

MEMORANDUM

TO: MNCPPC Planning Board and Staff
FROM: Stephen Z. Kaufman and Todd D. Brown, attorneys for Newland Communities
DATE: November 18, 2005
RE: Planning Board Delegation of Authority to Staff To Approve Amendments to Board Approved Site Plans.

The Master Developer, Newland Communities (the "Developer") and the Clarksburg Town Center Advisory Committee ("CTCAC") disagree as to whether or not the Planning Commission staff appropriately exercised the authority delegated to it to administratively approve amendments to the Planning Board's approved site plan. Notwithstanding CTCAC's argument, the only evidence of record clearly and correctly demonstrates that the changes at issue were authorized by the actions of the Planning Board, and the applicable enabling laws and ordinances. Accordingly, the amendments were in accordance with the power delegated to planning staff by condition 38 in the Site Plan Opinion for phase I. Additionally, CTCAC claims that said changes exceed the limited scope of the section of the Montgomery County Zoning Code that provides for minor amendments. CTCAC's is again incorrect in that significant enabling authority and case law confirms: 1) the Planning Board had the authority and power to delegate approval of the described amendments to staff as minor amendments; 2) the Planning Board cannot after the fact and after a change in position in good faith reliance apply new rules retroactively; and 3) the Planning Board has the lawful capacity to enter into development and regulatory agreements with a developer.

I. The Regional District Act Created The Maryland-National Capital Park & Planning Commission And The Planning Board, And Provides The Primary Enabling Authority For The Planning Board To Delegate Administrative Decisions To Its Staff.

The Regional District Act ("RDA") created the Planning Board and provides the Board with inherent powers and exclusive jurisdiction over certain matters. The Planning Board is "responsible for planning, platting, and zoning functions primarily local in scope ...". MD. CODE art. 28, § 7-111(a). "The local functions exclusively within the jurisdiction of the respective planning boards include, but are not limited to, the administration of subdivision regulations, the preparation and adoption of recommendations to the district council with respect

MNCPPC Planning Board
November 18, 2005
Page 2

to zoning map amendments, and the assignment of street names and house numbers within the regional district.” In addition, “[w]ithin its jurisdiction, each county planning board shall have and exercise the powers in regard to planning, zoning, subdivision control, platting, the assignment of street names and house numbers, and related matters, heretofore exercised by the Commission under this title.” MD. CODE art. 28, § 7-111(b). This statute serves two purposes. First, it provides the Planning Board with exclusive authority over certain matters independent of the Montgomery County Council. Second, it grants the Planning Board a broad capacity to exercise powers over a variety of land use issues, demonstrating that the General Assembly did not intend to restrict the authority of the Planning Board.

As far as the administrative operations of the Planning Board, the RDA provides the authority to delegate issues to staff. “Each planning board shall have administrative control and jurisdiction over personnel performing the duties and functions assigned in this section to the respective planning boards.” MD. CODE art. 28, § 7-111(c)(1). This provision empowers the respective Planning Boards to authorize and delegate to staff the discretion using its expertise to make decisions for the Planning Board itself. Therefore, since the Planning Board was created by the RDA and granted the authority to delegate decisions to administrative staff, the delegation and definition of what constitutes a minor amendment to staff for administration and approval appears to be well within the Planning Board’s power under the Maryland Code.

II. The County Council Delegated To The Planning Board The Authority To Approve Site Plans And Provided Flexible Guidelines For Their Approval And Administration.

In addition to the specific authority vested in the Planning Board by the RDA, the County Council also has the ability to delegate matters to the Planning Board. Primary zoning authority in Montgomery County is vested in the County Council sitting as District Council. MD. CODE art. 28, § 8-101. This provision of the RDA provides the basis of authority to pass zoning ordinances, adopt and amend zoning maps, and delegate powers to the Planning Board. *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686 (1977). Pursuant to this authority the County Council created the project plan and site plan ordinances in the Montgomery County Code, which delegated the approval and administration of the project plans and site plans to the Planning Board. See MC. CODE Sec. 59-D-2.1, and site plans, MC. CODE Sec. 59-D-3.1.

MNCPPC Planning Board
November 18, 2005
Page 3

a. The Montgomery County Code Provides The Planning Board The Authority To Delegate To Staff Approval of Minor Amendments To An Original Site Plan.

CTCAC asserts that the Planning Board exceeded its authority by including condition 38 in the Site Plan Opinion for Phase I. Alternatively, CTCAC claims that even if condition 38 in and of itself was not an unauthorized delegation, the Planning Board staff exceeded its authority by approving pertinent changes without a determination from the Board that such changes were in fact minor. Such a blanket statement, that the Planning Board must determine on a case by case basis which changes are minor versus major changes, is contrary to the authority granted to the Planning Board and its staff by MC. CODE, Sec. 59-D-2.6, 3.7.

Recognizing that requiring a full Planning Board hearing for every change to a project plan or site plan would make many development projects unmanageable, the Montgomery County, County Council passed Zoning Text Amendment 940001. This amendment was proposed by the Planning Board technical staff and recommended by the Planning Board for approval on February 25, 1994. The County Council adopted the amendment later that year. The plain reading of the text indicates that the Council intended for the Planning Board to not have to have a hearing for every "minor" change to a project plan or site plan. The Planning Board was also given the discretion to decide what was a minor or a major change. In drafting the text amendment the County Council stated only that staff could not alter the validity period or make changes that alter the fundamental determinations assigned to and made by the Planning Board. MC. CODE, Sec. 59-D-2.6. The County Council could have drafted the ordinance in a way that would have given the Planning Board and its staff less discretion. To the contrary, the County Council chose to pass an ordinance that encourages flexibility and delegates the administration of and defining details to the Planning Board and its staff.

The fundamental determinations assigned to the Planning Board for project plans are set forth in the "Findings Required for Approval", MC. CODE, Sec. 59-D-2.42, and "Basis for Consideration", MC. CODE, Sec. 59-D-2.43. For site plans, the fundamental determinations are set forth in "Action by the Planning Board", MC. CODE, Sec. 59-D-3.4. Each of these determinations are focused upon basic concepts such as: compatibility with the zone, master plan, and surrounding area; how the development will affect public facilities; adequacy of the provisions for the construction of MPDUs; and adequacy of environmental measures. These determinations are best characterized as a finding that the proposed development will meet all of its obligations under the applicable laws and planning guidelines. Thus a straight forward reading of the enabling language indicates that as long as any proposed change to an approved plan will not alter the project's ability to meet all of its overriding obligations, then any other changes should be considered minor. This statute does not dictate whether the Planning Board or

MNCPPC Planning Board

November 18, 2005

Page 4

staff should decide if a change is minor, as is the case with many administrative agencies, rather the County Council left this determination to the discretion of the agency itself.

The Montgomery County Code simply defines “[a] minor amendment [as] an amendment that does not alter the intent, objectives, or requirements expressed or imposed by the Planning Board in its review of the plan.” MC. CODE, Sec 59-D-2.6. Conversely, a strict interpretation, that every MPDU location, street location, or any other condition listed on the site plan drawings or stated in the opinion, cannot be altered without a formal amendment to the plan itself, ignores the broad delegation provision in the Montgomery County Code. Such an interpretation would as a practical matter render the delegation provision in the code meaningless. In order for CTCAC’s interpretation to be correct, there would have to be some provision in the code that states that an applicant/developer is bound by every location, detail and note depicted on the approved plans and that such details cannot be altered without a full hearing. The fact that the code does not include such a strict provision strongly indicates that the County Council deliberately intended to give the Planning Board and through it the professional staff the discretion to determine what is or is not a minor amendment.

b. The Planning Board Lawfully Defined What Is And Delegated Approval Of Minor Amendments To Its Staff In Condition 38 Of The Site Plan Opinion; And Thereafter Restated The Condition As Section (nn) In The Site Plan Enforcement Agreement.

The Planning Board’s inclusion of descriptive condition 38 in the Site Plan Opinion for Phase I exemplifies the lawful exercise of discretion by the Planning Board as enabled by the Montgomery County Code. Condition 38 states:

The Applicant may propose compatible changes to the units proposed, as market conditions may change, provided the fundamental findings of the Planning Board remain intact and in order to meet the Project Plan and Site Plan findings. Consideration shall be given to building type and location, open space, recreation and pedestrian and vehicular circulation, adequacy of parking etc. for staff review and approval.

The inclusion of this condition demonstrates that the Planning Board anticipated amendments to the approved plan would be necessary in light of the scale of development within the Clarksburg Town Center. By the inclusion of condition 38, the Planning Board clearly delegated to staff the ability to change provisions that were not inconsistent with the Board’s

MNCPPC Planning Board

November 18, 2005

Page 5

“fundamental findings”.* Condition 38 provides the applicant with the ability to seek to amend the approved plans, while requiring staff to evaluate how the proposed changes will affect certain planning parameters and the overriding fundamental findings of the Planning Board approvals. Once staff evaluated the changes pursuant to the guidelines set forth in condition 38 and made a determination that they would not alter the Planning Board’s fundamental determinations, staff rightfully could and did approve the changes, which are now through hindsight being questioned.

III. An After The Fact Decision By The Planning Board As Part Of The Present Proceedings Before It That Staff Did Not Have Authority To Approve Minor Amendments To The Site Plan Would Be Tantamount To New Administrative Rulemaking That The Board Cannot Retroactively Or Legally Apply.

If the Planning Board were now to find that staff was not authorized to approve minor changes (as defined by the Board’s own condition) to the Clarksburg Town Center site plan, that finding would constitute new retroactive administrative rulemaking. While the Planning Board is certainly free to make prospective changes to its rules, it may not retroactively apply such changes in a way that would make the Developer in violation of previously approved plans. The Maryland Court of Appeals has outlined several factors that should be considered to determine if a retroactive application of a statute and administrative rules to implement it impair a constitutionally protect right. The Court of Appeals stated:

Other factors, such as whether the retrospective application of the statute works substantial injustice, whether the retroactive act was anticipated at the time of the transaction, the nature of the “colorable authority” under which the governmental officials were acting, whether the defect in authority at the time of the [proceeding] was inadvertent, whether or not the [changes] made by the ratification statute were “small,” etc., all may have a role... *Washington Nat’l Arena Ltd. Partnership v. Treasurer, Prince George’s County*, 287 Md. 38, 51 (1980)(emphasis added).

In the instant case, it would clearly be a substantial injustice if the Planning Board were now to reverse its prior practice of permitting staff to approve minor amendments in that 1) staff acted under the authority given to them by the County Code, 2) this practice was well known to

* In the instant case, those fundamental findings were that the community was to be developed with a walkable small town environment and that it contain a mix of unit types (including MPDUs distributed throughout) with significant local and general amenities provided, and include a core of retail services.

MNCPPC Planning Board
November 18, 2005
Page 6

the Planning Board, and 3) neither staff nor the Developer had any indication that the Planning Board might at a later date change its interpretation of the delegation provision.

IV. The Regional District Act Also Provides Specific Authority For The Planning Board To Enter Into Regulatory Plan Enforcement Agreements And Development Rights And Responsibilities Agreements With A Developer.

The RDA also clearly enables the Planning Board to enter into regulatory plan enforcement agreements, MD. CODE art. 28, § 7-116(c), and development rights and responsibility agreements. MD. CODE art. 28, § 7-121. It is not apparent from either of these two sections, which one would govern a site plan approval or a site plan enforcement agreement. However, both of these sections contain language that could be construed to apply to either Planning Board Opinion conditions of approval and/or development enforcement agreements. The following is a summary of these provisions in the RDA, and a discussion of how these provisions provide additional authority and support for the Planning Board's power to define and delegate the approval of minor amendments to staff.

a. Regulatory Plan Enforcement Agreements.

The Planning Board is authorized to enter into regulatory plan enforcement agreements by the RDA. Under the title of "Subdivision regulations generally", this section enables the County Council to "prepare regulations and amendments governing the subdivision of land within the regional district." MD. CODE art. 28, § 7-116. This section then lists 12 issues that regulatory agreements may provide for, such as: coordination of roads; open spaces; the reservation of land for parks and schools; regulation of storm water management; preservation of historic sites; the provision of adequate recreational facilities; and other issues. *Id.* Because an approved site plan and site plan enforcement agreement create a contract controlling these issues, it is possible that they would be considered regulatory plan enforcement agreements.

If so, this section of the RDA provides:

...the planning board of the Commission or its designee may enter into regulatory plan enforcement agreements, declarations, easements, covenants, and other instruments, with appropriate persons or entities regarding any action it is authorized to take under this article. The agreement may establish terms and conditions required to implement the action and provide for enforcement and appropriate remedies... MD. CODE art. 28, § 7-116(c)(1).

MNCPPC Planning Board
November 18, 2005
Page 7

This enabling language for entering into a regulatory plan enforcement agreement is quite broad as it clearly allows and encourages the Planning Board and a party to enter into this type of agreement. The parties are free to establish terms for enforcement without any statutory imposed restraint. Thus, it is quite logical to argue that the Planning Board was within its statutory rights to delegate to staff the approval of certain changes to the approved plans because the Planning Board Opinion and conditions therein (approving said plans) in effect constitute a regulatory agreement.

b. Development Rights And Responsibility Agreements.

The RDA also provides the Planning Board with the authority to enter into “development rights and responsibly agreements in Montgomery County.” MD. CODE art 28, § 7-121. This section provides two important definitions. First, “‘a development rights and responsibilities agreement’ or ‘agreement’ means an agreement, approved by the district council or the county executive, as appropriate, made between a planning board of the Commission, or its designee, a reviewing entity, and a person having a legal or equitable interest in real property for the purpose of establishing conditions under which development of the property may proceed for a specified time.” Second, the same section of the RDA defines a regulatory plan as “an application proposing development on privately owned land that must be submitted to a planning board of the Commission for review and final approval under this article or under county laws and regulations.” Unfortunately, neither definition indicates the type of agreement a site plan opinion or site plan enforcement agreement would be considered.

This section does however, clearly dictate several different items that a development rights and responsibly agreements must include. The agreement must include “the general location of all buildings, structures and supporting facilities.” This provision, therefore, recognizes that some alteration to the final location of the buildings and structures would be made, thus, implicitly acknowledging that the location would be finalized without having to alter the agreement itself. This section of the RDA also supports the proposition that the General Assembly understood that the administration of a development rights agreement would require some adjustment to the plans as originally agreed to.

Accordingly, although it does not appear that the site plan enforcement agreement in question is strictly either a regulatory agreement or development agreement, the process of entering into a site plan agreement is nearly identical to the process and requirements set forth in the RDA for entering into a “Development Agreement.” For instance, the Planning Board can only enter into a development agreement or approve a site plan after it makes a determination that the proposed development is compatible with the applicable general plan or applicable zoning requirements as it did in the instant case as part of the findings section of the Planning

MNCPPC Planning Board
November 18, 2005
Page 8

Board Opinions approving both Phase I and Phase II site plans. *Compare*, MD. CODE art 28, § 7-121(f) with MC. CODE Sec. 59-D-3.4. In addition, when the Planning Board approved the site plans, it did so after conducting full public hearings, in which the public had the opportunity to participate, and where proper notice was given to the public regarding the subject matter of the upcoming hearing. *See* MC. CODE Sec. 59-D-3.4. Similarly, the section of the RDA that provides for development agreements, states: “[a] public hearing for a regulatory plan review may satisfy the requirement for a public hearing for an agreement.” MD. CODE art 28, § 7-121(e).

In the instant case, when the Planning Board issued its site plan opinion, the opinion stated that a site plan enforcement agreement would be entered into for administration of the project. *See* Site Plan Opinion, Condition 40. This process of approving a site plan and entering into a site plan enforcement agreement was done only after and with public notice and participation. Such a process meets the requirements imposed by both the state and county zoning enabling ordinances for the purpose of protecting both the public’s and developer’s interests, resulting in an agreement where both parties are protected by full disclosure.

Conclusion

The enabling ordinances of both the Regional District Act and the Montgomery County Code clearly authorize the Planning Board to approve site plans, to delegate to planning staff the authority and discretion to approve minor amendments, and to enter into an agreement with a Developer for the administration of an approved plan. Both the Planning Board and its staff properly exercised that authority during the build out of Clarksburg Town Center. Therefore, the Planning Board should not and cannot now find that the Developer and Builders in the Clarksburg Town Center wrongfully relied on the long-standing dual administrative practices of the Planning Board approval and staff modification of site plans. Such a determination would constitute an illegal act of retroactive rulemaking.