

M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760

October 18, 2001

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10-28-01

To: Montgomery County Planning Board

From: Joseph R. Davis, Chief, Development Review Division
A. Malcolm Shaneman, Supervisor, Development Review Division

Subject: Regulations For the Undergrounding of Existing Overhead Utility Lines
within Public Rights-of-Way

Recommendation: Approval of Record Plat without requirement for undergrounding
of overhead utility lines.

Background

At the September 20, 2001 Planning Board public hearing concerning Site Plan No. 8-01025 (Fishers Place), staff recommended, and the Planning Board agreed, that the issue of undergrounding existing public utilities along Fishers Lane would be discussed as part of the record plat process (rather than as a condition of site plan approval). The Board took this position based on the fact that the Board's authority for addressing utilities is contained in the Subdivision Regulations ("Regulations"), and consequently needs to be addressed as a condition of preliminary plan and/or record plat conformance with the conditions of approval and the Regulations.

As you likely recall, the applicant argued that the Commission does not have authority to require the undergrounding of existing utilities in a right-of-way if there is no master plan requirement and/or the project is located outside of a CBD. Staff has researched the legislative history associated with undergrounding public utility lines. Staff notes that Section 50-40(a) of the Subdivision Regulations (attachment #1) states:

Pipelines, electric power and energy transmission and distribution lines and cables, and telephone and telegraph lines and cables shall be underground in a subdivision where the preliminary subdivision plan is filed subsequent to June 6, 1967.

While the literal text of this language can be read to argue an applicant must underground existing utility lines, in practice the Commission has done so only when there is a Master

Plan requirement to do so, which has been required only for optional method development in CBDs. Therefore, staff recommends that the record plat be approved, without a requirement that the applicant underground the utilities as a condition of record plat.

County Jurisdiction

In addition, Section 49-27 of the Road and Street Code (Attachment #2) addresses the conversion of existing overhead public utility lines underground locations. The provisions of Section 49-27 authorize the County Executive may require the undergrounding of utilities if one or more of the following conditions exist:

- (a) Any fire hazard or possible interference with fire fighting equipment due to the location of the lines;
- (b) A close proximity of the lines to any place where people may congregate;
- (c) The anticipated increase of traffic on the road to be reconstructed or improved;
- (d) The population of the area, increase in population, and the future conditions to be reasonably anticipated in the normal course of development;
- (e) There exists such air traffic in the general area of the road, the road is near any airport, it is in an existing or anticipated approach to an existing or anticipated runway, or in the future, overhead lines would result in a hazard to such air traffic;
- (f) The comparative costs of relocating the lines overhead and installing them underground;
- (g) The comparative maintenance costs for overhead and underground lines;
- (h) The comparative frequency of interruptions in service for overhead and underground lines;
- (i) The improvement in the appearance of the area which would result from installing the lines underground; and
- (j) Any other conditions materials to the public convenience, health, safety, or general welfare.

Pursuant to this delegated authority, the County Executive, through Executive Regulation administered by the Department of Public Works and Transportation (DPW&T), has the lead responsibility for undergrounding existing overhead public utility lines located within public rights-of-way. County staff advises us that the County does not require the undergrounding of existing overhead utility lines unless recommended in a master plan and there is a "nexus of proportionality" to the level/scope of the approved development. In the case of the Fishers Lane development, County staff representatives have indicated that they believe that the costs for undergrounding utilities cannot be charged to the applicant, nor will they be covered by the County.

Further Recommendation:

This case calls our attention to the fact that the Board may wish to pursue a text amendment to clearly require an applicant to underground utilities up to a certain size, particularly as existing developments will redevelop as the County continues to urbanize.

In the meantime, staff recommends that this issue be further addressed with DPW&T as part of the ongoing Streetscape Guidelines discussion. Staff is concerned that to require undergrounding of public utilities only where recommended in the master plan, i.e., in Central Business Districts (CBD's), is not sufficient and does not address other urban areas outside of the CBD that may be slated for redevelopment at urban scale and density. Staff will continue to work with DPW&T on the Fishers Lane project and the applicable public improvement agreements (PIA's) to assess whether the public utilities warrant undergrounding, based on size and nature of the facilities and the size and nature of the proposed development. Staff will recommend to DPW&T that such undergrounding, for this case, is consistent with the provisions identified in Sub Sections b, f, i and j of 49-27 of the County Road and Street Code (see preceding page).

Attachments

Subdivision Regulation 50-40

County Road and Street Code 49-27

Applicant's Memorandum

- (4) ~~Recording of Plats. Record plats filed on cluster developments shall contain a statement indicating that the land lies within an approved cluster development, that subdivision or resubdivision is not permitted after the property is developed and that development of the land is permitted only in accordance with the land uses indicated on the approved preliminary plan and/or site plan. Covenants or joint use and maintenance agreements affecting the common lands shall be recorded simultaneously with the plat. (Ord. No. 5-156, § 1; Ord. No. 6-5, § 1; Ord. No. 6-45, § 1; Ord. No. 6-88, § 1; Ord. No. 7-31, § 1; Ord. No. 7-32, § 1; Ord. No. 8-16, § 2; Ord. No. 8-92, § 3; Ord. No. 10-12, §§ 4, 5; Ord. No. 12-16, § 1.)~~

Sec. 50-40. Public utilities.

- (a) *General.* Pipelines, electric power and energy transmission and distribution lines and cables, and telephone and telegraph lines and cables shall be underground in a subdivision where the preliminary subdivision plan is filed subsequent to June 6, 1967.
- (b) *Installation.* Underground installation shall be required but not limited to total of six (6) or more buildings in a subdivision. Temporary overhead lines shall be permitted for any total of less than six (6) buildings in a subdivision.
- (c) *Completion.* No final approval of a plat or portion thereof shall be granted by the board, unless the developer or subdivider shall present to the board, certificates or commitments from utility companies or public agencies, having responsibility for the installation of utilities to service the subdivision, that he has completed such arrangements as will ensure the full, final and proper completion and installation of the utility lines by such utility companies or public agencies. In the event such certificates or commitments have not or cannot be obtained by the developer or subdivider, he shall, if he qualifies for the public improvement agreement authorized by paragraph (2) of subsection (g) of section 50-37, include in such agreement provisions agreeing to ensure full, final and proper completion of the utility lines by such utility companies or public agencies, or alternatively when such agreement is not entered into for other public improvements, such qualified developer or subdivider, shall enter into an agreement for the completion of the utility lines conforming to the provisions of paragraph (2) of subsection (g) of section 50-37. (Ord. No. 6-31, § 1; Ord. No. 6-45, § 2.)

Sec. 50-41. Enforcement.

- (a) *Definitions.* In this section, these terms have the following meanings:
- (1) *Citation.* A document noting a violation of a Planning Board Action, seeking to impose a civil fine or penalty.

Sec. 49-25. Interfering with, damaging, etc., roads under construction prohibited; penalty.

Any person who shall in any way interfere with, impede or hinder the building, repairing, improvement or construction of public roads by traveling over the same with motor vehicles or otherwise or in any other manner so as to damage or destroy the public road being built, repaired, improved or constructed or to interfere with the work of such building, repairing, improvement or construction, or shall tear down or destroy the public road being built, repaired, improved or constructed or shall interfere with the work of such building, repairing, improvement or construction, or shall tear down or destroy the barricades or lanterns which give notice to the public and all parties not to travel the portion of such road being so built, repaired, improved or constructed during the period of such building, repairing, improving or construction shall be subject to punishment for a class C violation as set forth in section 1-19 of chapter 1 of the County Code. (Mont. Co. Code 1965, § 103-2; 1983 L.M.C., ch. 22, § 54.)

Sec. 49-26. Authority of county executive to classify road repairs.

The county executive is hereby given the authority to determine whether a given road repair job should be classed as maintenance or as construction pursuant to the provisions of the road construction code in force at the time. (Mont. Co. Code 1965, § 103-4; 1971 L.M.C., ch. 3, § 41.)

Sec. 49-27. Conversion of existing overhead public utility lines to underground locations.

Whenever it shall be necessary as the result of the construction or improvement of any county road to relocate any overhead electric, telephone, telegraph or other overhead lines of any kind, or related facilities, within any such county road right-of-way, the county executive shall, by written regulation adopted under method (3) of section 2A-15 of this Code, require that any such lines be installed underground if he determines that such underground installation is required by one (1) or more of the following conditions:

- (a) Any fire hazard or possible interference with fire fighting equipment due to the location of the lines;
- (b) A close proximity of the lines to any place where people may congregate;
- (c) The anticipated increase of traffic on the road to be reconstructed or improved;
- (d) The population of the area, increase in population, and the future conditions to be reasonably anticipated in the normal course of development;
- (e) There exists such air traffic in the general area of the road, the road is near any airport, it is in an existing or anticipated approach to an existing or anticipated runway, or in the future, overhead lines would result in a hazard to such air traffic;

MONTGOMERY COUNTY CODE
Chapter 49

- (f) The comparative costs of relocating the lines overhead and installing them underground;
- (g) The comparative maintenance costs for overhead and underground lines;
- (h) The comparative frequency of interruptions in service for overhead and underground lines;
- (i) The improvement in the appearance of the area which would result from installing the lines underground;
- (j) Any other conditions material to the public convenience, health, safety, or general welfare.

In any regulation adopted hereunder the county executive shall make such provision as may be necessary for the replacement of any street lights which may be removed as the result of the conversion of any public utility lines to underground locations. (Ord. No. 6-77; 1971 L.M.C., ch. 3, § 43; 1984 L.M.C., ch. 24, § 48.)

Editor's note—The above section is cited in Montgomery County v. Schultze, 57 Md.App. 781, 471 A.2d 1129 (1984).

~~Sec. 49-28. Deserved.~~

~~Editor's note—Section 49-28, relative to hawking and peddling within 500 feet of schools, derived from Mont. Co. Code 1965, § 103-5, and 1983 L.M.C., ch. 22, § 54, was repealed by 1995 L.M.C., ch. 5, § 3.~~

~~Sec. 49-29. Hitchhiking within main-traveled portion of street or highway.~~

~~It shall be unlawful for any person to stand or walk within the boundaries of the main-traveled portion of any public street or highway within the county for the purpose of soliciting a ride from the driver or occupant of any vehicle.~~

~~Any person who violates this section shall be subject to punishment for a class C violation as set forth in section 1-19 of chapter 1 of the County Code. (Mont. Co. Code 1965, § 103-6; 1983 L.M.C., ch. 22, § 54.)~~

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October 18, 2001

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VIA FACSIMILE

Mr. Malcolm Shaneman
Maryland-National Park and
Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Fishers Place -- Undergrounding of Utilities

Dear Malcolm:

In connection with the Fishers Place development, you have indicated that the M-NCPPC's general counsel and the Development Review Division Staff have concluded that Park and Planning does not have the authority to require the underground placement of the utilities lines located along the Fishers Lane right-of way. We are pleased with this determination and thought that it may be helpful to share with you the basis by which we reached the same conclusion.

Our research reveals that the only authority addressing the undergrounding of utilities in any manner is the Subdivision Ordinance, Section 50-40, and the Streets and Roads Code, Section 49-27. However, as explained below, neither of these sections provides the authority to require the undergrounding of utilities in situations such as the Fishers Place development.

A. Subdivision Ordinance Section 50-42(a)

Subdivision Ordinance Section 50-42(a) provides as follows:

Mr. Malcolm Shaneman

October 18, 2001

Page 2

General. Pipelines, electric power and energy transmission and distribution lines and cables, and telephone and telegraph lines and cables shall be underground in a subdivision where the preliminary plan is filed subsequent to June 6, 1967. Emphasis Added.

The plain language of Section 50-42 (a) addresses only utility lines internal to a subdivision and does not in any way address utility lines located outside a project area. In other words, Section 50-42 distinguishes between development lines (i.e. those internal to the project) and existing lines, that may serve the subject project, but more importantly, also serve other properties. The plain language of this Section makes it clear that new internal lines located within the Fishers Place project must be installed underground. Consistent with this provision, all of the utility lines within the 11.82 acre Fishers Place development are being located underground. At the same time, and again consistent with Section 50-42, the utility lines located outside the project area along the Fishers Lane and Twinbrook Parkway perimeters, will remain in their current, above grade location.

It is clear from the language of the Subdivision Ordinance that there is no basis for requiring the undergrounding of the utilities outside the subdivision, along the public rights-of-way.

B. Streets and Roads Code Section 49-27

Section 49-27 provides in part as follows:

Whenever it shall be necessary as a result of the construction or improvement of any county road to relocate any overhead electric, telephone, telegraph or other overhead lines of any kind, or related facilities, within any such county road right-of-way, the county executive shall, by written regulation adopted under method (3) of section 2A-15 of this Code, require that any such lines be installed underground if he determines that such underground installation is required by one (1) or more of the following conditions:

...

Section 49-27 sets forth the ten conditions that may trigger the requirement to underground the existing utilities. Throughout the Fishers Place Preliminary Plan and Site Plan approval process, there has been no determination that any of the conditions enumerated in Section 49-27 that would provide the basis for the undergrounding of the utilities exist. Further,

Mr. Malcolm Shaneman

October 18, 2001

Page 3

Section 49-27 explicitly provides that a determination that the undergrounding of the utilities will be required is vested in the authority of the County Executive and therefore, outside the scope of M-NCPPC's authority.

I trust that this information is helpful. If you have any questions, please do not hesitate to contact me.

Very truly yours,

HOLLAND & KNIGHT LLP



Patricia A. Harris

Regular Meeting
MONTGOMERY COUNTY PLANNING BOARD
Silver Spring, Maryland
October 25, 2001

Staff Recommendation:

The following record plat are recommended for APPROVAL, subject to the appropriate conditions of approval of the preliminary plans and conditioned on conformance with all requirements of Chapter 50 of the Montgomery County Code.

2-02054 Fishers Place, Lots 11 and 12, Block B
 I-1 Zone, 2 Lots
 Community Water, Community Sewer
 JBG JER Twinbrook Metro, L.L.C., Applicant

BOARD ACTION

Motion:

Vote:

Yea:

Nay:

Other:

Action:

