

Modification to the Memorandum of Understanding between M-NCPPC and DPS for Site Plan Enforcement

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DESCRIPTION

Modifications to the Memorandum of Understanding (MOU) between the Maryland-National Park and Planning Commission (M-NCPPC) and the Montgomery County Department of Permitting Services (DPS).

Primary modifications include:

- Updating sections of the MOU to include technology advances in plan review and approval of site plans and building permit applications, and plan delivery/notification.
- Revising inspection procedures and process for the release of financial sureties.
- Including language that addresses violations found in scenic easements created by site plan approval.

SUMMARY

Staff recommends approval and adoption of the revisions to the June 9, 2016 MOU between M-NCPPC and DPS. The update to the MOU is a requirement of the original agreement and the second amendment to that agreement. The update allows the participating Agencies to account for changes in processes and organizational structure which occasionally occur. The proposed revisions to the MOU are to provide additional clarifications on timing, processing, and the enforcement of violations. For the most part, the changes are already implemented at DPS and M-NCPPC.

PURPOSE

The purpose of this memorandum is to provide the Planning Board an update on site plan enforcement, including the efforts made by both DPS and M-NCPPC toward enforcement, and to discuss the modifications needed to the MOU to reflect current procedures.

BACKGROUND

The MOU between the M-NCPPC and DPS was initially executed on August 2, 2006, as result of a Council audit of site plan inspection and monitoring procedures. Since the adoption of the MOU, DPS has inspected site plans for compliance, but the ultimate responsibility for enforcement is with M-NCPPC. The first amendment to the MOU, on December 22, 2011, was to reflect process and procedural changes that evolved during the first five years after the adoption of the MOU. The second amendment to the MOU occurred on or about June 6, 2016, to update process efficiencies, bond release procedures, and technological changes associated with site plan and permit reviews.

Representatives from both agencies meet regularly to identify potential conflicts with approved site plans and the as-built conditions, streamline the building permit application review process, and continually strive to improve efficiency. The MOU requires quarterly meetings, which do occur. In addition, at any time, staff from both agencies can meet to discuss site plan conditions including triggers, site plan surety agreements and cost estimates, and enforcement of site plan conditions.

PROCESS

The MOU has three main aspects which are described in greater detail below. The three aspects have resulted in greater clarity in the roles and responsibilities for DPS and M-NCPPC in terms of the review of new site plans, building permit application reviews, and for the inspection and enforcement of site plans. Each is described below.

Development Review

The DPS zoning section started commenting on new development applications after the signing of the MOU. DPS Site Plan Zoning and Site Plan Enforcement Staff are:

1. Active and regular participants at Development Review Committee meetings.
2. Frequently requested to comment on the functionality of proposed site plan conditions of approval before finalization of staff reports.

Building Permit Applications

DPS and M-NCPPC have a close working relationship for the release of building permits. The relationship existed prior to the MOU and has been refined over the years. The number of building permit applications forwarded to M-NCPPC by DPS have declined through the streamlining of procedures and a greater understanding by DPS staff on which building permit

applications need M-NCPPC review. The current process for the review of building permit applications is outlined below:

1. DPS is using ePlans for the submission and review of new building permit applications. Approximately 70 percent of the building permit applications received by the Planning Department are via ePlans.
2. Planning staff reviews building permit applications to ensure the appropriate conditions of approval have been satisfied prior to recommending approval of a building permit. Planning staff does not review the technical aspects of an application, but rather ensures that the Planning Board's conditions of approval are satisfied including but not limited to: plans are certified; financial sureties submitted and accepted by the Associate General Counsel's office; all appropriate agreements are accepted and approved; record plat approved; etc.
3. Both the Planning Department and DPS Zoning and Enforcement staff track the number of building permits released for specific site plans with building triggers. Since DPS releases the building permit they have the final count for tracking triggers. Planning Staff may authorize the release of a building permit, but it may be many months before the building permit is actually released, therefore, the data accumulated by staff as they relate to triggers, may be less accurate than the data accumulated by DPS.

Inspection and Enforcement

The main purpose for the MOU is related to the inspection and enforcement of site plans. DPS Zoning and Enforcement staff are the Commission's inspection staff for all site plans. However, the overall enforcement responsibility still is with the Planning Department. The inspection and enforcement process is as follows:

1. The Planning Department forwards one signed certified site plan to DPS for their records.
2. The applicant submits cost estimates for all site plan features to the Planning Department for review. Once the cost estimate is approved, the applicant then submits the financial security and site plan surety agreement to the Planning Department for review, approval and safe keeping.
3. The Planning Department electronically forwards a copy of the site plan agreement to DPS.
4. Applicants request a pre-construction meeting with DPS zoning and enforcement staff.
5. DPS conducts site plan inspections throughout the build out.
6. DPS notifies the Planning Department when site plan financial sureties can be released.
7. DPS provides the Planning Department a copy of Notice of Violation for any site plan that does not comply with the approved or certified site plan.

8. DPS conducts follow-up inspections to determine if the corrective actions identified in the Notice of Violation are complete.
9. If the corrective action is not complete the case is referred to the Planning Department as an enforcement case in which the staff follows the Planning Board's Enforcement Rules.

MODIFICATIONS TO THE MOU

M-NCPPC and DPS have reviewed the current MOU and believe that there are modifications that need to occur with respect to process changes that have already occurred. The MOU anticipates that changes could occur and that the MOU should be reviewed on a three-year cycle; however, the last review occurred in 2016. The proposed changes to the MOU include the following:

1. Deleted Definitions in Section 1 not relevant to the MOU.
2. Revised various language under Section 2, Review of Building Permit Applications, that conforms to procedural changes.
3. Added a new Section 3, Review of Certified Site Plans, that updates electronic plan delivery and reporting procedures.
4. Revised various language in Section 4, Inspections, that further clarifies DPS inspection responsibilities.
5. Eliminated Attachment 1 flow chart that references enforcement procedures between agencies.
6. Added language in Section 5, Enforcement, that grants M-NCPPC permission to take the lead when violations occur in a conservation easement or scenic easement created by a site plan approval.
7. Updated zoning ordinance citation in Section 6, Inter-Agency Communications, and reduced the number of senior staff appointed meetings to review building permit and site plan inspection issues between agencies from bi-monthly to semi-annually.

Recommendations

Staff recommends the Planning Board approve the revisions made to the Memorandum of Understanding in collaboration with DPS, Zoning and Site Plan Enforcement Division and the Commission. Once the revisions are accepted by the Planning Board the updated MOU can be fully executed.

Attachments

Attachment 1 - Proposed 2020 Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING
BETWEEN THE MONTGOMERY COUNTY PLANNING BOARD
AND THE MONTGOMERY COUNTY
DEPARTMENT OF PERMITTING SERVICES

This Memorandum of Understanding ("MOU") is entered into this _____ day of _____, 2020, between the Montgomery County Planning Board ("Planning Board") and the Montgomery County Department of Permitting Services ("DPS") with the acknowledgement of the Montgomery County Council ("County Council").

WHEREAS, the Planning Board is charged with inspecting developments for compliance with Planning Board approvals including site plan amenities, height limits, setbacks and other development standards in site plan zones; and

WHEREAS, DPS is charged with inspecting developments for compliance with building permit approvals including height limits, setbacks and other development standards in zones that do not require a site plan; and

WHEREAS, the Planning Board and DPS (collectively referred to as "the Parties") were directed by the County Council to enter into this MOU to provide clarity of responsibility and greater efficiency between DPS and the Planning Board for the inspection of developments for compliance with site plan approvals; and

WHEREAS, the County Council's direction was a result of the findings of the Office of Legislative Oversight ("OLO") in its Fact-Finding Review of the Clarksburg Town Center Project (Report Number 2006-3) and the County Council's subsequent hearings on the adoption of a legislative package to address the OLO's findings; and

WHEREAS, for developments that are subject to site plan approval, the intent of this MOU is to assign agency responsibility for 1) the review of building permit applications to ensure compliance with the certified site plan, 2) the inspection of developments under construction to ensure that the construction is proceeding in accordance with the certified site plan, and 3) the investigation of allegations of site plan violations raised by individuals, civic associations, homeowners associations, and others concerned that developments comply with certified site plans; and

WHEREAS, it is not the intent of this MOU to supersede the legally prescribed responsibility of the Planning Board to determine if a development is in compliance with the certified site plan nor to preclude the Planning Board from, among the other things, requiring a plan of compliance or a site plan amendment or assessing penalties against the site plan violators.

NOW THEREFORE, in consideration of the mutual promises and stipulations set forth herein, including the foregoing recitals which are expressly made a part of this Memorandum, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties and their successors and assigns hereby agree to the following terms, conditions, requirements, and limitations:

1. Definitions: The following terms as used in this MOU are defined as follows:

- a. Commission: The Maryland-National Capital Park and Planning Commission.
- b. Commission Inspector: An Inspector or Inspection Supervisor employed by the Commission.
- c. DPS Director: Director of Montgomery County's Department of Permitting Services, or designee.
- d. DPS: Montgomery County's Department of Permitting Services.
- e. DPS Zoning & Site Plan Enforcement (ZSPE) Inspector: An Inspector employed by DPS.
- f. Planning Board: Montgomery County Planning Board of the Commission.
- g. Planning Director: Director of the Montgomery County Planning Department, or designee.

2. Review of Building Permit Applications

- a. The DPS Director must review building permit applications for conformance with the zoning ordinance.
- b. The DPS Director must review building permit applications for conformance with the certified site plan and all appropriate conditions of approval in the Planning Board's Resolution.
- c. The DPS Director must provide one copy of all new commercial building permit applications and or additions, along with supporting documents, to the Planning Director for review or assign a review task in e-plans to the Planning Director.
- d. The DPS Director must provide one copy of all new residential building permit applications, along with supporting documents, to the Planning Director for review or assign a review task in e-plans to the Planning Director.
- e. The Planning Director must review building permit applications for conformance to the certified site plan and all appropriate conditions of approval.

3. Review of Certified Site Plans

- a. The Planning Director must email notification of all new certified site plans and amendments to the DPS Director within one week of certification.
- b. The Planning Director must make all certified site plans and amendments available to the DPS Director electronically.

- c. The Planning Director must make Site Plan Surety and Maintenance Agreements available to the DPS Director electronically.

4. Inspections

a. Routine Inspections

- i. DPS ZSPE Inspector must conduct routine inspections of all active certified site plans for conformance with the approved building permit and the certified site plan at least every 10 working days that it is under construction and update the automated permit system within 3 business days.
- ii. DPS ZSPE Inspector must inspect all active certified site plan developments for compliance with all elements/requirements of the certified site plan including, but not limited to: recreation facilities; site furniture; landscaping including street trees; on-site lighting; private roads; private storm drains and private sidewalks, retaining walls; fencing; parking facilities; hardscapes; streetscapes; and all other site plan requirements.
- iii. DPS ZSPE Inspector must inspect the development for compliance with the development standards and the zoning ordinance, such as height and set-backs.
- iv. DPS ZSPE inspector must conduct a pre-construction meeting with the Developer/Applicant to review required inspections, enforcement procedures/remedies, conditions of development approval, trigger points, and other binding elements/agreements shown in the certified site plan.

b. Interim Landscaping/ Site Amenities Surety Bond Reduction/Release Process

- i. At the request of the Developer/Applicant and upon successful installation of the landscape materials/site features identified on the certified site plan, DPS must notify the Planning Department that up to 50 percent of the financial surety for landscaping/site features can be released.
- ii. Upon receipt of DPS acceptance of the site amenities and landscaping, the Planning Department will notify the Developer/Applicant that up to 50 percent of the financial surety attributed to landscaping /site features can be released upon submission and approval of a replacement financial surety or rider that reduces the amount of the original surety. Once a replacement financial security reducing the amount of the original surety is received, the Planning Department will release the original financial security, or keep the original if a Rider to the original security was submitted in lieu of a replacement security.

c. Final Inspection

- i. Upon satisfactorily installing all site amenities and maintaining the landscaping through the (1) year maintenance period, DPS must notify the Planning Department in writing that the Developer/Applicant has satisfied the specific requirements of the site plan and that any financial security retained can be released.
- ii. Upon receipt of final acceptance from DPS the Planning Department must release all outstanding financial securities submitted by the Developer/Applicant, for that phase of the development or the entire property, whichever is relevant.

d. Inspections Based Upon Allegations of a Violation

- i. DPS will investigate all allegations of site plan violations.
- ii. Authority for the initial processing of complaints rests solely with DPS. The Commission must immediately refer all complaints received to DPS. Upon receipt of a complaint, DPS must send notice to the Planning Director that a complaint has been received and a brief written description of the complaint.
- iii. DPS, upon receipt of any allegation of site plan violations from any person, including the Commission, must inspect the site for compliance with the certified site plan within 3 business days of receipt of any such allegation.
- iv. DPS must notify the complainant and the Planning Director of the results of its investigation within 7 days of receipt of the alleged site plan violation.
- v. If the complaint relates to clearing or grading in a conservation easement or "scenic" easement that is shown on a certified site plan, DPS must jointly investigate the alleged violation with the Commissioner's Inspector.

5. Enforcement

- a. Upon a finding of non-compliance with a certified site plan, DPS must issue a notice of non-compliance/notice of violation under §8-26(g) and §59.7.8 of the Montgomery County Code ("Code"), or issue a citation and/or stop work order under the provision of §50.10. of the Code (as Planning Director's designee) as appropriate and must send a copy of the notice to the Planning Director within 72 hours of its issuance.
 - i. If the non-compliance/violation can be brought into conformance with the certified site plan, then DPS must ensure the development is brought into conformance.

- ii. If the non-compliance/violation cannot be brought into conformance with the certified site plan or the alleged violator refuses to conform the development as shown on the certified site plan, then DPS must refer the matter to the Planning Director for appropriate action.

- b. If DPS and the Commission determines there is a violation found in a conservation easement or “scenic” easement shown on a site plan, it is agreed that the Commission will take the lead on the investigation and provide the complainant and DPS with a response in writing of any enforcement procedures that may or may not be necessary.

- c. The complainant, the Planning Director or the alleged violator may request in writing that the Planning Board review a DPS finding of compliance or non-compliance, such review to be filed as provided for in the Planning Board’s Rules of Procedure. Upon request for such a review, a Commission Inspector may inspect the site to determine compliance or non-compliance with the certified site plan.

- d. Upon receipt of a request for review by the complainant, the Planning Director or the alleged violator, DPS must provide the Planning Director with a copy of all records used in its determination.

- e. If the Planning Board holds a hearing on the alleged non-compliance, the DPS ZSPE Inspector must appear and testify at the Planning Board hearing as to the DPS ZSPE Inspector’s findings.

6. Inter-Agency Communications

a. Implementation of MOU

At the request of either the DPS Director or the Planning Board/Planning Director, the DPS Director and Planning Director must meet to discuss the implementation of this agreement.

b. Zoning Ordinance Interpretations

The DPS Director and Planning Director must convene appropriate members of their respective staffs no less than semi-annually each year to coordinate building permit application review and inspection issues to ensure consistent interpretation and application of the Zoning Ordinance provisions. Each agency must provide copies to the other of any advice memoranda generated interpreting a provision of the Zoning Ordinance. DPS staff and Planning staff will continue discussions, as necessary, regarding measurement of

height. Both agencies recognize that the Planning Board has the discretion to assign a point of measurement for height for each building in accordance with Section 59.4.1.7 of the Zoning Ordinance.

c. **Intra-Agency Communication**

Subject to County Council appropriations, DPS and the Planning Department will have full access to each other's permit database and tracking system (through Hansen or a similar system) to query and approve permits.

d. **MOU Review and Comment**

DPS and the Planning Board agree to submit this MOU, as may be amended from time to time, to the County Council for review and comment every three years.

7. **Fines:** Fines collected by each agency must be dispersed in accordance with the policies and procedures of the respective agency.

8. **Modifications and Amendments:** This MOU may be modified or amended only by an instrument duly executed by both DPS and the Planning Board and any modification shall be transmitted to the County Council.

As Chair of the Montgomery County Planning Board and as DPS Director of the Montgomery County Department of Permitting Services, we respectfully hereby agree to abide by the goals, objectives, terms and agreements as set forth in this MOU.

Casey Anderson, Chair
The Maryland National Capital Park and Planning Commission
Montgomery County Planning Board

Signed the _____ day of _____ 2020

Hadi Mansouri, Acting Director
Montgomery County Department of Permitting Services

Signed the _____ day of _____ 2020