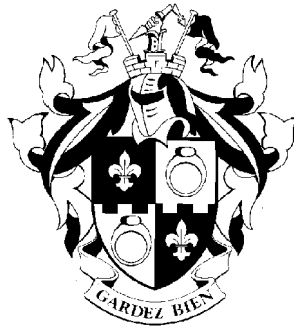


# REVIEW OF THE OFFICE OF THE PEOPLE'S COUNSEL



OFFICE OF LEGISLATIVE OVERSIGHT  
REPORT NUMBER 2008-10

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## EXECUTIVE SUMMARY

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By law, the Office of the People's Counsel ("Office") is a legislative branch office established to "protect the public interest and promote a full and fair presentation of relevant issues" in land use cases in the County. The People's Counsel, who is appointed by the County Council, can participate as a party in certain land use cases and can provide technical assistance to residents on land use topics. Current law prohibits the People's Counsel from representing the County, a government agency, or a private party in any proceeding.

### LEGISLATIVE AND FUNDING HISTORY OF THE OFFICE

The Council enacted legislation to create the Office of the People's Counsel in 1990, but did not fund the Office until 1999. Amendments to the law were adopted in 1999 and 2002. The legislative record indicates that the debate surrounding these bills focused on several recurring issues, such as the Office's role and jurisdiction. The Office's FY09 approved budget of \$250K funds a full-time People's Counsel's position and 0.8 workyears of an administrative aide position shared with the Board of Appeals.

By law, the Council can appoint a People's Counsel either as a term merit employee or a contract employee. The People's Counsel employed since 1999 is a term merit system employee who was reappointed in 2003 (to a four year term) and 2007 (to a one year term). The 2007 reappointment resolution provides that the People's Counsel serves until a successor is appointed.

### ACTIVITIES OF THE OFFICE OF THE PEOPLE'S COUNSEL

The People's Counsel is authorized to participate as a party, at his discretion, in seven types of land use cases and can make motions, introduce evidence, call witnesses, cross-examine witnesses, and make arguments in these cases. In practice, the People's Counsel primarily participates in special exception and local map amendment cases. The People's Counsel estimates that he spends 30% of his time participating in cases.

The People's Counsel also is authorized by law to provide technical assistance to residents – providing general information on land use topics and guidance on effective participation in the County's land use process. The People's Counsel's activities also include mediating land use disputes and participating on Community Liaison Committees (CLCs). The People's Counsel estimates that he spends approximately 70% of his time providing technical assistance, mediating cases, and attending CLC meetings.

### FEEDBACK ON THE LAW AND SERVICES OF THE OFFICE OF THE PEOPLE'S COUNSEL

OLO interviewed more than 50 government officials, staff, land use attorneys, and residents who have interacted with the People's Counsel. Most people interviewed praised the technical assistance provided by the People's Counsel. There was a wider range of opinions about the People's Counsel's case participation. Feedback from both governmental officials and non-governmental representatives also indicates that a range of views exist on the appropriate purpose and role of an Office of the People's Counsel.

### OLO RECOMMENDATIONS FOR COUNCIL ACTION

**#1: Revisit the purpose, duties, and structure of the Office of the People's Counsel as outlined in County law.** OLO recommends that the Council structure its discussion on the People's Counsel law around five issues, which parallel many of the issues discussed 18 years ago when the law creating the Office was adopted: statutory purpose; authority and duties; party representation; technical assistance; and staffing.

**#2: Postpone the personnel decision regarding reappointment of the People's Counsel until the Council completes its review and action on the law governing the Office.** After determining whether any changes are needed to the job description and/or the Office's staffing, OLO recommends the Council decide whether to reappoint the incumbent People's Counsel to a new term or initiate a new selection process.

**OFFICE OF LEGISLATIVE OVERSIGHT REPORT 2008-10**

**REVIEW OF THE OFFICE OF THE PEOPLE'S COUNSEL**

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## **Chapter I. Authority, Scope, and Organization of Report**

### **A. Authority**

Council Resolution 16-260, *Fiscal Year 2008 Work Program of the Office of Legislative Oversight*, adopted July 31, 2007.

### **B. Scope and Organization of Report**

This report by the Office of Legislative Oversight (OLO) responds to the Council's request to conduct a review of the Office of the People's Counsel. The County Council passed legislation to establish the Office of the People's Counsel (the "Office") in February 1990. However, the Office remained unfunded for almost a decade. In 1999, the Council amended the law, added a sunset provision, and appointed the first People's Counsel. In 2002, the Council removed the sunset provision.

The scope of OLO's review included:

- Research on the legislative and funding history of the People's Counsel;
- An assessment of the activities of the Office of the People's Counsel;
- A summary of feedback on the current law and work of the Office of the People's Counsel from interviews with governmental and non-governmental representatives who have interacted with the Office of the People's Counsel; and
- A comparison with similar offices in other Maryland counties.

**Chapter II, Legislative and Funding History**, summarizes the current law governing the People's Counsel; reviews the Office's legislative, funding, and staffing history; and identifies a number of relevant changes in County land use laws, programs, and practices since the Office was established.

**Chapter III, Activities of the Office of the People's Counsel**, reviews the People's Counsel's participation in land use proceedings; provision of technical assistance; and participation in other activities.

**Chapter IV, Feedback on the Current Law and Services Provided by the Office**, summarizes feedback on the Office of the People's Counsel from governmental and non-governmental individuals who have interacted with the Office.

**Chapter V, Comparison with Similar Offices in other Jurisdictions**, describes the work of similar offices in four other Maryland Counties: Baltimore County, Harford County, Howard County, and Prince George's County.

**Chapters VI and VII** present the Office of Legislative Oversight's **Findings and Recommendations**.

**Chapter VIII** presents **Comments on the Final Draft**.

### **C. Methodology**

Office of Legislative Oversight staff members Craig Howard, Leslie Rubin, Jennifer Renkema, and Sarah Downie conducted this study. OLO gathered information through general research, document reviews, and more than 50 interviews with government officials, staff, and non-governmental representatives who have interacted with the Office of the People's Counsel.

### **D. Acknowledgements**

OLO received a high level of cooperation from everyone involved in this study. OLO appreciates the significant time commitment, the information shared, and the insights provided by all the individuals who participated. In particular, OLO would like to thank Martin Klauber and Fran Hissong from the Office of the People's Counsel.

In addition, OLO would like to thank the various Montgomery County government officials and staff we spoke with in conducting this study, including: Councilmembers and Council staff; the Board of Appeals and staff; Office of Zoning and Administrative Hearings staff; Department of Permitting Services staff; the Montgomery County Planning Board and Planning Department staff.

OLO also extends its thanks to the various members of the community we received input from, including land use attorneys; representatives from special exception applicants; community members who have participated in land use cases; and individuals who received technical assistance from the Office of the People's Counsel.

Last, OLO thanks the following staff from other local jurisdictions that we spoke with: Stan D. Brown from Prince George's County; Robin Regner from Howard County; Lisa Sheehan from Harford County; and Peter Zimmerman from Baltimore County.

For a complete copy of OLO Report 2008-10, go to:  
[www.montgomerycountymd.gov/olo](http://www.montgomerycountymd.gov/olo).  
This document is available in alternative formats upon request.



## Chapter II. Legislative and Funding History

This chapter offers an overview of the existing law governing the Office of the People's Counsel ("Office"), and reviews the Office's legislative and funding history. It is organized as follows:

- **Part A** summarizes the current County Code provisions that set forth the structure, purpose, and duties of the Office of the People's Counsel;
- **Part B** reviews three pieces of legislation considered and adopted by the Council that relate to the Office of the People's Counsel: 1990 legislation that created the Office; 1999 legislation that amended the original law and added a sunset provision; and 2002 legislation that repealed the sunset provision;
- **Part C** summarizes the Office's funding and staffing since FY00. While authorized by legislation in 1990, the Council did not appropriate funds for the Office until the FY00 operating budget; and
- **Part D** briefly describes selected changes in County land use laws, regulations, programs, and practices since the establishment of the Office of People's Counsel.

### A. Overview of Current Law

Two sections of the Montgomery County Code outline the structure, purpose, authority, duties, and operations of the Office of the People's Counsel:

- Chapter 1A, Article II, *Departments and Offices*, establishes the Office of the People's Counsel in the Legislative Branch of County Government; and
- Chapter 2, Article XII, *People's Counsel*, describes the function and authority of the Office.

Appendix A contains copies of these two sections of County law beginning at A-2.

**Staffing options and requirements.** The County Code provides the County Council with two staffing options for hiring the People's Counsel. One option is to employ a term merit system employee as the People's Counsel.<sup>1</sup> The other option is to provide the service of the People's Counsel via a contract for "one or more attorneys, along with support staff, consultants, and expert witnesses." (§ 1A-204(b)(3)(A))

In either case, the law (§ 1A-204(b)(3)(B)) requires that any attorney employed or retained as the People's Counsel must:

- Be a member of the bar of the Court of Appeals of Maryland;
- Have at least five years experience in the practice or teaching of law; and
- Have substantial experience with land use legal issues and procedures.

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<sup>1</sup> Section 1-73 of the County's Personnel Regulations define a term position as: "A type of full-time or part-time career merit system position that is created for a special term, project, or program, or a position in which the incumbent's employment terminates at the expiration of a specific period of time or term."

The law also limits the People's Counsel's outside employment, stating that any attorney employed or retained as the People's Counsel:

- Must not represent any client, other than as People's Counsel, in any matter involving land use in Montgomery or Prince George's County; and
- Must not, within one year after the attorney's service as People's Counsel ends, represent any party in any proceeding involving land use in the County.

**Statutory purpose.** The law that outlines the functions of the Office describes the purpose of an independent People's Counsel as follows:

*Purpose.* Informed public actions on land use matters require a full exploration of often complex factual and legal issues. An independent People's Counsel can protect the public interest and promote a full and fair presentation of relevant issues in administrative proceedings in order to achieve balanced records upon which sound land use decisions can be made. In addition, a People's Counsel who provides technical assistance to citizen organizations will encourage effective participation in, and increase public understanding of and confidence in, the County land use process. (§ 2-150(a))

**Authority and duties.** The law (§ 2-150(b)) states that to “protect the public interest and achieve a full and fair presentation of relevant issues,” the People's Counsel may participate in a proceeding before:

- The Board of Appeals if the proceeding involves a variance or a special exception;
- The County Council (solely for oral argument) or the Hearing Examiner if the matter involves a local map amendment, a development or schematic development plan approved under the zoning process, or a special exception; and
- The Planning Board if the proceeding involves action on an optional method development, a subdivision plan for a cluster development, or a site plan.

The law also authorizes the People's Counsel to file the following with the Board of Appeals (under § 59-G-1.3 of the County Code): a complaint alleging failure to comply with the terms of a special exception; a request for modification of a special exception; or a request for revocation of a special exception.<sup>2</sup>

The law explicitly restricts the People's Counsel from participating in “any legislative proceeding, or in any proceeding before a board or agency of any municipality in the County.” (§ 2-150(c))

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<sup>2</sup> § 59-G-1.3(b) of the County Code allows “any person or government agency” to file a complaint alleging failure with the terms or conditions of a special exception with the Board of Appeals or the Department of Permitting Services (DPS). However, under § 59-G-1.3(c) and 59-G-1.3(e), the Board of Appeals may only modify or revoke a special exception based on a written notice or recommendation of DPS or at the request of the special exception holder.

**Participation.** The law (§ 2-150(d)) provides that the People's Counsel becomes a party in a proceeding by filing a "notice of intention to participate." After the notice is filed, the People's Counsel is entitled to receive notices and to participate in a proceeding by:

- Making motions;
- Introducing evidence;
- Calling witnesses;
- Examining and cross-examining witnesses;
- Making arguments as the law and the evidence warrant; and/or
- Filing and arguing an appeal the same as any other party to the proceeding.

The law makes the People's Counsel's participation in an eligible proceeding discretionary, allowing the People's Counsel to withdraw or decline to participate in any proceeding. The law states that the People's Counsel "is not liable to any person for participating in, or declining to participate in, any proceeding." (§ 2-150(g))

**Independent Status.** The law explicitly states that the People's Counsel "must not represent the County, any government agency, or any private party in any proceeding." Further, the law provides that the People's Counsel "is not subject to the authority of the County Attorney." (§ 2-150(e))

**Technical Assistance.** The law states that "without becoming a party to a proceeding and subject to available time and resources," the People's Counsel may provide technical assistance to any person about the land use proceedings the office may participate in. The law also states that, when providing technical assistance, the People's Counsel must inform the recipient that the People's Counsel is not acting and cannot act as a personal attorney for the recipient. (§ 2-150(h))

**Coordination and Annual Report.** The law requires that the People's Counsel coordinate the services of its office with those offered by "land use information staff in the Council, Board of Appeals, and Planning Board, to avoid inconsistency and duplication of services, and to maximize the assistance offered to citizens." In addition, the People's Counsel must annually report to the County Council on the activities of the office. (§ 2-150(i) and (j))

## **B. Legislative History (1989 – 2002)**

This section highlights the County Council's review and adoption of legislation related to the Office of the People's Counsel. In sum, there have been three separate bills:

- Bill 11-89, adopted in February 1990, established the Office of the People's Counsel;
- Bill 14-99, adopted in August 1999, amended the original People's Counsel's law and added a sunset provision; and
- Bill 25-02, adopted in October 2002, repealed the sunset provision on the Office of the People's Counsel.

While the Office of the People's Counsel was established in County Code in early 1990, a decade passed before the Office received any funding. The following section (beginning on page 13) tracks the funding and staffing history of the Office.

## **1. Bill 11-89 established the Office of the People's Counsel**

The Council introduced Bill 11-89 on March 7, 1989, and deliberated for close to a year before adopting the final version of the bill on February 6, 1990. Documents used to summarize the legislative history of Bill 11-89 are attached in Appendix B, beginning at B-1.

### **a. Summary of the bill as introduced**

The Legislative Request Report accompanying the original bill stated that the legislation was being proposed to address the following problem: "The perception by some citizens that often only narrow private property interests are represented in adjudicatory proceedings involving land use and environmental issues."

As introduced, Bill 11-89 established a People's Counsel authorized to "represent the public interest and to achieve a full presentation of relevant issues" by initiating or intervening as a party in judicial or administrative proceedings involving:

- The zoning, subdivision, use or development of land in the County, or
- The application or enforcement of a law or regulation designed to protect the environment.

The original version of the bill established a nine-member citizen advisory board (appointed by the Council) to advise the People's Counsel and recommend land use and environmental proceedings that the People's Counsel should be involved in. The parameters initially established for the People's Counsel included prohibitions from:

- Representing the County, any government agency, or any private party in any proceeding; and
- Intervening in any legislative proceeding, such as master plans, zoning text amendments, and annual growth policy resolutions.

As introduced, Bill 11-89 authorized the People's Counsel to provide technical assistance and advise any citizen of the County on that person's rights and duties in any matter that involved land use or environmental issues as described above. The introduced bill provided the People's Counsel with all rights of a party in a proceeding and the authority to employ or retain staff or expert witnesses.

At the time of introduction, reasons offered by individual Councilmembers in support of Bill 11-89 included:<sup>3</sup>

- The Office of People's Counsel will provide a degree of equity and should make the current system more effective;
- By raising issues of concern to citizens in a timely fashion, a People's Counsel will address the disparity that exists between the resources available to developers and those available to the residential community; and
- A citizen advisor will be useful because of the difficulty that citizens have in understanding land use issues.

**Public hearing.** On June 20, 1989, the Council held a public hearing on Bill 11-89. Subsequent worksession packets on the bill summarized the public hearing testimony as follows:

- A number of civic groups and individual residents testified in support of the bill. Several witnesses recommended that the People's Counsel be given the authority to represent individual residents and neighborhood organizations, and/or to participate in legislative proceedings.
- The League of Women Voters opposed the bill because of the very broad responsibilities and jurisdiction for land use and environmental issues included in it, and the potential difficulty for a People's Counsel to determine in any given case what is the public interest.
- Executive Branch staff representing the County Executive testified in opposition to the bill, arguing that a People's Counsel was unneeded, would cost too much, could delay essential but unpopular projects, and would encourage confrontation instead of cooperation in County government.
- The County Attorney testified that the bill could violate the County Charter because it sets up an instrumentality of County government that is not subject to the authority or legal advice of the County Attorney.

#### **b. Council Committee worksessions**

The Council's Government Structure, Automation & Regulation (GSA) Committee held two worksessions on Bill 11-89. A third worksession was held by a joint meeting of the GSA Committee and Planning, Housing, and Economic Development (PHED) Committee. Highlights of the Committee's discussion and action, organized by issue, are summarized below. The record indicates that key provisions of the legislation were changed a number of times throughout the various meetings.

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<sup>3</sup> Approved Minutes for the Montgomery County Council in Legislative Session, March 8, 1989.

**July 13, 1989, GSA Committee Worksession #1.** At this worksession, the Committee discussed numerous policy and legal issues, and tentatively adopted several amendments.

Statutory purpose. Councilmembers' expectations concerning the role of the People's Counsel voiced during Committee worksessions included that:

- The People's Counsel will be in a position to serve both an advocacy and informational role;
- One of the most important duties of the People's Counsel will be to assure that decision-makers are apprised of and understand all sides of the issues so that they are able to make the best decisions in the greater public interest; and
- The role of the People's Counsel will be to provide information, and in addition, to provide technical assistance and legal advice that citizens often need to present their case to the government.<sup>4</sup>

Authority and duties. The GSA Committee affirmed that the People's Counsel should be authorized to intervene as a party in administrative and adjudicatory proceedings. The Committee recommended that the People's Counsel's jurisdiction be defined to include land use and environmental issues. Committee members expressed their view that the People's Counsel should intervene in only the most important non-land use environmental matters, acknowledging a concern that involvement in environmental matters could consume a disproportionate amount of the People's Counsel's resources.

The Committee also recommended that the People's Counsel not be authorized to participate directly in legislative proceedings, such as Master Plan amendments and the Annual Growth Policy. This prohibition, however, was not intended to limit the People's Counsel from advising residents about their participation in such proceedings.

Party representation. The Committee recommended that rather than representing the "public interest", the People's Counsel should represent individual citizens or organizations with "standing" in the proceeding, meaning those directly aggrieved by an action or proposed action. The Committee also recommended that a potential client's ability to afford a lawyer should be a factor for the People's Counsel to consider; however, the Committee chose not to include a specific income eligibility standard.

Citizen Advisory Board. The GSA Committee approved the provision of Bill 11-89 that included appointment of a citizen advisory board. One of the primary roles of this committee would be to guide decisions of the People's Counsel with respect to who would be represented.

Term of appointment. The Committee recommended that the People's Counsel serve a four-year term that would generally coincide with the term of the Council that appoints him or her. The Committee agreed to a provision that required a two-thirds vote of the Council to remove a People's Counsel during his or her term.

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<sup>4</sup> Approved Minutes for the Government Structure, Automation & Regulation Committee, July 13, 1989.

**September 29, 1989, GSA Committee Worksession #2.** At this meeting, the Committee reviewed issues discussed at the previous worksession as well as several additional policy and legal issues.

Party representation. The Committee considered the amended language stemming from the previous worksession that provided that the People's Counsel may represent individual clients. The Committee added language that required the People's Counsel to obtain approval from the citizens advisory board before intervening in any proceeding.

Sunset provision and evaluation. The Committee discussed but opted not to add a sunset provision to Bill 11-89. However, it did recommend amending the bill to require an Office of Legislative Oversight evaluation of the People's Counsel in 1994.<sup>5</sup>

**January 12, 1990, Joint GSA/PHED Committee Worksession.** This joint Committee worksession reviewed Bill 11-89 and Bill 21-89, legislation that had been introduced to create a citizen land use information officer position within the Montgomery County Planning Board.

According to the legislative record of the worksession, representatives from the League of Women Voters discussed their recommendation that the People's Counsel be established to provide technical advice to citizens and to participate as a party in land use matters only to assure a full and complete record.

The joint Committee debated concerns raised by the County Attorney about whether creation of the office violated the County Charter, and various proposals to further refine the structure, authority, and functions of the People's Counsel.

In the end, the joint GSA/PHED Committees recommended that:

- The People's Counsel should be hired through a contract for services, rather than as a merit system employee;
- The People's Counsel should not be authorized to represent either aggrieved citizens or the public interest. Rather, the People's Counsel should assure that the decision-making body receives a full and fair presentation of relevant issues.
- The People's Counsel should not be authorized to file or intervene in any court case. The Office's jurisdiction would be limited to County administrative proceedings in which a decision is based on a written record.
- The citizens advisory board should be deleted entirely.

The Committees also asked staff to draft more specific provisions on the subject matter in which the People's Counsel could intervene and to develop language that strictly limits the People's Counsel's civil liability to dissatisfied residents.

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<sup>5</sup> In 1994, the Office of Legislative Oversight submitted a memorandum to the Council explaining that the Office of the People's Counsel had not yet been funded, and as a result, there was no evaluation to conduct.

**c. Final Council action on Bill 11-89**

The Council took final action on Bill 11-89 on February 6, 1990. The worksession packet describes the amended bill that came out of the joint GSA/PHED Committee worksession as follows:

The Committees essentially accepted an alternative presented by the League of Women Voters to limit the People's Counsel to providing technical assistance and advice, and intervening in any proceeding only to assure a complete and fair presentation of the issues.<sup>6</sup>

The legislation also incorporated many of the amendments recommended by the County Attorney as a result of the earlier Committee worksessions. The final version of the bill, as adopted by the Council and signed by the County Executive, included the following language to define the purpose of the "independent" Office of the People's Counsel:

Informed public actions on land use matters require a full exploration of often complex factual and legal issues. An independent People's Counsel can promote a full and fair presentation of relevant issues in administrative proceedings in order to achieve balanced records upon which sound land use decisions can be made. In addition, a People's Counsel who provides technical assistance to citizens and citizen organizations will encourage effective participation in, and increase public understanding of, the County land use process.

The adopted version of the legislation limited the authority of the People's Counsel to participate only in proceedings "before the Hearing Examiner, Board of Appeals, and Planning Board which involve issues related to matters covered under the Regional District Act." In addition, the adopted version provided that the services of the Office of the People's Counsel would be fulfilled by an independent contractor.

Appendix B contains a copy of the final version of Bill 11-89, which became law on May 17, 1990.

**2. Bill 14-99 amended the People's Counsel law and added a sunset provision**

Although the Council approved legislation to establish the Office of the People's Counsel in 1990, the Office was not funded until FY00, almost a full decade later. The year before the Office received its first appropriation, the Council considered and passed a number of amendments to the enabling legislation. Documents used to compile the legislative history of Bill 14-99 are attached in Appendix B beginning at B-59.

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<sup>6</sup> February 6, 1990 memorandum from Senior Legislative Attorney Faden to the County Council for Council Agenda Item 17. *Final Action: Bill 11-89, People's Counsel.*



**Introduction of Bill 14-99.** In May 1999, the Council introduced Bill 14-99, *People's Counsel – Amendments*. As introduced, Bill 14-99 included amendments that:

- Added the option of employing a People's Counsel as a term merit system employee; and
- Allowed for the People's Counsel to represent individual parties under certain conditions.

Specifically, the amendment in Bill 14-99 regarding representation proposed that:

The People's Counsel is not a party in a proceeding under subsection (b) unless the People's Counsel has agreed to represent an aggrieved party or organization which could be a party to the proceeding and which would not otherwise be effectively represented. In deciding whether to represent an aggrieved person or organization, the People's Counsel must consider:

1. The person or organization's ability to retain other counsel;
2. The relative balance of the advocacy resources of the parties to the proceeding;
3. The nature, significance, and breadth of impact of the issues in the proceeding; and
4. Any other public policy implications of the proceeding.

**PHED Committee Worksession.** In June, the PHED Committee held a worksession on Bill 14-99. The issues discussed and positions taken are summarized below.

*Party representation.* The Committee considered but voted against the amendment that would have given the People's Counsel authority to represent individual clients. The worksession packet summarized the different viewpoints on this issue as follows:

Some civic groups have urged that the People's Counsel be allowed to represent individual citizens or community organizations who have standing to participate in an adjudicatory proceeding but cannot find or afford a private lawyer....The most frequently raised objection to giving the People's Counsel this broad a function is the discretion involved – the perceived difficulty in deciding which cases or clients to take, who most needs representation (because of their lack of resources) and deserves representation (because of the merits of their position or the gravity of the issues).<sup>7</sup>

The Committee did, however, agree to amend the bill by adding a provision that the People's Counsel should protect the public interest. The worksession packet describes the public interest standard as one in which “the People's Counsel makes an independent decision on what result would best protect the public interest in each case.” The Committee also reaffirmed its support for language that directs the People's Counsel to “promote a full and fair presentation of relevant issues...to achieve balanced records on which sound land use decisions can be made.”

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<sup>7</sup> August 3, 1999 memorandum from Senior Legislative Attorney Faden to the County Council on Council Agenda Item 6. *Action: Bill 14-99, People's Counsel – Amendments.*

Authority and duties. The Committee agreed that the technical assistance function is one of the People's Counsel's two primary functions under the law in place at the time, and did not recommend any changes related that function.

The Committee agreed to amend the bill to allow the People's Counsel to request a review of existing special exceptions by the Board of Appeals. Additionally, as recommended by the County Attorney, the Committee agreed to amend the bill to clarify that the People's Counsel is intended to function as a party to a proceeding where he/she enters an appearance, instead of vaguely "participating" in the proceeding.

**Council Action.** The Council adopted Bill 14-99 on August 3, 1999. According to the legislative record, the Council discussion focused on whether and under what conditions the People's Counsel should be authorized to request a review of a special exception or file an appeal. The Council also discussed whether to add a sunset provision.

The final version of the bill as adopted by the Council made some changes to the purpose, authority, and duties of the People's Counsel. In sum, Bill 14-99:

- Added the phrase "protect the public interest" as part of the description of the purpose of the People's Counsel, to make the law read: "An independent People's Counsel can protect the public interest and promote a full and fair presentation of relevant issues..."
- Added to the authority of the People's Counsel the ability to initiate a review of an existing special exception by filing a complaint alleging failure to comply with special exception conditions and/or by requesting that the Board of Appeals hold a show cause hearing to consider modifying or revoking a special exception.<sup>8</sup>
- Amended the law to remove a restriction in the original legislation preventing the People's Counsel from filing and arguing an appeal the same as any other party to the proceeding.

The bill as adopted also made the following changes to the basic operations of the Office:

- Added a sunset provision that terminated the Office of the People's Counsel as of July 1, 2003;
- Added a provision that gave the Council the option of employing a People's Counsel either as an independent contractor or a term merit system employee; and
- Added a restriction that any attorney employed or retained as the People's Counsel must not, for one year after serving as People's Counsel, represent any party in any proceeding involving land use in the County.

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<sup>8</sup> According to the legislative record, at a July 26, 1999 worksession on Zoning Text Amendment (ZTA) 99004, the PHED Committee agreed to amend relevant provisions of the zoning law to reflect the People's Counsel's new role in this area. The legislative history for ZTA 99004 indicates that the amendments were recommended by the PHED Committee but were not included in the version of the ZTA as adopted by the Council. A copy of the ZTA is included in Appendix B beginning on B-85.

### **3. Bill 25-02 repealed the sunset provision from the People's Counsel law**

At the recommendation of the PHED Committee, the County Council adopted Bill 25-02 on October 1, 2002. As introduced and passed, Bill 25-02 removed the sunset provision from the law that had been added by the Council in 1999. Documents used to compile the legislative history of Bill 25-02 are attached in Appendix B beginning at B-97.

The worksession packet for Council action states that a “public hearing was held on September 17, at which speakers, including representatives of the Planning Board, Board of Appeals, and the Office of Zoning and Administrative Hearings, enthusiastically endorsed the bill. . . . The Council also received a number of letters from civic associations and individuals who have participated in land use issues supporting the sunset repeal.”

#### **C. Funding and Staffing History**

The County Council first appropriated funds for the Office of the People's Counsel in FY00. The Office staffing initially consisted of two full-time positions: the People's Counsel and an Administrative Aide. The Administrative Aide position became part-time in FY04, and then was restored to a full-time position beginning in FY07 with a portion of the position's time (0.2 workyears) budgeted to the Board of Appeals.

The Council opted to employ a People's Counsel as a term merit system employee.<sup>9</sup> The People's Counsel position was classified by the Office of Human Resources as a Grade 34; Appendix A contains a copy of the current class specification (A-5) and the original job announcement (A-7).

Following a selection process, the Council appointed the first People's Counsel by resolution on December 6, 1999; the term of the appointment was set for 3.5 years to coincide with the term of the County Council. The Council reappointed the incumbent as People's Counsel in June 2003 to a four-year term. On July 3, 2007, the Council again reappointed the incumbent, but set a term of one year. The 2007 resolution states that the current People's Counsel serves until a successor is appointed.

Table 1 on the next page shows the actual expenditures of the Office of the People's Counsel from FY00 through FY07, and the Office's approved budget for FY08 and FY09. Personnel costs have consistently accounted for around 95% of the Office's budget. Since FY00, increases in the Office's budget have been due to compensation increases for existing staff.

The total FY08 budget appropriation for the Office was \$239,130. The recently approved funding level for FY09 is \$250,170, an increase of 4.6%.

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<sup>9</sup> As noted in Section A, the County Code (§ 1A-204) provides the County Council with the option to hire the People's Counsel as a term employee or as a contractor.

Fiscal Year	Expenditure Category		Total	Workyears
	Personnel	Operating		
FY00	\$75,717	\$28,289	<b>\$104,006</b>	<b>2</b>
FY01	\$159,848	\$21,528	<b>\$181,376</b>	<b>2</b>
FY02	\$171,532	\$9,199	<b>\$180,731</b>	<b>2</b>
FY03	\$192,684	\$15,482	<b>\$208,166</b>	<b>2</b>
FY04	\$179,555	\$7,699	<b>\$187,254</b>	<b>1.8</b>
FY05	\$181,974	\$10,364	<b>\$192,338</b>	<b>1.8</b>
FY06	\$201,905	\$7,600	<b>\$209,505</b>	<b>1.8</b>
FY07	\$217,994	\$4,837	<b>\$222,831</b>	<b>1.8</b>
FY08 Budgeted	\$225,000	\$14,130	<b>\$239,130</b>	<b>1.8</b>
FY09 Budgeted	\$237,780	\$14,390	<b>\$250,170</b>	<b>1.8</b>

Source: Montgomery County Operating Budgets, FY00-FY09

## **D. Related Issues**

As reviewed earlier in this chapter, the Council adopted the initial legislation that established the Office of the People's Counsel in 1990. Over the course of the past 18 years, there have been many changes in County laws, regulations, programs, and practices. This section briefly describes a number of these changes that relate directly to issues discussed at the time the Office of the People's Counsel was established.

### **1. Special exceptions hearings and inspections**

**Special exception hearings.** When the Council adopted the law to establish the Office of the People's Counsel, public hearings on special exception petitions<sup>10</sup> were conducted almost exclusively by the Board of Appeals (BOA). At that time, the BOA only rarely exercised its discretion (allowed under the law upon approval of three of its members) of assigning special exception hearings to the Hearing Examiner.

*Current Practice.* In 2003, the Council amended the Zoning Ordinance (Section 59-A-4.125) to assign all special exception hearings to the Hearing Examiner. In particular, ZTA 04-03 established that the Hearing Examiner has responsibility for scheduling and conducting public hearings on all special exception petitions. The law requires the Hearing Examiner to render a written report with recommendations to the Board of Appeals, who retained authority for final action.

<sup>10</sup> Applications for special exceptions are commonly referred to as "petitions." OLO uses the terms "application" and "petition" interchangeably when referring to requests for special exceptions.

**Inspection/enforcement of special exception conditions.** When the Council adopted the law to establish the Office of the People's Counsel, the Department of Permitting Services' inspection of special exception conditions was primarily complaint driven. In other words, DPS' general practice was to inspect special exceptions for compliance with conditions when a complaint was filed alleging a violation.

Current Practice. Since the late 1990's, the Department of Permitting Services has operated a small staff unit (two inspectors) that is dedicated to conducting inspections of special exceptions. In addition to responding to complaints, DPS' current practice is to inspect all special exceptions on a rotating basis. The purpose of DPS' routine inspections is to ensure compliance with any conditions placed on approval, regardless of whether a complaint has been filed.

## **2. Disseminating information to the public about land use laws and proceedings**

**Greater use of information technology.** When the Council adopted the law to establish the Office of the People's Counsel, the County's practices for disseminating information to residents did not include widespread use of the Internet. At the time, agency staff answered questions and provided information through a combination of written material, telephone communication, and face-to-face meetings.

Current Practice. The public's access to information about the County's land use laws and proceedings is significantly different in 2008 than it was in 1990. Today, it is routine practice for County agencies to post information on websites and to answer questions via email. The County Code (including the Zoning Ordinance) is accessible online, and Council and Planning Board meetings are available for viewing from residents' home computers.

Land use information that is now Internet accessible include a document titled *Rules of Procedure for Applications for Local Map Amendments and Petitions for Special Exceptions* posted on the Hearing Examiner's website and a document titled *What is a Variance?* posted on both the Board of Appeals' and People's Counsel's websites. Examples of documents and other information posted on the Montgomery County Planning Department website include:

- The *Manual of Development Review Procedures*, which contains the agency's administrative standards for timely and comprehensive review of and compliance with plans submitted pursuant to the Subdivision Regulations and Zoning Ordinance;
- Drafts of different types of applications, e.g., forest conservation, project plan, site plan;
- A description of services offered at agency's Information Counter; and
- Links to Planning Board agendas, staff reports, and decisions (both current and archives).

### **3. Planning Department's Management Improvement Plan**

In 2006, the Montgomery County Planning Department (then the Department of Park and Planning) adopted a Management Improvement Plan to address an acknowledged “underperformance of the development review process.” The beginning section of the Management Improvement Plan contains the following background summary:

In August 2004, residents of the new Clarksburg Town Center development brought to the attention of Park and Planning their concerns regarding compliance of the emerging development with approved site plans. Since that time, research by the residents, and follow-up action by staff of Park and Planning and other agencies, have resulted in official findings of violations.

The Management Improvement Plan, which was prepared at the direction of the County Council, provides a framework to guide the Planning Department's efforts to improve the regulatory process.

One of the four main areas targeted for improvement is titled “Resident Participation.” The Plan sets forth a number of specific strategies aimed to: “Expand opportunities for residents to be aware of and follow the decision-making process for all new development, to participate in this process in a timely and meaningful way, and to obtain persuasive evidence of strong stewardship of the public interest by Park and Planning personnel.”

A number of objectives identified in the Management Improvement Plan (dated January 17, 2006) relate directly to improving how land use information is provided to residents and to improving accountability and transparency. Examples include:

- Add a community liaison officer to assist the public with access, information, and obtaining timely and consistent agency responses on pending or approved development review cases;
- Set and implement policy regarding response to residents for documents and information;
- Publish development applications, opinions, drawings, and other project documents on the Internet; and
- Improve file management and hearing management by implementing a protocol for numbering exhibits.

Planning Department staff provided an update to the Council on implementation of the Management Improvement Plan in February 2007. In sum, Planning staff had made progress on some but not all of the objectives related to the overall goal of improving “Resident Participation.”

### **Chapter III. Activities of the Office of the People's Counsel**

As outlined in Chapter II, County law assigns two primary functions to the People's Counsel: to participate in certain types of land use proceedings and to provide technical assistance to County residents related to those proceedings. This chapter reviews the activities of the Office as follows:

- **Part A** reviews the People's Counsel's participation in land use proceedings;
- **Part B** reviews the People's Counsel's provision of technical assistance; and
- **Part C** reviews the People's Counsel's participation in other mediations and Community Liaison Committees.

While noting that it can vary from year to year, the current People's Counsel estimates dividing his time 30/70 as follows: 30% of his time is spent attending and participating in land use proceedings; the other 70% is spent providing technical assistance, conducting mediations, and attending Community Liaison Committee meetings.

#### **A. Participation in Land Use Proceedings**

County law authorizes the People's Counsel to participate in the following types of land use proceedings:

- Variance and special exception proceedings before the Board of Appeals;
- Local map amendment, development or schematic development plan approvals, and special exception proceedings before the Hearing Examiner or County Council; and
- Optional method development, subdivision plan, and site plan action proceedings before the Planning Board.

This section describes the People's Counsel's process for participating in specific types of land use proceedings, reviews the number and types of cases the People's Counsel has participated in since 2002, and includes a detailed review of the People's Counsel's participation in special exception and local map and development plan amendment cases during calendar year 2007.

#### **1. Description of process for participating**

The law provides the People's Counsel total discretion to participate in or decline to participate in any eligible type of proceeding. In its 2007 Annual Report, the People's Counsel lists eight factors he uses when reviewing particular cases to determine whether or not he will participate as a party of record in a land use public hearing:

- Impact on the public;
- Effect on the public health, safety, and welfare;
- Establishment of a future precedent;

- Existence of significant legal issues;
- Effect on public policy;
- Need to assist an applicant during a public hearing;
- Need to assist citizens during a public hearing; and
- Possibility of resolving outstanding issues through mediation.

The People's Counsel's participation in different types of cases is described below.

**Local Map Amendments, Development Plan Amendments, and Special Exceptions.**

By law, all applications for local map and development plan amendments are heard by the Hearing Examiner in the Office of Zoning and Administrative Hearings (OZAH), who renders a report and recommendation to the County Council for decision. Since 2003, the Hearing Examiner also hears all applications for special exceptions. With special exception cases, the Hearing Examiner's report and recommendation is submitted to the Board of Appeals (BOA) for decision.<sup>11</sup>

As a matter of practice, the Office of the People's Counsel receives a copy of all local map amendment and special exception applications. After receiving an application, the People's Counsel formally fills out a Notice of Intention to Participate for each case. The People's Counsel files the Notice both with OZAH and the applicant(s)' legal counsel. As a result, the People's Counsel receives copies of all the information, exhibits, and notices filed for all applications.

The People's Counsel reports that he attends most special exception hearings, but that the type and level of his involvement at each hearing varies based on the specifics of each case. The People's Counsel generally does not participate in special exception cases for accessory apartments or monopoles (cell phone towers).

By law, the Planning Board or its technical staff must submit a report reviewing any petition for a special exception or local map amendment prior to the OZAH hearing on the application. In most cases, Planning Board staff produce a Technical Staff Report, which is followed by a public hearing and written recommendation from the Planning Board. The People's Counsel reports that he often looks to the analysis provided in the Technical Staff Report as well as testimony given at the Planning Board's hearing to determine whether there are "public interest" issues that should be pursued.

The People's Counsel reports that he is less likely to participate in a case when community participants are represented by legal counsel. According to the People's Counsel, when both sides have legal counsel, the relevant "public interest" issues are usually aired at the public hearing. When this occurs, there is less need for the People's Counsel to participate in order to achieve a balanced record.

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<sup>11</sup> Chapter II, page 14, describes the change in how special exceptions are heard that occurred in 2003.



**Variations.** By law, the BOA hears and acts on requests for variations. A variation is a relaxation of an applicable zoning regulation granted when the Board determines that application of the zoning regulation would result in peculiar or unusual practical difficulties to a property owner.

The People's Counsel reports that he generally keeps track of applications filed for variations. However, due to the routine nature of most variation requests, the People's Counsel does not become a party to all cases, or attend all variation hearings. The People's Counsel rarely received requests to participate in a variation hearing.

According to the People's Counsel, he tends to participate more on the "front-end" of variation cases, by providing information and guidance on effective participation to individuals who are interested in applying for a variation. For example, he will explain the entire variation application process, discuss and provide samples of results of applications for similar variations, and review the types of questions the applicant will likely have to answer and the types of information they will need to provide.

**Subdivision/Site Plans.** By law, the Planning Board hears and acts on all applications for subdivision and site plan approval. The People's Counsel reports that he reviews all subdivision and site plan applications, along with Planning Board staff recommendations, when they appear on the Planning Board's agenda. According to the People's Counsel, the Planning Board staff's reports usually "identify most if not all of the public interest issues" in a case. And in practice, the People's Counsel has found this decreases the need for his involvement in order to balance the record.

As with variations, the People's Counsel reports that his work related to subdivision and site plan cases is most often on the "front-end." In particular, the People's Counsel becomes involved by providing information to residents about the application, review, and approval process, and by providing guidance on how to participate effectively in Planning Board proceedings.

## **2. Number and type of proceedings participated in since 2002**

The People's Counsel tracks and annually reports the number and types of land use proceedings that he participates in. The Office tallies the People's Counsel's participation in front of the Planning Board, Hearing Examiner, and Board of Appeals as separate events, even when the participation is for the same case.

For example, a case in which the People's Counsel appeared in a Planning Board proceeding and also in a Hearing Examiner proceeding is recorded as two incidents of participation. As a result, the Office of the People's Counsel's data on proceedings that he participated in and OZAH data on annual hearings differ.

Table 2 summarizes the People's Counsel's data on the number and type of land use proceedings that he participated in between 2002 and 2007. According to the Office's annual reports, the People's Counsel participated in a total of 267 proceedings over the six-year period examined.

The data show that the People's Counsel participated in an average of 44 proceedings per year; the lowest number was 28 (in 2007) and the highest number was 76 (in 2002). Of the proceedings that the People's Counsel reports participating in, special exceptions consistently accounted for the largest number and percent, followed by local map amendments.

<b>Proceeding</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>Total</b>
Special Exception	62	22	37	31	16	16	<b>184</b>
Local Map Amendment	8	10	13	7	15	7	<b>60</b>
Subdivision Plan	2	1	1	3	1	2	<b>10</b>
Development Plan Amendment	3	--	--	4	--	2	<b>9</b>
Site Plan	1	--	1	--	1	1	<b>4</b>
Variance	--	--	--	--	--	--	<b>0</b>
<b>Total</b>	<b>76</b>	<b>33</b>	<b>52</b>	<b>45</b>	<b>33</b>	<b>28</b>	<b>267</b>

Source: Annual Reports of the Office of the People's Counsel, 2002-2007

### **3. Detailed review of case participation in 2007**

To learn more about the types of activities the People's Counsel undertakes when participating in proceedings, OLO conducted a more detailed review of special exception and local map amendment cases in which the People's Counsel participated during 2007.<sup>12</sup> OLO compiled the information presented below by reviewing a combination of OZAH and Board of Appeals public hearing transcripts and Hearing Examiner's reports.

**Participation and positions taken.** In 2007, the Hearing Examiner held hearings on 25 special exception cases and ten local map amendment cases. Almost half (12 out of the 25) of the special exception cases were accessory apartment petitions, in which the People's Counsel generally does not participate. Of the other 13 special exception cases heard by OZAH during 2007, the record shows that the People's Counsel did participate in 12 (or 92%). In addition, the People's Counsel participated in four of the ten local map amendment cases.

When the People's Counsel participates in a land use proceeding about a specific case, he can appear in support of the petition, in opposition to the petition, or as a neutral party.

<sup>12</sup> The People's Counsel's case participation numbers in this section differ slightly from the data presented in Table 2 because the data in Table 2 includes participation in Planning Board proceedings.

The table below shows what position the People's Counsel took in the 16 special exception and local map amendment cases he participated in before the Hearing Examiner during 2007. The data indicate the People's Counsel most often appeared in support of an application or remained neutral.

Type of Proceeding	2007 Participation	People's Counsel Position Taken		
		Supported	Opposed	Neutral
Special Exceptions	12	7	0	5
Local Map Amendments	4	0	1	3
<b>Total</b>	<b>16</b>	<b>7</b>	<b>1</b>	<b>8</b>

Source: Public hearing transcripts and Hearing Examiner's Reports provided by the Board of Appeals and OZAH.

OLO also reviewed how the People's Counsel's participation and position related to the voicing of community opposition. OLO found that:

- Of the seven applications supported by the People's Counsel, two had formal opposition and one had formal support from community members.
- Of the eight applications where the People's Counsel remained neutral, two had formal opposition and one had both formal opposition and support from community members.
- The one application opposed by the People's Counsel also had formal opposition from community members.
- For the 19 special exception and local map amendment cases in which the People's Counsel did not participate, two had formal support from community members (both local map amendment cases) and seven had formal opposition from community members (all accessory apartment special exception cases).

**Type of participation.** When participating in a land use proceeding, the County Code authorizes the People's Counsel to make motions, introduce evidence, call witnesses, examine and cross-examine witnesses, and make arguments as the law and evidence in the proceeding warrant. OLO examined the transcripts from the 16 hearings in which the People's Counsel participated to review the People's Counsel's type of participation.

As summarized on the next page, the cases reviewed by OLO showed that the People's Counsel primarily made oral arguments/statements and cross-examined witnesses. In sum, the People's Counsel:

- Made oral arguments or other statements in 15 cases;
- Cross-examined witnesses in 11 cases;
- Introduced evidence in three cases; and
- Did not file written motions or call witnesses in any case.

Type of Proceeding and Number of Cases	Made Oral Arguments	Cross-Examined Witness	Introduced Evidence	Filed a Motion*	Called Witness
Special Exception (12 cases)	12	8	1	0	0
Local Map Amendment (4 cases)	3	3	2	0	0
<b>Total</b>	<b>15</b>	<b>11</b>	<b>3</b>	<b>0</b>	<b>0</b>

\*According to the People's Counsel and OZAH staff, it is uncommon for participants in administrative proceedings before the Hearing Examiner to file written motions. Certain types of oral arguments or statements made by the People's Counsel or other participants could be categorized as motions in a more formal setting. Source: Public hearing transcripts provided by the Board of Appeals and OZAH.

OLO also classified the types of oral arguments/statements made by the People's Counsel into four categories: General Comments, Statements of Law, Improvement Suggestions, and Objections or Arguments. Table 5 offers examples of statements from each category based on the review of transcripts from the 16 cases.

<b>General Comments</b>
<ul style="list-style-type: none"> <li>• Commented on the procedure for public notice and entering exhibits into the record.</li> <li>• Provided background information on the geographic location of property in a case.</li> <li>• Discussed the concepts of "neighborhood" and "surrounding area."</li> </ul>
<b>Statements of Law</b>
<ul style="list-style-type: none"> <li>• Referenced a precedent set in previous cases heard by the Board of Appeals.</li> <li>• Commented on the applicability of State law to qualifying an individual as an expert witness.</li> <li>• Referenced the County's sign requirements administered by DPS.</li> <li>• Referenced the application of the County's Zoning Ordinance and Noise Ordinance.</li> <li>• Raised concerns about the legality of approval conditions proposed in the technical staff report.</li> </ul>
<b>Improvement Suggestions</b>
<ul style="list-style-type: none"> <li>• Suggested a special exception condition to require the submission of a long-range strategic plan.</li> <li>• Requested additional information to be added to the official record.</li> <li>• Requested corrections/changes to exhibits already included in the record.</li> <li>• Suggested adding a Transportation Management Plan condition to a special exception.</li> <li>• Suggested adding a Community Liaison Committee condition to a special exception.</li> </ul>
<b>Objections or Arguments</b>
<ul style="list-style-type: none"> <li>• Objected to lines of questioning that went beyond the scope of the proceedings.</li> <li>• Objected to designating an expert witness for the applicant based on insufficient qualifications.</li> <li>• Provided arguments that defined the "public interest" in the case and how the "public interest" was best served.</li> <li>• Provided arguments that qualified what actions needed to be taken for the People's Counsel to support the project.</li> </ul>

## **B. Providing Technical Assistance**

In addition to participating in certain hearings, the law authorizes the People's Counsel to provide technical assistance to residents about land use proceedings. According to the People's Counsel, in practice, providing technical assistance can be categorized into three types of activities:

- Providing general information and assistance on land use topics, e.g., explaining what a special exception is and how the process works;
- Providing guidance on effective participation in the County's land use process, e.g., offering advice and guidance on testifying at a land use proceeding; and
- Providing technical advice and support to government officials on land use issues and participating in the zoning text amendment advisory group.

**Providing general information and assistance.** The People's Counsel reports that this type of technical assistance usually occurs in response to requests from individual residents who contact the Office via phone, e-mail, or in-person. The People's Counsel reports that the topic of these requests varies widely. For example, the People's Counsel receives general inquiries related to how the County's land use and zoning process works as well as specific questions about land use proceedings. Also, upon request, the People's Counsel speaks at community meetings on land use issues.

**Providing guidance and advice on effective participation.** The People's Counsel reports that technical assistance about effective participation also occurs in response to requests from individual residents; however, it can occur when the People's Counsel initiates contact with one or more residents before, during, or after a proceeding. According to the People's Counsel, the intent of this type of technical assistance is to help residents (either in support of or opposed to an application) participate in proceedings in a manner that will help lead to a "full and fair presentation of relevant issues."

Examples cited by the People's Counsel as ways he supports effective participation include:

- Meeting with individuals to explain the special exception process, such as how various hearings are structured, who can speak at a hearing and for how long, etc.;
- Providing samples of materials and information from similar cases to a prospective applicant or case participant;
- Types of questions applicants for a variance should be prepared to answer at their public hearing;
- Explaining how Zoning Ordinance requirements apply to facts of specific zoning reclassification, special exception, variance, and subdivision cases; and
- Providing guidance on how to offer relevant evidence and structure arguments when appearing in a land use proceeding.

**Providing technical advice and support.** The People's Counsel reports that he provides technical advice and support on a variety of land use issues to government officials as needed or requested, including Councilmembers and Council staff, Planning Board members and Planning Department staff, Board of Appeals members and staff, OZAH staff, Department of Permitting services staff, and Department of Housing and Community Affairs staff. The People's Counsel also participates on a zoning text amendment advisory group.

**1. Number and types of technical assistance and information provided since 2002**

The Office tracks and annually reports the types and number of instances of technical assistance provided. According to these statistics, between 2002 and 2007, the Office provided over 18,000 instances of technical assistance covering 135 subjects.

The Office defines the provision of technical assistance as each instance where an Office staff member provided information or assistance on a land use issue. As a result, the technical assistance numbers capture the total number of interactions. For example:

- Five contacts with an individual on the same topic would be counted as five separate instances of technical assistance;
- One contact with an individual on two topics would be counted as two separate instances of technical assistance; and
- One meeting with 100 individuals on one topic would be counted as 100 separate instances of technical assistance.

The 135 subject categories vary widely, ranging from broad issues (e.g., parking, environment) to specific special exception types or cases (e.g., landscape contractor special exception, Holton-Arms special exception modification). A complete list of subject categories is available in the Office's most recent annual report, included in Appendix A beginning on A-9.

<b>Table 6. Instances of Technical Assistance as Reported in the Annual Reports of the Office of the People's Counsel, 2002-2007</b>							
	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>Totals</b>
Instances of Technical Assistance	645	1,071	1,889	3,140	3,982	7,554	<b>18,281</b>
Number of Subjects Each Year	32	43	53	70	94	99	<b>135*</b>

\* This number does not represent the sum of the numbers in this row. It represents the total number of subjects on which Office provided technical assistance from 2002 to 2007.

Source: Eighth Annual Report of the Office of the People's Counsel – 2007

**2. Publication of brochures and information**

Since its inception, the Office has produced written brochures and information on land use proceedings and issues. All brochures are available for pick-up in the Office of the People's Counsel, the Board of Appeals, and the Office of Zoning and Administrative Hearings, and at the Planning Board; some brochures are also available for download (in PDF format) from the Office's website.

Specific examples of informational materials initiated by the Office include brochures on variances, the special exception process, and the zoning of land in Montgomery County.

The People's Counsel worked with the Montgomery County Department of Planning to develop brochures on how to participate effectively in the subdivision process, how to participate effectively in the site plan process, and a soon to be published brochure on how to participate effectively in reviewing development applications. In addition, the People's Counsel is working with Planning Department staff to develop a brochure as well as an introduction and glossary on how to use the recently published *Manual of Development Review Procedures*.

The People's Counsel has also developed an information packet and brochure describing the Office and its functions, as well as a brochure advertising the various land use topics, procedures, and regulations on which the Office can provide information or assistance.

**C. Other Activities of the People's Counsel**

There are two other activities that the People's Counsel engages in that account for a notable amount of his time: mediating land use disputes and participating on Community Liaison Committees. Although neither one of these activities is explicitly referenced in the law establishing the Office of the People's Counsel, the Office has formally notified the County Council of its participation in these activities each year through its quarterly and annual reports.

**1. Mediation**

In certain instances, the People's Counsel offers to mediate land use disputes to resolve outstanding issues between community members and special exception and/or rezoning applicants. The People's Counsel established a land use mediation process in 2002, and reports having conducted 47 mediation sessions during the past five years. However, as shown in Table 7, the majority of those mediation sessions (31 or 66%) occurred in 2002 and 2003.

	2002	2003	2004	2005	2006	2007	Total
Number of Mediation Sessions	15	16	6	3	6	1	47

Source: Annual Reports of the Office of the People's Counsel, 2002-2007

The People's Counsel reports that mediation sessions have occurred as the result of:

- A request from one or both of the parties;
- A request from the Hearing Examiner; or
- The People's Counsel's belief that a mediation session may be successful in resolving outstanding issues.

The People's Counsel reports that he will not conduct a mediation session unless both of the sides voluntarily agree to participate.

In most cases, the People's Counsel reports that a mediation session occurs before an issue goes to a formal hearing. However, sometimes mediations are held based on a recommendation by the Hearing Examiner during a public hearing. Participation in a mediation session and any agreement on outcomes is completely voluntary for both sides. The People's Counsel reports that the results of the mediation sessions have been mixed, with some resulting in agreements and others not leading to agreement.

The People's Counsel suggested that fewer mediations have been conducted in recent years for a number of reasons. First, the People's Counsel has increased his less formal mediation efforts – for example, helping to seek a solution by bringing ideas back and forth between two sides without formally bringing the groups together face-to-face. The People's Counsel reports that, depending on the issue and the level of emotion involved, this process can more effectively gain agreement than a mediation session.

A second reason for fewer mediations may be the increase in the number of Community Liaison Committees (described below). The People's Counsel reports that these committees have helped solve community disputes related to special exception cases before they rise to a level requiring mediation.

## **2. Community Liaison Committee (CLC) participation**

Since 2001, the People's Counsel has been participating in CLCs. CLCs are groups formally established through a Board of Appeals condition on a special exception. The Board established the first CLC in 2001, at the recommendation of the People's Counsel, as a condition on the Holton-Arms private school special exception. The People's Counsel reports that the use of CLC's as a formal special exception condition is unique to Montgomery County.

CLCs were developed as a new element to facilitate the review of the operations of a special exception after it has been granted. The intent of a CLC is to foster communication between the special exception holder and the surrounding community and to prevent potential problems from rising up to the enforcement level. The inclusion of a CLC as a special exception condition is now recommended in many cases by the Hearing Examiner, the People's Counsel, the Planning Board, and/or the Board of Appeals.



CLC's are "permanent" entities that must meet a certain number of times per year, with mandated membership from both the special exception holder and representatives of the surrounding community. Most CLCs require the People's Counsel to attend CLC meetings as an "ex officio" member.

The People's Counsel reports that his role at the CLC meetings is to facilitate and mediate the meeting, and that he often helps the CLC participants access other offices in County Government as needed, e.g., the Department of Transportation or the Department of Environmental Protection. The People's Counsel also reports that:

- Some CLC meetings are contentious, requiring a higher degree of facilitation between the sides, while others are very collegial;
- One of the benefits of a CLC is that many issues do not come to light until the use (after being granted) becomes operational; and
- In many instances, CLC meetings have successfully transformed adversaries into co-operating neighbors.

There are currently about 28 CLCs in the County in which the People's Counsel participates. Table 8 shows that the number of CLC meetings the People's Counsel participated in has been increasing since 2003.

	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>Total</b>
Community Liaison Committee Meetings	20	24	24	29	44	<b>141</b>

Source: Annual Reports of the Office of the People's Counsel, 2002-2007

## **Chapter IV. Feedback on the Current Law and Services Provided by the Office**

In order to obtain feedback on the current law and services provided by the Office of the People's Counsel, OLO conducted interviews with a selected sample of government and non-government representatives. In total, OLO staff spoke with approximately 50 individuals who shared their views based upon their own knowledge of the law and/or their personal experience(s) with the People's Counsel during the past several years.

This chapter summarizes the feedback that OLO obtained through these interviews. In order to promote a candid sharing of opinions, OLO promised those interviewed that specific comments would not be attributed to individuals. As a result, this chapter is written with an emphasis on the recurring themes that OLO heard voiced by those interviewed. The text explicitly notes when a particular observation was offered by a single person.

In sum, a majority of those interviewed expressed support for maintaining an office in Montgomery County that is dedicated to providing information and assistance to residents that is related to the County's complex process of making land use decisions. Individuals' subjective assessment of their personal interactions with the Office of the People's Counsel range from extremely positive to neutral to somewhat negative. Some interviewees offered specific recommendations for changes to the law and/or adjustments to the types of services available from the Office of the People's Counsel.

The balance of this chapter reviews the feedback received in two parts:

- **Part A** summarizes the feedback from OLO's interviews with government representatives from the County Council, the Planning Board, the Office of Zoning and Administrative Hearings, the Board of Appeals, and the Department of Permitting Services; and
- **Part B** summarizes the feedback from OLO's interviews with land use attorneys, special exception holders, community members who have participated in land use proceedings, and a random sample of 27 residents who received technical assistance from the People's Counsel between January 2007 and April 2008.

### **A. Feedback from Interviews with Government Representatives**

When assigning this project, the County Council asked OLO to obtain feedback on the law and work of the Office from Councilmembers and Council staff as well as from other local government offices that frequently interact with the Office of the People's Counsel, i.e., Planning Board, Board of Appeals, Office of Zoning and Administrative Hearings, and Department of Permitting Services. The summary below highlights the recurring observations and comments expressed to OLO during the course of approximately 25 interviews held with government representatives during April and May 2008.

## **1. Opinions on the function of the Office of the People's Counsel in general**

Almost all of the government representatives interviewed hold the view that Montgomery County's land use process is so complex that residents need ready access to informational resources such as the Office of the People's Counsel. Many of those interviewed indicated that they have referred people with questions about specific land use matters to the People's Counsel for assistance. Common reasons cited for making referrals to the People's Counsel were that:

- The People's Counsel has knowledge of the County's laws and familiarity with the processes surrounding approvals for variances, special exceptions, and local map amendments; and
- The People's Counsel can answer questions about pending cases, whereas the law prohibits certain government officials – including Councilmembers, the Hearing Examiner, and members of the Board of Appeals – from discussing specific cases outside of a formal government hearing.

Several of the government representatives interviewed reported that they refer people with questions to other government offices – in addition to the People's Counsel – for technical assistance. Examples of other sources of information about land use laws and the decision-making process are staff from: Park and Planning, the Board of Appeals, the Office of the County Attorney, and the Department of Permitting Services (DPS).

When asked about the role of the People's Counsel, a majority of the government representatives interviewed supported the continuation of the Office of the People's Counsel as a neutral party who represents the “public interest.” Reasons for preferring this role include that a People's Counsel who argued during land use proceedings in favor of one side or the other of a particular application could be criticized for being “unfair” or “too political.”

However, some of the government representatives interviewed would like the People's Counsel to more affirmatively advocate for people in opposition to development applicants. One individual even expressed the view that the law, as currently written, already requires the People's Counsel to advocate on behalf of residents opposed to development projects in order to “balance the record.”

## **2. Opinions on the services of the Office of the People's Counsel**

**Case participation.** The general consensus among the government representatives interviewed is that the People's Counsel primarily participates in special exception and local map amendment cases; and rarely participates in variance, site plan, or subdivision cases.

Government representatives interviewed expressed a range of opinions about the benefit of the People's Counsel's participation in special exception and local map amendment cases. Specific observations included:

- The People's Counsel's expertise on the history of land use decisions in Montgomery County adds value to the decision-making process;
- The People's Counsel provides a different perspective and/or different information for the record that is not offered by an applicant or other community members;
- By asking questions and cross-examining witnesses, the People's Counsel draws added attention to certain issues, such as traffic or development compatibility; and
- The People's Counsel tends to focus on procedural as opposed to substantive issues.

**Providing technical assistance and information.** The People's Counsel responds to requests for technical assistance and information about land use issues. This assistance often includes providing guidance to individuals about how they can participate "effectively" in land use proceedings, e.g., hearings on variances, special exceptions, or zoning map amendments.

Some of the government representatives interviewed cited specific examples where the People's Counsel's efforts to help individuals participate in land use proceedings has had a beneficial effect on the process. Examples of reported benefits include:

- The People's Counsel explains the land use decision-making process before the hearing takes place, which better prepares residents who want to participate;
- The People's Counsel's involvement helps residents present testimony that includes relevant and legally-significant topics; and
- The People's Counsel helps residents develop suggestions that sometimes influence the final design and/or conditions placed on land use approvals.

Several government representatives commented on the usefulness of having someone to whom they can refer residents for information who is not a "decider" in a case. The People's Counsel can speak to any party at any time about any issue in a case without violating *ex parte* rules. Some of the government representatives interviewed voiced their opinion that County residents appreciate the availability of the services that the Office of the People's Counsel provides.

**Community Liaison Committees (CLCs).** The People's Counsel serves as an *ex officio* member of many CLCs, which are groups appointed as a condition of some special exception approvals. A CLC typically consists of representatives from the special exception holder and surrounding residents; the group generally convenes at regular intervals during the year to address issues created by the special exception.

Government representatives familiar with various CLCs praise their establishment. The consensus view is that CLCs facilitate the resolution of disagreements in special exception cases without the need for enforcement action by DPS.

Most, but not all, individuals interviewed (who had some experience with CLCs) commented that having a government official on the CLCs enhanced the CLCs' work. Several government representatives specifically support the People's Counsel's presence on the CLCs because he is a "neutral" government party. These representatives stated that neither staff from the Council nor from DPS could perform the same role as the People's Counsel on a CLC because Council staff are "political" representatives and DPS staff have enforcement authority over special exceptions.

Observations offered on the People's Counsel's participation on CLCs included the following:

- The People's Counsel levels the playing field among the participants and brings legitimacy to the process;
- The People's Counsel's presence makes special exception holders listen more carefully to residents' concerns;
- The legal experience of the People's Counsel can be beneficial for residents participating in CLCs; and
- Sometimes the People's Counsel's participation in CLC meetings does not add any substantive benefit to the meeting.

**Mediation.** At times, the People's Counsel "mediates" issues between residents and applicants – either at the request of a Hearing Examiner or at his own initiative. Some government representatives expressed the belief the People's Counsel's mediation efforts improve some government hearings by facilitating agreements prior to the hearings.

### **3. Suggestions offered for improvements**

Several of the government representatives interviewed suggested "improvements" to the structure and/or work of the Office of the People's Counsel. Suggestions for legislative changes were to:

- Amend the law to specifically allow the People's Counsel to assist and facilitate implementation of Community Liaison Committees;
- Amend the law to specify a supervisor for the People's Counsel, e.g., the Council Staff Director or the Council's PHED Committee; and
- Amend the law to clarify that the People's Counsel can and should advocate on behalf of the position held by community representatives during land use proceedings such as special exception, local map amendment, site plan, and subdivision hearings.

A number of government representatives interviewed weighed in on the issue of providing the People's Counsel with funds to hire expert witnesses to testify in cases. One point of view is that this would be valuable because of the additional information that could be provided at land use hearings to support residents' or the People's

Counsel's concerns about complex and technical issues, such as traffic impact. The alternative view is that allowing the People's Counsel to hire expert witnesses could conflict with the role of the Office to argue for the "public interest."

## **B. Feedback from Non-Governmental Representatives**

The Council's assignment to OLO included a request to solicit opinions about the law and services of the Office of the People's Counsel from a sample of non-governmental representatives, to include residents, applicants for land use approvals, and land use attorneys.

This section includes two components. The first component summarizes feedback on the function and services of the Office from OLO's interviews with a sample of non-governmental representatives who participated in land use proceedings in the past several years that involved the People's Counsel or who received technical assistance or information from the People's Counsel.<sup>13</sup>

The second component summarizes feedback from a randomly-selected sample of 27 residents who received technical assistance from the Office of the People's Counsel between January 2007 and April 2008.

### **FEEDBACK BASED ON PARTICIPATION IN LAND USE PROCEEDINGS**

#### **• Opinions on the function of the Office of the People's Counsel**

With few exceptions, the non-governmental individuals who spoke with OLO support the function of the Office of the People's Counsel. Different individuals, however, supported different aspects of the work of the People's Counsel to varying degrees.

The land use attorneys interviewed reported interacting with the People's Counsel in a variety of ways. Some participated with the People's Counsel in hearings before the Hearing Examiner or the Board of Appeals. Others have clients that serve on Community Liaison Committees.

A general consensus among the non-governmental representatives interviewed is that the People's Counsel serves a useful function by educating residents about the County's complex land use decision-making process. Several attorneys commented that residents who meet with the People's Counsel are better educated about the process and that the People's Counsel's efforts make the land use process work more smoothly. One even offered the compliment that the People's Counsel is the "best source of land use information for residents available throughout the County Government."

There is a greater split of opinion, however, with respect to the People's Counsel additional functions. Some of the residents and land use attorneys interviewed believe that the People's Counsel should not remain a neutral party during land use proceedings but

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<sup>13</sup> The People's Counsel provided OLO with a list of individuals with whom he has interacted over the past several years.

should, instead, “affirmatively advocate” on behalf of residents to oppose an applicant’s requested land use approvals. These individuals expressed the following views:

- Residents expect that the People’s Counsel will “represent” them in cases and get frustrated when they learn that is not a function explicitly assigned to the People’s Counsel under the law; and
- The current structure of the law establishing the People’s Counsel limits how beneficial the Office of the People’s Counsel can be to residents who want help from the County Government to oppose changes in land use.

On the other hand, other non-governmental representatives interviewed strongly support the current structure of the law, which allows the People’s Counsel to participate in land use proceedings, but on behalf of the generic “public interest” as opposed to advocating for one particular side or the other. These individuals would oppose an amendment to the law that required the People’s Counsel to “represent” individuals, either in favor of or opposed to a land use change.

## **2. Opinions on the services of the Office of the People’s Counsel**

**Case participation.** The land use attorneys interviewed expressed a variety of opinions about the People’s Counsel’s participation in land use proceedings. Most of the examples were of the People’s Counsel’s participation in hearings held by the Hearing Examiner on special exception and/or local map amendment applications. The positive comments included that:

- The People’s Counsel is diligent in his efforts to facilitate a complete record;
- The People’s Counsel has a moderating influence on people during the hearings and his participation helps to keep the hearing focused; and
- The time that the People’s Counsel spends with residents to educate and prepare residents prior to hearings make the proceedings go more smoothly.

The less positive comments included that the People’s Counsel sometimes offers compromises during land use proceedings that are not perceived by residents as in their best interest and that it is unclear in some cases how the People’s Counsel defines the “public interest.” One land use attorney shared the view that the law should explicitly define the People’s Counsel’s participation in the “public interest” as meaning defense of the County’s Zoning Ordinance and adopted master plans.

**Providing technical assistance and information.** Almost all of the non-governmental representatives interviewed had high praise for the technical assistance and other information that the People’s Counsel provides to residents. Even those individuals who openly question why the People’s Counsel cannot or does not affirmatively represent residents in their opposition to land use applications support the work of the People’s Counsel to educate residents about the land use process.

Comments from non-governmental representatives interviewed about the technical assistance provided by the People's Counsel included:

- The People's Counsel's advice helps residents to better understand the County's complex land use process;
- The People's Counsel is one of the best resources available for educating the public about special exceptions and local map amendments;
- The People's Counsel is helpful and tough, but fair-minded; and
- The People's Counsel can be very patient when working with people who are new to the land use process in the County.

While acknowledging the value of information provided by the People's Counsel, a number of the residents and attorneys who were interviewed commented that the demeanor of the People's Counsel can at times be "brusque" or "dismissive."

**Community Liaison Committees.** Some of the non-governmental representatives interviewed – attorneys, special exception holders, and residents – have interacted with the People's Counsel within the context of one or more of the Community Liaison Committees. The majority of comments about the People's Counsel's involvement in CLCs was positive, with a few negative comments.

Most individuals shared the view that the People's Counsel's participation on CLCs was helpful. Specific examples are that the People's Counsel facilitates greater discussion and resolution of issues in a constructive way; helps to find a balanced solution to problems; and explains the "reality" of situations to all parties. The only negative feedback was that the People's Counsel's participation can, on occasion, prolong CLC meetings without helping to resolve outstanding issues. One individual stated a perception that the People's Counsel insists that he be appointed to CLCs.

**Mediation.** Only a few of the land use attorneys interviewed had interacted with the People's Counsel in a mediation context, and those individuals comments were mixed. These included:

- The People's Counsel is fair in mediation meetings and tries to get something for citizens who do not know how to do it themselves;
- The People's Counsel was helpful in presenting a realistic idea of the possible outcome in a particular case;
- The People's Counsel at times "interferes" in mediations where both sides are represented by attorneys – sometimes undermining an attorney's request on behalf of a client when the other side is willing to comply with the request; and
- The People's Counsel seeks to participate in all mediations, even when all parties are represented by attorneys and arrange to meet on their own.



### **3. Suggestions offered for improvements**

Some non-governmental representatives offered suggestions for making improvements to the Office of the People's Counsel. A recurrent suggestion – based on the perception that the workload of the People's Counsel is too much for one person – was to increase the number of staff in the Office. Other suggested changes included amending the law to:

- Clarify the meaning of the “public interest;” and
- Allow the People's Counsel to hire consultants or experts on contract to assist with specific cases.

#### **FEEDBACK BASED ON RECEIPT OF TECHNICAL ASSISTANCE**

OLO solicited feedback from a randomly-selected sample of residents who had contacted the Office of the People's Counsel for technical assistance. This section describes OLO's methodology for selecting individuals for interview and summarizes their comments.

**Survey methodology.** The Office of the People's Counsel maintains a database with the names of individuals that contact the Office for technical assistance, the date of the contact, and basic information about the topic of assistance.

At OLO's request, the Office generated a list of all individuals who had contacted the Office of the People's Counsel for technical assistance between January 2007 and April 2008. From this list, OLO randomly selected individuals to contact for telephone interviews. OLO ultimately interviewed 27 individuals. OLO's telephone survey solicited respondents' views on the following issues:<sup>14</sup>

- How residents learned of the Office of the People's Counsel and what was their understanding of the services available through the Office;
- What was the nature of the residents' interactions with the Office, including the type of land use issue; how many times a resident interacted with the Office; and where the interaction had occurred;
- Whether the services received from the Office had met their expectations;
- How the residents' interaction with the People's Counsel had influenced their ability to participate in the County's land use process; and
- Whether participants would recommend the services of the Office to other residents.

**Services received by survey participants.** Twenty-two of the 27 survey respondents had contact with the Office of the People's Counsel regarding a specific case. Interactions related to a variety of issues, including special exceptions, local map amendments, master plans, and variances. Additionally, several respondents interacted with the People's Counsel as a member of a CLC or other community group.

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<sup>14</sup> Because OLO conducted phone interviews, OLO requested that the list omit individuals who had not provided a telephone number. A complete list of survey questions asked is included in Appendix A at A-24.

A majority of survey respondents reported being referred to the People's Counsel at a community meeting or from the Board of Appeals' staff. Others learned of the Office through the County's website, a Councilmember's office, or one of the County's Regional Services Centers. Most of those surveyed met with the People's Counsel in person (about half met with the People's Counsel in a community setting); the balance consulted with the People's Counsel over the telephone.

Most of those surveyed reported that they interacted with the People's Counsel multiple times. Ten of the 27 survey respondents said they had current, ongoing interactions with the Office. Although OLO only contacted people who interacted with the Office between January 2007 and April 2008, several people reported that their initial interaction with the People's Counsel was before January 2007.

**Feedback on Services of the Office.** This section describes themes from the telephone survey that OLO conducted.

**1. Most survey respondents expressed satisfaction with the services they received from the Office of the People's Counsel.**

About two-thirds of survey respondents (17 out of 27) reported general satisfaction with the services they received from the People's Counsel, agreeing with the statement that the services provided had "met their expectations." About 75% (20 out of 27) reported that the services they received positively influenced their participation in the County's land use process. More than 80% (22 out of 27) of those surveyed indicated that they would recommend the services of the People's Counsel to other County residents.

Recurring observations from respondents who reported a positive experience with the People's Counsel include that the People's Counsel is:

- A resource for residents to get accurate information about the County's land use process without needing to hire a private attorney;
- Knowledgeable about land use proceedings in the County and able to offer suggestions about how to meet legal requirements; and
- One of the rare places where residents can get information and technical assistance about the County's land use laws and proceedings.

**2. Some respondents reported being dissatisfied with the services received from the Office of the People's Counsel.**

A minority of those surveyed (5 out of 27) reported experiences with the Office of the People's Counsel that did not meet their expectations. The disappointment expressed by survey respondents concerned either the demeanor of the People's Counsel and/or a general frustration that the services received were inadequate.

Several people who reported experiences with the People's Counsel that did not meet their expectations had negative comments about the People's Counsel's demeanor. Another criticism expressed was a perception that the People's Counsel had not made a sufficient effort to assist them. Two respondents believed that they could not trust the People's Counsel because it appeared to them that he favored the other party in a proceeding.

**3. There are varying perceptions and some apparent confusion in the community about the role of the People's Counsel.**

Those surveyed expressed different perceptions and some confusion about the role the People's Counsel is "supposed" to be playing in County land use proceedings. About one-fourth of those surveyed (7 out of 27) stated that they were "unsure" of the roles of the People's Counsel. Others described the People's Counsel in different ways, e.g., as an informational resource, a mediator, an advocate for neighborhoods, and/or a legal advisor.

About half of those surveyed (13 out of 27) stated their understanding of the People's Counsel as someone who can provide guidance, advice, and information regarding the County's land use processes, laws, and regulations. Five of those surveyed viewed the People's Counsel's primary role as a mediator between parties involved in land use proceedings.

Five others stated their understanding that the People's Counsel's role was to be an advocate for citizens or a neighborhood. Three respondents expressed their belief that the People's Counsel can provide legal advice or representation as an alternative to hiring private counsel.

**4. Suggestions offered for improvement.**

In sum, survey respondents offered the following suggestions for "improvements" to the structure and/or work of the Office of the People's Counsel:

- Greater definition of the role that the People's Counsel is expected to play;
- Improved publicity about the Office and its services; and
- Expanded staff to enhance the services that could be offered.

In contrast, two survey respondents expressed their opinion that the Office of the People's Counsel was unnecessary because there are other places in the County that provide land use information.

## Chapter V. Comparison with Similar Offices in Other Jurisdictions

Four other Maryland counties have established offices similar to Montgomery County's Office of the People's Counsel. Like the Office of the People's Counsel, these offices participate in land use cases on behalf of the "public interest." Several of the offices also provide technical assistance to the public on certain land use matters.

This chapter summarizes the four related offices as follows:

- **Part A** describes the People's Counsel in Baltimore County;
- **Part B** describes the People's Counsel in Harford County;
- **Part C** describes the Zoning Counsel in Howard County; and
- **Part D** describes the People's Zoning Counsel in Prince George's County.

Legislation authorizing these four offices is included in Appendix B (B-100 to B-118).

The District of Columbia and the State of Maryland have offices "of the People's Counsel" with different missions – these offices represent local utility ratepayers before state and federal regulatory agencies and educating consumers about their utility rights.

### A. Baltimore County's People's Counsel

Baltimore County voters adopted a County Charter amendment to create a People's Counsel in 1974 and expanded the position's duties in 1978. (Baltimore County Charter § 524.1)

**Structure and staffing.** Organizationally, the People's Counsel staff are located within the County's Office of Planning and Community Conservation. The staff include three full-time, non-merit positions – the People's Counsel (position authorized in the Charter), the Deputy People's Counsel, and a legal secretary. The County Executive appoints and the County Council confirms the People's Counsel and Deputy People's Counsel. The Office's approved budget for FY08 was \$183,340.<sup>15</sup>

**Participation in zoning cases.** Under the Baltimore County Charter, the People's Counsel represents the public interest in zoning matters by defending approved master plans and/or comprehensive zoning maps. Specifically, the Charter states that the People's Counsel:

Shall appear as a party before the zoning commissioner of Baltimore County, his deputy, the county board of appeals, the planning board, and the courts on behalf of the interests of the public in general, to defend any duly enacted master plan and/or comprehensive zoning maps as adopted by the county council, and in any matter or proceeding ... involving zoning reclassification and/or variance from or special exception under Baltimore County Zoning Regulations...in which he may deem the public interest to be involved. (§ 524.1(a)(3)(A))

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<sup>15</sup> Baltimore County FY08 Budget, pg. 95.

The People's Counsel may also participate in or initiate proceedings on matters involving the preservation of the air, land, and water resources of the County and may conduct investigations, have full access to the records of all county agencies, and employ experts as necessary.

According to the current People's Counsel, he and/or his Deputy review every filed zoning case – zoning reclassifications, variances, or special exceptions – case to determine appropriate legal involvement. In some cases, the People's Counsel appeals the zoning commissioner's decision to the County Board of Appeals or in courts, while in other cases the People's Counsel defends the zoning commissioner's decision in an appeal filed by another party.

According to the Baltimore County budget, the following criteria guide the People's Counsel's decision regarding involvement in a case:

- The possibility of broad public impact;
- Adverse effect on public health, safety, or welfare;
- The establishment of important precedent; and
- The existence of significant legal issues.<sup>16</sup>

In zoning case appeals, the People's Counsel reports that he bases his litigation position on the County's zoning laws (including comprehensive zoning maps) and considers the master plan and public input.

**Technical assistance.** The Baltimore County Charter does not include technical assistance as a duty of the People's Counsel. However, the People's Counsel reports that he does provide information on zoning procedures to members of the public who contact him with questions.

## **B. Harford County People's Counsel**

In 1976, Harford County voters adopted a Charter amendment to create a People's Counsel. (Harford County Charter § 224) Subsequent local legislation further outlined the powers and duties of the position. (Harford County Code § 4-26)

**Structure and staffing.** Harford County law authorizes the County Council's Attorney to employ a People's Counsel and "such assistants as may be necessary," subject to approval by the County Council. (§ 4-26) Currently, Harford County employs on a contractual basis both a People's Counsel and an Associate People's Counsel. The Office's approved FY08 budget was \$72,408.<sup>17</sup>

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<sup>16</sup> Baltimore County FY08 Budget, pg. 95.

<sup>17</sup> Harford County Approved Annual Operating Budget, Fiscal Year 2007-2008, pg. 858.

Harford County law also establishes a People's Counsel Citizens' Advisory Board. The Advisory Board has seven County Council-appointed members who "shall be broadly representative of all segments of the county's population." (§ 4-27A) The law authorizes the Advisory Board to:

- "Provide guidance to and make recommendations to the People's Counsel regarding any matter referred to it by the People's Counsel, County Council, or as requested by any citizen or group of citizens;" (§ 4-27C) and
- "By a majority vote of the entire membership, direct the People's Counsel to enter his appearance in a particular matter, case, or proceeding to protect the interest of the public in general." (§ 4-27D)

**Participation in zoning cases.** Under County law, the People's Counsel may "represent the interest of the public in all matters and proceedings preliminary to, arising out of or affecting the zoning classification or reclassification of land in the County." (§ 4-26A) Specifically, the law states that the People's Counsel:

- May appear as a party before any government agency, any state or federal court, the Zoning Hearing Examiners, Board of Appeals, and the County Council on behalf of the citizens of the county in planning, zoning, and other land use and development related matters and proceedings; (§ 4-26D)
- May hire expert witnesses as necessary for specific proceedings; and
- May not represent or protect the interests of private parties "insofar as those interests are different from the general public's interest." (§ 4-26D)

According to Harford County's People's Counsel, she primarily participates in re-zoning, variance, and special exception cases at the recommendation of the People's Counsel Citizens' Advisory Board. The People's Counsel reports that the Advisory Board generally recommends the People's Counsel's involvement in a case only when there is opposition to an application.

The People's Counsel reports that when she gets involved in a case, she meets with neighbors opposed to an application, conducts any necessary investigation, and, if necessary, interviews and retains experts. The People's Counsel does not advocate for any specific party, but rather for the general public's interest by determining the impact a certain case will have on the community at large.

The Advisory Board meets monthly to review zoning cases and decide whether to direct the People's Counsel to appear in a particular case. The People's Counsel attends the Advisory Board meetings to provide monthly updates on the status of her cases.

**Technical assistance.** Harford County law does not include technical assistance as part of the job functions of the Harford County People's Counsel.

### C. Howard County Zoning Counsel

Howard County enacted legislation in 2000 to establish a Zoning Counsel position to participate in “piecemeal zoning map amendments.” The Howard County Code outlines the structure, powers, and duties of the position. (§ 16.1000)

**Structure and staffing.** Under the law, the Zoning Counsel is a part-time, contractual position employed by the County Council. (§ 16.1000a) The single position is funded through the County Council’s budget at a rate of \$100 per hour.

**Participation in piecemeal zoning cases.** The law requires that “the Zoning Counsel shall appear at all zoning board hearings on requests for piecemeal zoning map amendments for the purposes of producing evidence and testimony supporting comprehensive rezoning and facilitating the compilation of a complete record.” (§ 16.1000c) While participating in these hearings, the Zoning Counsel may:

- Present evidence and witnesses;
- Examine and cross-examine witnesses;
- Present arguments; and
- Retain expert witnesses. (§§ 16.1000d-1000f)

Under the law, the Zoning Counsel does not represent the County, any government agency, or any private party; is not a party in a case; and “does not have a right of appeal in connection with any case before the Board of Appeals.” (§ 16.1000i)

According to Howard County Zoning Board staff, the Zoning Counsel’s workload varies based on several factors, including the length of time since the last comprehensive rezoning (which occurs approximately every ten years). The Zoning Board applies a “change or mistake rule” to zoning map amendment requests, where the Zoning Board approves a request only if a “substantial change in the character of the neighborhood has occurred since the last Comprehensive Zoning or [] a mistake was made during the last Comprehensive Zoning in zoning the subject property.”<sup>18</sup> Zoning Board staff report that after a comprehensive rezoning, there are (at least temporarily) fewer zoning map amendment requests.

**Technical assistance.** The Howard County Code states that “the Zoning Counsel shall be available to any person interested in any zoning matter to advise as to the procedures before a County agency or board.” The Zoning Counsel also can speak to community groups about zoning procedures although, according to Zoning Board staff, this occurs infrequently. The Zoning Counsel is prohibited from providing legal advice on individual cases. (§16.1000g)

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<sup>18</sup> Howard County Department of Zoning and Planning web site, accessed May 14, 2008.

#### **D. Prince George's County People's Zoning Counsel**

The Prince George's County's People's Zoning Counsel was established in 1973 in the County Charter (§ 712) and the positions' duties are further outlined in County law. The law was amended most recently in 2003. County law outlines the structure, powers, and duties of the position, and includes the following purpose statement: "An independent People's Counsel can protect the public interest and promote a full and fair presentation of relevant issues in administrative proceedings in order to achieve balanced records upon which sound land use decisions can be made." (§ 27-136)

**Structure and staffing.** Under County law, the County Council appoints one or more attorneys to serve as People's Zoning Counsel and Deputy People's Zoning Counsel for four-year terms. The People's Zoning Counsel is a part-time, contract position; Prince George's County does not currently have a Deputy People's Zoning Counsel. The FY08 budget for the People's Zoning Counsel services is \$140,000.

**Participation in zoning cases.** The law authorizes the People's Zoning Counsel to "appear on behalf of the interests of the public in general, to defend any General Plan, Master Plan, or comprehensive zoning maps as adopted by the District Council, and in any matter involving zoning reclassification or any Special Exception." (§ 27-139.01) In performing these duties, the People's Counsel may appear as a party of record before:

- The Zoning Hearing Examiner or the District Council in a zoning case;
- The Planning Board in a matter involving a comprehensive design plan, or
- The Board of Appeals in a matter involving a variance.

The law also allows the People's Zoning Counsel to "prosecute an application before any state or federal court for injunctive or other relief incidental thereto, to enjoin violation of any zoning map or Master Plan or as specifically authorized by the District Council." (§ 27-139.01b)

According to the Prince George's People's Zoning Counsel, he participates in all cases in which he has the right to be involved to ensure a complete record and the presentation of all relevant information. The People's Zoning Counsel does not represent any side and may argue for or against the application or the opposition in any zoning case.

In April, the Maryland General Assembly passed legislation authorizing the Prince George's County People's Zoning Counsel to appeal final actions on an application for a subdivision of land, special exception, variance, or site plan on behalf of a citizens' association, if the People's Counsel "reasonably believes" that the final action is "arbitrary and capricious." (House Bill 928) According to Prince George's People's Counsel, this State law may conflict with County law, which only gives the People's Counsel the right to appear on behalf of the public interest and which does not authorize the People's Counsel to appear in subdivision case hearings before the Planning Board.<sup>19</sup>

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<sup>19</sup> See Appendix B at B-111 to B-118 for a memo from the Prince George's People's Counsel and a copy of House Bill 928.



**Technical assistance.** Legislation passed in 2003 authorizes the Prince George's County People's Zoning Counsel to provide technical assistance on zoning procedures to any person without becoming a party to any judicial or administrative proceeding. When providing technical assistance, the Zoning Counsel must inform people that he or she is not and cannot act as their personal attorney. The law also states that the People's Zoning Counsel shall be available to any civic association, homeowners association, or other similar groups to talk about the zoning process. (§ 27-139.02) According to the Prince George's County Counsel, this function occupies approximately 25% of his time.

## Chapter VI. Findings

This chapter summarizes the findings of the Office of Legislative Oversight's (OLO) review of the Office of the People's Counsel ("Office"). The presentation of OLO's findings parallels the structure of the report, organized into the following categories:

- Legislative and funding history;
- Activities of the People's Counsel;
- Feedback on the current law and services provided by the Office; and
- Comparison to similar offices in other Maryland counties.

### LEGISLATIVE AND FUNDING HISTORY

**Finding #1. The purpose of the People's Counsel is to "protect the public interest," "promote a full and fair presentation of relevant issues," and provide technical assistance to "encourage effective participation in ... the County land use process."**

The County Code sets forth the purpose of the Office of the People's Counsel as follows:

*Purpose.* Informed public actions on land use matters require a full exploration of often complex factual and legal issues. An independent People's Counsel can protect the public interest and promote a full and fair presentation of relevant issues in administrative proceedings in order to achieve balanced records upon which sound land use decisions can be made. In addition, a People's Counsel who provides technical assistance to citizen organizations will encourage effective participation in, and increase public understanding of and confidence in, the County land use process. (§ 2-150(a))

By law, the County Council appoints the People's Counsel, and can do so either as a term merit employee or a contract employee. Either way, the People's Counsel is authorized to accomplish the stated purpose of the Office in the following ways:

- **Participate as a party in proceedings concerning: variances, special exceptions, local map amendments, development plan amendments, optional method development applications, subdivision plans, and site plans.** The People's Counsel is authorized to make motions, introduce evidence, call witnesses, cross-examine witnesses, make arguments as the law and evidence warrant, and file and argue an appeal.
- **Provide technical assistance to any person about the land use proceedings the office may participate in.** The People's Counsel is, however, not allowed to act as a personal attorney for the recipient of technical assistance.

The law prohibits the People's Counsel from representing the County, any government agency, or any private party in any proceeding; and explicitly provides that the People's Counsel is not subject to the authority of the County Attorney.

**Finding #2. The County Council considered and passed three bills legislation over a 12-year period related to the Office of the People's Counsel. Debate surrounding these bills focused on several recurring issues.**

Between 1990 and 2002, the County Council adopted three pieces of legislation related to the Office of the People's Counsel:

- Bill 11-89, passed in February 1990, created the Office of the People's Counsel;
- Bill 14-99, passed in August 1999, amended the original People's Counsel's law and added a sunset provision; and
- Bill 25-02, passed in October 2002, repealed the sunset provision on the Office.

The legislative record indicates that the Council's worksessions on these three bills included a number of recurring debates on several issues, including but not limited to the Office's role, subject matter jurisdiction, and staffing structure.

Table 9 on the next page summarizes several issues that the Council discussed. The first column lists key provisions that were eventually adopted; the second column lists other provisions or amendments that were discussed but not approved in the final legislation.

**Finding #3. The law creating the Office of the People's Counsel was passed in 1990, but the Office remained unfunded for almost ten years. The FY09 approved budget for the Office is \$250,170.**

The County Council first appropriated funds to the Office of the People's Counsel in fiscal year 2000 – almost a decade after the Council passed legislation to establish the Office. Before funding the Office, the Council also passed some amendments to the People's Counsel's law. (See Finding #2 and the table on the next page.)

The Office was initially funded to support two positions: the People's Counsel and an Administrative Aide. Since FY07, 20% of the Administrative Aide's time has been allocated to (and funded by) the Board of Appeals. All but a small percent of the Office's total budget has consistently been for personnel costs. Increases in appropriations for the Office since FY00 have been to cover compensation adjustments for existing staff.

**Table 9. Summary of People's Counsel Legislation and Key Issues**

Issue	Key Provisions of the Law as Passed	Provisions/Amendments Considered but Not Adopted
<b>Bill 11-89 (adopted in February 1990)</b>		
<b>Statutory Purpose</b>	The People's Counsel should: <ul style="list-style-type: none"> <li>• Ensure a full and fair presentation of the relevant issues.</li> <li>• Provide technical assistance and advice.</li> </ul>	The People's Counsel should represent the public interest.
<b>Party Representation</b>	The People's Counsel must not represent the County, any government agency, or any private party in any proceeding.	The People's Counsel should be authorized to represent private parties.
<b>Authority and Duties</b>	The People's Counsel may participate in certain administrative land use proceedings before the Hearing Examiner, Board of Appeals, and Planning Board in which a decision is based on a written record.	The People's Counsel should be able to initiate or intervene as a party in: <ul style="list-style-type: none"> <li>• Certain judicial or administrative land use proceedings; and</li> <li>• Proceedings involving application or enforcement of environmental laws.</li> </ul>
<b>Staffing Structure</b>	The Council may only hire a People's Counsel as an independent contractor.	The Council should hire a People's Counsel as a term merit employee.
<b>Citizen Advisory Board</b>		The Council should appoint a citizen advisory committee to advise the People's Counsel and recommend cases that the People's Counsel should be involved in.
<b>Bill 14-99 (adopted in August 1999)</b>		
<b>Statutory Purpose</b>	Added that the People's Counsel should protect the public interest.	
<b>Party Representation</b>	No change made to the law adopted in 1990.	The People's Counsel should be authorized to represent private parties under certain conditions.
<b>Authority and Duties</b>	Added that the People's Counsel may: <ul style="list-style-type: none"> <li>• Request a review of special exceptions by the Board of Appeals; and</li> <li>• File and argue an appeal of a case</li> </ul>	
<b>Staffing Structure</b>	Added the option of hiring a People's Counsel as a term merit employee.	
<b>Sunset Provision</b>	Added a sunset provision terminating the Office as of July 1, 2003.	
<b>Bill 25-02 (adopted in October 2002)</b>		
<b>Sunset Provision</b>	Amended the law to remove the sunset provision.	

**Finding #4. Current law provides that the Council can employ a People's Counsel either as a term merit employee or a contract employee. The People's Counsel employed since 1999 is a term merit employee.**

The law adopted in 1990 to create the Office of the People's Counsel established the position of People's Counsel as an employee under contract to the Council. Before the first People's Counsel was hired, the Council amended the law (in 1999) to provide the Council with the option of hiring the People's Counsel as a term merit employee.

In December 1999, the Council appointed the first People's Counsel as a term merit system employee for a 3.5-year term to coincide with the Council's term. The Council reappointed the incumbent in June 2003 to a full four-year term. On July 3, 2007, the Council again reappointed the incumbent, but set a term of one year. The 2007 resolution states that the appointed People's Counsel serves until a successor is appointed.

Under law, the People's Counsel is appointed by the Council, but operates independently on a daily basis. Historically, the Council's oversight of the Office has consisted of receipt of the Office's annual report (see example in Appendix A) and annual review of the Office's budget.

**Finding #5. Some notable changes in recent years directly relate to the issues discussed at the time the People's Counsel was created.**

Many changes in County laws, programs, and practices have occurred since the Council passed legislation to establish the Office of the People's Counsel in 1990. Some changes that relate directly to the issues discussed during the legislative debates about the People's Counsel are listed below.

- **Change in who holds public hearings on special exceptions.** In 2004, the Council passed legislation to shift the legal responsibility for holding public hearings on special exception petitions from the Board of Appeals to the Hearing Examiner.
- **Change in practice of inspecting special exceptions.** Inspections by the Department of Permitting Services for compliance with special exception conditions used to be primarily complaint-driven. In addition to responding to complaints, the current practice now includes routine inspections by two full-time inspectors.
- **Changes in how government disseminates information.** Government communication with the public has undergone significant transformation in recent years. The Internet has created many new communication opportunities with the public – beyond printed materials, the telephone, and in-person meetings – that were not available when the Office of the People's Counsel was established.
- **Changes in how the Planning Department manages the development review process.** In 2006, M-NCPPC adopted a Management Improvement Plan that outlines significant changes to how the agency is organized and managed. One of the four main areas targeted for change is titled “Resident Participation;” the objectives for improvement in this area include how land use information is provided to residents.

ACTIVITIES OF THE PEOPLE'S COUNSEL

**Finding #6. The People's Counsel estimates that he spends around 30% of his time participating in land use proceedings; the other 70% is spent providing technical assistance, conducting mediations, and attending Community Liaison Committee meetings.**

Table 10 summarizes the People's Counsel's activity data between 2002 and 2007.

According to the Office's annual reports, the People's Counsel participated in a total of 267 proceedings over the six-year period examined. Of the proceedings that the People's Counsel reports participating in, special exceptions consistently accounted for the largest number and percent, followed by local map amendments.

In addition, OLO's review of public hearing records shows that the People's Counsel participated in 92% of special exception cases (excluding accessory apartment petitions, which the People's Counsel generally does not participate in) and 40% of local map amendment cases heard by the Hearing Examiner in 2007.

The data show an increase in the instances of technical assistance provided annually by the People's Counsel. The Office defines the provision of technical assistance as each instance where an Office staff member provided information or assistance on a land use issue. As a result, the technical assistance numbers capture all interactions with the Office.

<b>Table 10. People's Counsel Activities, 2002-2007</b>							
<b>Type of Activity</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>Total</b>
<b>Land Use Proceedings</b>							
Special Exception	62	22	37	31	16	16	<b>184</b>
Local Map Amendment	8	10	13	7	15	7	<b>60</b>
Subdivision Plans	2	1	1	3	1	2	<b>10</b>
Development Plan Amendment	3	--	--	4	--	2	<b>9</b>
Site Plan	1	--	1	--	1	1	<b>4</b>
Variance	--	--	--	--	--	--	<b>0</b>
<b>Total Number of Proceedings</b>	<b>76</b>	<b>33</b>	<b>52</b>	<b>45</b>	<b>33</b>	<b>28</b>	<b>267</b>
<b>Technical Assistance</b>							
Instances of Technical Assistance	645	1,071	1,889	3,140	3,982	7,554	<b>18,281</b>
Number of Subjects Each Year	32	43	53	70	94	99	<b>135*</b>
<b>Mediations</b>							
Number of Mediation Sessions	15	16	6	3	6	1	<b>47</b>
<b>Community Liaison Committee (CLC) Meetings</b>							
Number of CLC Meetings Attended	--	20	24	24	29	44	<b>141</b>

\* This number does not represent the sum of the numbers in this row. It represents the total number of subjects on which Office provided technical assistance from 2002 to 2007.

Source: Annual Reports of the Office of the People's Counsel, 2002-2007

**Finding #7. By law, the People's Counsel is authorized to decide which cases to participate in.**

The People's Counsel reviews all special exception, local map amendment, development plan amendment, subdivision plan, and site plan applications. The Office's 2007 Annual Report lists eight factors that the People's Counsel considers when deciding whether to participate in a land use proceeding:

- Impact on the public;
- Effect on the public health, safety, and welfare;
- Establishment of a future precedent;
- Existence of significant legal issues;
- Effect on public policy;
- Need to assist an applicant during a public hearing;
- Need to assist citizens during a public hearing; and
- Possibility of resolving outstanding issues through mediation.

The People's Counsel reports that he also assesses the need for a third party "to pursue the public interest" and/or the need "to achieve a balanced record."

The People's Counsel generally attends all special exception hearings except for cases concerning accessory apartments or cell phone towers. To determine whether there are "public interest" issues he wants to pursue in these cases, the People's Counsel reports that he also consults the analysis provided by Planning Board staff and the testimony and evidence presented at the Planning Board's hearing.

Other comments from the People's Counsel about participating in land use proceedings included that:

- When an applicant and any opposition in a case are both represented by legal counsel, the relevant "public interest" issues tend to be advanced by the two sides, which in turn reduces the need for the People's Counsel involvement;
- In subdivision plan and site plan cases, the Planning Board staff usually "identify most if not all of the public interest issues," which also reduces the need for the People's Counsel involvement to ensure a balanced record; and
- For variance, subdivision plan, and site plan cases, the People's Counsel tends to participate more on the "front-end" of cases by providing information and guidance on effective participation to individuals involved.

**Finding #8. The position that the People's Counsel takes in land use proceedings is sometimes, but not always, aligned with the position voiced by community members.**

When the People's Counsel participates in a land use proceeding about a specific petition (e.g., application for special exception, local map amendment), he can appear in support of the petition, in opposition to the petition, or as a neutral party.

OLO's detailed review of the People's Counsel's involvement in 16 special exception and local map amendment cases during 2007 found that: the People's Counsel appeared in support of seven petitions; appeared in opposition to one petition; and remained neutral in the other eight cases.

The record shows that the People's Counsel's participation sometimes, but not always, aligned with a formal position taken by community members on the petition. For example:

- Two applications supported by the People's Counsel had formal opposition from the community and one had formal support from community members;
- Two applications where the People's Counsel remained neutral had formal opposition and one had both formal opposition and support from community members; and
- In the one application that the People's Counsel opposed, there was formal opposition from community members.

**Finding #9. The People's Counsel's participation in land use proceedings primarily consists of making oral arguments and cross-examining witnesses.**

When participating in a land use proceeding, the County Code authorizes the People's Counsel to make motions, introduce evidence, call witnesses, examine and cross-examine witnesses, and make arguments as the law and evidence in the proceeding warrant.

In the 16 cases reviewed by OLO, the People's Counsel primarily made oral arguments/statements and cross-examined witnesses. In sum, the People's Counsel:

- Made oral arguments or other statements in 15 cases;
- Cross-examined witnesses in 11 cases;
- Introduced evidence in three cases; and
- Did not file written motions or call witnesses in any case.

According to the People's Counsel and OZAH staff, it is uncommon for participants in administrative proceedings before the Hearing Examiner to file written motions. Certain types of oral arguments or statements made by the People's Counsel or other participants could be categorized as motions in a more formal setting.



**Finding #10. The People's Counsel's technical assistance consists of providing general information on land use topics and guidance on effective participation in the County's land use process.**

By law, the People's Counsel is authorized to provide technical assistance to residents about land use proceedings. The law includes the caveat that this assistance is "subject to available time and resources." The People's Counsel categorizes the technical assistance that he provides into three types:

- General information and assistance on land use topics;
- Guidance on effective participation in the County's land use process; and
- Technical advice and support for government officials and staff.

Technical assistance often occurs in response to requests from individual residents who contact the Office, but guidance on effective participation also occurs when the People's Counsel initiates contact with residents before, during, or after a land use proceeding.

According to the People's Counsel, the intent of offering guidance on effective participation is to help residents (either in support of or opposed to a petition) get involved in a way that helps lead to a "full and fair presentation of relevant issues." Examples of guidance on effective participation include:

- Explaining the special exception process, how various hearings are structured, who can speak at a hearing and for how long, etc.;
- Providing samples of materials and information from similar cases to a prospective applicant or case participant; and
- Providing guidance on how to offer relevant evidence and structure arguments when appearing in a land use proceeding.

**Finding #11. The People's Counsel's activities also include mediating land use disputes and participating on Community Liaison Committees.**

The People's Counsel's annual reports to the County Council have included mention of his participation in mediation sessions and Community Liaison Committee (CLC) meetings, as shown in the table below. These activities are not explicitly identified in the law as ways the People's Counsel is authorized to "participate" in land use proceedings. Data on the number of mediation session provided and the number of CLC meetings attended between 2002 and 2007 are included in Finding #6 on page 48.

**Mediation.** The People's Counsel offers to mediate land-use disputes to resolve outstanding issues between the community and special exception and/or rezoning applicants. According to the People's Counsel, mediations are conducted only if both of the sides voluntarily agree to participate. Agreement on the outcome is also voluntary.

The People's Counsel conducted 47 mediation sessions during the past five years. The majority of those mediation sessions occurred in 2002 and 2003. Some of the mediation sessions have resulted in agreement, while others have not.

**Community Liaison Committee (CLC) participation.** Community Liaison Committees are groups formally established as part of a Board of Appeals' condition on a special exception. A CLC typically consists of representatives from the special exception holder and surrounding residents who convene at regular intervals during the year. The goal of CLCs is to foster communication between a special exception holder and the surrounding community and to prevent potential problems from rising up to the enforcement level.

Since 2003, the People's Counsel has participated in CLCs, most often as an "ex officio" member whose role is to help facilitate the CLC meeting. There are currently 28 CLCs that the People's Counsel participates in.

#### FEEDBACK ON THE CURRENT LAW AND SERVICES PROVIDED BY THE OFFICE

**Finding #12. While most people who have worked with the Office of the People's Counsel express support for the Office, there is a range of views about what the role and services of the People's Counsel "should" be.**

To obtain feedback about the function and services of the Office of the People's Counsel, OLO conducted more than 50 interviews with government officials, staff, and non-governmental representatives who have interacted with the Office. The common views expressed by those interviewed are summarized below.

**Opinions on the Function of the People's Counsel.** There is a mix of opinions about the current role of the People's Counsel as a party in land use cases who represents only the "public interest." A majority of government representatives interviewed support the People's Counsel's current role, while a few believe the People's Counsel should more vigorously advocate for community residents in opposition to development applications.

Non-government representatives were split on whether the People's Counsel should retain his current neutral role or assume more of an advocacy role. OLO's interviews with residents also found varying perceptions and some apparent confusion about the role of the People's Counsel.

**Opinions on the Services of the People's Counsel.** A majority of the government representatives interviewed commented that the People's Counsel's participation in land use proceedings added value. With few exceptions, the governmental and non-governmental individuals also praised the technical assistance and information provided to residents by the People's Counsel. The majority of residents interviewed indicated they would recommend the People's Counsel to other County residents.

Non-governmental representatives expressed a wider range of opinions about the People's Counsel's participation in proceedings – from complimenting his efforts to facilitate a more complete record to questioning how the People's Counsel determines the meaning of the “public interest.” Some individuals also expressed mixed views of the People's Counsel's mediation efforts.

**Suggestions offered for improvement to the Office of the People's Counsel.** OLO heard many suggestions for improvements to the Office of the People's Counsel. Suggestions included amending the People's Counsel law to:

- Create a different supervisory and/or reporting structure for the People's Counsel;
- Direct the People's Counsel to advocate for residents' positions in land use cases;
- Explicitly authorize the People's Counsel to participate on Community Liaison Committees; and
- Clarify the meaning of the “public interest.”

Other suggestions include increasing the Office's staff, allowing the People's Counsel to hire contract consultants or experts, and improving publicity about the Office.

#### COMPARISON TO SIMILAR OFFICES IN OTHER MARYLAND COUNTIES

**Finding #13. Four other Maryland counties have offices that are comparable, but not identical to, Montgomery County's Office of the People's Counsel.**

The table on the next page compares key characteristics of Montgomery County's Office of the People's Counsel to those of similar offices in Baltimore County, Harford County, Howard County, and Prince George's County. As the comparative information shows, the type of land use activity that each office focuses on varies.

Compared to the other offices, Montgomery County's People's Counsel also spends more time providing technical assistance. In addition, Montgomery County's People's Counsel is the only jurisdiction to fill the position with a term merit system employee (the others either use contract or non-merit employees), and Montgomery County's office has the largest annual budget.

**Table 11. Comparison of Montgomery County's People's Counsel to Similar Offices in Other Maryland Counties**

	Montgomery County	Baltimore County	Harford County	Howard County	Prince George's County
<b>Authority</b>	County Code	County Charter	County Charter and County Code	County Code	County Charter and County Code
<b>Title</b>	People's Counsel	People's Counsel	People's Counsel	Zoning Counsel	People's Zoning Counsel
<b>Year established</b>	1990	1974	1976	2000	1973
<b>Staffing</b>	1 full-time attorney 1 part-time office admin.	2 full-time attorneys 1 full-time legal secretary	2 part-time attorneys	1 part-time attorney	1 part-time attorney
<b>County employees or hired on contract?</b>	County employees (merit with specified term)	County employees (non-merit)	Hired on contract	Hired on contract	Hired on contract
<b>FY08 Budget</b>	\$239,130	\$183,340	\$72,408	\$100/hour (funds in Council budget)	\$140,000
<b>Primarily participates in these types of land use cases</b>	<ul style="list-style-type: none"> <li>• special exceptions</li> <li>• local map/development plan amendments</li> <li>• site/subdivision plans</li> </ul>	<ul style="list-style-type: none"> <li>• zoning reclassifications</li> <li>• variances</li> <li>• special exceptions</li> </ul>	<ul style="list-style-type: none"> <li>• zoning reclassifications</li> <li>• variances</li> <li>• special exceptions</li> </ul>	<ul style="list-style-type: none"> <li>• piecemeal zoning map amendments</li> </ul>	<ul style="list-style-type: none"> <li>• zoning reclassifications</li> <li>• special exceptions</li> <li>• comprehensive design plans</li> <li>• variances</li> </ul>
<b>Law assigns responsibility to provide technical assistance?</b>	Yes	No	No	Yes	Yes
<b>How is involvement in cases determined by law?</b>	People's Counsel decides.	People's Counsel decides.	The People's Counsel decides or the People's Counsel Citizens' Advisory Board decides by majority vote.	The People's Counsel must appear at all zoning board hearings on requests for piecemeal zoning map amendments.	People's Counsel decides.

## **Chapter VII. Recommendations**

By law, the Office of the People's Counsel is housed in the Legislative Branch of County Government – the County Council appoints the People's Counsel. As such, the Council has both the authority and the responsibility to decide the purpose, function, and expectations for the Office. Consistent with this mandate, the County Council asked the Office of Legislative Oversight (OLO) to conduct a review of the Office of the People's Counsel based on:

- Research on the legislative and funding history of the Office;
- An assessment of the activities of the Office;
- Feedback on the current law and work of the Office; and
- A comparison with similar offices in other jurisdictions.

This chapter summarizes OLO's recommendations for Council action. In sum, OLO recommends that the Council first revisit the law establishing the Office of the People's Counsel. After making its decisions regarding changes to the purpose, duties, and/or structure of the Office of the People's Counsel, the Council will be better positioned to make decisions regarding the future budget and staffing of the Office.

### **Recommendation #1: Revisit the purpose, duties, and structure of the Office of the People's Counsel as outlined in County law.**

The County Council established the Office of the People's Counsel by law in 1990. In 1999, the Council amended the law, funded the Office for the first time, and appointed the first People's Counsel. Based on the information compiled in this report, OLO recommends the Council revisit the law that established the People's Counsel, paying particular attention to whether the purpose, duties, and staffing structure of the Office meet the Council's current priorities and expectations for the People's Counsel.

**OLO recommends that the Council structure its discussion on the People's Counsel law around the five issues outlined below. These five issues largely parallel the issues discussed 18 years ago when the law creating the Office was adopted:**

- Statutory purpose;
- Authority and duties;
- Party representation;
- Provision of technical assistance; and
- Staffing structure.

In addressing each of these issues, OLO recommends the Council consider changes in laws and practices that have occurred since the original law establishing the Office of the People's Counsel was enacted. Issues of particular relevance include changes in special exception hearings and inspections, changes in how government agencies disseminate information to the public, and changes underway at the Planning Department to improve public participation in the development review process.

**ISSUE A: STATUTORY PURPOSE**

The People's Counsel law, as currently written, establishes three primary purposes for the Office. These are:

1. To protect the public interest;
2. To promote a full and fair presentation of relevant issues in administrative proceedings in order to achieve balanced records; and
3. To provide technical assistance to encourage effective participation in, and increase public understanding and confidence of, the County land use process.

OLO's review of the legislative history found that previous Councils debated the role and purpose of the People's Counsel. Current feedback from both governmental officials and non-governmental representatives indicates that a range of views continues to exist on the appropriate purpose and role of an Office of the People's Counsel.

The legislative records shows that numerous discussions held by the Council have centered on the People's Counsel's duty to "protect the public interest." The primary argument made for including this purpose statement was that "only narrow private property interests are represented or discussed in land use proceedings." The main arguments voiced against including this purpose statement in the law were: (1) how difficult it can be to determine the public interest in any given case; and (2) the possibility of competing public interests.

OLO's review of the legislative record indicates that the two other purpose statements – promoting a full and fair presentation of issues and encouraging effective participation through technical assistance – were not discussed to the same degree as the "public interest" purpose statement. To the extent they were discussed, the record shows general agreement about including them both in the law.

OLO recommends that the Council discuss and decide whether to affirm or amend the three primary statements of purpose of the Office of People's Counsel established in law.

## **ISSUE B: AUTHORITY AND DUTIES**

Under the current law, the People's Counsel may participate in certain land use proceedings, provide technical assistance, and request reviews of existing special exceptions. The law authorizes the People's Counsel to participate in: special exceptions, local map amendments, development plan amendments, variances, subdivision plans, and site plans.

OLO's review of the People's Counsel's activities shows that, in practice:

- The People's Counsel's participation in land use proceedings is primarily in special exception and local map amendment cases;
- The People's Counsel provides technical assistance to residents that includes both general information and guidance on effective participation in the land use process; and
- The People's Counsel has not used his authority to request special exception reviews.

OLO's review also found that two other activities account for a sizeable amount of the People's Counsel's time, but are not explicitly authorized in the law: participating on Community Liaison Committees and mediating land use disputes.

OLO recommends that the Council discuss and decide whether to maintain, add to, eliminate, or modify the People's Counsel's authorities established in law.

## **ISSUE C: PARTY REPRESENTATION**

The current law provides for an "independent" People's Counsel that "must not represent the County, any government agency, or any private party in any proceeding." OLO's review of the 1990 and 1999 legislative records found that previous Councils debated *who the People's Counsel should represent* – and in particular, whether the People's Counsel should represent individual parties.

The primary argument offered in favor of authorizing the People's Counsel to represent individual parties was that it would "even the playing field" for individuals or community groups who oppose an application but cannot find or afford a private lawyer. The argument made against giving the People's Counsel this function was the potential difficulty in deciding which cases or clients to take, i.e., who most needs representation (because of their lack of resources) and deserves representation (because of the merits of their position or the gravity of the issues).

Current feedback from both governmental officials and non-governmental representatives indicates that a range of views continues to exist on questions related to the appropriate type of representation by the People's Counsel.

OLO recommends that the Council discuss and decide whether to maintain or change the current law on who the People's Counsel represents in a land use proceeding.

#### **ISSUE D: PROVISION OF TECHNICAL ASSISTANCE**

The current law provides that the People's Counsel may provide technical assistance "subject to available time and resources." At the same time, OLO's review of the legislative record repeatedly indicates that providing technical assistance was viewed as one of the Office's "primary functions."

In practice, the current People's Counsel estimates that he spends approximately 70% of his time on technical assistance and related activities, including providing general information on land use issues and offering guidance on effective participation in specific land use proceedings.

OLO recommends that the Council discuss and decide whether to further clarify in law what is expected from the People's Counsel in terms of technical assistance. Specific issues to address include the Council's expectations regarding: the priority to place on this function, coordination with other agencies that provide information on land use issues, and use of technology for disseminating information to the public.

#### **ISSUE E: STAFFING STRUCTURE**

The current law provides the Council with the option to employ a People's Counsel as a term, merit system employee or as a contract employee. OLO's comparative research found that three of the four other Maryland counties that have a similar office fill the position using contract employees; the fourth employs full-time, non-merit staff.

Historically, the Council's oversight of the Office of the People's Counsel has consisted of receipt of the Office's annual report (required by law) and the annual review of the Office's budget. One of the recurring pieces of feedback on the law and structure of the Office was a suggestion to create a different supervisory and/or accountability structure for the Office within the Legislative Branch.

OLO recommends that the Council discuss and decide whether to maintain, change, or modify the Council's options for filling the position of People's Counsel. OLO also recommends the Council consider different approaches to structuring the Council's supervision/oversight of the Office.



**Recommendation #2: Postpone the personnel decision regarding reappointment of the People's Counsel until the Council completes its review and action on the law governing the Office.**

On July 3, 2007, the Council reappointed the incumbent People's Counsel for a term of one year. The 2007 resolution states that the current People's Counsel serves until a successor is appointed. In May 2008, the Council approved FY09 funding for the Office totaling \$250,170.

Before taking further action on reappointment of the People's Counsel or future funding of the Office, OLO recommends that the Council address three staffing and budget issues.

**ISSUE A: JOB DESCRIPTION OF THE PEOPLE'S COUNSEL**

The job description for the position of People's Counsel is based on the current law. If the Council decides to change any significant aspects of the law, then this will require corresponding changes to the formal job description.

Even if no changes are made to the law, OLO recommends that the Council review the job description to determine if it needs updating to reflect changes in law, changes in policies or practices, and/or advances in the dissemination of information to the public through technology.

**ISSUE B: STAFFING TYPES AND LEVELS**

If the Council maintains the two options in the law for employing a People's Counsel, the Council should decide whether it prefers to stay with the current practice of employing a term merit employee, or whether to change its practice and fill the position by contract. The Council should also determine, given any changes to the authority, duties, or expectations of the Office, the appropriate level of staffing/funding needed to fulfill the Office's mission.

**ISSUE C: DECIDE HOW TO PROCEED WITH FILLING THE POSITION**

After determining any changes to the job description and/or the Office's staffing, the Council should decide whether to:

- Reappoint the incumbent People's Counsel to a new term; or
- Initiate a new selection process for the position of People's Counsel.

**Chapter VIII.           Comments on Final Draft**

The Office of Legislative Oversight circulated a final draft of this report to the Office of the People's Counsel and drafts of relevant chapters to the Board of Appeals and the Office of Zoning and Administrative Hearings. OLO appreciates the time taken by the People's Counsel and BOA and OZAH staff to review the drafts and provide comments. OLO's final report incorporates technical corrections provided by these staff.

The People's Counsel intends to provide written comments on the report in advance of the Planning, Housing & Economic Development Committee's scheduled discussion of the report.