

**MEMORANDUM**

DATE: March 20, 2006

TO: Montgomery County Planning Board

FROM: Faroll Hamer, Acting Planning Director *FH*

SUBJECT: Violations Guidelines

Attached please find a draft set of guidelines provided for public comment and Planning Board adoption, to be used when the Board makes a determination on when fines should be assessed, and if so how much should be assessed. Staff is recommending these guidelines as a tool to ensure that the Board is consistent in its assessments, that it has some standardized considerations when assessing fines, and to balance the findings and remedies with overarching public interest considerations.

Additionally, staff is providing the Board with some policy suggestions on broader violation issues that may help frame the Board's discussion of the draft guidelines.

Violation Considerations**A. "Non-Conforming" Buildings.**

There has been much discussion of the status of buildings that are built in violation of (a) zoning standards (e.g., height and setback restrictions, lot size limitations); and (b) dimensional limitations established by the Board in site plans (e.g., height, setback limitations). The category of standard that has been violated determines the status of the building.

A zoning violation creates an illegal building. A nonconforming building or structure is "A building or structure that was lawful when constructed and continues to be lawful, even though it no longer conforms to the requirements of the zone in which it is located because of the adoption or amendment of the zoning ordinance or the zoning map." Chapter 59-A-2.1 (Definitions). Since a building that violates zoning law, by definition, cannot be "lawful" when constructed, it cannot be nonconforming. If the structure is destroyed, it can only be rebuilt if it conforms to the zoning ordinance.

A violation of a site plan limitation creates a site plan violation, but one that can be cured. If the violation does not create a zoning violation, it can be “cured” through a site plan amendment. If the Board elects not to “cure” the violation through a site plan amendment, the owner still can rebuild the structure if it is destroyed, but the new unit must meet the restrictions in the site plan approval.

B. Innocent Third-Party Purchaser Status

In some instances, the property in violation has been transferred to a third-party purchaser, one that had no hand in creating the violation status. In particular, this has happened to a number of residential homeowners. The question becomes how to address that status, and in staff’s view it should be in a manner that protects the property rights of the third-party. In the first instance discussed above, where the building is illegal, it may in some instances be appropriate to require the builder to repurchase the property and relocate the homeowner. For example, in an instance where the lots as recorded are smaller than the zone allows, not only is the building illegal but it cannot be rebuilt on the existing lot. A different remedy may be appropriate in a case where the building is too tall, but can be rebuilt on a lot within zoning restrictions, thus the homeowner still can retain use of the property even if the house is destroyed. Finally, in cases where the height restriction exceeds not the zone but a site plan, the Board may consider an amendment to the site plan to change the height, thus creating a conforming building, or affirmatively stating that it will not pursue enforcement against the third-party purchaser but noting that if the unit ever is rebuilt, it must conform to the site plan limits. There is more flexibility with this option in single-family developments than there is in townhouse or condominium developments.

In these cases, title generally is not an issue – the owners have clear title to the property. However, they may not own what they paid for – a legal building. For some illegal buildings, it may be difficult to obtain homeowner’s insurance (e.g., if the lot is too small to allow reconstruction of a building). In others, it probably is immaterial – if a home is a foot or two taller than the Planning Board authorized, a new home could be built within the approved height limit with little or no diminution in the value of the improvement. The same analysis applies to resale value. A home on a lot that cannot be rebuilt probably has little fair market value. One that can be reconstructed largely as built will probably see little change in value.

These matters are highly case-specific, and it is difficult to generalize how a particular violation would affect a particular homeowner.

C. “Finding” of Violation vs. Acceptance of a “Proffered” Plan of Compliance

These violations arise in the context of a violation hearing or the issuance of a citation, alleging a violation. In the preponderance of these cases, the party charged with violating the zoning ordinance or site plan limitations (the original subdivider and/or the subsequent builder) have asked the Board to accept a proffer of a plan of compliance, but not find a violation.

Settlements of violations of regulatory matters, with a punitive component assessed notwithstanding the fact that there is no admission of wrongdoing or finding of violation occur as a matter of course. Public reports of such settlements are routinely mentioned in the general press and in specialty periodicals. The following examples show the broad range of enforcement agencies that accept settlements of alleged violations, even though there is no finding or admission of culpability:

1. The Department of Justice has agreed to forego criminal charges against an energy company in exchange for a payment of \$77.1 million and promises of good behavior. The Energy Daily ED Volume 34, No. 30, Friday, February 24, 2006.
2. The Federal Consumer Product Safety Commission accepted a \$700,000 civil penalty from Acuity Brands, Inc. (a maker of lighting equipment). The settlement expressly noted that “Acuity contests and denies the Staff’s allegations and enters into the Agreement to resolve the Staff’s allegations without the expense and distraction of litigation. By agreeing to this settlement, Acuity does not admit any of the allegations set forth above in the Agreement or any fault, liability, or statutory or regulatory violation.” Federal Register: March 14, 2006 (Volume 71, No. 49).
3. The Securities and Exchange Commission (SEC) entered into a settlement with Lumenis (which develops, manufactures and markets laser-based medical devices) that did not include a monetary fine but that included Lumenis’ agreement to be delisted from the SEC for trading purposes. “Lumenis said it ‘will consent, without admitting or denying the allegations in a complaint to be filed by the SEC, to the entry of a permanent civil injunction against future violations . . . “ Globes Online 3/8/06, 2006 WNLN 3886560, March 8, 2006.
4. The Environmental Protection Agency agreed to accept a \$5,000 penalty in settlement over alleged violations of the clean water act, and required the builder to apply for an “after the fact” permit with the Army Corps of Engineer, which would require mitigation of the adverse effect on waterways resulting from the alleged unlawful discharge of fill material into a stream during the construction of an industrial park. US Federal news 2/23/06, 2006 WLNW 3207607.
5. Federal investigators accepted a settlement from two pharmaceutical companies of alleged violations of the federal False Claims Act, “without admitting guilt,” and the companies “paid fines, settlements for liabilities and and reimbursements in the amount of \$850 million and \$355 million, respectively.” Obesity, Fitness & Wellness Week, 2/18/06 p. 1168.

There are several benefits of accepting a settlement without a finding of violation. First, the monies provided in the settlement are immediately available for whatever remedial measures the Planning Board may impose. Second, a settlement eliminates the possibility of a judicial appeal, which saves time and money (both scarce resources in most regulatory agencies). Alleged violators have incentive to offer a settlement because it reduces risk, and the consequences of a finding of violation can affect the ability to obtain (and/or the cost of) construction bonds, may affect licensing, and may affect the ability to bid on public projects.

Staff believes that settlements need to be weighed on a case-by-case basis, and may not be appropriate in each matter. Often, however, they can be effective in achieving a number of public policy goals, including the ability to ensure a penalty amount.

D. Lack of Standards

There are numerous instances where site plans have been approved with no height or other development standards. There is no specific regulation or required finding for such standards. The zoning ordinance (Sec.59-D-3.23) indicates that one of the submittal requirements is “a plan of the proposed development including but not limited to the following information unless waived by the planning director at the time of application as being unnecessary because of the limited scope of the proposal: (a) the location, height, ground coverage and use of all structures.” It should be noted that there is no specific regulation or required finding for such standards. Both because a submittal requirement has less weight than a finding or regulation, and because numerous innocent third-party purchases would be harmed, it would be desirable for the Planning Board to cure the omission of development standards through an amended site plan (plan of correction) rather than finding a violation.

E. Use of Hearing Examiner

ZTA 05-08, effective March 1, 2006:

The Planning Board may assign a hearing officer designated by the Planning Board, including a Hearing Examiner from the Office of Zoning and Administrative Hearings, to conduct a public hearing and submit a report and recommendation on any alleged violation of this Chapter or any other Planning Board Action as defined in Section 50-41. The hearing officer must submit the required report and recommendation to the Planning Board not later than 60 days after the hearing record closes, but the hearing officer may by order extend the time to file the report.

The Board has broad discretion as to when they assign a case to a Hearing Examiner. It could be based on factors such as the overall complexity of the alleged violations; on workload limitations with staff; or cases involving concerns about whether staff could be impartial in their assessments based on allegations that staff was partly at fault in creating the situation giving rise to the violations. Ultimately, the Hearing Examiner’s decision will come to the Planning Board as a recommendation, and the Examiner’s record and recommendation will be included in the Board’s record. If the matter only involves the issuance of a citation under Section 50-41 of the Subdivision Regulations, then an appeal would go to the Montgomery County District Court as a de novo trial; if the hearing results in a plan of compliance under Section 59-D-3.6 of the Zoning Ordinance, then the appeal would be to the Montgomery County Circuit Court as a petition for judicial review of an agency decision, with a review based solely on the record that was before the Board when it made its decision.

These broader policy considerations may help the Board frame its discussion of the attached proposed Violation Guidelines, which in turn will be used as staff develops its recommendations to the Board in upcoming violation hearings.

Attachment

-DRAFT-
PLANNING BOARD GUIDELINES FOR FINDING VIOLATIONS AND
ASSESSING FINES UNDER CHAPTER 50-41 OF THE MONTGOMERY
COUNTY SUBDIVISION REGULATIONS AND SECTION 59-D-3.6 OF THE
MONTGOMERY COUNTY ZONING ORDINANCE

I. Introduction

These Guidelines are designed to provide the Planning Board guidance in finding violations and evaluating the amount of fines to assess when a development standard or condition of approval for a development project has been violated.

II. Types of Violations

A. Violations fall within four general categories:

1. Projects in zones with no development standard(s) and where Planning Board approvals do not establish such standards (*e.g.*, no height limit established);
2. Projects that violate development standards set forth in the zoning ordinance (*e.g.*, zoning ordinance height or setback limitations violated);
3. Projects that violate development standards established by the Board (*e.g.*, height or setbacks that fall within zoning ordinance standards, but violate limitations established by the Planning Board); and/or
4. Phasing and process violations (*e.g.*, recreational facilities not built in a timely manner, or clearing/grading occurs sooner than permitted by conditions of approval).

B. These violations either can or cannot be cured. For example, a partially constructed building that is too tall can be reduced in height; on the other hand it is unlikely that a fully constructed building that has been transferred to a third-party purchaser can be reduced in height. The Planning Board generally will not seek to reduce height or setback in buildings occupied by innocent third-party purchasers.

C. Lack of development standards does not constitute a per se violation. Lack of development standards can be cured through a revision to the site plan (Plan of Correction).

III. Factors to Consider in Assessing a Fine

In assessing a fine, the Planning Board should take into consideration the following factors:

1. The willfulness of the violation(s);
2. The damage or injury to residents of the existing or proposed development, or adjoining or confronting property owners;
3. Any adverse impact on water quality or implementation of any master plan or functional land use plan applicable to the project;
4. The extent to which the current violation is part of a recurrent pattern of the same or similar type of violation committed by the violator;
5. Whether the violation can be cured; and,
6. Other relevant factors.

If present, the Board also should take into consideration the following mitigating factors:

1. Violations that are caused, in part, by action or inaction of governmental or quasi-governmental bodies outside of the control of the applicant (e.g., recreational facilities that cannot move forward because DPWT or SHA is not moving forward with a road project); and
2. The violator's efforts to remedy the violation.

IV. Innocent Third-Party Purchasers

In assessing a fine, the Board should take into consideration the impact of the violation on innocent third-party purchasers. Specifically, the Board should consider:

1. Whether a finding of violation potentially harms third-party purchasers (relevant in cases where the violation cannot reasonably be cured); and, if so,
2. Whether the acceptance of a proffer of settlement would enhance the timeliness (e.g., appeal rights are waived) or amount of fine monies that can be spent within the community for remedial measures.

V. How Fine Monies Should Be Assessed

In assessing a fine and/or accepting a proffer of settlement, the Board should determine how fine monies should be assessed, based on the following criterion:

1. An amount sufficient to deter future violations;
2. If the violation cannot be cured, an amount sufficient to provide offsetting amenities to benefit the affected community; and
3. The cost of the enforcement action.

VI. Board Findings

In assessing a fine, the Board should state on the record the basis for its fine and, if accepting an offer of settlement, the public interest in accepting such an offer, and the percentage of fine to be allocated for offsetting the cost of enforcement.