond what is recommended in a master plan or sector plan.

a. Alternative Payments to the HIF

Legal Framework: The DHCA Director may allow a developer to make an alternative payment to the HIF in lieu of building some or all MPDUs in a project if a majority of the ARC finds one or both of the following:

- Services and facilities available to all residents of the subdivision would cost MPDU buyers so much as to make the MPDU effectively unaffordable to eligible buyers AND the public benefit of the funds to support additional affordable housing would be greater than locating MPDUs in the development; or
- Environmental constraints at a site would render the building of all MPDUs at the site economically infeasible AND the public benefit of the funds to support additional affordable housing would be greater than locating MPDUs in the development.²⁰

Practice and Procedure: The staff to the ARC report that the ARC evaluates requests by developers to make alternative payments to the HIF by looking at a project in its entirety. The ARC examines whether the project would be financed by a reasonable lending institution. To do this, the ARC examines the current market, the types of units in the project, and the location of the project. Considering these factors, the ARC examines whether the project has a likelihood of producing a “reasonable” rate of return.

b. Additional Height or Density

Legal Framework: To approve certain development applications, the District Council or the Planning Board must find that the development application “complies” with or “conforms” to an applicable master plan or sector plan. The law allows a development plan, a project plan, or a preliminary plan to exceed the recommended density or height limits in a master plan or sector plan in order to

¹⁹ *Alternative Review Guidelines*, page 3.

²⁰ MCC § 25A-5A(a)(1)-(2).

accommodate the construction of all MPDUs on site, including any bonus density units.²¹ Plans may exceed these density or height limits, however, only if a majority of the ARC finds “that a development that includes all required MPDUs on site, including any bonus density units, would not be financially feasible within the constraints of any applicable density or height limit.”²²

Neither the MPDU law and regulation, the Zoning Ordinance, nor the Subdivision law provides guidance to the ARC for interpreting the legal standards described above. The staff to the ARC report that the ARC has had to make its own determination of the meanings of these legal standards.

Practices and Procedures: The staff to the ARC report that the Committee has discussed at length what rate of return would make a project seeking additional height and density “financially feasible.” To make a determination of whether a project is “financially feasible,” the ARC requires a threshold finding that a project is financially feasible without MPDUs. If the ARC determines that a project is financially feasible without MPDUs, it examines whether the project is financially feasible with MPDUs within the recommended density and height limits in the applicable master plan or sector plan.

Finally, if the ARC determines that a project is not financially feasible at the recommended height or density limits in the master plan or sector plan with MPDUs, the ARC examines whether alternative options presented by a developer with additional height and/or density are financially feasible.

B. Alternative Review Committee – Recent Experience

The staff to the ARC report that participation on the ARC has fostered beneficial communication and cooperation among DHCA, the Planning Department, and HOC with respect to the ARC’s work and with respect to the overall implementation of the MPDU program.

Seven projects have come before the ARC since its inception. Four of the seven projects were development plans or development plan amendments seeking height and density exceeding the recommended limits in the applicable master plan or sector plan. Two of the projects sought to make payments to the HIF in lieu of building MPDUs. One project sought an advisory opinion from the ARC about the financial feasibility of a conceptual project where a developer was weighing the merits of building a residential building versus an office building.

Table 9-2 on the next page summarizes the projects that have come before the ARC and the context in which they were brought.

²¹ See MCC §§ 59-D-1.61(a) (development plan); 59-D-2.42(b) (project plan); 50-35(l) (preliminary plan).

²² See *ibid.*

**Table 9-2
Summary of Projects Presented to the ARC**

Project	Context of Request	Type of Request	Decision
Edgemoor II, Bethesda ARC Meeting: 4-7-06	Local Map Amendment No. G-842 / Development Plan	Request for additional height and density in a Development Plan.	Financially infeasible without additional height and density. (vote: 3-0)
4901 Hampden Lane, Bethesda ARC Meeting: 5-1-06	Local Map Amendment No. G-819 / Development Plan	Request for additional height and density in a Development Plan.	Financially infeasible without additional height and density. (vote: 3-0)
Lot 31 at Woodmont Ave. and Bethesda Ave., Bethesda ARC Meeting: 6-2-06	Local Map Amendment No. G-850 / Development Plan	Request for additional height and density in a Development Plan.	Financially infeasible without additional height and density. (vote: 3-0)
Woodmont View, Bethesda ARC Meeting: 8-14-06	Development Plan Amendment DPA-06-01	Request for additional height and density in a Development Plan Amendment.	Financially infeasible without additional height and density. (vote: 3-0)
Woodside Courts, Silver Spring ARC Meeting: 8-14-06	Site Plan #8-20060030	Request to make an alternative payment to the HIF based on environmental constraints at the site.	Allow payment to HIF in lieu of providing 1 MPDU. (vote: 3-0)
Pearl Street, Bethesda ARC Meeting: 10-4-06	No application filed with Park and Planning.	Request for additional height and density in a conceptual development.	Financially infeasible without additional height and density. (vote: 3-0)
The Galaxy, Silver Spring ARC Meeting: 10-4-06	Site Plan #8-20060130	Request to make an alternative payment to the HIF based on excessive fees for services and facilities AND environmental constraints at the site.	Do not allow payment to the HIF in lieu of MPDUs. (vote: 3-0)

Source: ARC Decision Memoranda and DHCA.

1. Timing of Submission of Cases to the ARC

The Office of Zoning and Administrative Hearings (OZAH) conducts public hearings and issues reports and recommendations to the District Council on applications for rezoning. After ARC's inception, OZAH reviewed an application for rezoning with a development plan seeking height and density exceeding the limits in a master or sector plan that did not first seek review by the ARC. OZAH put a public hearing on hold so the applicant could seek ARC review of the project. In subsequent cases, Planning Department staff have arranged for ARC review, where required, before the OZAH public hearing.

The *Alternative Review Guidelines*, which specify that requests for alternative measures must be submitted at least 45 days prior to the filing of a development application, were written before April 1, 2005. Staff to the ARC report that the suggested timing in the *Guidelines* does not correspond well to the process for reviewing development applications and that many of the cases reviewed by the ARC did not follow the timing outlined in the *Alternative Review Guidelines*. Overall, the staff to the ARC report that there has been uncertainty regarding the timing of when developers must submit projects for review to the ARC.

2. Evolution of ARC Decision Making

In four of its first five decision memoranda, the ARC made recommendations about subsequent action that should be taken based on its findings. The sections of the law mandating ARC review, however, only require the ARC to make specific findings, not recommendations.

As reported by staff to the ARC, before making its sixth decision, the Committee reassessed its authority under the law. Consequently, the ARC's sixth written decision reports a finding, but does not make a recommendation for action by another entity.

3. Failure to Make a Required Finding

For the Woodside Courts development, the Planning Board required the developer to provide one MPDU and waived the requirement for three others.²³ Subsequently, the developer submitted the project to the ARC, seeking to make an alternative payment to the HIF of \$318,750 based on environmental constraints of the site instead of providing the one required MPDU.

As discussed above, for the DHCA Director to allow an alternative payment on this basis, the ARC must find that environmental constraints at a site make the building of all MPDUs economically infeasible *and* that the public benefit of the funds to support additional affordable housing would be greater than locating MPDUs in the development.²⁴

²³ See Chapter IV for a more detailed discussion of this project.

²⁴ MCC § 25A-5A(a).

In its decision memorandum for the Woodside Courts project, the ARC recommended accepting the alternative payment to the HIF from the developer even though it did not make a finding that the project was “financially infeasible” as required under the law.²⁵ The ARC issued a Decision Memorandum finding “that it was *not financially infeasible* to provide the MPDU”²⁶ On May 16, 2007, the Director of DHCA and the developer of Woodside Courts entered into an Alternative Agreement allowing the developer to make a payment to the HIF in lieu of building the MPDU. Based on the MPDU law, the Alternative Agreement sets out a formula for determining the actual amount of the payment based on the actual sale prices of the market rate units in the development.²⁷

4. Necessity of ARC Review

The interrelation of several provisions of the MPDU law and the Zoning Ordinance that address residential density raise unanswered questions about whether certain projects must be presented to the ARC for review. The following question has arisen before the Planning Board:

- Can the Planning Board approve a project plan for a building with a proposed density exceeding the density recommended in a sector plan without the developer seeking review by the ARC because it is eligible for an MPDU density bonus for including more than 12.5 percent MPDUs?

This question has arisen based on the following:

- The MPDU law allows a developer to receive an MPDU “density bonus” up to 22 percent if the developer builds a percentage of MPDUs in a development greater than the 12.5 percent minimum required by law.²⁸
- Master and sector plans include residential density limits that recommend upper limits on density in certain zones.
- Under the optional method of development in Central Business District (CBD) zones, the Zoning Ordinance allows an increase in the maximum density or residential floor area ratio (FAR) “in proportion to any MPDU density bonus provided on-site.”²⁹
- The Zoning Ordinance, however, requires approval of a majority of the ARC for a project plan to exceed residential density limits established in a master plan or sector plan.³⁰

²⁵ The ARC’s Decision Memorandum in the Woodside Courts case is the last ARC decision to include a specific recommendation for subsequent action.

²⁶ *ARC Decision Memorandum re: Woodside Courts*, page 1 (October 9, 2006) (emphasis added).

²⁷ See MCC § 25A-5A(b).

²⁸ See MCC § 25A-5(c)(3). See also Chapter IV.

²⁹ MCC § 59-C-6.215(b).

³⁰ MCC § 59-D-2.42(b).

On May 17, 2007, the Planning Board reviewed a project plan for the 4900 Fairmont project in Bethesda. This project plan raised the issue for the first time of whether a project proposing a 22 percent MPDU density bonus must seek ARC review if it exceeds a master plan residential density limit in proportion to the MPDU density bonus. The FAR in the proposed project exceeded the FAR that was recommended in the applicable sector plan, the *Woodmont Triangle Amendment to the Sector Plan for the Bethesda CBD*, and established in the Zoning Ordinance with an exception for an MPDU density bonus.³¹

This particular sector plan recommends differentiated height limits for buildings with 12.5 percent MPDUs versus 15 percent MPDUs. It recommends “MPDU Bonus Height” of up to 22 percent for buildings with more than 12.5 percent MPDUs.³² The sector plan does not, however, recommend differentiated density limits for providing additional MPDUs.

Planning Department staff recommended that the Planning Board require the project to appear before the ARC and seek approval of the FAR (1) because the FAR exceeded the recommended limit in the sector plan and set in the Zoning Ordinance; and (2) because the sector plan did not contain language explicitly establishing a higher FAR for buildings with more than 12.5 percent MPDUs. At the same time, Planning Department staff explained to the Planning Board that the Zoning Ordinance provision allowing an increase in the maximum residential FAR “in proportion to any MPDU density bonus provided on-site” could be interpreted to allow a project to exceed the FAR set in the Zoning Ordinance by 22 percent. Ultimately, the Planning Board decided that the project did not need to seek ARC review and approved the project plan with the excess density.

5. Applicability of Maryland’s Open Meetings Act to the ARC

In a recent petition for judicial review challenging the District Council’s approval of a local map amendment and a development plan amendment, the petitioner argued that the ARC’s alleged practice of making decisions in private violates the Maryland Open Meetings Act. The Open Meetings Act requires “public bodies,” as defined by the law, to conduct meetings in open session.³³ The County Attorney argued to the court that the Open Meetings Act does not apply to the ARC because the ARC performs administrative functions that are not covered by the Act. The judge upheld the District Council’s decision without deciding whether the Open Meetings Act applies to the ARC.

Questions about the applicability of the Open Meeting Act to ARC meetings have also been raised before the Hearing Examiner in rezoning cases. The Hearing Examiner has found that regardless of whether the ARC meetings should be public, the rezoning hearing process provides sufficient opportunity for the public to comment on financial feasibility issues, allowing the rezoning process to proceed.

³¹ The Zoning Ordinance set and the sector plan recommend an FAR of 5.0 in the applicable zone. The developer requested approval for an FAR of 6.05.

³² *Woodmont Triangle Amendment to the Sector Plan for the Bethesda CBD*, page 22.

³³ *Maryland Open Meetings Act Manual*, Office of the Attorney General of Maryland, page 2 (6th ed. October 2006).

CHAPTER X. RELATED ISSUES

As described in Chapter I, the scope of this report focuses on issues relating to the implementation of the MPDU program. This report examines a variety of issues related to MPDU implementation including:

- the number of MPDUs required to be built in a subdivision (Chapter IV);
- the staging of MPDU construction relative to market rate construction (Chapter V);
- the location of MPDUs in a subdivision (Chapter VI);
- the design and size of MPDUs (Chapter VII);
- the method for determining sale and rental prices of MPDUs (Chapter VIII); and
- the practices and decisions of the Alternative Review Committee(Chapter IX).

OLO limited the project scope to the topics listed above. In the course of reviewing MPDU implementation policies and practices, OLO identified a group of related issues that were beyond the scope of this project. These related issues include:

- **Income Eligibility Standards:** The MPDU law and regulation and DHCA policies establish income eligibility standards for participation in the MPDU program.
- **Compliance with MPDU Occupancy Requirements:** DHCA enforces MPDU occupancy requirements established in law and regulation.
- **MPDU Sale, Resale, and Rental Procedures:** The MPDU law and regulation and DHCA policies govern the process for selling, reselling, and renting MPDUs. DHCA manages the process for selecting households to purchase new MPDUs and monitors compliance with resale requirements.
- **MPDU Price Control Periods:** The 2004 amendments to the MPDU law changed the price control period for MPDU sale units from 10 to 30 years and for MPDU rental units from 20 to 99 years. DHCA monitors compliance with price controls and is evaluating the effect of the extended controls on other elements of the MPDU program.
- **Growth Policy Units:** County agencies oversee implementation programs for housing units generated through the affordable housing exception in the County's Growth Policy.

CHAPTER XI. FINDINGS AND RECOMMENDATIONS

This chapter presents the Office of Legislative Oversight's (OLO) findings and recommendations regarding the implementation of Montgomery County's Moderately Priced Dwelling Unit (MPDU) Program. Section A of this chapter summarizes OLO's findings and Section B presents OLO's recommendations for Council action.

A. Findings

The County Council requested that OLO assess the implementation of the County's MPDU program. The success of the MPDU program is undeniable. Since 1974, the County's MPDU program has produced more than 12,000 affordable units, far more than any similar program in the country.

The purpose of this study is to assess the implementation of the MPDU program with the goal of identifying opportunities to further strengthen a successful program. In general, OLO found a well-managed program that continues to provide much-needed affordable housing to thousands of County residents. This section describes the strengths of the MPDU program and also identifies some shortcomings in program implementation.

The Office of Legislative Oversight's findings on MPDU implementation are organized into seven parts:

- Number of MPDUs in a Subdivision;
- Location of MPDUs in a Subdivision;
- Staging of MPDUs;
- Design and Size of MPDUs;
- Pricing of MPDUs;
- Alternative Review Committee; and
- Post-Clarksburg Enforcement Initiatives.

NUMBER OF MPDUS IN A SUBDIVISION

Finding #1: MPDU production rates are linked to overall residential development rates. In the last two years, the Planning Board approved new site plans containing approximately 400 MPDUs.

Private development triggers MPDU production. By design, the MPDU program produces affordable housing units as a by-product of the development of new market rate housing. In the last two years, the Planning Board approved new site plans containing more than 2,900 residential units, including approximately 400 MPDUs. MPDUs comprised 13.4 percent of the combined total units in all of the site plans.

Density provisions of the MPDU law influence the number of both market rate units and MPDUs in a project. The MPDU law allows increased project density in exchange for increased production of MPDUs. In about half of all projects, developers opt to provide near the maximum number of MPDUs in order to receive the maximum density bonus. Using the MPDU bonus density option increases overall project density, but decreases the number of market rate units per MPDU.

For many one-family zones, the Zoning Ordinance contains MPDU development standards that provide more flexibility and options than would be permitted under the base zone without an MPDU requirement. MPDU development standards yield project densities up to 40 percent greater than would be achievable under base development standards for many one-family zones. Increased overall project density, in turn, increases MPDU generation in a subdivision.

Finding #2: Based on the density bonus formula in the MPDU law, the Planning Board, in one recent case, approved additional market rate units without additional MPDUs.

The MPDU law includes a formula that allows increased density in exchange for increased production of MPDUs. As stated in the law, “the required number of MPDUs must vary according to the amount by which the approved development exceeds the normal or standard density for the zone in which it is located.” However, in one recent case, the Planning Board approved a site plan in which a developer used the MPDU formula to achieve a density bonus of three market rate units without providing any more MPDUs than would have been required without a density bonus.

Finding #3: The County lacks guidelines for coordinating the implementation of the MPDU program with other policies that affect development density (e.g., master plan height limits or the transferable development rights (TDR) program).

On occasion, multiple County policies that affect development density simultaneously come into play in a single project. For example, in some cases, master plan density or height limits may affect the ability of a developer to achieve an MPDU density bonus. Not all master or sector plans provide the same guidance as to how to resolve a potential conflict between density limits (often expressed in floor area ratio and height) and the MPDU density bonus provision (measured in units).

As another example, a single project may offer a developer an opportunity to request additional density either through the TDR program or through the MPDU program. In such a case, Planning Department staff and the Planning Board consider the concurrent application of these programs during the preliminary plan or site plan process. The procedure for calculating MPDU and TDR requirements may vary from project to project.

Finding #4: Under current laws and practices, MPDU buyouts and waivers are extremely rare occurrences.

The MPDU law offers a developer two ways to petition for a reduction in the number of MPDUs in a project. The first way is a waiver; the second way is an alternative payment agreement. A waiver relieves a developer of responsibility for all or part of an MPDU requirement. Over the past decade, the Planning Board approved waivers for only two projects.

An alternative payment agreement (or “buyout”) allows a developer to make a payment to the Housing Initiative Fund in lieu of providing some or all of the required MPDUs. In the three years prior to the 2004 amendments to the MPDU law, alternative payment agreements reduced MPDU production by more than 300 units.

Since the 2004 amendments, an alternative payment was approved for only one MPDU. The developer in that project proposed a payment of \$318,750 to the Housing Initiative Fund based on a formula in the MPDU law that takes into account the actual sale prices of the market rate units in the development.

Finding #5: In certain cases, the zoning reclassification process determines the number of MPDUs in a project. The number of MPDUs in a project of this type remains constant as the Planning Board proceeds through the site plan process.

The Zoning Ordinance requires that an applicant for certain zoning reclassifications prepare a development plan that, among other things, indicates the number of MPDUs in the proposed project. For an approved reclassification, the Zoning Ordinance requires that the subsequent site plan conform “to all non-illustrative elements of the approved development plan” In practice, MPDU decisions in a development plan remain fixed throughout the subsequent stages of the land use approval process, leaving the Planning Board with no discretion to alter the number of required MPDUs.

In one recent case, an approved development plan included a higher ratio of market rate units to MPDUs than allowed by the formula in the law. During site plan review for the project, the Planning Board decided to waive the requirement for some MPDUs to maintain consistency with the number of MPDUs indicated in the zoning reclassification development plan.

LOCATION OF MPDUS IN A SUBDIVISION

Finding #6: County laws and regulations do not establish requirements regarding the dispersal or clustering of MPDUs within a development project. The Planning Board makes decisions on the location of MPDUs on a case-by-case basis.

The County Code, the County Zoning Ordinance, and the MPDU Executive Regulation establish no rules or guidance regarding the location of MPDUs within a development. Non-binding Planning Board site plan guidelines advise plan reviewers to permit clustering of one-family MPDUs. Recently approved site plans include some that cluster MPDUs together and some that disperse MPDUs among market rate units throughout a subdivision. MPDUs in high-rise projects generally are dispersed among floors.

Finding #7: DHCA has not approved any alternative location agreements allowed under the 2004 amendments to the MPDU law.

The 2004 amendments to the MPDU law authorize the DHCA Director to allow a developer of a high-rise residential project to build some or all of the required MPDUs at another location in the same planning policy area. Since April 1, 2005, the DHCA Director received one request to locate MPDUs at an off-site location. The Director denied that request.

STAGING OF MPDUS

Finding #8: The MPDU law establishes staging criteria that apply to agreements signed by DHCA and project developers. The County Code does not specify whether the MPDU staging criteria apply to Planning Board land use approvals.

The MPDU law establishes staging criteria to assure that the construction of MPDUs occurs concurrent with (or before) the construction of market rate units in a project. The MPDU law requires Agreements to Build signed by the developer and DHCA to contain these criteria. While the Code requires that an approved preliminary plan or site plan meet the requirements of the MPDU law, the law does not make clear whether the Planning Board must consider the MPDU staging criteria when making its decisions.

For some large projects, site plans approved by the Planning Board divide the project into multiple geographic sub-units called "phases." The certified site plans include the number and location of MPDUs in each phase of a project. Site plan phases typically are identified numerically (for example, "Phase 1," "Phase 2A," "Phase 2B," etc.). The numeric designation of phases does not constitute an explicit construction sequencing requirement.

The Planning Board has approved some projects that have included a disproportionately high percent of MPDUs in later (that is, higher number) phases. In recent months, the Board has considered whether to require similar MPDU percentages in each phase of a project. Nonetheless, the County Code does not bind the Planning Board to abide by the same MPDU staging criteria that apply to DHCA.

Finding #9: In addition to requiring that Agreements to Build meet MPDU staging criteria, the MPDU law also requires these Agreements to be consistent with approved site plans. At times, these two requirements may come into conflict.

The Planning Board has approved some projects that include a disproportionately high percent of MPDUs in later phases. In such a situation, DHCA finds itself in a “catch-22” situation. If DHCA approves an Agreement to Build with a development schedule that is consistent with the site plan, it may run afoul of MPDU staging requirements listed in the law. If the Agreement to Build modifies the project construction schedule, DHCA might violate the requirement that the Agreement to Build be consistent with land use approvals.

Finding #10: While the MPDU law requires that “the pace of MPDU production must reasonably coincide with the construction of market rate units,” the law provides no quantitative method for assessing compliance with this standard.

The MPDU law requires that “the pace of MPDU production must reasonably coincide with the construction of market rate units.” The law suggests no quantitative measure for the “reasonably coincide” standard. The law does not indicate whether DHCA must require near or exact proportionality of MPDUs in each phase of a project. By necessity, DHCA has had to make subjective judgments in assessing whether a proposed Agreement to Build construction schedule conforms to the MPDU staging criteria established in the MPDU law.

Finding #11: The MPDU staging criteria spelled out in the MPDU law address the relative pace of market rate and MPDU construction, not the timing or duration of building an entire project. For many projects, the timing and pace of construction are products of changing market conditions.

DHCA enforces MPDU staging based on construction start and completion dates entered into the staging plan of an Agreement to Build. A developer is considered in compliance with the staging plan if the MPDUs required for each phase are started prior to the start date and completed prior to the completion date listed in the Agreement to Build.

Actual development construction schedules are influenced by market forces. Developers may choose to delay construction of a project (both market rate and MPDUs) in anticipation of more preferable customer demand, interest rates, labor availability, or other factors. In some recent cases, developers delayed construction of both market rate units and MPDUs beyond the dates set in the Agreement to Build. The developers subsequently constructed the market rate units and MPDUs at a pace similar to the one indicated in the Agreement to Build. In these cases, DHCA did not find the developer in violation of the staging element of the Agreement to Build.

In recognition of the unpredictable nature of housing market conditions, some developers have proposed -- and DHCA has approved -- construction schedules (for both market rate units and MPDUs) that span a period of four or more years. In such a case, a developer could complete all market rate units two or three years before completing the MPDUs and still be in technical compliance with the Agreement to Build.

DESIGN AND SIZE OF MPDUS

Finding #12: The Zoning Ordinance establishes lot size, unit type, and other development standards for subdivisions with MPDUs. The MPDU law sets requirements for the number of bedrooms in MPDUs.

The Zoning Ordinance establishes lot size, unit type, and other development standards for land zones in the County. For many single-family zones, the Zoning Ordinance permits development under MPDU optional method standards that allow variations in unit types and lot dimensional requirements for all units (including market rate) in a subdivision. In some cases, the Zoning Ordinance establishes development standards specific to MPDUs. The Planning Board establishes MPDU lot sizes and unit types through the preliminary plan and site plan processes.

The MPDU law mandates that each single-family MPDU must have at least three bedrooms. In multi-family developments, the law requires that the percentage of MPDUs that are efficiencies and one-bedroom units must not exceed the percentage of market rate units that are efficiencies and one-bedroom units, respectively. Of the more than 500 new MPDU units that were offered for sale between April 2005 and April 2007, about 25 percent were one-bedroom units, about 43 percent were two-bedroom units, and about 32 percent were three-bedroom units. All one-bedroom units offered in this time period were located in high-rise or garden condominiums. Nearly all the three-bedroom units were townhouses.

Finding #13: Although the law mandates that each single-family MPDU must have at least three bedrooms, neither site plans nor Agreements to Build indicate the number of bedrooms that will be built in single-family MPDUs.

The MPDU law mandates that each single-family MPDU must have at least three bedrooms. While site plans frequently indicate the number of bedrooms in MPDUs in multi-family buildings, site plans do not always show the number of bedrooms in single-family MPDUs. Similarly, Agreements to Build signed by DHCA and a project developer do not indicate the number of bedrooms in each unit listed in the Agreement. The absence of this information in any land use approval or contract complicates enforcement of the minimum bedroom requirement.

Finding #14: County laws and regulations do not establish any MPDU design standards. The design of MPDUs is a matter of developer choice as modified by Planning Board site plan requirements and DHCA specifications.

The MPDU law and regulation do not include any standards or specifications regarding the design of MPDUs. Planning Board approved site plans frequently include design standards for an entire subdivision or for groups of buildings. On some occasions, a Board resolution, Planning Department staff report, or certified site plan will establish design standards specific for MPDUs. Two sets of DHCA guidelines, the *Minimum Specifications for MPDUs* and the *MPDU Pricing Standards*, mandate certain design requirements for MPDUs.

PRICING OF MPDUS

Finding #15: The MPDU Executive Regulation directs DHCA to set MPDU sale prices based on unit construction costs. The Regulation directs DHCA to set MPDU rental prices based on affordability to MPDU program participants.

The sections of the law governing MPDU sale and rental prices do not differ greatly. However, while the MPDU regulation bases the sale price of an MPDU on construction costs, the regulation bases MPDU rental rates on the income level of and affordability to program participants. Similarly, the County Executive's proposed amended regulation for the County's Workforce Housing Program bases the pricing of Workforce Housing sale and rental units on affordability to program participants.

Finding #16: The process for setting MPDU sale prices is complex and predicated on undefined terms and vague language.

Setting MPDU sale prices involves a complex multi-step process. To determine the price of an MPDU, DHCA takes into account, among other things, construction and land development costs, loan financing, marketing costs, builder's overhead, and costs incurred to achieve architectural compatibility.

The MPDU law and regulation use multiple undefined terms as a foundation for the process for setting MPDU prices, including: base sales price, allowable sales price, maximum allowable sales price, allowable structure cost, allowable base cost, and allowable base price.

Finding #17: Since April 1, 2005, 27 percent of the MPDUs offered for sale were considered "unaffordable" to households eligible to participate in the MPDU program. In the same timeframe, only 29 percent of MPDUs were affordable to households earning below 65 percent of area median income (AMI).

To participate in the MPDU program, households must have incomes at or below 70 percent of AMI. Based on a DHCA affordability model that assumes households can contribute 30 percent of their monthly gross income to housing, 27 percent of the MPDUs offered for sale since April 1, 2005 were considered unaffordable to households qualified to participate in the MPDU program. Only 29 percent were considered affordable to households earning below 65 percent of AMI.

Finding #18: In the past, DHCA approved architectural compatibility costs as a component of MPDU sale prices that exceeded the amounts allowed in the MPDU law and regulation. Within the past year, DHCA has ended this practice.

The MPDU law allows the DHCA Director to increase the sale price of an MPDU by up to 10 percent of the allowable base price of a unit for architectural compatibility costs. The MPDU regulation includes soft costs in the allowance for architectural compatibility, which allows an addition of up to 12.1 percent of the allowable base price for architectural compatibility costs. DHCA reports that the Department routinely allowed developers to include architectural compatibility costs in excess of these limits in the sale price of an MPDU. In the past year, however, DHCA discontinued this practice and limits architectural compatibility costs to a maximum of 10 percent.

ALTERNATIVE REVIEW COMMITTEE (ARC)

Finding #19: The County Code provides no criteria to guide the ARC's interpretation of the legal standards that it is required to apply. Accordingly, the ARC has formulated its own criteria for evaluating these standards.

The provisions in the MPDU law, in the Zoning Ordinance, and in the Subdivision law mandating ARC review require the ARC to apply legal standards and make findings, but provide no definitions or guidance on interpreting the legal standards set out in the Code. The County Code requires the ARC to determine when projects are not “financially feasible,”¹ when projects are “economically infeasible,”² and when certain fees make MPDUs “effectively unaffordable to eligible buyers.”³

The County Code, however, does not define these terms. The ARC has evaluated the projects presented based on its understanding and interpretation of the real estate market and economic considerations determined by the Committee.

Finding #20: Staff to the ARC report that there has been uncertainty regarding the timing of when developers must submit projects for review to the ARC.

The MPDU law, the Zoning Ordinance, and the Subdivision law identify the projects requiring ARC review, but do not specify the timing of the review. The MPDU regulation requires applicants to submit a written request to make an alternative payment to the Housing Initiative Fund at least 45 days before filing a development application with the Planning Board. The *Alternative Review Guidelines* reiterate the 45 day timing for requests for alternative payments and establish the same timing for Development Plans and Project Plans seeking additional height and/or density. The *Alternative Review Guidelines*, however, do not mention preliminary plans.

The seven projects that have come before the ARC have not all followed this timing. Some projects had a development application pending before April 1, 2005, the date of the ARC's inception, precluding adherence to these timelines. However, in some projects, Planning Department staff did not realize that a project required ARC review until notified by outside parties, such as staff in the Office of Zoning and Administrative Hearings.

¹ See MCC §§ 59-D-1.61(a); 59-D-2.42(b), 50-35(l).

² See MCC § 25A-5A(a)(1).

³ See *ibid.*

Finding #21: Participants in the land use approval process have had differing opinions as to what triggers ARC review of a project.

The Planning Board decided on May 17, 2007 that a project plan did not require review by the ARC even though the project plan proposed a floor area ratio (FAR) above the limit recommended in the applicable sector plan and set in the Zoning Ordinance. The Zoning Ordinance allows a project plan to exceed a density limit established in a Sector Plan only if a majority of the ARC finds that the project would not be financially feasible with all MPDUs included on site at the density recommended in the Sector Plan.⁴

At the same time, the Zoning Ordinance allows for an increase in residential FAR in the zone applicable to that particular project plan “in proportion to any MPDU density bonus provided on-site,” and the project plan included a 22 percent MPDU density bonus.⁵ The Planning Board concluded that the Zoning Ordinance’s allowance of excess density based on the MPDU density bonus took precedence over the requirement that the ARC review the project plan.

Finding #22: Four of the ARC’s first five decisions recommend subsequent action based on its findings. After re-assessing its authority under the law, the ARC’s subsequent written decision reports a finding, but does not make a recommendation for action by another entity.

The ARC’s interpretation of its authority under the law has evolved over the course of the seven cases it has reviewed. After making affirmative recommendations for subsequent action in four of its first five cases, the ARC decided to include only its findings in subsequent cases.

POST-CLARKSBURG ENFORCEMENT INITIATIVES

Finding #23: County agencies have undertaken several initiatives to remedy MPDU enforcement deficiencies that came to light during the examination of the Clarksburg Town Center project.

The events surrounding the Clarksburg Town Center project brought to light deficiencies in the County’s enforcement of the MPDU law. Specifically, the Department of Permitting Services (DPS) had no system in place to enforce the legal requirement that the Department may not issue project building permits before execution of an Agreement to Build MPDUs. In addition, County officials did not routinely conduct field inspections to enforce the MPDU elements of approved site plans. Since September 2005, County agencies have undertaken several initiatives to remedy these deficiencies.

⁴ MCC § 59-D-2.42(b).

⁵ MCC § 59-C-6.215(b). Many sections of the Zoning Ordinance allow an increase in residential FAR based on an MPDU density bonus, including CBD zones (MCC § 59-C-6.215(b)); TS-R and TS-M zones (59-C-8.42(c)); MXTC zones (MCC § 59-C-11.3(a), (b)); and TOMX 2.0 zones (MCC § 59-C-13.215(a), (b)).

- DHCA now provides DPS and the Planning Department with copies of all executed Agreements to Build.
- DPS now requires builders to attach a copy of an executed Agreement to Build to the first building permit application submitted for a subdivision that includes MPDUs.
- DPS sends DHCA monthly reports detailing all residential building permits issued. These reports assist DHCA in monitoring the pace of construction of market rate units and MPDUs.
- Planning Department staff now review pending building permits to verify their conformance with site plan conditions, including the requirement for an executed Agreement to Build MPDUs.
- The Planning Board now often requires developers to enter into an Agreement to Build MPDUs as a condition of site plan approval.
- DHCA has created two new MPDU implementation and enforcement positions. A new Senior Planning Specialist is responsible for working with the Planning Department to coordinate the implementation of MPDU requirements; serving on the Development Review Committee and providing comments on pending development projects; and reviewing project proposals for conformance with the requirements of the MPDU law and regulation. An MPDU Compliance Monitor position is responsible for enforcement of Agreements to Build and MPDU-related conditions of certified site plans.

B. Recommendations

This section outlines the Office of Legislative Oversight's ten recommendations for Council action to improve implementation of the MPDU law and better achieve the policy goals of the MPDU program. In sum:

- Recommendations #1 through #6 suggest steps to advance MPDU program objectives.
- Recommendations #7 and #8 propose ways to strengthen the enforcement of the MPDU law.
- Recommendations #9 and #10 put forward ideas for more consistent implementation of the MPDU program.

ADVANCING PROGRAM POLICY OBJECTIVES

Recommendation #1: Ask the Executive to amend the MPDU regulation to calculate MPDU sale prices based on affordability to program participants.

The very purpose of the MPDU program is to create housing that is affordable to households earning below 70 percent of area median income (AMI). The current practice of setting MPDU sale prices based on construction costs runs contrary to the purpose of the program. In the past two years, more than a quarter of the MPDUs offered for sale were unaffordable to households earning at or below 70 percent of AMI. The majority of the remaining MPDUs offered for sale were affordable only to the highest earning tier of program participants, those that earn between 65 and 70 percent of AMI.

Precedent exists for using affordability as a basis for setting prices. The MPDU regulation establishes an affordability-based methodology for setting maximum prices for MPDU rental units. In addition, the Executive's proposed Workforce Housing regulation sets prices based on affordability to program participants.

OLO recommends that the Council ask the Executive to amend the MPDU regulation to base MPDU sale prices on affordability to program participants. The regulation should address how the pricing methodology would take into account changes in interest rates. The Executive should also consider whether the regulation should establish separate pricing procedures for MPDUs in high-rise buildings that are subject to master plan height and density limits. OLO recommends that the Council ask the County Executive to transmit a proposed regulation to the Council within the next six months.

Recommendation #2: Amend the MPDU law to require that use of the MPDU density bonus result in at least one additional MPDU.

The MPDU law includes a formula that offers increased project density in exchange for increased production of MPDUs. In one recent case, however, the Planning Board approved a site plan in which a developer used the MPDU formula to achieve a density bonus of three market rate units without providing any more MPDUs than would have been required without a density bonus.

OLO finds this outcome contrary to the requirement that the number of MPDUs vary when a development exceeds standard density for the base zone. OLO recommends that the Council amend the MPDU law to require at least one additional MPDU when a developer achieves additional market rate units through the MPDU density bonus

Recommendation #3: Support continued DHCA participation in Development Review Committee evaluation of preliminary, project, and site plans.

The County Code establishes the Development Review Committee (DRC) to assure coordination of land use and other related policies. The DRC is an interagency task force that reviews land use plans prior to Planning Board consideration and action. Planning Department staff assemble written comments from DRC participants for the Planning Board. Historically, DHCA representatives did not routinely attend DRC meetings and the group rarely discussed MPDU staging, location, or design issues.

Beginning in early 2007, DHCA began to participate regularly in DRC meetings and to submit comments relating to implementation of the MPDU program. OLO considers DHCA involvement in DRC critical to the integration of MPDU policies into the land use approval process. OLO suggests that the Council encourage continued DHCA participation in DRC.

Recommendation #4: Ask the County Executive and Planning Board to adopt a process that results in the drafting of Agreements to Build MPDUs concurrent with the site plan approval and certification process.

The MPDU law requires that Agreements to Build be consistent with land use approvals, including site plans. At the same time, the law requires that Agreements to Build conform to staging criteria that ensure the concurrent development of market rate units and MPDUs. The County Code does not specify whether the MPDU staging criteria apply to Planning Board land use approvals.

Under current practice, DHCA executes Agreements to Build after a development receives site plan approval. As a result, if the Planning Board approves a site plan with a disproportionately high percent of MPDUs in later phases, DHCA must decide whether

to execute an Agreement to Build that meets the site plan consistency requirement but violates the staging requirements or vice versa.

OLO suggests that Agreements to Build should be drafted prior to the certified site plan. This approach will allow for better coordination of MPDU policies with site plan decision-making. As an active participant in the Development Review Committee, DHCA would have an opportunity to raise MPDU staging issues for Planning Board consideration prior to approval of a site plan.

In addition, the Planning Board could make execution of an Agreement to Build that is consistent with site plan elements a condition of final approval. OLO recommends that the Council request that the County Executive and the Planning Board work together and report back in the *Fall* with a recommended process for drafting Agreements to Build MPDUs concurrent with site plan approvals.

Recommendation #5: Convene a working group to evaluate and make recommendations to clarify the rules and procedures related to the Alternative Review Committee (ARC).

The 2004 amendments to the MPDU law set in place a framework for interagency review of developer requests to alter whether or how they provide MPDUs in a development. The Council established an Alternative Review Committee, consisting of the DHCA Director, the Planning Department Director, and the Executive Director of HOC, to assess requests of alternative MPDU compliance measures. The ARC reviews:

- Developers' requests to make alternative payments to the Housing Initiative Fund in lieu of building some or all MPDUs in a development; and
- Developers' proposals in development plans, preliminary plans of subdivision, or project plans for height and/or density beyond the limits recommended in a master or sector plan.

A developer may not receive approval for these alternative compliance measures unless the ARC makes certain findings based on information submitted by the developer.

The sections of the law establishing the ARC, however, lack specificity regarding the way the ARC should conduct its review of projects and regarding the meaning of the legal standards the ARC must apply when reviewing projects. OLO recommends that the Council should convene a working group to review the current law establishing the ARC. This group should make recommendations to the Council regarding the following:

- At what point in the land use approval process should developers with projects requiring ARC review submit projects to the ARC?
- What question or questions is/are the ARC required to answer when examining a project?

- What are the meanings of the legal standards that the ARC must apply? Should the Council establish criteria for evaluating the standards, define the meaning of the standards, or continue the practice of the ARC determining the meaning of the standards?
- What information does a master plan or sector plan need to include regarding density, height, and MPDU bonuses for the relevant parties to know unambiguously which cases must be submitted to the ARC for review?
- What is the appropriate framework for establishing rules for an interagency body like the ARC?

OLO recommends that the Council ask the working group to transmit its recommendations to the Council within the next six months.

Recommendation #6: Decide whether to establish standards for the location and design of MPDUs.

County laws and regulations do not establish standards regarding (1) the location of MPDUs within a development project; or (2) the design of MPDUs. Currently, the location and design of MPDUs are determined on a case-by-case basis. The Council should ask the Planning Board and the Executive to prepare a white paper discussing the advantages and disadvantages of establishing MPDU location and design standards. After reviewing the white paper, the Council may determine whether or not to pursue this issue.

STRENGTHENING ENFORCEMENT

Recommendation #7: Ask the County Executive to draft a regulation to use the building permit process as a mechanism to enforce MPDU staging requirements.

DHCA currently lacks sufficient tools to effectively enforce MPDU staging requirements. The MPDU law establishes staging criteria to assure that the construction of MPDUs occurs concurrent with (or before) the construction of market rate units in a project. The MPDU staging criteria address the relative pace of market rate and MPDU construction, not the timing or duration of project build out.

DHCA enforces MDPU staging requirements based on construction start and completion dates entered into the staging plan of an Agreement to Build. Actual development construction schedules are influenced by market forces. If market conditions prompt a delay in the construction of both market rate units and MPDUs, a developer may be in non-compliance with the Agreement to Build even if the MPDUs were eventually built concurrently with the market rate units. Conversely, if an Agreement to Build includes a construction schedule that spans several years, a developer could build all market rate

units two or three years before the MPDUs and still be in compliance with the Agreement to Build.

OLO suggests that the building permit process offers a more reasonable means of assuring compliance with the MPDU staging requirements. The Executive could develop a procedure allowing DPS to issue building permits as long as a developer maintains a given proportion of market rate units to MPDUs. This requirement would remain in effect at all times and for all project phases to assure that MPDU construction keeps pace with market rate construction throughout project build-out. The required ratio of market rate units to MPDUs should be included in the Agreement to Build and determined case-by-case, based on the specific elements of the project's approved site plan.

OLO recommends that the Council ask the County Executive to draft a regulation by the end of the year that uses the building permit process as a mechanism to enforce MPDU staging requirements.

Recommendation #8: Ask the County Executive to enter into Agreements to Build MPDUs that allow for enforcement of the minimum bedroom requirement set in the MPDU law.

Under current practice, no mechanism exists to enforce the requirement for the number of bedrooms in single-family MPDUs. The MPDU law mandates that each single-family MPDU must have at least three bedrooms. Neither certified site plans nor Agreements to Build indicate the number of bedrooms required in single-family MPDUs. The absence of a bedroom requirement in these documents may impede the ability of DHCA to enforce the MPDU bedroom requirement. OLO recommends that the Council ask the County Executive to identify the number of bedrooms in each specific MPDU in Agreements to Build.

IMPROVING CONSISTENCY OF PROGRAM IMPLEMENTATION

Recommendation #9: Direct the Planning Board to establish written guidelines to address the relationship between the MPDU program and other County policies that affect development density.

The County lacks consistent approaches for coordinating the MPDU program with other policies that affect development density. Different approved master and sector plans provide different guidance as to how to resolve a potential conflict between density and height limits and the MPDU density bonus provision. At present, the Planning Department determines on a case-by-case basis how to concurrently implement TDR and MPDU requirements in a single property.

OLO recommends that the Council direct the Planning Board to establish clear written guidelines specifying (a) the information that must be included in master or sector plans

to avoid confusion over the implementation of the MPDU law for development in areas where the plan recommends a height or density limit; and (b) the requirements for projects built in TDR receiving areas that receive MPDU bonus density. The Council should ask the Planning Board to report back in the Fall of 2007 on the status of this work.

Recommendation #10: Request an analysis of MPDU requirements when considering zoning reclassifications.

MPDU requirements emerging from the rezoning process have differed from those resulting from preliminary or site plan review. Because the Zoning Ordinance requires that a site plan must conform to all non-illustrative elements of an approved zoning reclassification development plan, the Planning Board has limited discretion regarding the number of MPDUs required for a property that has undergone a zoning reclassification. MPDU decisions in development plans have remained fixed throughout subsequent stages of the land use approval process even in a case where a development plan included a miscalculation of the MPDU formula. Therefore, OLO suggests that the Council request a thorough analysis of MPDU requirements included in development plans for proposed zoning reclassifications. In addition, the Council may wish to express development plan MPDU requirements as a percentage (which allows the actual number of MPDUs to vary with the total number of units in a development), rather than as a fixed absolute number.

CHAPTER XII. AGENCY COMMENTS ON FINAL DRAFT

The Office of Legislative Oversight circulated a final draft of this report to the Chief Administrative Officer (CAO) for Montgomery County, the Chair of the Montgomery County Planning Board, the Executive Director of the Housing Opportunities Commission, and the Director of the Office of Zoning and Administrative Hearings. OLO appreciates the time taken by agency representatives to review the draft report and provide comments.

The written comments received from the CAO and the Planning Board Chair are attached in their entirety. Comments from the Chief Administrative Officer begin on the following page. Note that OLO reordered some of the report findings after sending a draft to the CAO for review. The CAO's comments on Finding #15 refer to Finding #17 in this report. Similarly, the CAO's comments on Findings #16 and #17 refer to report Findings #15 and #16, respectively.

Comments from the Planning Board Chair begin on page 86. OLO's final report incorporates technical corrections provided by agency staff during the review period and identified in the comments from the Planning Board.



OFFICES OF THE COUNTY EXECUTIVE

Isiah Leggett
County Executive

MEMORANDUM

Timothy L. Firestine
Chief Administrative Officer

July 11, 2007

TO: Karen Orlansky, Director
Office of Legislative Oversight

FROM: Timothy L. Firestine
Chief Administrative Officer 

SUBJECT: Office of Legislative Oversight Report 2007-9,
A Study of Moderately Priced Dwelling Unit Program Implementation

We have reviewed the Draft Office of Legislative Oversight (OLO) Report 2007-9, A Study of Moderately Priced Dwelling Unit (MPDU) Program Implementation and want to acknowledge the excellent work of OLO staff Aron Trompka and Leslie Rubin in researching and preparing this report. For your information, we are providing the following comments on OLO's findings and recommendations.

Comments on Findings

Finding #9: We concur that in the past this requirement has created instances where the construction phasing requirements of Chapter 25 and the approved site plan were in conflict. We believe the increased participation of the Department of Housing and Community Affairs (DHCA) in the Development Review Committee (DRC) will eliminate future instances of this occurrence.

Finding #13: In general, Paragraph 9 of the standard MPDU Agreement to Build does bind the developer to the bedroom requirements contained in Chapter 25A. However, it is correct that the number of bedrooms for each individual unit is not broken out in detail in the agreement.

Finding #15: We concur with the finding that the MPDU pricing model results in high-rise MPDUs that are often "unaffordable" to one- and two-person households. This result is due to the higher construction costs allowed for high-rise construction, as well as the smaller household sizes eligible to live in one and two bedroom MPDUs located in high-rise buildings. This "mismatch" of unit type with household size is evidenced by the number of requests (as is permitted under Chapter 25A) DHCA receives to sell high-rise MPDUs to non income-eligible households after the list of income-eligible households has been exhausted.

However, it is less definitive to state that MPDU townhouses are “unaffordable” to households participating in the MPDU Program. DHCA determines what is affordable to a particular household income level using a conservative affordability model with conservative inputs. Based on this model, some MPDU townhouses appear to be unaffordable to households earning incomes within the ranges served by the MPDU program. However, all MPDU townhouses have been purchased by households certified by the program; no requests have been made to open the sales of MPDU townhouses to households outside the program. This is primarily due to the fact that mortgage lenders use less conservative models in determining the mortgage level for which a household is eligible.

We are concerned that as construction costs rise faster than household median incomes over time, the MPDU pricing model will result in more townhouses being priced as affordable only to households at the very highest income levels of the program, or beyond the affordability of program participants altogether.

Finding #16: We concur that there is an inconsistency between the methods used to calculate MPDU sales prices and MPDU rents and recommend a pricing model based on affordability to program participants.

Finding #17: We concur that the current method of determining MPDU sales prices is overly complex and vague. DHCA is developing a simpler, more predictable model of MPDU pricing based on affordability to program participants.

Finding #18: In the past, DHCA had allowed higher *architectural compatibility* allowances in order to promote better integration of MPDU design with the overall market rate units in a community. This was especially important given the increased scattering of MPDUs throughout a community. However, DHCA now strictly enforces the requirements of Chapter 25A in order to promote increased housing affordability for MPDU households.

Findings #19 through #22: We concur that the ARC process is not clearly defined in Chapter 25A. This has resulted in an alternative review process that has evolved over time as the ARC members better understand and more clearly define their mission and role.

Finding #23: Staff from DHCA, the Department of Permitting Services (DPS) and M-NCPPC have worked diligently over the last year to improve communication among the agencies and to implement procedures to better monitor and enforce the requirements of Chapter 25A.

Comments on Recommendations

Recommendation #1: We concur with this recommendation in order to ensure that the MPDU units remain affordable to households in the program.

Recommendation #2: We concur with this recommendation.

Recommendation #3: We concur with this recommendation and DHCA will continue this activity.

Recommendation #4 and #7: Given the new monitoring and enforcement procedures established among DHCA, DPS and M-NCPPC, these two recommendations are linked. We support the concept of developing a draft of the Agreement to Build MPDUs (“Agreement”) and inclusion of the draft Agreement as part of the Planning Board packet for a specific development. However, we have reservations about making the execution of the Agreement a condition of final approval by the Planning Board (as per Recommendation #4) for the reasons below.

The system that DHCA and DPS have established to monitor the construction of MPDUs in relation to market rate units depends on identifying the specific street address of each MPDU and market rate unit in the Agreement and entering this information into the Hanson permitting system. With this information, DPS can generate detailed reports from Hanson which allow DHCA to monitor the permitting and building inspections of MPDUs in relation to market rate units. This system is currently in use, and has performed well. This system would serve as the foundation and mechanism used to implement Recommendation #7.

However, street addresses are not assigned by M-NCPPC until the time the final plats are approved, which occurs after final approval of the site plan by the Planning Board. If the final approval of a site plan is conditioned upon execution of the Agreement, there would be no pre-determined procedure in place to collect the required street address information. We believe the current practice of executing an Agreement after final site plan approval but prior to applying for building permits works well and that staff can monitor and ensure that an Agreement reflects the most current approved site plan. As recommended, an Agreement can still be drafted as part of the site plan approval process. We believe Recommendation #7 can be better implemented under the current procedures and practices.

Recommendation #5: Ultimately, we believe that any changes to the ARC or ARC procedures should be considered only after consideration and disposition of Council Bill 13-07 – “Moderately Priced Dwelling Units (MPDUs) Amendments”, which was introduced by the County Council on June 26, 2007. If this bill passes in substantially the same form as drafted, one of the two primary functions of the ARC will be eliminated (specifically, the approval of an alternative payment for two narrowly defined circumstances). The only ARC function that will remain will be the requirement of reviewing requests for additional height or density above that allowed in the applicable sector or master plan.

If the ARC remains in its current form, we have concerns about this recommendation in the absence of changes to Chapter 25A which better define the purpose, functions, and standards that the ARC is to follow. A working group such as is being recommended here was convened between the passage of the amendment to Chapter 25A which created the ARC in November 2004, and the implementation of the ARC on April 2005. This working group included representatives of DHCA, M-NCPPC and the Housing Opportunities Commission (HOC). While the working group tried to define procedures and standards for review, it lacked the legal framework necessary to determine the ARC’s precise responsibilities, the exact standards the

Ms. Karen Orlansky

July 11, 2007

Page 4

ARC should use to make the necessary findings under Chapter 25A, and the precise questions the ARC must ask when reviewing a request. The group also lacked guidance on what circumstances triggered the requirement for an ARC review.

Recommendation #6: We concur with the recommendation that this issue should be examined more thoroughly.

Recommendation #8: We concur with this recommendation.

Thank you for the opportunity to provide our comments. We look forward to working with the Council and OLO in discussing the report and its findings.



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

July 10, 2007

Mr. Aron Trombka
Ms. Leslie Rubin
Montgomery County Office of Legislative Oversight
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, MD 20850

Re: Comments on OLO MPDU Program Study

Dear Mr. Trombka and Ms. Rubin:

The Planning Department was very pleased to be able to review the advance draft of the OLO report entitled *A Study of Moderately Priced Dwelling Unit Program Implementation*. A team of staff selected by our Acting Director, Gwen Wright, reviewed Chapters II through VII and IX through XI. Overall, staff found the document to be a holistic and thorough look at the MPDU program since the new legislation went into effect in April of 2005.

As you know, it is very important for OLO to understand what the Planning Board can and cannot do within the framework of the MPDU legislation. During our staff's review, they did find indication that there is still some misunderstanding about our role in the process, and I think that the specific comments provided by staff will help clarify that.

The comments provided by staff fell into four categories: 1.) global corrections of terminology, 2.) clarification of the role played by MNCPPC in the MPDU process, 3.) inclusion of more nuanced language to describe events and outcomes, and 4.) typographic corrections.

Examples of global changes included a variety of new terms, such as: "signature set" is now "certified site plan"; "opinion" is now "resolution"; "maps" are "plans"; and "subdivision plans" are not the same as "site plans."

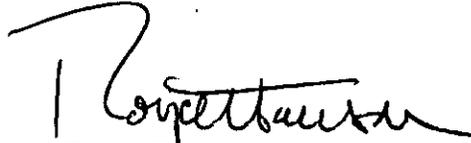
Examples of substantive clarifications involved describing what the Planning Board does **not** do within the MPDU process, as well as what it does. For example, the Planning Board does not approve development plans, nor can it undo a Court of Appeals interpretation of the MPDU calculation. Our goal is providing this clarification is to ensure that the OLO Report is clear on the Planning Board's role.

Another substantive clarification made by staff was that the zoning ordinance does not designate zoning on parcels. The master plans do that. There was additional clarification on the existing confusion related to rounding within the MPDU ordinance that makes calculations

seem erroneous, when in fact they are not. Finally, staff pointed out the conflicts within the interpretation of the interface between the MPDU and TDR calculations.

The Planning Department looks forward to receipt of your final document and to the opportunity to review it. If you have any questions about our comments, please do not hesitate to call Acting Director, Gwen Wright, or me.

Regards,

A handwritten signature in black ink, appearing to read "Royce Hanson". The signature is written in a cursive style with a large initial "R".

Royce Hanson
Chairman
Montgomery County Planning Board

RH:gw:ss

APPENDICES

Appendix A: <i>Site Plan Guidelines for Projects Containing MPDUs</i>	A1
Appendix B: <i>Procedure for the MPDU Alternative Review Process</i>	B1
Appendix C: <i>MPDU Pricing Standards and Minimum Specifications for MPDUs</i>	C1
Appendix D: <i>Calculation of Sales Prices for MPDUs</i>	D1
Appendix E: <i>Calculating Rental Rates for MPDUs</i>	E1
Appendix F: <i>May 1, 2006 Memorandum from DHCA Director regarding Alternative Review Committee</i>	F1

SITE PLAN GUIDELINES FOR PROJECTS CONTAINING MPDUS

Approved 6/1/95

GUIDELINES FOR UNIT TYPES	
(1)	Encourage a variety of MPDU unit types. Promote, but do not require, duplexes or single-family detached MPDUs in a single-family detached only section of a subdivision. Encourage more than one MPDU unit type in subdivisions with three or more market rate unit types. MPDU unit types and market rate unit types need not be the same.
(2)	Prohibit back-to-back townhouse MPDUs unless it can be demonstrated that no other unit type is suitable to the site, that the disadvantages associated with that unit type are eliminated in the site design, and the MPDUs are scattered among market rate back-to-back units.
(3)	Encourage innovative site and building configurations for townhouses, piggy-backs, quadriplexes, triplexes, duplexes, small-lot detached units, and apartments. Solicit comments from agencies most familiar with the market, delivery, and life of MPDUs prior to preparation of site plans for review.
GUIDELINES FOR MPDU LOCATIONS AND SITE PLAN FEATURES	
(4)	Discourage location of more than 16 back-to-back or piggy-back MPDUs OR 30 non-garage townhouse MPDUs adjacent to or confronting each other. Quantities larger than this should be separated from other MPDUs of these two types by market rate buildings. Garage townhouse, duplex, and detached MPDUs would be exempt from limits on aggregation.
(5)	Permit townhouse-type buildings containing only MPDUs.
(6)	Encourage, but do not require, MPDUs and market rate units on a single garden apartment stairwell. If an individual stairwell has only MPDUs, then the remainder of the building must contain some or all market rate units.
(7)	Encourage distribution of any MPDU-only apartment stairwells among the market rate stairwells.
(8)	Continue to advocate siting of MPDUs to facilitate access to public facilities.
(9)	Permit enough clustering of single-family detached and duplex MPDUs to take advantage of production and marketing efficiencies.
(10)	Continue to give special attention to site plans for MPDUs in order to provide useable open space, play and congregating areas near units, age-appropriate recreation, adequate parking for residents and guests, and adequate provision for storage and garbage collection.
(11)	Ensure that open space and recreational facilities which are required for site plan approval are equally available to all residents, regardless of income or unit type.
(12)	Continue to require close proximity for MPDUs to open space and recreation facilities required for site plan approval; where off-site recreation facilities are allowed, locate MPDUs nearby unless additional, age-appropriate facilities are located near the MPDUs.
(13)	In townhouse and garden apartment areas where residents lack individual private and defensible yards, continue to require open space areas which are adjacent and useable; steep slope and inaccessible open space areas are insufficient.
(14)	Require phasing plan contained in site plan to conform to Section 25A-5(i) of the Montgomery County Code.
(15)	Clearly identify MPDUs on all site plan applications and signature set drawings.
(16)	Clearly state on the record plat that the site provides MPDUs, the location of which are shown on the site plan.

**PROCEDURE FOR THE
MPDU ALTERNATIVE REVIEW PROCESS**

Effective April 1, 2005

The Moderately Priced Housing Law includes several options for developers to take advantage of Alternative Compliance Measures to provide MPDUs. On November 30, 2004, amendments to the MPDU law were adopted by the County Council in Bill No. 24-04/25-04/27-03 (technical corrections were made in Bill No. 4-05). These amendments added a new decision making group to the Alternative Agreement approval process called the Alternative Review Committee (ARC). The ARC is made up of the Director of the Department of Housing and Community Affairs (DHCA), the Director of Park and Planning, and the Executive Director of the Housing Opportunities Commission (HOC). Several text amendments to the Zoning Ordinance were also adopted that provide flexibility to the Montgomery County Planning Board in approving development applications to encourage the provision of MPDUs on site.

The DHCA created this handout to outline the steps required in implementing the allowable Alternative Compliance Measures specified in the MPDU law. Attachment 1 outlines the options available to developers. This attachment includes a synopsis of the applicability of the options, information on where the request should be submitted, what entity makes the decision on the request, and whether or not the Alternative Review Committee must consider the economic feasibility of the project.

Step 1. Voluntary Pre-application Conference for Concept Development

In the current development review process, applicants may meet with Park and Planning staff prior to *filing an application* for development. At this meeting, Park and Planning staff provides applicants with a list of required items that must be filed with their applications. After April 1, 2005, Department of Housing and Community Affairs (DHCA) staff will participate in the DRC process. If the developer wants to request approval of an Alternative Compliance Measure, the developer must convey that request to DHCA and Planning staff during the pre-application process. Likewise, requests for additional density or height above that specified in the Master Plan must be conveyed to Park and Planning staff at this time.

Applicants should contact Park and Planning staff to set up the meeting, and the staff at Park and Planning will notify appropriate staff from DHCA. Alternatively, applicants may meet individually with DHCA staff.

Attachment A				
Option Chart for Alternative Compliance Measures*				
<i>Option</i>	<i>Time and Enty of Submission</i>	<i>Applicability</i>	<i>Approval Entity</i>	<i>Economic Feasibility Model with ARC Review Required?</i>
1. Provide MPDUs at an Alternative Location in Same Policy Area [Section 25A-5B]	Submit to DHCA Director not less than 45 days prior to the submission of Preliminary or Site Plan Application	High-rise Residential Buildings	DHCA Director	No
2. Transfer Land to the County for the Construction of Units [Section 25A-5(f)(1)]	Submit to DHCA Director not less than 45 days prior to the submission of Preliminary or Site Plan Application	All Developments that Require MPDUs	DHCA Director	No
3. Full or Partial Waiver of Number of MPDUs to be Built [Section 25A-6(b)]	Submit to Planning Board as part of submission of Preliminary Plan or Site Plan Application	All Developments that Require MPDUs	Planning Board	No
4. Alternative Payment to the HIF for Some or All Units Due to High Condo Costs or HOA fees [Section 25A-5A(1)(A)]	Submit to DHCA Director not less than 45 days prior to submission of Preliminary or Site Plan Application	For-sale MPDU Projects with condo or HOA fees	DHCA Director	Yes
5. Alternative Payment to the HIF for Some or All Units due to Environmental Constraints [Section 15A-5A(1)(B)]	Submit to DHCA Director not less than 45 days prior to submission of Preliminary or Site Plan Application	All Developments that Require MPDUs	DHCA Director	Yes
6. Request Additional Height or Density Above Master Plan or Sector Plan [Zoning Ordinance Section 59-D-1.61(a)] <i>*Note: All MPDUs must be provided on-site if this option is used.</i>	Submit to Planning Board 45 days prior to submission of application for project requiring Development Plan or Project Plan for Optional Method of Development	Applications Requiring Development Plans or Project Plans for Optional Method of Development	Planning Board (Project Plan) or District Council (Development Plan)	Yes
7. Build Fewer or No MPDUs in Certain Developments [Section 25A-5(d)(1)]	Submit to DHCA Director after Planning Board Finding	Developments with more than 20 but less than 50 units at one location	DHCA Director with Planning Board Finding	No

* NOTE: For those developments that proceed directly to Building Permit for approval, substitute Department of Permitting Services (DPS) for Planning Board

In the case of applications that do not require Planning Board approval, the request for approval of an Alternative Compliance Measure must be submitted 45 days prior to submission of a building permit application to the Department of Permitting Services.

Step 2. Application Review Process

Confidentiality - In the case of required findings of financial infeasibility, financial information that the applicant identifies as being confidential will only be available to the minimum number of staff and/or consultants required to review the information to make a finding of financial infeasibility. Confidentiality of the information submitted will be maintained in accordance with the Public Information Act, Section 10-601, *et seq.* of the State Government Article.

Once the requests are submitted, they will go through appropriate review processes, as follows:

A. DHCA Director Decision without ARC review (Options 1, 2, 7)

1. Requests for approval of Alternative Compliance Measures under these options must be submitted to the DHCA Director not less than 45 days prior to the filing of a development application with the Planning Board.
2. In any development where only a building permit is required, the request for approval of an Alternative Compliance Measure must be submitted to the Director of DHCA not less than 45 days prior to submission of a building permit application to the Department of Permitting Services.
3. The DHCA Director may consult with the County Attorney and Planning Board to receive input prior to approving a request for an Alternative Compliance Measure. The Director may also request a meeting with the applicant.
4. The DHCA director will provide a decision on the request for approval of an Alternative Compliance Measure to the applicant prior to the applicant's filing of the application.
5. The Director will submit a memo to the applicant and to the Planning staff for inclusion in the staff report on the application that goes to the Planning Board for its consideration at the time that the Board takes action on the application.
6. The Planning Board will send a copy of its development approval to the DHCA Director and to DPS.

B. DHCA Director Decision with ARC review (Options 4, 5)

1. Requests for approval of a request for Alternative Payments must be submitted to the DHCA Director not less than 45 days prior to filing of a development application with the Planning Board. The request must include a rationale for why the request should be granted. The Developer must provide evidence regarding why this request should be granted, as well as the required Economic Feasibility Model inputs. The Preliminary Plan or Site Plan application will contain a checkoff box to notify the Park and Planning staff that a request for building less than the required MPDUs has been submitted to DHCA.
2. DHCA staff will distribute the requests to the ARC and the consultant for review upon receipt of the request. A recommendation by the ARC will be made to the DHCA Director within 45 days. Based on the ARC recommendation, the Director may recommend an Alternative Compliance Agreement. This recommendation will be sent to the applicant prior to filing of the development application.
3. The Director will submit a memo to the applicant and the Planning staff for inclusion in the staff report on the application that goes to the Planning Board for its consideration at the time that the Board takes action on the application.
4. The Planning Board will send a copy of its decision on the application to the DHCA Director and DPS.

C. Planning Board Decision without ARC review (Option 3)

1. A request for a full or partial waiver of the MPDU requirement must be submitted to the Planning Board concurrently with the application being submitted for development review. Requests must be made in writing stating the reasons that the full density of the zone cannot be attained because of requirements of the Zoning Ordinance, master plan, or other laws or regulations. The request must contain substantiation in the form of plans, plats, and all other pertinent material which will assist in evaluating the conditions. Under this request, any MPDUs that are required must be built on-site.
2. The applicant must also send a copy of the waiver request to the Director of DHCA who will consult with the Planning Board. The Department's recommendation must be considered by the Planning Board in determining whether to grant or deny the Applicant's request for a waiver.

3. The Planning Board will send a copy of its decision to the DHCA Director and DPS.

D. Planning Board Decision with ARC review (Option 6)

1. Requests for approval of a modification to the sector plan height or density requirements must be submitted to the Planning Board not less than 45 days prior to filing of a development application with the Planning Board. Applications are submitted to Development Review Division. The Developer must provide evidence regarding why this request should be granted, as well as the required Economic Feasibility Model inputs.
2. Planning Board staff will distribute the requests to the ARC and the consultant for review upon receipt of the request. A recommendation by the ARC will be made to the Planning Board staff and the applicant within 45 days.
3. The Planning Board staff will include the ARC recommendation in its memo to the Planning Board for its consideration at the time that the Board takes action on the application.
4. The Planning Board will send a copy of its decision to the DHCA Director and DPS.

Step 4 - Follow-up to Alternative Compliance Measure Approval

Once an Alternative Compliance Measure is approved, the applicant must submit an *Alternative Agreement for providing MPDUs to the DHCA for final approval*. This Agreement will be reviewed by the County Attorney.

MPDU PRICING STANDARDS
Effective Date: July 2, 2005

UNIT DESCRIPTION				UNIT SIZE				COST				ADDITION/SUBTRACTION ADJUSTMENTS			
Unit Type	No. of Stories	No. of BR	No. of Baths	Basement Included	Base in SF	Min. in SF	Max. in SF	Sq. ft. Cost	Structure Cost	Lot Dev. Cost	Basement Deletion	Bath	Powder Room	Sq. Ft. Change from Base in SF	
												Finished	Finished		
												Rough	Rough		
S.F. Detch.	1-2	3-4	1-1 1/2	yes	1400	1100	1500	\$56.00	\$78,400	\$17,000	\$7,600	\$2,800	\$1,850	\$28.00	
Semi-Detch.	1-2	3-4	1-1 1/2	yes	1200	1100	1400	\$52.00	\$62,400	\$14,000	\$6,500			\$26.00	
Townhouse / Four-plex	2-3	2-3	1-1 1/2	yes	1200	1050	1300	\$48.00	\$57,600	\$12,000	\$5,400			\$24.00	
Townhouse / Four-plex	2-3	4	2	yes	1260	1120	1400	\$48.00	\$60,480	\$12,000	\$5,400			\$24.00	
Piggyback Townhouse	1-2	2-4	1-1 1/2	no	1200	1050	1400	\$42.00	\$50,400	\$10,000	N/A			\$21.00	
Garden Condo.	2-4	1-3	1	N/A	950	650	1150	\$46.00	\$43,700	\$9,000	N/A			\$23.00	
High Rise	5+	0-3	1	N/A	850	550	1100	\$124.00	\$105,400	Note 8	N/A			\$62.00	

Prices for bath and powder room adjustments are the same for all units regardless of type

ALLOWANCES:

1. End unit for townhouses and back-to-back townhouses, add \$2,200; for end unit piggyback townhouses add \$1,700 for each unit.
2. Walkout basement with 5 ft. sliding glass door, add \$1,400; with 6 ft. door, add \$1,600.

NOTES:

1. The structure cost will be increased or decreased based on the actual square footage of space constructed at the square foot adjustment factor from the last column. No additions will be made over the maximum floor areas shown (measurements are made from outside wall to outside wall and to center of interior walls.)
2. The lot development cost does not include a Development Impact Fee or system impact charge for water and sewer; these fees will be waived. A letter requesting the waiver which identifies the MPDUs must be sent to the agencies from the MPDU Section. You must submit a list to the MPDU Office, identifying the MPDUs by lot, block street address, tax account number, and building application number if that is available
3. The cost to install a sprinkler system has not been included in the square foot prices. If the County Code requires the installation of a sprinkler system, the allowable price will be increased for this expense. Contracts or estimates verifying the actual cost of the sprinkler system must be provided to the Department.
4. The lot development cost does not include water and sewer house connection fees; the actual cost of the connection fees will be added to the direct construction cost of the unit.
5. All four bedroom units, regardless of the unit type, must include two full bathrooms in the base square foot price.
6. Condominium developments must have FHA approval; the expense of obtaining this approval will be added to the sales price.
7. If garage townhouses or detached units are approved for the MPDUs, the cost of constructing the garage will be added to the cost of the basic unit.
8. Lot development costs for high-rise buildings, including the parking structures, will be based on cost estimates or construction contracts provided by the applicant and approved by the Department.
9. Unfinished space will be priced at the cost of constructing the framed in space; estimates or contracts must be provided to the Department for approval.
10. Requests for extra lot development costs must be submitted with detailed estimates or construction costs.

MINIMUM SPECIFICATIONS FOR MPDUs

Effective Date: July 2, 2005

- (a) All MPDUs must have a refrigerator, range and range hood, garbage disposal, a rough-in connection for a dishwasher, and complete electrical and plumbing connections and a dryer exhaust for a clothes washer and dryer.
- (b) Refrigerator must be 14 to 15 cu. Ft. frost free, meeting General Electric "builders" grade specifications. A 30" electric, porcelain enameled range/oven with clock/timer and range hood must be supplied.
- (c) All carpeting must meet minimum FHA specifications.
- (d) Unit landscaping must be as designated on the approved site plan.
- (e) If a privacy fence is included in the approved site plan for townhouses, end units must have sections on each side of the rear yard.
- (f) Piggyback townhouses must be provided with an enclosed space for outside trash storage disposal if required and approved by the MNCPPC.
- (g) Townhouses must provide access to the rear of the unit through an exterior door with a 2' 8" minimum opening.
- (h) A linen closet or storage shelf system within a clothes closet must be included in the unit. (\$375 will be added to the price for a separate linen closet)
- (i) The main bathroom must include a vanity (\$200 will be added to the base price for each vanity).
- (j) A list of options and their respective prices must be submitted with the offering agreement. Selections of options must be at the discretion of the purchaser. Options and their selling price must be listed on a separate addendum to the sales contract. All options may be financed.
- (k) Garden apartment/condominium units and piggyback townhouses must have sound attenuating materials such as Gypcrete in the ceiling/floor assemblies between units.

Item	Single Family Detached	Semi-detached	Townhouses	Piggyback Townhouses BR/Stories	Garden Condominiums & Apartments	Elevator
No. of BR	2 3 4	2 3	2 3	2 3	0 1 2	1 2 3
No. of Baths	1 1 ½	1 1 ½	1 1 ½	1 1 ½	1 1 1 ½	1 1 1 ½
Elec. Hot Water Heater (gallon)	40 50	40 50	40 50	30 40	30 40 50	30 40 40
Gas Hot Water Heater (gallon)	30 40	30 40	30 40	40 40	30 30 40	30 30 30

NOTE:

1. The square foot prices are based upon heat pump systems for heating and air conditioning. DHCA will adjust the sales price for units having other HVAC systems.
2. Rough-in plumbing and electrical installation must meet the following conditions to qualify for a pricing additon:
 - (a) Plumbing rough-in: the installation of all parts of the plumbing system that can be completed prior to the installation of fixtures, appliances, or equipment must be included. This includes drainage, water supply, vent piping, and necessary supports and backboards. All piping must be tied in and capped off after penetrating the wall or floor surface. Duct work for the future installation of exhaust fans must be installed. Rough-in must pass air or water tests by the BOCA or WSSC Codes.
 - (b) Electrical rough-in: wiring must be installed from service panel box and terminated at an outlet of the appliance or fixture that is to be served.

Appendix D

MONTGOMERY COUNTY DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CALCULATION OF SALES PRICES FOR MPDUs FOR:

Date: _____

(Project Name)

A. MPDU UNIT TYPE:

- 1. Unit type and number of stories _____
- 2. Number of bedrooms _____
- 3. Number of full baths and rough-in full baths _____
- 4. Number of half baths and rough-in half baths _____
- 5. Basement of slab _____
- 6. End or interior unit _____
- 7. Square footage of finished area _____

B. CALCULATION OF DIRECT CONSTRUCTION COSTS: *(NOTE: Please refer to the MPDU Pricing Standards and Minimum Specifications for Base Unit Size and Square Footage Cost)*

- 8. _____ = Square footage of finished space *(from Line 7)*
- 9. _____ = Square footage of base unit @ _____ /sq. ft. _____
- 10. _____ = Sq. foot difference from base @ _____ /sq. ft. _____
- 11. **Subtotal (Line 9 + Line 10)** _____

	<u>Additions and Deletions</u>	<u>Addition</u>	<u>Deletion</u>
12.	a. End unit	_____	_____
	b. Rough-in half bath	_____	_____
	c. Finished half bath	_____	_____
	d. Rough-in full bath	_____	_____
	e. Finished full bath	_____	_____
	f. Basement addition/deletion	_____	_____
	g. Walkout basement	_____	_____
	h. Garage	_____	_____
	i. Expandable space:	_____	_____
	_____ ft. @ \$ _____ /sq.ft.	_____	_____
	j. _____	_____	_____
	k. _____	_____	_____
	l. _____	_____	_____
	m. _____	_____	_____
	n. _____	_____	_____
	o. _____	_____	_____
	Subtotal	_____	_____

13. **Difference between Additions/Deletions** _____

14. **DIRECT CONSTRUCTION COST** *(Line 11 + Line 13; enter in Line 15, Page 2)* _____

* (NOTE: if you exceed the set price standard, you must attach an itemized listing of lot development costs.)

MONTGOMERY COUNTY DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CALCULATION OF SALES PRICES FOR MPDUs FOR:

(Project Name)

C. ADDITIONAL CONSTRUCTION AND INDIRECT COSTS:

15. Direct Unit Construction Cost (from Line 14 on Page 1) _____

16. a. Direct land development cost (from MPDU Pricing Standards*) _____
 b. Water and sewer house connection fee _____
 c. Fire sprinkler system installation cost _____

17. **Subtotal of Miscellaneous (Lines 16.a through 16.c)** _____

18. Special Conditions:

a. Extra sidewalk _____
 b. Special Protection Area environmental construction measures _____
 c. Extra common area landscaping _____
 d. Alleyways _____
 e. Site amenities/trails _____
 f. Rock blasting/removal _____
 g. Super silt fence _____

19. **Subtotal of Special Conditions (Lines 18.a through 18.g)** _____

20. **TOTAL OF DIRECT CONSTRUCTION COST ITEMS (Lines 15 + 17 + 19)** _____

21. **SOFT COSTS:** (Calculated as a percentage of the Base MPDU Sales Price)

Construction Loan Financing Expenses:

i) Interest Rate = Prime Rate + 2 Points = _____
 ii) Calculation = Interest Rate x Average Take Down Rate (6 months) x Length of Loan (9 months)
 x 75% of Base MPDU Sales Price
 a. iii) Calculation = Interest Rate x .50 x .75 x .75 = _____
 b. Construction loan placement fee 1.50%
 c. Legal and closing costs 3.50%
 d. Marketing and sales commission 1.50%
 e. Builder's overhead 8.00%
 f. Engineering and architectural fees 5.00%
 g. General requirements 3.00%

22. **Subtotal of Indirect Cost Percentages (Lines 21.a through 21.g)** _____

23. Base MPDU Sales Price Calculation:

a. Soft Cost Percentages (from above) _____
 b. Inverse Ratio (100 - Soft Cost Percentage / 100) = _____
 c. Base MPDU Sales Price = $\frac{\text{Direct Construction Cost (Line 20)}}{\text{Inverse Ratio (Line 22.b)}}$ = _____

24. **Subtotal of Architectural Compatibility Items (from Line 29.c on Page 3)** _____

25. **FINAL MPDU SALES PRICE (Line 23.c + Line 24)** _____

MONTGOMERY COUNTY DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CALCULATION OF SALES PRICES FOR MPDUs FOR:

(Project Name)

ARCHITECTURAL COMPATIBILITY COSTS

The direct construction costs for architectural compatibility must be approved by the Department of Housing and Community Affairs. The percentage for construction financing in Line 3 is obtained from the calculations determined in 21.a on Page 2. The cost of the architectural compatibility items must be reduced by a credit for normal construction item which is included in the direct construction cost (for example, brick façade reduced by the cost of vinyl siding).

LIST OF ITEMS AND COST FOR ARCHITECTURAL COMPATIBILITY:

<u>ITEM</u>	<u>DESCRIPTION</u>	<u>COST</u>
a.	_____	_____
b.	_____	_____
c.	_____	_____
d.	_____	_____
e.	_____	_____
f.	_____	_____
g.	_____	_____
h.	_____	_____
i.	_____	_____
j.	_____	_____
k.	_____	_____
l.	_____	_____
m.	_____	_____
n.	_____	_____
o.	_____	_____
p.	_____	_____

Subtotal of Architectural Compatibility Costs: _____

LESS: Cost of Items Included in the Base MPDU Price _____

26. **TOTAL HARD COST OF ARCHITECTURAL COMPATIBILITY ITEMS:** _____

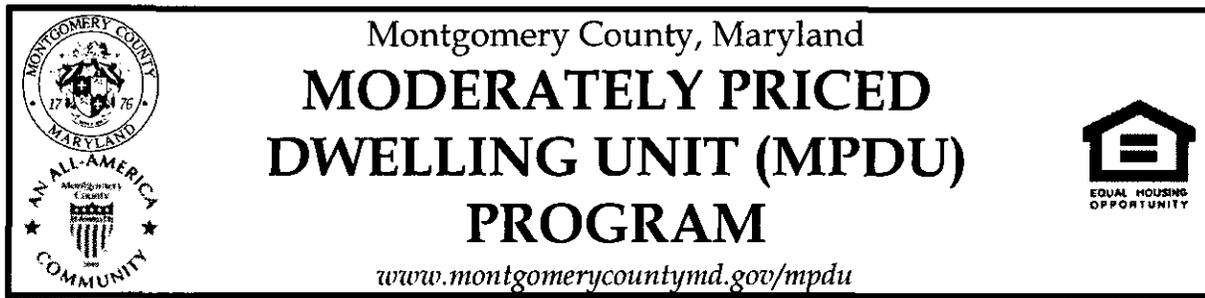
27. **SOFT COST CALCULATION FOR ARCHITECTURAL COMPATIBILITY ITEMS:**

a. Construction financing (from Line 21.a, Page 2)	_____
b. Construction loan placement fee	1.50%
c. Builder's overhead	8.00%
d. Engineering and architectural fees	5.00%

28. **Subtotal of Indirect Cost Percentages (lines 27.a through 27.d)** _____ 14.50%

29. **TOTAL COST FOR ARCHITECTURAL COMPATIBILITY:**

a. Soft cost percentage (from Line 28)	_____
b. Inverse ratio: (100 - Soft Cost Percentage / 100)	_____
c. Cost for Arch. Compat. = Total Hard Cost Arch. Compat. (Line 26) =	_____
Inverse Ratio (Line 29.b)	_____



Calculating Rental Rates for MPDUs

Introduction

The allowable rents that may be charged for the MPDUs are set at the time the Department approves the Rental Offering Agreement¹. In general, the MPDU rent is set at a level so that a qualified household pays no more than 25 percent of its monthly gross income on rent. Rental rates are computed using the maximum income limits for the MPDU program in effect at the time the MPDUs are offered for rent. The maximum income for the MPDU rental program is set at 65 percent of the median income for the Washington, DC Primary Metropolitan Statistical Area (PMSA). If an apartment development is financed through a Federal or state affordable housing program (such as the Federal Low Income Housing Tax Credit), then the requirements of that program supercede the MPDU regulations.

Methodology

The method for computing the allowable monthly rents for garden apartment MPDUs, before utilities, is described below (establishing rents for high rise apartments is discussed later). The income for the rent calculation is based on one and one half (1½) people per bedroom.

- The rent for an efficiency unit is based on the income for one person household.
- The rent for a one (1) bedroom unit is based on the mid-point between the income for a one person household and a two person household (eg. 1.5 people per bedroom).
- The rent for a two (2) bedroom unit is based on the income for a three person household.
- The rent for a three bedroom unit is based on the mid-point between the income for a four person household and a five person household (eg. 4.5 people per bedroom).

Based on the appropriate household size and corresponding maximum income, the income for each unit size is divided by 12, multiplied by twenty-five percent (25%),

¹ see Executive Regulation 13-05AM "Requirements and Procedures for the Moderately Priced Dwelling Unit Program", Section 6.1 "Offering MPDUs for Sale or Rent"

and then rounded to the next highest whole number. This determines the monthly MPDU rent based on bedroom size, before utilities.

EXAMPLE: *Calculating the rent for a 1 bedroom unit (1.5 person household):*

Annual Income for a 1 person household = \$40,000

Annual Income for a 2 person household = \$46,000

Mid-point = \$43,000

$\$43,000 \div 12 \text{ months} = \$3,583 \text{ per month} \times .25 = \underline{\$895}$ (rounded) maximum rent for a 1 bedroom apartment, before utilities

Utilities and Other Service Charges

In addition to the rental rates established for MPDUs, consideration can be given to those utilities and services paid by the tenant versus those utilities and services paid by the owner. Utility charges and service fees that are paid by the owner may be added to the MPDU rental rate calculated above to establish the MPDU rent. The Department uses "Allowances for Tenant-Furnished Utilities and Other Services" for the Washington PMSA, as determined annually by the U.S. Department of Housing and Urban Development (HUD) to calculate these charges. Any request by a landlord for a variance from these rates will only be considered by the Department upon receipt of a certified report from a registered engineer or by the appropriate utility company. After the first year of operation, utility charges may be based on the actual, average cost of the utility expenses for the previous 12 months.

EXAMPLE: *Using the rent calculated for a 1 bedroom, Garden apartments (above):*

Rent	\$ 895
Allowance for Additional Utility or Service Cost Paid by Owner*	Monthly Cost
Heating	
Cooking	
Other Electric	
Air Conditioning	
Water Heating	
Water	\$ 9
Sewer	
Trash Collection	\$ 12
Range/Microwave	
Refrigerator	
Other	
Total Maximum Rent - 1 BR	\$ 916

* - From HUD Form 52667-Montgomery County, MD

Special Exceptions for High Rise and Senior Apartment Complexes

The Director may set different rent limits for units in high rise buildings if the Director determines that there is no other reasonable means available to finance the building of all required MPDUs at a specific development. Rents in high rise apartment buildings may be calculated using an income set at 70 percent of the median income for the Washington, DC PMSA (as opposed to 65 percent of the median, as is used for garden apartment developments).

EXAMPLE: *Calculating the rent for a high rise 1 bedroom unit (1.5 person household):*

Annual Income for a 1 person household = \$44,000

Annual Income for a 2 person household = \$50,000

Mid-point = \$47,000

$\$47,000 \div 12 \text{ months} = \$3,916 \text{ per month} \times .25 = \underline{\$980}$ (rounded) rent for a 1 bedroom apartment, before utilities

The Director may also set different rent limits for rental units in age-restricted buildings if the Director determines that to do so will contribute to the long term availability and affordability of MPDUs for eligible certificate holders, and other households with moderate incomes. The Director may exercise this option upon the conclusion of the priority marketing period if there are MPDUs that can not be rented to eligible certificate holders at the approved MPDU rents.

Annual Rent Increases

The MPDU rent may only be adjusted once a year by the Director in accordance with the County's voluntary rent guidelines. Apartment complexes are notified, usually in January, of the allowable rent increase for the upcoming year. The adjustment may be applied to vacant units immediately; for occupied units, the adjustment be applied upon lease renewal.

Other Special Considerations

Laundry washer and dryer equipment must be provided in each MPDU unit unless this equipment is not provided in the market rate units. No increase in rent is allowed for laundry washer and dryer equipment unless the market rate units are separately charged and the increase is limited to the same fee that the market rate apartments are charged.

The Director may adjust the rental rates for rental apartment developments that provide services, amenities, or design features to all tenants which cannot be made optional to the tenants of the MPDUs on a fee basis. The owner may not charge a fee for non-structured, automobile parking to MPDU tenants. Structured parking, garage or other enclosed spaces may be offered as an option to the MPDU occupants at the monthly rate normally charged by the applicant.

**MPDU Maximum Rent Calculation Worksheet for FY 2006
Garden Apartment**

Name of Development: _____

		Household Size					
		1	1.5	3	4.5+	N/A	N/A
a) MPDU Maximum Annual Gross Income		\$40,000	\$43,000	\$50,000	\$59,000		
b) Monthly Gross Income		\$ 3,333	\$ 3,583	\$ 4,167	\$ 4,917		
c) 25% of Monthly Gross = MPDU Rent		\$ 835	\$ 895	\$ 1,045	\$ 1,230		
		0 BR	1 BR	2 BR	3 BR	4 BR	5 BR
Utility or Service Provided By Landlord		Monthly Dollar Allowances By Bedroom Size <i>(Circle the Appropriate \$ Figure Below)</i>					
		0 BR	1 BR	2 BR	3 BR	4 BR	5 BR
Heating	a. Natural Gas	36	46	56	65	80	90
	b. LPG/Propane	33	46	59	72	89	101
	c. Oil	31	43	55	68	86	98
	d. Electric	21	30	38	46	59	67
	e. Coal/Other						
Cooking	a. Natural Gas	5	7	9	11	14	16
	b. LPG/Propane	7	10	13	16	20	23
	c. Electric	5	7	9	11	14	15
	d. Coal/Other						
Other Electric/Lighting		10	14	18	23	29	33
Air Conditioning		6	8	10	13	16	19
Water Heating	a. Natural Gas	11	15	20	24	31	35
	b. LPG/Propane	16	22	28	34	43	50
	c. Oil	14	20	25	31	39	45
	d. Electric	12	17	22	27	34	39
	e. Coal/Other						
Water		7	9	14	23	34	46
Sewer		5	7	16	29	45	62
Trash Collection		12	12	12	12	12	12
Range/Microwave		7	7	7	7	7	7
Refrigerator		7	7	7	7	7	7
Other - Specify							
d) Subtotal of Utility and Service Charges:		\$	\$	\$	\$		
e) Maximum MPDU Rent with Utilities (Line c + Line d)		\$	\$	\$	\$		

**MPDU Maximum Rent Calculation Worksheet for FY 2006
High Rise Apartment**

Name of Development: _____

		Household Size					
		1	1.5	3	4.5+	N/A	N/A
a) MPDU Maximum Annual Gross Income		\$44,000	\$47,000	\$56,000	\$65,000		
b) Monthly Gross Income		\$ 3,667	\$ 3,917	\$ 4,667	\$ 5,417		
c) 25% of Monthly Gross = MPDU Rent		\$ 920	\$ 980	\$ 1,170	\$ 1,355		
		0 BR	1 BR	2 BR	3 BR	4 BR	5 BR
Utility or Service Provided By Landlord		Monthly Dollar Allowances By Bedroom Size <i>(Circle the Appropriate \$ Figure Below)</i>					
		0 BR	1 BR	2 BR	3 BR	4 BR	5 BR
Heating	a. Natural Gas	36	46	56	65	80	90
	b. LPG/Propane	33	46	59	72	89	101
	c. Oil	31	43	55	68	86	98
	d. Electric	21	30	38	46	59	67
	e. Coal/Other						
Cooking	a. Natural Gas	5	7	9	11	14	16
	b. LPG/Propane	7	10	13	16	20	23
	c. Electric	5	7	9	11	14	15
	d. Coal/Other						
Other Electric/Lighting		10	14	18	23	29	33
Air Conditioning		6	8	10	13	16	19
Water Heating	a. Natural Gas	11	15	20	24	31	35
	b. LPG/Propane	16	22	28	34	43	50
	c. Oil	14	20	25	31	39	45
	d. Electric	12	17	22	27	34	39
	e. Coal/Other						
Water		7	9	14	23	34	46
Sewer		5	7	16	29	45	62
Trash Collection		12	12	12	12	12	12
Range/Microwave		7	7	7	7	7	7
Refrigerator		7	7	7	7	7	7
Other - Specify							
d) Subtotal of Utility and Service Charges:		\$	\$	\$	\$		
e) Maximum MPDU Rent with Utilities (Line c + Line d)		\$	\$	\$	\$		

MEMORANDUM

May 1, 2006

TO: Applicants to the Alternative Review Committee (ARC) for Moderately Price Dwelling Units (MPDUs)

FROM: Elizabeth B. Davison, Director
Department of Housing and Community Affairs (DHCA)

SUBJECT: Procedures for Submitting a Request to the Alternative Review Committee (ARC), and the ARC's Review Procedures

The Moderately Priced Housing Law (Chapter 25A of the Montgomery County Code 2004, as amended) includes several options for developers regarding alternative compliance measures to provide Moderately Priced Dwelling Units (MPDUs). On November 30, 2004, amendments to the MPDU law were adopted by the County Council in Bill No. 24-04/25-04/27-03 (technical corrections were made in Bill No. 4-05). These amendments added a new decision making group to the Alternative Agreement approval process called the Alternative Review Committee (ARC). The ARC is made up of the Director of the Department of Housing and Community Affairs (DHCA), the Director of Park and Planning, and the Executive Director of the Housing Opportunities Commission (HOC).

As part of its review responsibilities, the ARC has adopted the following procedures and policies to guide applicants, and its own review, of requests for alternative compliance measures.

Submitting a Request to the ARC:

An Applicant who wishes to request an alternative compliance measure for providing MPDUs for any reason permitted under Chapter 25A must submit a letter to the Director of DHCA requesting a review by the ARC.

The Director will schedule a meeting of the ARC, and set the date of the meeting. The Applicant will be notified of the meeting date at which the request will be considered, and the location of the meeting.

The applicant must submit background information for the project, with supporting documentation, to the Director of DHCA at least two (2) weeks before the scheduled meeting date. Documentation must include:

- The specific and particular facts related to the project;
- The specific legal basis, under Chapter 25A, upon which an alternative is being requested;
- An explanation, supported by documentation, of why the standard requirements of Chapter 25A can not be met;
- A proposed solution or alternative method, as allowed under Chapter 25A, of meeting the requirements of that Chapter;
- Any other relevant project and financial data the Applicant wishes to present to the ARC (no new information will be allowed to be presented during the ARC meeting itself)

In order to analyze the financial impact of meeting the requirements of Chapter 25A, the Applicant must provide, at a minimum, a detailed development cost breakdown showing the financial impact of meeting the standard requirements of Chapter 25A. A suggested format for Applicants requesting additional density (height) is included as Attachment A. If you would like this template in Excel, please email a request to Christopher Anderson, Manager, Single-Family Housing Programs at: christopher.anderson@montgomerycountymd.gov

A consultant under contract to the ARC will review the financial information and write a report to the ARC regarding the economic feasibility of providing the MPDUs as required under Chapter 25A. The consultant's report will be given to the applicant and the members of the ARC for review, comment, and response seven (7) days before the meeting date.

ARC Meetings:

The location of the ARC meetings will rotate among the offices of DHCA, HOC and M-NCPPC. Authorized attendees may include the members of the ARC (or their designees), support staff from participating agencies, consultants to the participating agencies, representatives of the Applicant, and Applicant's legal counsel.

At least one representative of the Applicant who is knowledgeable of the project financials must be present to answer questions presented by the ARC members and staff. As stated earlier, no new information will be allowed to be presented in the ARC meeting itself.

The staff person at Park and Planning who has been assigned responsibility for reviewing the project will be present to make a presentation to the ARC, and answer questions.

ARC Recommendations:

The ARC will make a decision on the request by majority vote. The Applicant may not be present for the discussion and the vote. Within seven (7) days after the meeting date, staff to the ARC will produce a draft of the decision memorandum for ARC members' review.

Within fourteen (14) days after the meeting date, the ARC will produce a final decision memorandum which will be available to the Applicant, decision makers, and the public. Each member of the ARC will sign off on the decision memorandum.

DHCA:4/28/06

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22% BONUS DENSITY FOR 15% MPDU (3.05 FAR)

SITE CRITERIA	UNITS	SF
Net Development Site Area	0	-
Two Below Grade Parking Levels	0	0
Residential Gross FAR SF	-	0
Residential Sales SF - Mkt Rate	0	0
Residential Sales SF - MPDU	0	0

2.5 FAR - NO BONUS DENSITY

UNITS	SF	ASSUMPTIONS
0	-	Total Units / Land Area including dedications
0	0	Two levels of below grade parking
-	0	Allowable density
0	0	Studios Area Calcs at _____ SF per Unit
0	0	Studios Area Calcs for MPDUs

CATEGORY	Value	TOTAL	Per SF
Land			
PreDevelopment Costs	-	-	-
Total Pre-Development Costs	-	-	-
Hard Costs			
Sitework	-	-	-
Below Grade Parking	-	-	-
Residential	-	-	-
Contingency	-	-	-
Total Hard Costs	-	-	-
Furniture, Fixtures & Equipment			
Security / Telcom Design	-	-	-
Lobby/Fitness/Community Room	-	-	-
Total FF&E	-	-	-
Design Costs			
Architecture & Engineering	-	-	-
Civil Engineering	-	-	-
Other Consultants	-	-	-
Additional Services	-	-	-
Reimbursables	-	-	-
Total Design Costs	-	-	-
Permit Fees/Impact Taxes			
Building Permit Fees	-	-	-
WSSC / MC Water Sewer Fees	-	-	-
Pepeco Electric Fees	-	-	-
Gas/Other Utilities	-	-	-
School Facilities Impact Tax	-	-	-
Transportation Impact Tax	-	-	-
Offsite Amenity Impact Tax	-	-	-
Total Permit Fees/Impact Taxes	-	-	-
Testing and Inspections			
Environmental / Geotech	-	-	-
Surveys/Tests/Other Consultants	-	-	-
Total Testing & Inspection	-	-	-
Professional Fees			
Legal	-	-	-
Accounting	-	-	-
Total Professional Fees	-	-	-
Marketing and Leasing			
Marketing Expenses	-	-	-
Sales Office	-	-	-
Sales Commissions	-	-	-
Total Marketing & Leasing	-	-	-
Real Estate Taxes			
	-	-	-
Insurance			
	-	-	-
Soft Cost Contingency			
	-	-	-
Financing			
Construction Loan Amount	-	-	-
Const Interest Expense	-	-	-
Recordation Fee	-	-	-
Points	-	-	-
Mortgage Broker	-	-	-
Closing Costs/Misc	-	-	-
Total Financing	-	-	-
Development Fee			
	-	-	-
Total Project Cost			
	-	-	-
Sales Proceeds	\$0		
Market Rate Units	\$0		
MPDU Units	-		
Total Sales Proceeds			
	-	-	-
Gross Profit			
	-	-	-

Value	TOTAL	Per SF	ASSUMPTIONS
-	-	-	Fixed Land Cost - All-In Acquisition Basis
-	-	-	Assumes Grant is not extended
-	-	-	\$100,000 Costs plus \$75,000 Construction CPI increase
-	-	-	Per _____ Estimate (date)
-	-	-	Per _____ Estimate (date)
-	-	-	Per _____ Estimate (date) adjusted for Density
-	-	-	_____% Owner Contingency
-	-	-	Allowance
-	-	-	Allowance
-	-	-	Per _____ Proposal (date)
-	-	-	Per _____ Proposal (date)
-	-	-	Traffic, Pepeco
-	-	-	_____% of Design Costs
-	-	-	_____% of Design Costs
-	-	-	Per County formula for Building Permit / Cofo
-	-	-	Per _____ calculations (date)
-	-	-	Per _____ calculations (date)
-	-	-	Allowance
-	-	-	\$_____ per unit per County formula - Mkt Rate Units Only
-	-	-	\$_____ per unit per County formula - Mkt Rate Units Only
-	-	-	Offsite contribution anticipated
-	-	-	Site Remediation Reports, Studies
-	-	-	Construction Monitoring, Testing & Inspections Allowance
-	-	-	Transactional Legal Fees
-	-	-	Project Accounting/Reports
-	-	-	Events, Materials, Agent Stipends
-	-	-	FF&E on Sales Office
-	-	-	_____% Blended Average on Gross Sales /Less MPDUs
-	-	-	Two Years Real Estate Taxes / Plug Number
-	-	-	Per Quote x 2
-	-	-	_____% of Soft Costs
-	-	-	Assumes no additional equity/Finance all costs
-	-	-	_____% for _____ months x _____%
-	-	-	_____ Basis Points
-	-	-	_____% of Loan Amount
-	-	-	_____ Loan Basis Points
-	-	-	Legal fees, miscellaneous closing costs
-	-	-	_____ % Total Project Costs
\$0			\$S per Sales Area SF Net of Closing Costs
\$0			Market Rate Unit Sales Proceeds
			\$_____ 1-BR + \$_____ 2-BR
			Sales Proceeds less Total Project Cost