

**BEFORE THE MONTGOMERY COUNTY  
PLANNING BOARD**

Re: Administrative Subdivision No. 620190100  
7025 Longwood Drive  
MCPB No. 19-137 (February 6, 2020)

**PETITION TO RECONSIDER**

This petition to reconsider is filed in the above-captioned case through undersigned counsel on behalf of my clients, Mark G. and Ursula M. Wolfman; Jan A. J. Bove, Trustee; Jordan B Goldstein and Hillary B. Davidson; and Douglas R. and Barbara P. Rosing (the "Neighbors"). All my clients are homeowners and residents of properties in close proximity to the subdivision at issue in this case, i.e., 7025 Longwood Drive, Bethesda, Maryland 20817. All appeared in person or through counsel in writing or at the Board hearing on the subdivision application (the "Application"), on December 19, 2019.<sup>1</sup> This petition is being filed with the Planning Director pursuant to Board Procedural Rule 4.12.1. to request that the Board reconsider Resolution MCPB No. 19-137, issued on February 6, 2020 (the "Resolution").<sup>2</sup>

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<sup>1</sup> For future reference purposes, the above listing of the names of my clients reflects correction of minor typographical errors in prior written communications to the Board.

<sup>2</sup> Under Rule 4.12.1, the petition was due 10 days after its mailing on February 6<sup>th</sup>, but February 16<sup>th</sup> being a Sunday, the filing deadline is extended to the next Business Day, i.e., February 18<sup>th</sup>. Board Rule 5.1.

The Resolution should be reconsidered because it is based on legal error that became apparent only during the hearing, as more explicitly confirmed by the Resolution. Petitioners' opposition case was premised on the expectation that the Board, though it had removed the resubdivision criteria from the Ordinance and had brought decisions on resubdivision requests within the larger framework of general subdivision approval, had nevertheless not abandoned evaluating resubdivisions (though no longer identified by that name) by the resubdivision process and criteria that, prior to the Subdivision Ordinance Rewrite, were in the Ordinance and employed by the Board in every application for resubdivision (except for lot/use categories excluded).

#### STATEMENT OF FACTS

Petitioners in this case relied on a process and a set of criteria that the Resolution makes unmistakably clear the Board now deems abandoned and irrelevant to a proper decision on the Application. As set forth in the Resolution (at 6), the Board's response to Petitioners at the hearing was that "the old law is not applicable to this Application. There is no grandfathering provision, nor is there resubdivision criteria in the current and applicable law." Petitioners' hearing presentation was in principal part based on the belief that the Board should regard this case as controlled by its decisions in closely similar cases on nearby lots along Longwood Drive under the "old law." But the Resolution unequivocally states that it "need not look back at old cases that were decided under laws that are no longer in effect." *Id.*

Given the Board's essentially complete rejection at the hearing of the legal foundation of Petitioners' opposition case, I thereafter commenced an investigation of whether I had mistakenly understood what was intended by the Board when it decided to remove the subdivision criteria from the Ordinance. To that end, I determined that this decision was made at the first worksession held by the Board on the Ordinance Rewrite Project, held on March 19, 2015, and never further

discussed thereafter, either by the Board or in the various legislative worksessions held at the Council or Council Committee level prior to enactment of the Subdivision Ordinance Rewrite. Nor was I able to unearth any evidence of public comment expressing concern about the change in the course of the Rewrite process following the Board's March 19, 2015 worksession.

In further investigation of this matter, I obtained from the Board the official transcript of that part of the March 19, 2015 worksession wherein the Board made the decision to eliminate the resubdivision criteria from the Rewrite. I closely reviewed the transcript, noting that Commissioner Amy Presley, along with Chair Anderson, were the most active participants in the discussion. I then prevailed upon former Commissioner Presley to review the transcript and advise me of her understanding of the Board's intentions with respect to future treatment of resubdivisions in the new Ordinance. I also forwarded to her a copy of the Resolution and asked her whether the Resolution's discussion of the elimination of the resubdivision criteria from the Ordinance squared with her understanding of what the Board had done at the 2015 worksession. Given her response, I requested that she execute an affidavit in support of this petition to the Board to reconsider its decision, and she agreed to do so. Her affidavit is attached to this petition.

### **DISCUSSION**

A petition to reconsider is appropriate when there is an alleged error of fact or law based on "mistake, inadvertence, surprise, fraud or other good cause." Board Rule 4.12.1. In this case, I was more than "surprised" at the hearing to witness the Board's dismissive response to my detailed discussion of the legal framework I viewed as proper for deciding this case, i.e., urging the Board to follow prior Board precedents denying resubdivisions along Longwood Drive—one of them literally a stone's throw away. Indeed, it is difficult to imagine two cases involving different resubdivision requests that could be considered more indistinguishable than this case and

the 1988 Longwood Drive case know as Preliminary Plan 1-88114 – Lot 2, Block 2, 7013 Longwood Drive, which rejected a very similar flag lot resubdivision just two lots away from 7025 Longwood. Further, Petitioners established without contradiction that (a) there have been no allowed resubdivisions in the neighborhood defined in the 1988 case since then, and (b) that the one flag lot mentioned in the Resolution to justify converting 7025 Longwood into two lots, to include a flag lot, Resolution at 6, pre-existed the 1988 resubdivision application, and was not considered part of the neighborhood then, in that it fronted on Greentree Road, whereas the defined neighborhood for resubdivision analysis consisted entirely of lots fronting on Longwood Drive. In short, the legal validity of the Resolution can fairly be said to be dependent upon whether the Board was correct in concluding that the elimination of the resubdivision criteria from the new Ordinance meant that resubdivisions, though no longer known by that name, need not be judged according to those criteria and the analytical framework used to apply them.

On the question of how to judge a request to subdivide an already platted lot under the new Ordinance, former Commissioner Presley's answer is both well-informed and definitive. She first describes how resubdivision requests were analyzed and adjudicated under § 50-29(b)(2) of the old Ordinance during her eight years as a Commissioner from 2008-16, Presley Aff. ¶¶ 4-7; she then reviews the public record available regarding the Board decision to delete the resubdivision criteria from the new Ordinance while the matter was before the Board, *id.* ¶¶ 8-17. This is followed by her detailed explanation of how the Board arrived at a consensus on this decision at its March 19, 2015 worksession. *Id.* ¶¶ 18-23. Complementary to the staff's understanding of the Board consensus, i.e., that resubdivisions could be judged under the general subdivision requirements for evaluating subdivisions, *id.* ¶ 13, she added that

what the Board did was streamline the Ordinance in this subject area by folding the analytic process and considerations relevant to evaluating resubdivisions into the more all-encompassing term "subdivision," doing so without materially altering how the Board intended to evaluate "resubdivisions" that no longer had that name, but were nonetheless proposals to subdivide existing platted lots, most often in established neighborhoods.

*Id.* ¶ 20.<sup>3</sup>

One obvious question arising from such a decision, but one the Board did not immediately address, was how to orderly implement a detailed, analytic process that was to be taken out of the statute but was to be still operative after the Ordinance was enacted. Commissioner Presley's expectation was that the process would be reduced to writing and made a Board regulation, one that would not be needed until the new Ordinance was adopted and went into effect. But Ordinance enactment took place in 2017, well after Commissioner Presley's second term on the Board ended.

*Id.* ¶¶ 22-24. Unbeknownst to the departed Commissioner Presley, however, no such regulation was promulgated, before or after enactment of the new Ordinance. She was similarly unaware that the Board, sometime between her departure and its hearing in the Longwood case in December 2019, had decided that the deletion of the resubdivision criteria from the Ordinance meant that there would no longer be any analytic process of defining the neighborhood, no charting of all the lots in the neighborhood against the resubdivision criteria, and no deciding the critical lot compatibility question on the basis of a known, prescribed process that strove to be as objective and predictable as possible. *Id.* ¶ 27.

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<sup>3</sup> Commissioner Presley also points out that, in line with the Rewrite goals generally, the worksession discussion was not directed toward enacting major substantive change in the Ordinance, but rather that the revision would just enhance the flexibility and adaptability of the resubdivision criteria to future cases. *Id.* ¶ 28. She adds, quite tellingly, that if major change was the intended goal, the Board would have publicized this highly sensitive issue in the affected communities, not simply buried it in a Rewrite omission of the standards and process for evaluating what used to be called a resubdivision. *Id.*

Based on the foregoing, it can come as no surprise to the Board that when I asked former Commissioner Presley to review the statements by the Board in the Resolution regarding the fate of the resubdivision criteria and process once used to judge requests to subdivide already platted lots in existing neighborhoods, her reaction was unequivocal: “a complete, unjustified abandonment” of the resubdivision criteria and process. *Id.* ¶ 26. Petitioners fully agree with her conclusion that “the current Board has misread the purpose and intent of the streamlining decision made in 2015. . .” and that the consensus reached in 2015 was not one where the Board was “undertaking any significant change in the long-standing analytic process, just enhancing its flexibility and adaptability to varying situations.” *Id.* ¶ 27.

### CONCLUSION

For the foregoing reasons, the Board should grant reconsideration of its decision approving the subdivision at 7025 Longwood Drive, Administrative Subdivision No. 620190100. Denial of reconsideration would leave in place a legally erroneous approval, one that improperly repudiates the purpose and effect of prior action taken by this Board to take former § 50-29(b)(2) out of the Rewrite of the Ordinance; one that effectively and improperly relegates decisions on requests to subdivide platted lots in existing neighborhoods to the standardless, subjective judgment of whoever is serving on the Board at the time; and one that simply cannot be defended in light of prior Board resubdivision denials in circumstances that are, for all practical and material purposes, identical in all respects to the instant case.

Respectfully submitted,

  
David W. Brown

Counsel for Petitioners

February 18, 2020

**CERTIFICATE OF SERVICE**

**IT IS CERTIFIED** that this 18<sup>th</sup> day of February 2020, that a true and correct copy of the Petition to Reconsider has been served on all parties on the attached list provided by the Planning Board, by mailing a copy by first class, postage prepaid to those on the list with an address, and sending a copy via electronic email to those listed with an email address.

  
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## AFFIDAVIT OF AMY PRESLEY

1. I, Amy Presley, am over eighteen years of age, a resident of Montgomery County, Maryland, and am competent to testify as to the matters set forth below, based on personal knowledge.
2. I am making this Affidavit in support of the Petition to Reconsider filed by parties to Administrative Subdivision No. 620190100, 7025 Longwood Drive, approved by the Montgomery County Planning Board ("Board") in Resolution MCPB No. 19-137 (Feb. 6, 2020 (the "Resolution")).
3. I served as a member of the Board for eight years, from 2008-2016. Below I describe my general experience in hearing and deciding resubdivision applications at the Board. This is followed by my recollection of the events in 2015 when, in the course of preparing and approving a complete rewrite of the Subdivision Ordinance, the Board decided how it would deal with resubdivision applications under the revised ordinance. I then explain why I regard the Resolution recently adopted in the Longwood matter to be completely contrary to the consensus the Board reached in 2015 when we decided to include the old resubdivision criteria within the revised subdivision ordinance.

### Board Resubdivision Process, 2008-2016

4. During my two terms of service on the Board, I heard and decided numerous resubdivision cases, learning first-hand how contentious resubdivision requests could be, particularly when they involved lots in older neighborhoods. This was more painfully evident when a resubdivision request proposed to alter long-standing development patterns in an existing neighborhood. A classic example would be a lot with one detached home where the lot was at least twice the minimum lot size for the zone, and the resubdivision plan envisioned

razing the existing house and replacing it with two houses, each on one of the two new smaller lots of roughly equal size to be created by resubdividing the existing lot. Frequently, the resubdivision would create a "flag" lot, where the two new houses would, unlike others in the neighborhood, not sit side-by-side facing the street.

5. The resubdivision process used by staff and the Board was grounded in the following provision in the Subdivision Ordinance:

§50-29(b)(2). Lots on a plat for the resubdivision of any lot, tract or other parcel of land that is a part of an existing subdivision previously recorded in a plat book shall be of the same character as to street frontage, alignment, size, shape, width, area and suitability for residential use as other lots within the existing block, neighborhood or subdivision.

6. To implement this provision, the Board relied on staff to define a "neighborhood" within which existing lots would be compared to the proposed resubdivided lots, as to each of the seven criteria set forth in the Ordinance. Then staff would perform the a very detailed analysis, making all of the comparisons necessary under the statute. For example, a chart would be produced showing the street frontage of all lots in the neighborhood, showing where the proposed new lots ranked among the others as to street frontage, and so on. Based on all of these charts, staff would make a recommendation on compatibility of the proposed new lots in the defined neighborhood.
7. Board hearings on resubdivision applications were especially contentious, often involving considerable opposition from neighboring residents when staff recommended approval. Residents would recount anticipated adverse impacts from the planned resubdivision, dispute the significance or accuracy of the comparison charts, or dispute the neighborhood determined by staff to be the appropriate yardstick for lot comparison. But for me, this level of interest among affected residents only underscored the importance of making the

right decision in each case. As a practical matter, most of the disputes turned on disagreement regarding what the yardstick "neighborhood" should be.

**Rewrite of the Subdivision Ordinance, 2015**

8. Along with other members of the Board, I was closely involved in the Board-originated project to rewrite first the Montgomery County Zoning Ordinance and then the Montgomery County Subdivision Ordinance, Chapters 49 and 50, Montgomery County Code, respectively. The Board's work on both of these initiatives was completed during my term on the Board.
9. The Subdivision Ordinance is foundational legislation establishing the Board's authority, and the framework for exercising that authority, to review and approve virtually all major private development projects in the County. Hence, it was vitally important to me as a Board member to understand the significance of changes envisioned for the Board's work in the rewrite of the Subdivision Ordinance (Rewrite").
10. As presented to us by staff, the Rewrite was not about substantive change in the law; the general objectives were to (1) modernize and clarify existing language; (2) improve organization and ease of reference; (3) codify current interpretations; (4) ensure consistency with new provisions in the zoning ordinance; and (5) improve the efficiency of review. Staff Report (March 12, 2015), excerpted as Exhibit 1.
11. The Board held its first Rewrite worksession on March 19, 2015. Among matters we discussed at this worksession was the following recommendation from staff regarding the resubdivision criteria in section 50-29(b)(2):

Modified the provisions for resubdivision by limiting the zones in which it applies to R-40, R-60, R-90, R-200 and RE-1 zones, specifying that the criteria only apply to single family detached residential uses, and reducing the review criteria from the existing seven to the three specified in state law:

lot area, alignment and frontage. Staff is requesting that the Planning Board provide guidance on whether the review criteria should be expanded to include frontage, alignment, lot area, lot width, and buildable area, or whether the resubdivision review should be eliminated entirely.

**Exhibit 1** at 4.

12. As requested by staff, the Board did provide guidance on resubdivisions in the course of the March 19, 2015 worksession, in which I participated. I have obtained a Board-prepared transcript of that portion of the worksession in which resubdivisions were discussed, **Exhibit 2**, and used it to refresh my recollection of what exactly was the Board's guidance to staff on this topic.

13. In a follow-on staff memo on the Rewrite provided to the Board for a further worksession on the Rewrite on June 18, 2015, excerpted as **Exhibit 3**, staff summarized the Board's guidance on resubdivisions as follows:

*Removed requirements for a separate resubdivision analysis from the Chapter. After discussion prior to the public hearing, the Planning Board concluded that the general requirements for lot dimensions in Section 50.4.C.3.1.a provide a sufficient basis to judge the suitability of any subdivision, including a resubdivision, and opted to remove requirements for a separate subdivision analysis from the Chapter.*

**Exhibit 3** at 4.

14. There was, to my best recollection, no further Board discussion about the removal of the resubdivision criteria from the Rewrite, either at the June 18, 2015 worksession or thereafter, while the Rewrite was before the Board.

15. The Board turned its work on the Rewrite over to the County Council for review, via a transmittal letter from Board Chair Anderson dated August 11, 2015. **Exhibit 4**. On resubdivisions, the letter simply states, without further explanation, that the Rewrite "Removed existing 50-29(b)(2) resubdivision requirements . . ." **Exhibit 4** at 2. This and

other wording in the letter was, as is typically the case, not the subject of Board consideration or deliberation.

16. This matter came up during my seventh year as a Commissioner. Prior to that time, I also brought to the resubdivision discussion on March 19, 2015 an awareness from my work on resubdivisions that there would continue to be development pressure in mature, established neighborhoods regarded as especially desirable locations for taking advantage of infill development opportunities wherever resubdivision could produce an additional zone-compliant record lot. The clash between those seeking infill development opportunities and existing residents in the neighborhood concerned about the compatibility of the intended result was not something that would magically disappear; the Board would have to continue to deal with and decide these cases, whatever we said or did about resubdivisions in the Rewrite.

17. Finally, as expressed in the Rewrite's general objectives, as detailed above, I did not expect there to be any significant departure from the existing substantive standards for resubdivisions in the Rewrite, even as we sought to streamline and improve the decision making process.

**The Worksession Consensus to Take the Resubdivision Criteria Out of the Ordinance**

18. In its March 19, 2015 worksession on the Rewrite, there was an approximately half-hour discussion between the Board and staff on what to do about resubdivisions. That discussion is fully contained in Exhibit 2. What emerged at the end was a consensus that the goal of a simplified, more flexible resubdivision evaluation process could be achieved, and perhaps best so, by eliminating the resubdivision criteria from the Ordinance. It was emphasized that "resubdivision is a subdivision," *id.*, Tr. 32, and that the criteria for both subdivision

and resubdivision "are basically just the same." *Id.* Tr., 24. It was also recognized that evaluation of resubdivisions in an infill context necessarily had to differ from evaluation of subdivision of unplatted, undeveloped land. As Chair Anderson put it, where one is resubdividing in a developed area, what is appropriate requires one to "look at what else is around it existing lots . . ." *id.*, Tr. 28, a point echoed by Board Counsel Rubin as follows:

the point of making resubdivision more stringent than just your original subdivision is when people move into a subdivision they have an expectation . . . that they kind of know what's, what their neighborhood is and how it's going to be made up and it's not going to significantly change.

*Id.*, Tr. 23.

19. This dialogue was in connection with the proposal put forth by the Chair to take the resubdivision criteria out of the Ordinance as a separate criteria because resubdivisions could be judged by the criteria remaining in the Ordinance for subdivisions, as the differing words "mean the same thing." *Id.*, Tr. 30. I was not fully convinced of this idea until the follow exchange took place between Chair Anderson and me:

COMMISSIONER PRESLEY: So would you give any more credence to meeting those criteria for resubdivision in a little developed neighborhood than you would personally to a green field development?

MR. CHAIR: Yes, but that's because what's appropriate or in character, whichever adjective you want to use has to be judged differently [in] reference to an existing neighborhood than one that's undeveloped.

*Id.*, Tr. 30-31. After that, I agreed to the idea of dropping the resubdivision criteria from the Ordinance when Chair Anderson agreed with my characterization of what he was proposing for the Board as follows:

So you're not saying get rid of the resubdivision, you're just saying resubdivision is already covered in the general heading subdivision and that we should just acknowledge it there and not have a separate [set of resubdivison criteria].

*Id.*, Tr. 31-32. With his "Yes" response, there was no other objection to this characterization from any Commissioner, and the Chair reported to staff that deleting the separate resubdivision criteria was the Board consensus. *Id.*, Tr. 35.

20. This consensus is reflected in the follow-on staff memo, Exhibit 3, and no member of the Board expressed any concern with its description of what the Board had agreed to. In essence, rephrasing the staff's words with my understanding, what the Board did was streamline the Ordinance in this subject area by folding the analytic process and considerations relevant to evaluating resubdivisions into the more all-encompassing term "subdivision," doing so without materially altering how the Board intended to evaluate "resubdivisions" that no longer had that name, but were nonetheless proposals to subdivide existing platted lots, most often in established neighborhoods.

21. I did not have a contemporaneous opportunity to examine the wording of the letter the Chair sent to the County Council on August 11, 2015, forwarding the Board's work on the Rewrite. Exhibit 4. I note that while it is technically correct in reporting our deletion of the resubdivision criteria in the then-existing Ordinance, it does not include the important clarification, as expressed by the staff in Exhibit 3, that resubdivisions would continue to be evaluated in their true context as subdivisions of existing platted lots under our long-standing evaluative criteria, even in the absence of those criteria from the revised Ordinance.

22. The revised Ordinance was not formally adopted by the County Council until sometime in 2017, which was after the end of my second term on the Board. As a result, I had no opportunity to participate in any Board decisions under the revised Ordinance where the resubdivision criteria, though no longer expressly in the Ordinance, needed to be employed,

i.e., in a case where a subdivision was of an existing platted lot. Hence, during the remainder of my second Board term, the Board continued to apply the statute-based resubdivision criteria to resbdivision applications.

23. Had the time come to conduct business under the Rewrite while I was still on the Board, I would have expected to see the analytical process of resubdivision review, as still operative under the consensus reached in 2015, incorporated into a Board regulation, along the lines, for example, of the Board's Administrative Procedures for Development Review.

**The Board Resolution in the Longwood Case**

24. Following my departure from the Board and until very recently, I did not have any personal awareness of how the Board has been handling resubdivision cases under the Rewrite of the Ordinance. This changed only very recently, when I was asked by counsel for neighbors who opposed Administrative Subdivision No. 620190100, 7025 Longwood Drive, to review the Resolution, with particular attention to its claim about the effect of the Ordinance change in the Rewrite regarding resubdivisions.

25. I was shocked and dismayed by the passage on Resolution page six that dismisses the neighbors' reliance on past resubdivison cases decided by the Board concerning nearby properties on the very same street, decided under the resubdivision criteria in the old Ordinance. The Resolution states that "There is no grandfathering provision, nor is there resubdivision criteria in the current and applicable law." The Resolution goes on to state that the Board "need not look back at old cases that were decided under laws that are no longer in effect." *Id.*

26. This reasoning is starkly contrary to what the Board agreed to on March 19, 2015, as I have detailed above. The Resolution contains no description of the yardstick "neighborhood"



for evaluating lot compatibility, as apparently no yardstick "neighborhood" was ever determined by staff. Instead, the Resolution employs the vague term "vicinity" without any attempt by the Board or staff to define what constitutes the "vicinity" of the subject property. Neither does the Resolution, nor evidently the underlying staff report, do the quantitative analysis regularly done in resubdivision applications under former § 50-29(b)(2), for the seven resubdivision criteria. In total disregard of the Board's intention to have these considerations continue under the Subdivision Ordinance, this analysis is omitted not just on some of those criteria, but on all criteria. The analysis could not be done in any event without defining the missing "neighborhood" of lots to be included in the analysis. The Resolution exhibits a complete, unjustified abandonment of the analytic framework that, although formally removed from the statute, was understood on a consensus basis to have been effectively incorporated into the subdivision analysis to be conducted whenever the object of the subdivision was to subdivide already platted lots in an established neighborhood.

27. Had I still been on the Board when the first post-Rewrite resubdivision-as-subdivision application came before the Board, my first question to staff would have been: "Based on the consensus Board action in 2015, where is the regulation incorporating the analytical framework and criteria for evaluating the application?" I would never have agreed to the demotion of the resubdivision criteria and process to anything less than a written standard, i.e., a detailed prescription of the established review process. I state this because I knew from my many encounters with concerned residents of existing subdivisions that an unfocused application of the general subdivision criteria alone would not result in objective and predictable decisions; approval/disapproval would be almost entirely at the mercy of


the subjective impression of the staff and whoever was on the Board at the time. It is now apparent to me that the staff's answer to my question would have been that there is no need for a regulation; the resubdivision process and its associated criteria have been abandoned. Such an outcome is not only contrary to the consensus reached in 2015; it is unacceptable in its own right.

28. That the current Board has misread the purpose and intent of the streamlining deletion made in 2015, effective in 2017, is reinforced by the fact that I, and I believe the other Board members who participated in the 2015 decision, understood that we were not undertaking any significant change in the long-standing analytic process, just enhancing its flexibility and adaptability to varying situations. Indeed, if major change was the goal, the Board, at that time very well aware of community sensitivity to resubdivision issues, would have certainly publicized the prospect for such change far and wide for guidance and input before doing so, just as the Board did for even minute changes in the Zoning Ordinance Rewrite over that 2011-14 period.

I, Amy Presley, declare under the penalties of perjury that the foregoing is true and correct.

Executed on

5/18/2020



Amy Presley

**Subdivision Regulations Rewrite**

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 Catherine Conlon, Supervisor, DARC

Staff Report Date: 3/12/15

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**Introduction**

A comprehensive revision of Chapter 50, the Subdivision Regulations has been contemplated since the start of the Planning Department's efforts to revise the zoning ordinance. We knew at that time changes would be needed based on how the zoning ordinance changed. We also recognized that, even in the absence of a zoning ordinance revision, it was time to review and update provisions of the subdivision ordinance that hadn't been comprehensively looked at for more than 50 years.

The general objectives in rewriting the Subdivision Regulations were:

- Modernize and clarify existing language
- Improve organization and ease of reference
- Codify current interpretations
- Ensure consistency with new provisions of the zoning ordinance
- Improve the efficiency of review

To meet these objectives, the organization and layout of the revised regulations has significantly changed and the language of most provisions has been updated. For the most part, the updated language clarifies but does not change the existing requirements; however, some changes in the requirements have been made.

The revised Chapter 50 reorganizes the existing Article and Section format to one that contains Articles, Divisions and Sections. This document provides an outline of the provisions contained in each new Division, and which sections of the existing ordinance that they came from. It also summarizes the changes made to the provisions in each Division and discusses the most significant.

**Article I. In General**

This Article contains general provisions and requirements.

**Division 50.1. Purpose**

- Combined previous purpose list (Sec. 50-2) into a consolidated purpose statement that retains the important elements.

**Division 50.2. Defined Terms**

- Added new section of rules for interpretation of the Chapter.

- Modified the list of defined terms (Sec. 50-1) by clarifying existing language, removing terms that duplicate the zoning ordinance definitions or that are not specifically used in the Chapter, and adding new terms as needed.

### **Division 50.3. General Requirements**

- Retained previous requirements for applicability (Sec. 50-3), approving authority (Sec. 50-4), and impacts to other ordinances (Sec. 50-5) with only minor language updates.
- Placed emphasis on the fact that subdivisions of land must be recorded by plat prior to land transfer (Sec. 50-8) and issuance of building permits (Sec. 50-20) by moving existing provisions to a new section.
- Modified the language of the existing exceptions to platting requirements (Sec. 50-9) provisions for clarification. The section is now broken into subsections covering the types of land transfers that can be done without a record plat, and uses that can receive building permits without being located on a record lot.
- Moved existing provisions for submission of subdivision plans (Sec. 50-23) to a new section under this Division and modified the existing language for clarification.
- Building permit language moved to Ch. 8 (50-22 and 50-32).

#### **Significant changes made in this Division include:**

- Prohibiting the issuance of a building permit for a dwelling unit on unplatted parcels of agricultural land that are less than 25 acres in size.  
*The current exception applies to "land that is and will remain part of a farm, as defined in this chapter, but that is used concurrently for a related use that requires a building permit." A farm is defined as "a tract of land, with or without associated buildings, that is devoted to agriculture", as it is defined in the chapter. In the agricultural zone (AR), a problem is created by the existing language because it can be interpreted to permit construction of a dwelling on a tract of land less than 25 acres in size which violates the density requirement of the zone.*
- Permitting construction of one detached dwelling unit on a part of a previously platted lot that has not change in size or shape since June 1, 1958, as anticipated by the new zoning ordinance.
- Permitting the reconstruction of any existing detached dwelling under the new zoning ordinance.

## **Article II. Subdivision Plans**

Article II now contains provisions for the different types of subdivision plans, instead of the record plat provisions. This change was made because it reflects the actual order of the process. The types of plans covered in the article are preliminary plans, pre-preliminary submissions, simplified subdivision plans, and minor subdivisions. Simplified subdivision plans are a new plan type.

### **Division 50.4. Preliminary Plan**

- More clearly separated the plan drawing requirements from the requirements for supporting information (Sec. 50-34)
- Modified and updated the provisions for review and approval of preliminary plans, including provisions for plan validity (Sec. 50-35), to clarify and provide better organization.
- Modified the general standard for review of lot dimensions to include consideration of the applicable requirements of Chapter 59 in addition to the recommendations of the applicable master plan.
- Retained the requirement that all lots abut a road, but the road can now be either public or private.
- Continue to permit a maximum of two lots without public or private road frontage on a shared driveway, but added the requirement that the two lots include any existing lots to codify our current interpretation of the existing section.

- Language of the current requirements for providing public sites and open space areas (Secs. 50-30 and 50-31) has been modified for clarity, but not significantly changed except that the language covering objection to required dedication was deleted because it's not needed; the applicant can make their case as part of review, and after decision, can file an appeal.
- Eliminated road design standards that are out of date such as: planning secondary streets to discourage use by nonlocal traffic; local bypasses around shopping centers; parallel streets with lots backing to major thoroughfares; and short culs-de-sac having terminal lots backing to major thoroughfares.
- Added provision that a subdivision with only one non-through road providing access must be limited to a maximum of 75 lots.
- Added minimum standard intersection spacing requirements for all road types, but retained the provision that the Planning Board may specify different spacing than the standard.
- The septic tier language was moved into the Water supply and sewage disposal facilities sections (50-24, 50-27)
- The requirement that public utilities be placed underground (50-40) was modified to apply to all subdivisions rather than basing it on the number of buildings, but language was added that allows the Planning Board to grant an exemption if it finds that underground placement is infeasible.
- Modified requirements for environmental review (Sec. 50-32) to clarify that a Forest Conservation Plan approval is required as part of approval of a preliminary plan.
- Modified the provisions for residential cluster subdivision (50-39) to eliminate language that is out of date and no longer necessary.

Significant changes made in this Division include:

- Added application processing and hearing schedule that conform with the new zoning ordinance requirements for site plan; including the requirement that a hearing date be established within 120 days of the acceptance of the application, with provisions for requesting extensions.
- Added new requirements for the timing of agency plan review so that the 120 day hearing schedule can be met.
- Added new provisions to explicitly state which public agency approvals are needed before the Planning Board may take action on a preliminary plan, and moved the review for conformance with the State's Sustainable Growth and Agricultural Preservation Act of 2012 (Sec. 50-35(e)) to the new technical review section.
- Added a list of specific findings that the Planning Board must make in order to approve a preliminary plan. The findings generally codify the findings made currently in Board resolutions, with additional language added to include a finding about the adequacy of roads.
- Removed sediment control provisions that are now covered by Chapter 19 (Sec. 50-35(j)). These included requirements that a preliminary plan approval be conditioned upon execution of an erosion and sediment control plan approved by the Board after consideration of recommendations from the Montgomery Soil Conservation District, that the permit for clearing and grading issued by the Department of Permitting Services (DPS) be in conformance with this plan, and that the Board could revoke a preliminary plan approval if a developer proceeded to clear and grade a site without a DPS permit.
- Review standards that form the basis for Planning Board findings (Secs. 50-24, 50-25, 50-26, 50-27, 50-28, 50-29, 50-30, 50-31, 50-32, parts of 50-35, 50-39, and 50-40) are now consolidated in a new Technical Review section.

*Issue: The draft retains the existing provision that the Planning Board may find "that events have occurred to render the relevant master plan, sector plan, or urban renewal plan recommendation no longer appropriate." The County Council discussed, but rejected a similar provision for the master plan finding that is now required for site plans by the new zoning ordinance. Thus, the Planning Board will not be able to find that a master plan recommendation is no longer appropriate for projects that*

*require both preliminary and site plan approval. Nonetheless, staff recommends retaining the provision in the subdivision regulations for the projects that only need preliminary plan review. In staff's opinion, the provision is needed because the development standards that apply to a preliminary plan that doesn't go to site plan will not be as flexible as those for a site plan.*

- Modified the provisions for resubdivision by limiting the zones in which it applies to R-40, R-60, R-90, R-200, and RE-1 zones, specifying that the criteria only apply to single family detached residential uses, and reducing the review criteria from the existing seven to the three specified in state law: lot area, alignment, and frontage. Staff is requesting that the Planning Board provide guidance on whether the review criteria should be expanded to include frontage, alignment, lot area, lot width, and buildable area, or whether the resubdivision review should be eliminated entirely.
- Added new provisions for creating private roads to address what has become a common desire for their use. The provisions include:
  - Private roads created by subdivision must be platted in right of way parcels that are separate from adjoining lots to maintain the Board's ability to ensure adequate space for road related uses within subdivisions.
  - Private road right of way parcels, like a dedicated public right of way, must be platted to the full width of the right of way recommended for the applicable road classification in Chapter 49; however, the Planning Board may approve a narrower than standard right of way for either type of road under certain circumstances.

*The existing provisions for road right of way apply exclusively to public roads and require that all roads be dedicated to the width specified by the applicable master plan or to the width specified by Chapter 49 for roads that are not included in the master plan. The only discretion currently granted to the Planning Board is for tertiary roads where the Board has the authority to determine when they may be used, and when they can be narrowed for environmental or compatibility reasons. In staff's opinion, the Board needs the flexibility to consider in all instances, whether a narrower right of way is desirable and will not be detrimental to the function of the road. The basic criteria for the Board's determination of right of way adequacy has not changed (Sec. 50-30(c)).*
  - Private roads must be built to the applicable structural standard, grade, and typical section based on the functional classification of the road in Chapter 49.

*This is a change from the existing requirement that private roads only be built to meet the structural standards of a tertiary road. This standard may have been adequate in the past when the use of private roads was limited to RE-2C and RNC residential subdivisions and townhouse developments, but now all types of roads are being created as private roads. As such, the roads need to be built to all applicable standards to ensure that they function as needed. The existing requirement that a registered engineer certify to the Department of Permitting Services (DPS) that the private road has been designed, and will be built to adequate standards has been retained, but this will need further discussion. DPS has stated that they don't have the authority to review private roads in any way, and that they do not currently ask for any certifications for private roads. If we are going to continue to allow private roads, we need to ensure that they are adequate, so this is a major issue that needs to be resolved. However, the requirement needs to be included regardless of who is ultimately tasked with the review.*
- The Adequate Public Facilities Ordinance (50-20(c), 50-24(g), 50-35(k)) was clarified to state that ancillary uses associated with religious institutions, such as schools, day care facilities, and clinics, that generate peak hour trips are not exempted from adequate public facilities requirements.
- The extension criteria for mixed use project in the Adequate Public Facilities Ordinance (50-20(c), 50-24(g), 50-35(k)) was modified to be based on the number of vehicle trips generated.

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THE MONTGOMERY COUNTY PLANNING BOARD OF  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

RESUBDIVISION OF RESIDENTIAL PROPERTIES

T R A N S C R I P T  
O F  
P R O C E E D I N G S

COUNTY ADMINISTRATION BUILDING

Silver Spring, Maryland

March 19, 2015

VOLUME 1 of 1

BEFORE:

- CASEY ANDERSON, Chairman
- MARYE WELLS HARLEY, Vice Chair
- NORMAN DREYFUSS, Commissioner
- AMY PRESSLEY, Commissioner
- NATALI FANI-GONZALEZ, Commissioner

**Deposition Services, Inc.**  
12321 Middlebrook Road  
Germantown, MD  
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info@DepositionServices.com www.DS.com

EXHIBIT 2

P R O C E E D I N G S

(Audio beginning at 5:59:12 p.m.)

1  
2  
3 UNIDENTIFIED MALE SPEAKER: Okay. The next issue  
4 that we'd like to talk about is resubdivision, meaning  
5 resubdivision of residential properties. This is one of  
6 those areas that Cathy was alluding to when we said that we  
7 wanted to the extent that you have some foresight your  
8 direction on this issue and this goes to what Commissioner  
9 Dreyfuss asked about in the very beginning when we opened he  
10 aside about whether our changes could be construed as more  
11 liberal or more conservative in terms of what development we  
12 allow. This is an issue where it's in flux and there's a  
13 tension between the amount of liberalness and  
14 conservativeness in this issue and we'd like to hear your  
15 direction on this.

16 This is a residential resubdivision. It is, does  
17 anyone have the Staff Report?

18 UNIDENTIFIED MALE SPEAKER: I think Nia (phonetic  
19 sp.) would like to go through the slide and there's a little  
20 more thought provoking slides here --

21 UNIDENTIFIED FEMALE SPEAKER: The first bullet on  
22 or first arrow on page 4 of the staff memo is kind of a  
23 summary. But we put it on the slide too to flesh it out a  
24 little bit more.

25 UNIDENTIFIED MALE SPEAKER: So the language in the



1 current regulations in the Existing Chapter 50 says that  
2 residential resubdivision applies in any residential zone  
3 including townhouse lots or single family residential lots  
4 and what's required is that when the Planning Board approves  
5 a subdivision of lots that is a resubdivision of previously  
6 platted residential lots. The Planning Board in making that  
7 approval has to find that the new lots are of the same  
8 character as existing lots and in a certain defined  
9 neighborhood of the same character with respect to street  
10 frontage, alignment, lot size, lot shape, lot width,  
11 buildable area of the lot and suitability for residential  
12 use.

13           In reviewing what changes to make to this section  
14 our committee did not reach what I would say really broad  
15 consensus on this, which is why we're looking for your input  
16 and direction. We felt that some change was needed because  
17 there are problems in the way the current law is being  
18 administered now. So we feel that some of the criteria are  
19 perhaps too subjective and subject to sort of gaming by the  
20 applicants to get the result that they're looking for. And  
21 there have been other issues with this, the Planning Board  
22 looked at this issue in 2001 and they made a determination  
23 to limit the application of this section to only residential  
24 uses in those residential zones. Before that it was  
25 interpreted that this requirement would also apply to other

1 uses in the zone such as an institutional use, for example,  
2 hospitals that occur in residential zones.

3 In 2011 the Planning Board made a determination  
4 that that wasn't appropriate and that this provision would  
5 apply only to residential uses.

6 UNIDENTIFIED SPEAKER: When was this?

7 UNIDENTIFIED MALE SPEAKER: Yes this was in, I  
8 believe, February of 2011. The case that instigated it was  
9 a subdivision of a lot near Wheaton, or I guess in Wheaton,  
10 that contains a nursing home on it, it was called the  
11 Kensington Nursing Home, if any of you remember that case.  
12 The proposal was to subdivide from the large lot that  
13 contains the nursing home to smaller lots that were proposed  
14 to contain one dwelling each, on each lots, so there would  
15 be two new dwellings and it came in as a pre-preliminary  
16 plan first and the issue was that the remainder lot, the one  
17 that would have contained the nursing home, would be, you  
18 know, order of magnitude larger than any lot in the existing  
19 neighborhood and the Planning Board could have simply waived  
20 the requirement with respect to that lot for lot size, but  
21 instead what came out of that was this determination by the  
22 Board that was applied to all resubdivision cases going  
23 forward, that they would only apply to residential uses.

24 That's the regime that we're operating now and  
25 that includes, those residential uses include townhouses as

1 well as single family detached residences.

2 COMMISSIONER PRESSLEY: Are we taking the  
3 opportunity to set the criteria for how the neighborhood is  
4 chosen?

5 UNIDENTIFIED MALE SPEAKER: That's something that  
6 we could talk about.

7 MS. PRESSLEY: I mean because that has always been  
8 ambiguous and that's where you get pushback from people who  
9 come in and say well wait a minute, you're only picking this  
10 side of the street and not that side of the street.

11 UNIDENTIFIED MALE SPEAKER: Right.

12 COMMISSIONER PRESSLEY: And it's very loosey  
13 goosey.

14 UNIDENTIFIED MALE SPEAKER: Well we left it  
15 somewhat undefined, the reason why, that was an intentional  
16 decision on our part to give the Planning Board flexibility  
17 that they might desire to define what the neighborhood is,  
18 and perhaps legal counsel can augment this. But a recent  
19 court case determined that the Planning Board does  
20 appropriately have a large amount of discretion in  
21 determining what the neighborhood is.

22 UNIDENTIFIED MALE COMMISSIONER: I guess I'm not  
23 quite sure I see the problem that demands a solution. The  
24 way I understand it is that --

25 COMMISSIONER PRESSLEY: I'll be happy to answer.

1 UNIDENTIFIED MALE COMMISSIONER: Huh?

2 COMMISSIONER PRESSLEY: I'd be happy to answer you  
3 on that.

4 UNIDENTIFIED MALE COMMISSIONER: Well the  
5 applicant defines the neighborhood, they submit it and you  
6 say that's not the neighborhood you've got to add this and  
7 then they do this chart of square footages and lot sizes and  
8 all that.

9 COMMISSIONER PRESSLEY: But you could argue that  
10 point back and forth applicant and staff all day long because  
11 there's nothing you can point to as you do with the other  
12 criteria that says look, it's within this distance --

13 UNIDENTIFIED MALE COMMISSIONER: But --

14 COMMISSIONER PRESSLEY: -- whether it's equal  
15 distant, it's whatever, no terms at all.

16 UNIDENTIFIED MALE COMMISSIONER: -- but when the  
17 staff comes in and makes a recommendation they analyze the  
18 area, they determine whether they agree with the applicant  
19 or not and they --

20 COMMISSIONER PRESSLEY: But you always argue for  
21 consistency for the people, the people want to know --

22 UNIDENTIFIED MALE COMMISSIONER: Now let me  
23 finish.

24 COMMISSIONER PRESSLEY: Okay.

25 UNIDENTIFIED MALE COMMISSIONER: So they come in

1 and they make a recommendation. Sometimes we say well we  
2 think it should it include this street because it's across  
3 the street. That happened just the other day. And  
4 sometimes we say well you know the reason this lot is a  
5 little bigger in this corner is because of topography or  
6 because it's on the corner of the street. So the  
7 subjectivity is not just the staff's subjectivity on what  
8 applies, it's also ours. We look at what they recommend and  
9 we say you know we agree with you that shouldn't, it  
10 shouldn't be subdivided or we don't agree with you because  
11 of some other reason. So by being very specific going to  
12 one of those bullets there where it's only quantifiable  
13 criteria it sort of takes away, this isn't a black and white  
14 area, resubdivision. Because often times the whole  
15 neighborhood's done and there's one or two lots that are a  
16 little different than everybody else's and 20 years later  
17 somebody wants to subdivide and sometimes it makes sense and  
18 sometimes it doesn't.

19 COMMISSIONER PRESSLEY: Well, I wasn't --

20 UNIDENTIFIED MALE COMMISSIONER: And I don't --

21 COMMISSIONER PRESSLEY: -- looking to take away --

22 UNIDENTIFIED MALE COMMISSIONER: -- take our

23 subjectivity away.

24 COMMISSIONER PRESSLEY: -- our, I don't want to

25 take away the subjectivity at all. All I'm saying is --

1 UNIDENTIFIED MALE COMMISSIONER: But that's what  
2 that says.

3 COMMISSIONER PRESSLEY: No, that's --

4 UNIDENTIFIED SPEAKER: No it doesn't.

5 UNIDENTIFIED SPEAKER: No.

6 COMMISSIONER PRESSLEY: Those things --

7 UNIDENTIFIED SPEAKER: Include only --

8 COMMISSIONER PRESSLEY: Wait.

9 UNIDENTIFIED SPEAKER: -- quantifiable criteria.

10 COMMISSIONER PRESSLEY: Those things are all  
11 existing as we look at lot to lot comparison and whether  
12 something is compatible. What I'm talking about is that  
13 there is no measurement whatsoever, none. We have  
14 subjectivity anyway, even if someone uses a measurement we  
15 can disagree with the staff if they say this is an  
16 appropriate alignment we can say no it's really not in this  
17 case, as you're saying, or no really the lot should be  
18 bigger because of the topography. We retain that right.  
19 All I'm saying is there is nowhere any guidance that would  
20 keep staff decisions consistent or future Planning Board  
21 decisions consistent or applicants having the understanding  
22 of what's going to constitute a neighborhood. And I'm not  
23 saying bullet points, I'm not saying like it's got to be  
24 exactly this, this and this because it's different. You  
25 can't say every neighborhood is within a mile or two miles

1 or half a mile, or a quarter mile or three streets.

2 UNIDENTIFIED MALE COMMISSIONER: Well --

3 COMMISSIONER PRESSLEY: But there should be some  
4 consistent criteria that's --

5 UNIDENTIFIED SPEAKER: That's fine --

6 COMMISSIONER PRESSLEY: -- all I'm saying. What  
7 is a neighborhood?

8 UNIDENTIFIED MALE COMMISSIONER: But I don't think  
9 our decisions should be guided strictly by consistency.  
10 Because when we looked at a plat and I can't remember the  
11 area of a lot that was twice as big as other lots, it's  
12 because it had a hill in the middle of it and the topography  
13 changed from one place to another and it was originally  
14 preserved as a particular lot size because of the  
15 topography. The applicant came in and said I want to have a  
16 house on the lower part and another house on the upper part  
17 and we said you know even though the lot is twice the size  
18 it's not appropriate because of this other issue. I don't  
19 want to lose that ability to do that, that's all.

20 COMMISSIONER PRESSLEY: I'm talking about it --

21 UNIDENTIFIED SPEAKER: It's something like this  
22 where we have (indiscernible).

23 UNIDENTIFIED SPEAKER: Your microphone.

24 COMMISSIONER PRESSLEY: You might have several  
25 very large lots that are part of an existing development and

1 right across the street which starts a new development, you  
2 might have lots of little lots.

3 UNIDENTIFIED SPEAKER: We have that.

4 COMMISSIONER PRESSLEY: Okay. So the applicant is  
5 going to come in and say well I want to put, I want to  
6 divide mine into six because look across the street it  
7 matches this, and this and this. But the staff, I'm looking  
8 for things like you can't just eliminate what's adjacent to  
9 you because you want to say that's not in my neighborhood  
10 because it's not where I want to go with it.

11 UNIDENTIFIED FEMALE SPEAKER: Amy, do you have the  
12 staff draft of the chapter --

13 COMMISSIONER PRESSLEY: What page?

14 UNIDENTIFIED FEMALE SPEAKER: 25.

15 COMMISSIONER PRESSLEY: 25. Thank you.

16 UNIDENTIFIED FEMALE SPEAKER: I just want to give  
17 you what the language says.

18 COMMISSIONER PRESSLEY: Thank you.

19 UNIDENTIFIED FEMALE SPEAKER: I don't think it's as -

20 -

21 COMMISSIONER PRESSLEY: No, I'm not.

22 UNIDENTIFIED FEMALE SPEAKER: -- clear as you want  
23 it to be but I --

24 COMMISSIONER PRESSLEY: I just wanted something --

25 UNIDENTIFIED FEMALE SPEAKER: -- want you to see



1 what it is anyway.

2 COMMISSIONER PRESSLEY: -- (indiscernible) no  
3 bullet points that it has to be A, B, C but some standard  
4 for analysis.

5 UNIDENTIFIED FEMALE SPEAKER: So the staff draft  
6 actually says that it needs to be, includes all abutting and  
7 confronting lots and any other lots --

8 COMMISSIONER PRESSLEY: (Sound.)

9 UNIDENTIFIED FEMALE SPEAKER: -- needed to  
10 conducted a meaningful analysis and that all the lots must be  
11 within the same zone. We did discuss putting maybe a  
12 distance in there but the problem is --

13 COMMISSIONER PRESSLEY: Yes, you can't.

14 UNIDENTIFIED FEMALE SPEAKER: -- is sometimes --

15 COMMISSIONER PRESSLEY: You can't.

16 UNIDENTIFIED FEMALE SPEAKER: -- it doesn't fall  
17 within that distance to --

18 COMMISSIONER PRESSLEY: Yes.

19 UNIDENTIFIED FEMALE SPEAKER: -- conduct a  
20 meaningful analysis. So that's why we came up with the  
21 language that we have now.

22 COMMISSIONER PRESSLEY: Okay. What was the  
23 rationale for the same zone? Because if something's really  
24 within the same neighborhood but maybe parts of it do have  
25 like a, a commercial residential flavor or different sized

1 lot what was --

2 UNIDENTIFIED FEMALE SPEAKER: Because we just felt

3 you can't do apples to oranges, I mean different zones have

4 completely different requirements --

5 COMMISSIONER PRESSLEY: Okay.

6 UNIDENTIFIED FEMALE SPEAKER: -- size

7 requirements. And that's the way staff has always

8 interpreted it was within the same zone.

9 COMMISSIONER PRESSLEY: So you're saying if I had

10 done a more fine tooth reading of your language --

11 UNIDENTIFIED FEMALE SPEAKER: No.

12 UNIDENTIFIED SPEAKER: No.

13 COMMISSIONER PRESSLEY: -- I would not have had

14 this issue.

15 UNIDENTIFIED SPEAKER: It's a lot.

16 UNIDENTIFIED MALE SPEAKER: It's a lot to read.

17 UNIDENTIFIED FEMALE SPEAKER: Only if you want to

18 fall asleep.

19 COMMISSIONER PRESSLEY: Okay. That's good, that's

20 exactly what I meant. Does that seem --

21 UNIDENTIFIED SPEAKER: Yeah, yeah.

22 COMMISSIONER PRESSLEY: -- good to you?

23 UNIDENTIFIED SPEAKER: We don't have a problem

24 with it (indiscernible).

25 MR. CHAIR: Okay. Can I suggest what we're

1 talking about here is just putting it a public hearing  
2 (indiscernible)?

3 COMMISSIONER PRESSLEY: Can I just make --

4 MR. CHAIR: So we don't have to resolve this --

5 UNIDENTIFIED SPEAKER: Okay. Thank you.

6 MR. CHAIR: -- conclusively.

7 COMMISSIONER PRESSLEY: Can I make --

8 MR. CHAIR: It's helpful if you have some ideas,  
9 but we don't have to nail it down.

10 UNIDENTIFIED SPEAKER: Please.

11 UNIDENTIFIED MALE SPEAKER: Okay.

12 UNIDENTIFIED SPEAKER: I would just make a  
13 suggestion on this one because I had the most recent case on  
14 this and what the courts, really what is important when  
15 you're looking at neighborhood that gives it some  
16 objectivity, but not, but still leaves it to be subjective  
17 is impact. That's what people are, that's what you're  
18 looking for when you talk about meaningful analysis, it's  
19 analysis based on impacts that are similar. It could be  
20 impacts by the road, it could be the view shed, it could  
21 some other things, but it's the impact that is, and that's  
22 what the courts kind of agreed with, that it left it to the  
23 Board to make that determination and it was an impact  
24 analysis. So what the staff does is they look at the  
25 impacts for consistent, what the impacts will be to the area

1 and that's the neighborhood that they define. That's why  
2 they're looking at it that way. So perhaps some language of  
3 that in that regard, but --

4 UNIDENTIFIED FEMALE SPEAKER: So I just want to  
5 take a step back here and look at, I know we had the  
6 discussion about neighborhood, but really focus on what we  
7 need your direction on today is the criteria because that is  
8 something that the six of us cannot agree on and we need to  
9 put something in the draft that we are releasing. And just  
10 to --

11 MR. CHAIR: All right. Here's my thought. You  
12 asked for it, you got it.

13 UNIDENTIFIED FEMALE SPEAKER: Okay.

14 MR. CHAIR: My understanding of the law is that  
15 the cases talked about how this is really about  
16 compatibility. So I would suggest framing it in those terms  
17 and using the criterion as a luster but not exhaustive sort  
18 of criteria for assessing compatibility. So I don't think  
19 it's as important that it goes from seven to three or  
20 whatever the number is, but I would say the Board needs to  
21 find that the lots are compatible with the neighborhood,  
22 whatever that is and by reference to the following criteria,  
23 limited but not including to consistency of size, frontage,  
24 et cetera, et cetera, et cetera.

25 UNIDENTIFIED SPEAKER: (Indiscernible).

1 MR. CHAIR: Yes.

2 UNIDENTIFIED SPEAKER: The current list, right?

3 MR. CHAIR: I don't care if it's a current list or  
4 not, I just think we shouldn't like put so much weight on  
5 this, this should be illustrative and not purport to be, to  
6 describe the universe of things that could be considered or  
7 that necessarily even the entire list that's enumerated  
8 should be considered relevant in every case.

9 UNIDENTIFIED FEMALE SPEAKER: So here's the thing  
10 is the state law if you are going to have resubdivision  
11 criteria which you do not need to have, that is one option  
12 that a few of us has thrown out, just get rid of resub  
13 (phonetic sp.) altogether, right. So that's option 1.  
14 Option 2 is if you are to have resub criteria you need to at  
15 least have three and you need to treat all those three every  
16 single time it needs to be in conformance with all those  
17 three. Because in the state law it has alignment, oh where  
18 is it --

19 UNIDENTIFIED SPEAKER: The frontage one.

20 UNIDENTIFIED FEMALE SPEAKER: -- frontage,  
21 alignment and size. Or area, I'm sorry, frontage, alignment  
22 and area. Those three must be in your resubdivision  
23 criteria.

24 UNIDENTIFIED MALE SPEAKER: If you have them.

25 UNIDENTIFIED FEMALE SPEAKER: If you have them.

1 Then the third option that the six of us have been kicking  
2 around is okay you take those three and then you take the  
3 other quantifiable determinations that we have right now  
4 which are I believe with, do you have the slide?

5 UNIDENTIFIED SPEAKER: It's on the screen --

6 UNIDENTIFIED FEMALE SPEAKER: Oh, I can't read it.

7 UNIDENTIFIED SPEAKER: It's at the end.

8 UNIDENTIFIED FEMALE SPEAKER: Oh, okay. So yes,  
9 lot width and buildable area and, and what else?

10 UNIDENTIFIED MALE SPEAKER: Frontage, alignment --

11 UNIDENTIFIED FEMALE SPEAKER: Frontage, alignment,  
12 lot area slash size, lot width and buildable area.

13 UNIDENTIFIED MALE SPEAKER: And not suitability.

14 UNIDENTIFIED FEMALE SPEAKER: Not suitable, no,  
15 right. So those --

16 UNIDENTIFIED SPEAKER: Not suitability and not --

17 UNIDENTIFIED FEMALE SPEAKER: -- those five.

18 UNIDENTIFIED SPEAKER: Right.

19 UNIDENTIFIED MALE SPEAKER: It would be four  
20 quantifiable criteria and we have to keep alignment because  
21 it's in the State Code.

22 UNIDENTIFIED FEMALE SPEAKER: That's right.

23 UNIDENTIFIED SPEAKER: Right.

24 UNIDENTIFIED MALE SPEAKER: And I think getting  
25 more to the Chairman's point was does the State Code

1 actually require that a proposed lot within a subdivision  
2 meet those three criteria or is it written general enough  
3 that you can say considering these three --

4 UNIDENTIFIED FEMALE SPEAKER: No it has to --

5 UNIDENTIFIED MALE SPEAKER: -- and --

6 UNIDENTIFIED FEMALE SPEAKER: -- you have to show  
7 conformity of character to those three, at the very least.

8 UNIDENTIFIED MALE SPEAKER: So while we considered  
9 your option early on to say generally speaking while  
10 considering these criteria, we think that the proposed lots  
11 conform to, I don't think, I think the reason we did not  
12 present that to you is because the State Code prevents us  
13 from doing so.

14 UNIDENTIFIED FEMALE SPEAKER: Right.

15 COMMISSIONER PRESSLEY: I'm in favor of the four  
16 that you said. That gives us less restriction --

17 UNIDENTIFIED SPEAKER: (Indiscernible).

18 COMMISSIONER PRESSLEY: -- yes, the three plus  
19 that one, but --

20 UNIDENTIFIED FEMALE SPEAKER: Well it's so there's  
21 none, there's three or there's five --

22 COMMISSIONER PRESSLEY: Oh.

23 UNIDENTIFIED FEMALE SPEAKER: -- are the three  
24 options.

25 COMMISSIONER PRESSLEY: I thought you said four.

1 UNIDENTIFIED MALE SPEAKER: There's four  
2 quantifiable criteria --

3 UNIDENTIFIED FEMALE SPEAKER: Plus alignment.

4 UNIDENTIFIED MALE SPEAKER: -- and then alignment  
5 which is not --

6 COMMISSIONER PRESSLEY: Oh.

7 UNIDENTIFIED SPEAKER: Oh, okay.

8 UNIDENTIFIED FEMALE SPEAKER: But either way, when  
9 you apply them you're going to have to apply all of them and  
10 what we're trying to avoid is right now the Board has been  
11 waiving a lot of the resub criteria and so that was one of  
12 the things we wanted to try and avoid by taking some of  
13 these away was the constant need to waive these.

14 COMMISSIONER PRESSLEY: So what happens when you  
15 have none? How does, how do two different property owners,  
16 I have a specific question on what you have none. How do  
17 two different property owners who want to subdivide, what is  
18 their assurance that they are going to have an equal review  
19 or a fair review or anything based on a specific criteria  
20 other than the luck of the draw of whose looking at it and  
21 the Board at the time?

22 UNIDENTIFIED MALE SPEAKER: Well it's --

23 UNIDENTIFIED FEMALE SPEAKER: So refer to page 24,  
24 and under lot design general requirements 1, lot dimensions,  
25 that's what you would fall back to if you did not have



1 resubdivision. Lot size, width, shape and orientation must  
2 be appropriate for the location of the subdivision and for  
3 the type of development and use contemplated considering the  
4 recommendations of the Master Plan and the applicable  
5 requirements of Chapter 59. That's what would you fall back  
6 to.

7           COMMISSIONER PRESSLEY: Fall back to, but how  
8 would you explain that because how is this then any less  
9 restrictive, either we have to meet this or we don't.

10           UNIDENTIFIED FEMALE SPEAKER: That's, you know, we  
11 talked about the implications of going and applying just  
12 this, which we apply to unplatted parcels all the time --

13           COMMISSIONER PRESSLEY: Yes.

14           UNIDENTIFIED FEMALE SPEAKER: -- and this is a  
15 basic premise. So you would say that the lots are located  
16 in proximity to other lots and you could make a general  
17 finding that we think it fits. The danger, I think would be  
18 if you didn't have a resub and certain criteria you have to  
19 have look at is that there might be some court case in the  
20 future that requires this entire section to become as  
21 regimental as we've had to get with the application of the  
22 resub criteria and that you might be looking at these  
23 criteria just as stringently and as you know, there's a  
24 range in the neighborhood and you have to have to fall  
25 within that range, that there might be some court case that

1 sends us there and then it wouldn't be limited to  
2 residential lots, it would be every lot. Because this  
3 section applies generally to all lots that you create. So  
4 we kind of came to the conclusion that keeping resub and  
5 limiting it to residential zones because we cut down the  
6 number of zones --

7 UNIDENTIFIED SPEAKER: No.

8 UNIDENTIFIED FEMALE SPEAKER: -- it applies to and  
9 we said it has to be detached lots, no townhouses and then  
10 we thought and this hasn't gone over well with some of the  
11 attorneys we've talked with, we thought we would limit the  
12 criteria to three so that and that they wouldn't waived.  
13 Basically it is or it isn't. But as you said that's, you  
14 know, it's size. So if you're 5 square feet bigger than  
15 everything else in the range, should you be denied? So we  
16 know there's still going to be waivers that occur and the  
17 bottom line is if you have criteria, we probably are going  
18 to want to grant waivers sometimes of those criteria. So  
19 the negative of maybe only having three is that if you waive  
20 one you're waiving a significant amount of the fining. If  
21 you waive one of five or one of seven today, you still have  
22 substantial conformance with the majority of the criteria  
23 but we have gone --

24 MR. CHAIR: I don't --

25 UNIDENTIFIED FEMALE SPEAKER: -- round and round

1 with this.

2 MR. CHAIR: -- really understand, I'm not sure I  
3 understand this concern about future court case. I don't  
4 really get it.

5 UNIDENTIFIED FEMALE SPEAKER: Well because you  
6 still have the issues of neighborhood character, you know,  
7 you still have the instances where you're changing a  
8 recorded lot surrounded by other lots that were created with  
9 it. You know by their nature, those are, you know they're  
10 the toughest subdivisions that you look at, infill  
11 subdivisions in an existing neighborhood. And I would just  
12 have a concern that it would be, you'd still have that kind  
13 of opposition sometimes and it would be elevated into a case  
14 that would then potentially have to apply some way of  
15 analyzing it that wouldn't be as flexible as the language is  
16 today, you know --

17 MR. CHAIR: I don't know, I --

18 UNIDENTIFIED FEMALE SPEAKER: -- it's very open  
19 but, right.

20 UNIDENTIFIED FEMALE SPEAKER: But it might not  
21 happen, you could --

22 UNIDENTIFIED FEMALE SPEAKER: Yes.

23 UNIDENTIFIED FEMALE SPEAKER: -- fix it with  
24 legislation if it did. It's really hard to say when I know  
25 that Rich took some time to look and see who else has

1 resubdivision criteria and I'll tell you not many people do,  
2 so.

3 UNIDENTIFIED SPEAKER: (Indiscernible).

4 MR. CHAIR: I vote for nothing.

5 UNIDENTIFIED FEMALE SPEAKER: I do too.

6 MR. CHAIR: That's my --

7 COMMISSIONER PRESSLEY: So what was the other  
8 legal opinion? Because Carol you started to, I mean not the  
9 rationale it was to go with less and or none?

10 UNIDENTIFIED SPEAKER: (Indiscernible).

11 COMMISSIONER PRESSLEY: Yes.

12 UNIDENTIFIED FEMALE SPEAKER: And I've actually  
13 talked to Christine about this. And I mean I was originally  
14 kind of along the line of where the Chair was about the  
15 finding just has to be that it's within character and that  
16 you consider these whatever the, however many criteria that  
17 you want. However you know, as Christina pointed out the  
18 state law says that it does have to, if you're going to have  
19 subdivision it has to conform to some of them. So you can't  
20 really have that broad consider, you can't have  
21 consideration for the other criteria and just have it  
22 conform with the three that are required. And so really  
23 because I've always looked it as the finding that the Board  
24 makes is really about character and those other things, the  
25 criteria is how you get to that finding.

1           So you know, I just wanted to point that. I mean  
2 what I was beginning to talk about was the difference  
3 between neighborhood, your neighborhood delineation, it's a  
4 two part test. First, you determine what the appropriate  
5 neighborhood is based on impacts then you look at the other  
6 criteria. We had this that was part of the argument that we  
7 had in that Arkin (phonetic sp.) case. But you know I think  
8 that if you kind of eliminate the resub criteria, you're  
9 going to get a lot of pushback. Because that's a lot of the  
10 established communities like and have, the point of making  
11 resubdivision more stringent than just your original  
12 subdivision is when people move into a subdivision they have  
13 an expectation and that's what the courts have said. And  
14 the expectation is that they kind of know what's, what their  
15 neighborhood is and how it's going to be made up and it's  
16 not going to significantly change.

17           I mean it does over time because zoning changes  
18 and other things, but in your single family neighborhoods,  
19 it's people, that's the hot button issue that we got on the  
20 Zoning Ordinance and I think it's going to come back in the  
21 subdivision regs. So I do think if you take out  
22 resubdivision altogether you're going to get a lot of  
23 pushback from the community.

24           MR. CHAIR: But I still, I just don't get why  
25 what's in the initial lot design requirements is really

1 less, I mean it all basically just boils down to sort of  
2 this multifactor balancing for compatibility, right?  
3 Because the criteria, if you want to resubdivide, you would  
4 then have to conform to the general requirements, right?  
5 Which are size, width, shape and orientation, appropriate to  
6 the subdivision type of development or use contemplated,  
7 considering our conditions in the Master Plan, right?

8 UNIDENTIFIED FEMALE SPEAKER: Yes, I mean I think  
9 that's the simplest way to go because that's what the,  
10 you're basically going with what state, you're saying we're  
11 going to go with this, we're going to keep resub but we're  
12 really going to do the bare minimum which is required by the  
13 state.

14 UNIDENTIFIED FEMALE SPEAKER: No, he's talking  
15 about a different provision. It's not, that's the provision  
16 that applies to all subdivisions. There's a resubdivision  
17 criteria would be separate.

18 MR. CHAIR: But so what I'm saying is why --

19 UNIDENTIFIED FEMALE SPEAKER: Yes.

20 MR. CHAIR: -- isn't it good enough to just and I  
21 know people will say oh my God the neighborhood, you know,  
22 what you said a minute ago which is well people have an  
23 expectation for the neighborhood, but the point is those  
24 criteria are basically just the same, it's just a different  
25 words --

1 UNIDENTIFIED SPEAKER: True.

2 UNIDENTIFIED FEMALE SPEAKER: That's correct.

3 MR. CHAIR: -- that basically mean look at the  
4 compatibility of the lots with each other and the  
5 neighborhood in the Master Plan, so.

6 UNIDENTIFIED FEMALE SPEAKER: That's correct and  
7 the reason why resubdivision actually has such a strict way  
8 of looking at it now is because we've had two court cases  
9 and that's what Cathy was eluding to was you know, what if  
10 we were to have a court case in the future which would then  
11 have that impact on the general subdivision language but  
12 it's, that's, you know, that's a what if.

13 MR. CHAIR: Yes, I would say the criteria should  
14 be the same for a new subdivision versus resubdivision.  
15 Because the existing, the two separate existing standards to  
16 me don't really do any additional work. They create the,  
17 perhaps the appearance that there's a stricter standard for  
18 resubdivision, but in fact it's just a lot of different  
19 words that kind of getting at the same thing.

20 UNIDENTIFIED SPEAKER: So are you saying eliminate  
21 the resub --

22 MR. CHAIR: Yes.

23 UNIDENTIFIED SPEAKER: -- or are you just making  
24 the two of them the same or you're just saying taking out  
25 the resub?

1 MR. CHAIR: Well if you took out resub then you  
2 sort of default back to --

3 UNIDENTIFIED SPEAKER: The subdivision.

4 MR. CHAIR: Yes.

5 UNIDENTIFIED SPEAKER: Is that what you're saying?

6 MR. CHAIR: Right, a resub is the same as a  
7 subdivision because --

8 COMMISSIONER PRESSLEY: So if it is the same then  
9 what value are we getting out of removing it except sending  
10 a huge red flag out to a lot of people who aren't going to  
11 understand that?

12 MR. CHAIR: Well, we're streamlining the Code, and  
13 we are --

14 COMMISSIONER PRESSLEY: You mean the words on the,  
15 I mean --

16 MR. CHAIR: Yes. We're making this less  
17 complicated and more accessible so people can understand it  
18 because --

19 COMMISSIONER PRESSLEY: But --

20 MR. CHAIR: -- they don't have to sort through  
21 here and try to understand what's the difference between  
22 subdivision and resubdivision. It's all in one place. It's  
23 the same criteria and both the public and property owners  
24 benefit from not having to try to, try to, you know, discern  
25 the subtle differences between one group of words that all



1 are basically dancing around the same general concept and  
2 another set of words.

3           COMMISSIONER PRESSLEY: So there's no way that  
4 those words that are for resubdivision are in any different  
5 to intend to accomplish anything different because if that's  
6 the case then it could be called subdivision and  
7 resubdivision it's just all grouped into one place and you  
8 could arguably say you moved all the text into one place,  
9 but you know what I mean, but we'd have to look at those  
10 side by side and say, or you guys would, you know, is there  
11 any word or any criteria for resubdivision that is  
12 specifically that way to intend a different review than  
13 subdivision?

14           UNIDENTIFIED FEMALE SPEAKER: You know, I think by  
15 its nature binding conformance with other lots which the  
16 resubdivision analysis requires you to do --

17           COMMISSIONER PRESSLEY: And that's not in  
18 subdivision.

19           UNIDENTIFIED FEMALE SPEAKER: -- and that's not in  
20 the subdivision --

21           COMMISSIONER PRESSLEY: Because it may not exist.

22           UNIDENTIFIED FEMALE SPEAKER: -- prevents the  
23 resubdivision that gets much smaller lots than the existing  
24 lots around it. Because what the ---

25           COMMISSIONER PRESSLEY: And that's what people are

1 going to argue about.

2 UNIDENTIFIED FEMALE SPEAKER: -- typical  
3 subdivision criteria are about is developing according to  
4 the Zone.

5 MR. CHAIR: I understand that people argue that, I  
6 just don't think that's supported by the plain meaning of  
7 the words in the general requirements for lot dimensions.  
8 It says lot size, width, shape and orientation must be  
9 appropriate for the location of the subdivision and for the  
10 type of development or use contemplated. So I think that it  
11 seems obvious to me that means you should look what else is  
12 around it existing lots --

13 UNIDENTIFIED SPEAKER: Yes.

14 COMMISSIONER PRESSLEY: But what's appropriate.

15 MR. CHAIR: -- which is the same thing.

16 COMMISSIONER PRESSLEY: So what does appropriate  
17 mean? Because in one then when you to resubdivision it  
18 actually gives you some guidelines for appropriate. It says  
19 size, width, lot, I mean it gives you adjectives and  
20 measuring sticks to say what's appropriate.

21 MR. CHAIR: And they're almost the --

22 COMMISSIONER PRESSLEY: And the word appropriate,  
23 oh it's all, I think it's appropriate, I think you can, I  
24 think that I live on a one acre lot, but you know I think  
25 it's appropriate to have half acres next to me, because

1 especially if it's like an acre and a few feet, because it's  
2 closer to an acre than not an acre.

3 MR. CHAIR: Yes, but the finding on subdivision is  
4 of the same character. That's no more or less, it's all  
5 vague subjective --

6 COMMISSIONER PRESSLEY: Except for the things  
7 about lot shape, width, frontage.

8 UNIDENTIFIED FEMALE SPEAKER: I actually think in  
9 some ways it might help opponents to a resub and I say that  
10 because right now on the seven criteria which are  
11 quantifiable and they still hate it, they hate what's being  
12 proposed but if it falls within those ranges, then basically  
13 we are going to recommend approval.

14 Unlike with a Site Plan where it says you can meet  
15 all the development standards, but if you the Board still  
16 don't find that it's compatible with the neighborhood, then  
17 you can turn it down and to me this puts it somewhat back  
18 into that category.

19 COMMISSIONER PRESSLEY: But that's why I'm having  
20 a problem with it, because I'm not arguing on behalf of the  
21 small communities who already live there or on behalf, I'm  
22 arguing on either side. Because if I want to develop and  
23 I'm just at the mercy of the Board because it's maybe, you  
24 know, this Board might think it's appropriate and then next  
25 year I come with another like type of thing and another

1 Board doesn't think it's appropriate and I'm going to ask  
2 myself well what was the criteria by which you judge whether  
3 it's appropriate or not.

4 MR. CHAIR: Yes, but the problem is the adjective,  
5 you don't like appropriate but why is same character any  
6 better?

7 COMMISSIONER PRESSLEY: Because the resub it has  
8 that plus then it has a specific thing, lot width, size, it  
9 has all those things that you have to look at.

10 MR. CHAIR: But so does the initial one. It says  
11 lot size, width, shape and orientation. I mean I just think  
12 it's like one is an Italian and the other one is in Spanish  
13 but they basically mean, they're different words that mean  
14 the same thing.

15 COMMISSIONER PRESSLEY: Do you think there's any  
16 more weight in the requirement to be very careful about the  
17 appropriateness of those things in a resubdivision than in a  
18 subdivision?

19 (No audible response.)

20 COMMISSIONER PRESSLEY: So would you give any more  
21 credence to meeting those criteria for resubdivision in a  
22 little developed neighborhood than you would personally to a  
23 green field development?

24 MR. CHAIR: Yes, but that's because what's  
25 appropriate or in character, whichever adjective you want to

1 use has to be judged differently reference to an existing  
2 neighborhood than one that's undeveloped.

3 COMMISSIONER PRESSLEY: Okay. So how would you  
4 make that distinction in this thing if we group it all  
5 together, because I'm not against --

6 MR. CHAIR: Well --

7 COMMISSIONER PRESSLEY: -- if it's efficient, I'm  
8 not against having all the language in one. How would you  
9 group it all into one --

10 MR. CHAIR: I mean --

11 COMMISSIONER PRESSLEY: -- subdivision  
12 resubdivision and still get the same weight that you just  
13 acknowledged there is?

14 MR. CHAIR: I mean my argument is that you don't  
15 need to write it into the statute because what makes the  
16 difference is if we got resubdivision, I'm looking at the  
17 house across the street and say hmmm, there's a two-story  
18 house with you know a detached garage and it has certain  
19 buildable area and here's how that property's been  
20 developed. And so I have something to end the lot is this  
21 wide and here's where the driveway is oriented and I can  
22 look at that and I can say you know what not really in  
23 character or not appropriate, whichever adjective you  
24 prefer.

25 COMMISSIONER PRESSLEY: So you're not saying get

1 rid of the resubdivision, you're just saying resubdivision  
2 is already covered in the general heading subdivision and  
3 that we should just acknowledge it there and not have a  
4 separate --

5 MR. CHAIR: Yes.

6 COMMISSIONER PRESSLEY: So therefore the message  
7 would be if I were a marketing and PR person, the message  
8 would be --

9 MR. CHAIR: Christine is looking at me like --

10 COMMISSIONER PRESSLEY: -- it's already covered in  
11 the one topic and we just add the word subdivision and  
12 resubdivision.

13 MR. CHAIR: Why don't, Ms. Rento, why don't we  
14 don't want to do this.

15 UNIDENTIFIED FEMALE SPEAKER: Well I wouldn't want  
16 to put the word resubdivision under the general, because  
17 then you're kicking in what you need to do under the state  
18 law, which are those three criteria and they must be in  
19 conformance --

20 UNIDENTIFIED SPEAKER: Subdivision.

21 UNIDENTIFIED FEMALE SPEAKER: Yes, subdivision  
22 which is how it's written right now for that under the  
23 general requirements lot dimensions.

24 UNIDENTIFIED SPEAKER: But resubdivision is a  
25 subdivision.

1 UNIDENTIFIED FEMALE SPEAKER: Yes.

2 UNIDENTIFIED SPEAKER: (Indiscernible).

3 UNIDENTIFIED FEMALE SPEAKER: Yes, that's correct.

4 COMMISSIONER FANI-GONZALEZ: (Indiscernible) for  
5 the resubdivision which are the requirements are usually  
6 waived by people applying? Is there one that you usually  
7 waive or not?

8 UNIDENTIFIED FEMALE SPEAKER: All of them,  
9 depending on what's in front of the Board. I mean --

10 COMMISSIONER FANI-GONZALEZ: So not a specific --

11 UNIDENTIFIED FEMALE SPEAKER: No, not to my  
12 knowledge.

13 COMMISSIONER DREYFUSS: Waive them or reach a  
14 different conclusion than the staff?

15 UNIDENTIFIED FEMALE SPEAKER: You waive them, you  
16 have to.

17 COMMISSIONER DREYFUSS: You have? Why?

18 UNIDENTIFIED FEMALE SPEAKER: Because you have to  
19 find, you have to find character with all seven of those  
20 criteria and they must be in the range. So if anything is  
21 outside of the range you need to waive it.

22 UNIDENTIFIED FEMALE SPEAKER: And I think what  
23 Rose, and what Rose was saying that it can be used not only,  
24 it can be used against what would be an appropriate  
25 resubdivision potentially because the range is anywhere in

1 the range. So it doesn't need to be, so you might find,  
2 there might be a particular lot in a neighborhood, and  
3 there's only one. Okay. Or if it's the smallest and you're  
4 only and you're going to be the second smallest, but it's  
5 really a large lot neighborhood. Unfortunately, I mean in  
6 that case an applicant can use that against the Board  
7 because say hey it's in the range, you have to find that  
8 it's appropriate, it's in conformance, it meets all of the  
9 resubdivision criteria, it's in that range, it might be the,  
10 you know, it might be at the bottom, the very bottom of the  
11 range of every single one of those criteria but and you look  
12 at it and it really is out of character but it could be used  
13 against you know, it could be used against the Board to say  
14 in an appeal to say hey it's in the range, you can't not  
15 approve it because it does meet all those criteria and  
16 therefore it's in character.

17           So it can be used either way and I think what the  
18 Chair is suggesting, probably gives more flexibility both  
19 ways to the Board and to the staff, you know.

20           MR. CHAIR: And as I say it's a public hearing  
21 draft so if we put out a draft that is written that way and  
22 somebody says oh my God, no way because X, Y and Z --

23           UNIDENTIFIED SPEAKER: (Indiscernible).

24           MR. CHAIR: -- the world will end, then we can say  
25 all right we'll consider that.



1 UNIDENTIFIED FEMALE SPEAKER: Is that the  
2 consensus then to move forward?

3 UNIDENTIFIED SPEAKER: Yes.

4 UNIDENTIFIED FEMALE SPEAKER: Okay.

5 (Requested portion of the hearing ended at 6:34:30 p.m.)

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DIGITALLY SIGNED CERTIFICATE

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings before the Montgomery County Planning Board in the matter of:

RESUBDIVISION OF RESIDENTIAL PROPERTIES

*Diane Wilson*

By: \_\_\_\_\_

Date: January 7, 2020

Diane Wilson, Transcriber



**Worksession to Discuss the Draft Subdivision Regulations**

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Completed: 6/11/15

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**Description**

This report provides an overview of the information to be presented at the worksession on the Draft Rewritten Subdivision Regulations, Montgomery County Code Chapter 50. This worksession is designed to give the Board and general public an overview of major changes and provide an opportunity for discussion.

**Summary**

A comprehensive revision of Chapter 50, the Subdivision Regulations has been contemplated since the start of the Planning Department's efforts to revise the zoning ordinance. We knew at that time changes would be needed based on how the zoning ordinance changed. We also recognized that, even in the absence of a zoning ordinance revision, it was time to review and update provisions of the subdivision ordinance that hadn't been comprehensively looked at for more than 50 years.

The general objectives in rewriting the Subdivision Regulations were:

- Modernize and clarify existing language
- Improve organization and ease of reference
- Codify current interpretations
- Ensure consistency with new provisions of the zoning ordinance
- Improve the efficiency of review

To meet these objectives, the organization and layout of the revised regulations has significantly changed and the language of most provisions has been updated. For the most part, the updated language clarifies the existing requirements but, some changes have been made. The discussion below contains a combined summary of the changes that were presented as a part of the Planning Board's public hearing, and the new changes that have been made since the hearing in response to comments received. Copies of the comments that were received in writing are included in Attachment A.

## Discussion of Changes

### Article I. In General

This Article contains general provisions and requirements.

#### Division 50.1. Purpose

- Combined previous purpose list (Sec. 50-2) into a consolidated purpose statement that retains the important elements.

#### Division 50.2. Defined Terms

- Added new section of rules for interpretation of the Chapter.
- Modified the list of defined terms (Sec. 50-1) by clarifying existing language, removing terms that duplicate the zoning ordinance definitions or that are not specifically used in the Chapter, and adding new terms as needed.

#### Division 50.3. General Requirements

- Retained previous requirements for applicability (Sec. 50-3), approving authority (Sec. 50-4), and impacts to other ordinances (Sec. 50-5) with only minor language updates.
- Placed emphasis on the fact that subdivisions of land must be recorded by plat prior to land transfer (Sec. 50-8) and issuance of building permits (Sec. 50-20) by moving existing provisions to a new section.
- Modified the language of the existing exceptions to platting requirements (Sec. 50-9) provisions for clarification. The section is now broken into subsections covering the types of land transfers that can be done without a record plat, and uses that can receive building permits without being located on a record lot.
- Moved existing provisions for submission of subdivision plans (Sec. 50-23) to a new section under this Division and modified the existing language for clarification.
- Building permit language moved to Ch. 8 (50-20 and 50-32).

#### Significant changes made in this Division include:

- Prohibiting the issuance of a building permit for a dwelling unit on unplatted parcels of agricultural land that are less than 25 acres in size.  
*The current exception applies to "land that is and will remain part of a farm, as defined in this chapter, but that is used concurrently for a related use that requires a building permit." A farm is defined as "a tract of land, with or without associated buildings, that is devoted to agriculture", as it is defined in the chapter. In the agricultural zone (AR), a problem is created by the existing language because it can be interpreted to permit construction of a dwelling on a tract of land less than 25 acres in size which violates the density requirement of the zone.*
  - Permitting construction of one detached dwelling unit on a part of a previously platted lot that has not change in size or shape since June 1, 1958, as anticipated by the new zoning ordinance.
  - Permitting the reconstruction of any existing detached dwelling under the new zoning ordinance.
- Additional changes made in response to comments from the public hearing:
- Added rule clarifying "In Writing" to include electronic communication.

- Added, removed, and added clarifying language to defined terms.
- Added exemption to platting for advanced dedication or donation of master planned rights-of-way.

## **Article II. Subdivision Plans**

Article II now contains provisions for the different types of subdivision plans, instead of the record plat provisions. This change was made because it reflects the actual order of the process. The types of plans covered in the article are preliminary plans, pre-preliminary submissions, simplified subdivision plans, and minor subdivisions. Simplified subdivision plans are a new plan type.

### **Division 50.4. Preliminary Plan**

- More clearly separated the plan drawing requirements from the requirements for supporting information (Sec. 50-34)
- Modified and updated the provisions for review and approval of preliminary plans, including provisions for plan validity (Sec. 50-35), to clarify and provide better organization.
- Modified the general standard for review of lot dimensions to include consideration of the applicable requirements of Chapter 59 in addition to the recommendations of the applicable master plan.
- Retained the requirement that all lots abut a road, but the road can now be either public or private.
- Continue to permit a maximum of two lots without public or private road frontage on a shared driveway, but added the requirement that the two lots include any existing lots to codify our current interpretation of the existing section.
- Language of the current requirements for providing public sites and open space areas (Secs. 50-30 and 50-31) has been modified for clarity, but not significantly changed except that the language covering objection to required dedication was deleted because it's not needed; the applicant can make their case as part of review, and after decision, can file an appeal.
- Eliminated road design standards that are out of date such as: planning secondary streets to discourage use by nonlocal traffic; local bypasses around shopping centers; parallel streets with lots backing to major thoroughfares; and short culs-de-sac having terminal lots backing to major thoroughfares.
- Added provision that a subdivision with only one non-through road providing access must be limited to a maximum of 75 lots.
- Added minimum standard intersection spacing requirements for all road types, but retained the provision that the Planning Board may specify different spacing than the standard.
- The septic tier language was moved into the Water supply and sewage disposal facilities sections (50-24, 50-27)
- The requirement that public utilities be placed underground (50-40) was modified to apply to all subdivisions rather than basing it on the number of buildings, but language was added that allows the Planning Board to grant an exemption if it finds that underground placement is infeasible.
- Modified requirements for environmental review (Sec. 50-32) to clarify that a Forest Conservation Plan approval is required as part of approval of a preliminary plan.

- Modified the provisions for residential cluster subdivision (50-39) to eliminate language that is out of date and no longer necessary.

**Significant changes made in this Division include:**

- Added application processing and hearing schedule that conform with the new zoning ordinance requirements for site plan; including the requirement that a hearing date be established within 120 days of the acceptance of the application, with provisions for requesting extensions.
- Added new requirements for the timing of agency plan review so that the 120 day hearing schedule can be met.
- Added new provisions to explicitly state which public agency approvals are needed before the Planning Board may take action on a preliminary plan, and moved the review for conformance with the State's Sustainable Growth and Agricultural Preservation Act of 2012 (Sec. 50-35(e)) to the new technical review section.
- Added a list of specific findings that the Planning Board must make in order to approve a preliminary plan. The findings generally codify the findings made currently in Board resolutions, with additional language added to include a finding about the adequacy of roads.
- Removed sediment control provisions that are now covered by Chapter 19 (Sec. 50-35(j)). These included requirements that a preliminary plan approval be conditioned upon execution of an erosion and sediment control plan approved by the Board after consideration of recommendations from the Montgomery Soil Conservation District, that the permit for clearing and grading issued by the Department of Permitting Services (DPS) be in conformance with this plan, and that the Board could revoke a preliminary plan approval if a developer proceeded to clear and grade a site without a DPS permit.
- Review standards that form the basis for Planning Board findings (Secs. 50-24, 50-25, 50-26, 50-27, 50-28, 50-29, 50-30, 50-31, 50-32, parts of 50-35, 50-39, and 50-40) are now consolidated in a new Technical Review section.  
*Issue: The draft retains the existing provision that the Planning Board may find "that events have occurred to render the relevant master plan, sector plan, or urban renewal plan recommendation no longer appropriate." The County Council discussed, but rejected a similar provision for the master plan finding that is now required for site plans by the new zoning ordinance. Thus, the Planning Board will not be able to find that a master plan recommendation is no longer appropriate for projects that require both preliminary and site plan approval. Nonetheless, staff recommends retaining the provision in the subdivision regulations for the projects that only need preliminary plan review. In staff's opinion, the provision is needed because the development standards that apply to a preliminary plan that doesn't go to site plan will not be as flexible as those for a site plan.*
- Removed requirements for a separate resubdivision analysis from the Chapter.  
*After discussion prior to the public hearing, the Planning Board concluded that the general requirements for lot dimensions in Section 50.4.3.C.1.a provide a sufficient basis to judge the suitability of any subdivision, including a resubdivision, and opted to remove requirements for a separate resubdivision analysis from the Chapter.*
- Added new provisions for creating private roads to address what has become a common desire for their use. The provisions include:
  - Private roads created by subdivision must be platted in right of way parcels that are separate from adjoining lots to maintain the Board's ability to ensure adequate space for road related uses within subdivisions.
  - Private road right of way parcels, like a dedicated public right of way, must be platted to the full width of the right of way recommended for the applicable road classification in



**MONTGOMERY COUNTY PLANNING BOARD**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIR

August 11, 2015

The Honorable George Leventhal, President  
Montgomery County Council  
Stella B. Werner Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850

Re: Planning Board Recommendation on Transmittal to County Council for Introduction and Review of a Comprehensive Revision to the Montgomery County Code, Chapter 50 - Subdivision Regulations, affecting the transfer and subdivision of land within the Montgomery County Portion of the Maryland-Washington Regional District.

Dear Mr. Leventhal and Councilmembers:

On Thursday, July 23, 2015, the Montgomery County Planning Board voted to transmit the Comprehensive Revision to Chapter 50, the Subdivision Regulations, to the County Council. The effort to update and revise the Subdivision Regulations has been ongoing for over a year. The Planning Board reviewed the Planning Department staff ("Staff") draft of the Comprehensive Revision initially on Thursday, March 19, 2015 and authorized Staff to release the document for public review. On Thursday, April 30, 2015, the Planning Board held a public hearing at which time both oral and written comments on the Revision were accepted. The Planning Board held the public record open after the scheduled public hearing to receive additional comments. Worksessions were held on Thursday, June 18, 2015, Monday, July 20, 2015 and Thursday, July 23, 2015. The Board is pleased to be sending you this draft Revision; the work done to date represents a significant effort on this very important section of the County Code.

In reviewing the Comprehensive Revision, the Planning Board considered the recommendations of Staff as well as any commentary provided from all interested parties. Staff made substantial outreach efforts to other agencies, the community and local legal firms and engaged any party who wished to provide input or have more intimate discussions on the details of the Revision. The commentary provided from the handful of participants was welcomed and extremely helpful to the process, however, the overall community-wide interest was low.

The focus of the Comprehensive Revision was to modernize and clarify outdated language; improve the document's organization and ease of use; codify current interpretations; and ensure consistency with the recently adopted zoning ordinance. The Revision is not intended to reinvent the basic methodologies by which land has been subdivided. With every

modification, the Planning Board kept in mind the overarching goal of improving the efficiency in which development applications are reviewed.

While our efforts were not to radically overhaul the Subdivision Regulations, we believe some improvements were needed. The Planning Board has identified some of the most significant changes that may require further discussion with the County Council prior to adoption of the Revision.

The significant changes include:

- Addition of rules for interpretation and new defined terms (§50.2);
- New platting exceptions to permit construction and reconstruction of new detached dwellings as anticipated in the new zoning ordinance (§50.3.3.B.4);
- Modified application processing and hearing schedule timing for preliminary plans to conform with the new zoning ordinance requirements for site plan (§50.4.4.2.B);
- Added specific findings that the Planning Board must make in order to approve a preliminary plan (§50.4.4.2.D);
- Combined review standards that form the basis for Planning Board findings into a new technical review section (§50.4.4.3);
- Retained the Board's ability when making a determination of substantial conformance to a Master or Sector Plan, to find that events have occurred to render the relevant plan recommendation no longer appropriate if a site plan is not required (§50.4.4.3.A.1);
- Removed existing 50-29(b)(2) resubdivision requirements;
- Added new provisions to permit creation of private roads (§§50.4.4.3.C and 50.4.4.3.E), including the ability to create such roads in an easement only so that underground structures like a shared garage may be constructed (§50.4.4.3.E.4);
- Added new provisions for Administrative Subdivision Plans that permit new lots to be created in certain circumstances after approval by the Planning Director (§50.6);
- Added application processing and hearing schedule timing requirements for subdivision record plats (§50.8.8.2);
- Modified the waiver finding by removing the need to find that unusual circumstances and practical difficulties of the plan prevent full compliance with the chapter and replacing it with a finding that application of specific requirements of the chapter are not needed if the intent of the requirements are achieved (§50.9.9.3); and
- Modified provisions for bonding and surety to permit the Planning Board to require them for both public and private improvements, especially improvements to private streets (§50.10.10.2).



The outstanding issues are:

- Reaching consensus on the need for private streets in certain circumstances to facilitate the types of development anticipated by the zoning ordinance, and if that is achieved, establishing standards and procedures for creating, designing, constructing and maintaining private streets; and
- Re-examination of the Adequate Public Facilities Ordinance provisions in Chapter 50 in coordination with discussion on the next Subdivision Staging Policy.

#### Private Streets

It is evident in reviewing recent plan applications that the development community has a keen interest in furthering the use of private roads for public use within the urbanizing areas of the County. As professed by the building industry, private streets are needed to provide necessary flexibility in right-of-way width and road design that cannot be achieved under Chapter 49 to provide more desirable building design and such things as enhanced sidewalk, curb and crosswalk design features that promote pedestrian circulation. They also point out that private streets permit an overseeing management entity to retain control over maintenance of the roads rather than relying on the County to provide for it. The Planning Board has agreed with the design argument in several development projects and has approved private roads in public access easements, however, it has become obvious that provisions are needed in the Subdivision Regulations to address certain private road issues.

First, there is the issue of ensuring that private roads are designed and constructed properly. The existing provisions of Chapter 50 require private roads to be built to the structural standards of a tertiary street, and that the builder must have a registered engineer certify to the Department of Permitting Services (DPS) that the road has been designed to meet these structural standards and that all construction complies with the design. These provisions were written for the limited use of private cul-de-sacs anticipated by the previous zoning ordinance for large lot and rural cluster detached residential zones, and streets serving townhouse and multi-family residential parking lots. There is now much more of a desire to use private roads in the urbanizing areas of the county as part of mixed use development where higher classification roadways are anticipated by the Master Plan and the tertiary road structural standards are not appropriate. To address this, the proposed Revision requires that private roads be designed and constructed to the standards that are appropriate for the classification of the road with builder certification to DPS that this is done. However, DPS has stated that this is a problem because they are not authorized to review private roads under Chapter 49, and in most cases, they do not look at the ones that have been approved or track whether the certification has been provided.

Ideally, if consensus can be reached about the use of private roads in certain circumstances, the Planning Board believes that such roads should be reviewed by DPS and the Department

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of Transportation (DOT) who already have the professional engineering staff with the necessary expertise. Otherwise, if the Planning Board maintains authority over private roads, staff with the appropriate qualifications will need to be added to the Planning Department.

A second issue involved in the use of private roads is maintaining access to the public, especially when the roads are an integral part of the road network called for in a Master Plan. Therefore, in the instances where the Planning Board has approved private roads, they have been required to be placed in a public access easement. However, there has been some difficulty in getting DPS to accept these easements on the record plat. Planning Staff has been working with DPS and DOT to develop a standard easement document for this purpose but further discussion is needed.

A final issue involving private roads is how they are platted. The proposed Revision anticipates that private roads will generally be created, like a public road, in a road parcel that is separate from the adjoining lot(s) but not dedicated to the public. However, some recent plan approvals have demonstrated that such parcels are a problem if an underground parking structure crosses beneath the vertical plane of the road parcel. Although current subdivision provisions permit aboveground or underground parking facilities to cross a lot line, DPS has pointed out that this actually violates building code standards that require fire walls within structures, where such structures cross a lot line. To address this issue, developers in the urbanizing areas have proposed, and the Planning Board has approved, private roads created by a public access easement only, and not within a separate and distinct parcel. This option for these limited circumstances has also been added to the proposed Revision.

These issues need further discussion, but the Planning Board believes that the option to create private roads in certain circumstances is needed and, therefore, supports the proposed provisions.

#### Adequate Public Facilities

Several comments on the proposed Revision concerned the provisions for the determination of Adequate Public Facilities (APF) and the possible need for significant revisions, especially to the rationale by which the Planning Board extends aging APF validity periods to consider the prevailing economic climate that we now recognize as a major influence on the pace of new development. With the exception of adding provisions for extension of APF validity for mixed use projects, the proposed Revision retains the currently codified approach to both granting and extending APF approvals. However, given the age of these provisions and the recent Master Plan discussions on this topic it is reasonable to assume that the way the County assesses that public facilities are adequate, especially transportation related facilities, will be changing under the new Subdivision Staging Policy. If this occurs, it will likely mean further revision of the Subdivision Regulations.

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**BOARD RECOMMENDATION**  
**CERTIFICATION**

**This is to certify that the attached report is a true and correct copy of the technical staff report and the foregoing is the recommendation adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, at its regular meeting held in Silver Spring, Maryland, on Thursday, July 23, 2015.**

  
**Casey Anderson**  
**Chair**

