



MONTGOMERY COUNTY PLANNING DEPARTMENT
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB
02/18/10
Item #__

MEMORANDUM

DATE: January 4, 2010

TO: Montgomery County Planning Board

VIA: Rose Krasnow, Chief *RK*
Development Review Division

FROM: Catherine Conlon, Subdivision Supervisor *CC*
Development Review Division
301-495-4542

RE: Application of resubdivision criteria to non-residential uses

Introduction

This memorandum concerns the applicability of §50-29(b)(2) of the Subdivision Regulations, also known as the "resubdivision criteria." §50-29 is attached as Attachment One. The resubdivision criteria apply to "residential lots," and are intended to ensure that resubdivided lots are of the same character as surrounding residential lots in terms of lot size, shape, width, orientation, area, street frontage, and suitability for residential use. Since 1998, after receiving public comment and holding a hearing, the Planning Board interpreted that the resubdivision criteria apply to any lots that are residentially-zoned, as opposed to lots slated for residential use.

Interpreting Section 50-29(b) to apply to any resubdivision of a lot in a residential zone has created an almost insurmountable obstacle for institutional and other non-residential uses in residential zones. Because such uses almost always require more land area than surrounding residential lots, it is difficult, if not impossible, for the Board to find that a resubdivision for purposes of replatting a large residential lot is compatible with surrounding lots.

This is a question of some urgency, because there are several pending resubdivision applications before the Board. Some involve existing non-residential uses in residential zones proposed for expansion, and some involve new non-residential uses in residential zones. The purpose of the hearing on February 18, 2010, is for the Board to hold a full and open discussion in order to consider whether its previous interpretation and application of §50-29(b)(2) was correct.

Montgomery County Subdivision Regulations, Section 50-29

Section 50-29 of the County Subdivision Regulations deals with lot design, generally, to be applied in the Board's consideration of subdivision applications. Section 50-29(b) is titled "[a]dditional requirements for residential lots," under which §50-29(b)(2) lists the specific criteria upon which the Board's findings of fact must adhere in its consideration of a resubdivision application. That provision requires that the proposed new lots be of the same character as to (i) street frontage, (ii) alignment, (iii) size, (iv) shape, (v) width, (vi) area, and (vii) suitability for residential use.

Section 50-29(c) creates separate, less restrictive requirements for "[n]onresidential lots." It requires that the "[d]epth and width of lots reserved or laid out for commercial and industrial purposes be adequate for the off-street service and parking requirements needed by the type of use and development proposed."

The question before the Board is whether non-residential uses must go through a §50-29(b)(2) analysis, or whether the Board will consider an analysis under §50-29(c).

History: 1998 Hearing

On April 23, 1998, the Planning Board held a public hearing to discuss whether the resubdivision criteria apply to certain preliminary plan applications involving the consolidation of lots and found that they do so apply. The hearing then turned to the applicability of the resubdivision criteria to special exception uses in residential zones. Specifically, staff raised the concern that an assemblage of lots for special exception uses would rarely meet the resubdivision criteria since the resulting lot would necessarily be larger than the residential lots in the existing neighborhood.

After several hours of testimony, the Planning Board ultimately found that 1) the resubdivision criteria do apply to assemblages of lots, and 2) the resubdivision criteria apply to residentially zoned lots. A copy of the transcript of that hearing can be found on the Park and Planning website at www.montgomeryplanning.org/development/resub_policy.shtm.

Applicability and Effect of Section 50-29(b)(2) of the Subdivision Regulations on Non-Residential Uses

Based on the Planning Board's conclusion at the 1998 Hearing, any preliminary plan proposing to assemble or otherwise modify existing lots in a residential zone for a permitted, non-residential use must meet the resubdivision criteria or apply for and have the Board consider a waiver. Because non-residential uses are typically located on lots that are substantially larger than lots that contain residential uses, it is often not possible to find that lots that house such non-residential uses are of the same character as the surrounding residential lots as required by §50-29(b)(2) for approval. The inability of most applications of this nature to comply with §50-29(b)(2) of the Subdivision Regulations almost always leads the applicant to submit a request for waiver under §50-38. And approval of a waiver requires that the Planning Board find that practical difficulties or unusual circumstances exist that prevent full compliance with the requirements. Section 50-38 is attached as Attachment Two.

Staff Recommendation: The Planning Board should not require lots containing or proposed for non-residential uses in residential zones to comply with the residential resubdivision criteria.

We believe that the Planning Board's current policy to subject lots containing or proposed for non-residential uses to the residential resubdivision criteria is based on a misapplication of the Subdivision Regulations and is inconsistent with the plain language or the intent of the regulations.

Section 50-29 of the Subdivision Regulations provides requirements for lot design. Subsection (a) applies to all lots, subsection (b) applies to residential lots only, and subsection (c) applies to nonresidential lots only. It is subsection (b) that contains the requirement for analysis of the seven criteria for resubdivision. Therefore, the key to deciding when resubdivision analysis applies is in deciding whether in the title language in §50-29(b) - residential lots mean it applies only to lots for residential uses, or whether it means lots for any type of use on residentially zoned land.

We submit that the meaning of "residential lot" is a lot primarily containing residential uses, regardless of the zone, for the following reasons:

1. Section 50-29(c) of the Subdivision Regulations applies to nonresidential lots "reserved and laid out for commercial and industrial *purposes*." The language discusses purpose, or use of the lots, and not the zone in which they are located. If a *nonresidential* lot is one for *nonresidential* uses, then it stands to reason that a residential lot is one for residential uses.
2. The underlying reason for the heightened review of resubdivision over subdivision is that the existing community has a certain expectation that

the neighborhood as it exists will not be substantially altered. However, if a non-residential use is permitted, the community already has some heightened expectation of its appearance; and if required by special exception, the heightened regulatory review to determine compatibility is considered during that process. Any change, including expansion of such approved use, would also require an amendment to the special exception.

3. Throughout both the Subdivision Regulations and the Zoning Ordinance, the language contains the term “residentially zoned” lots or parcels when that is what is meant. Since “residential use” and “residential zone” do not mean the same thing, it would be an incorrect interpretation to use the terms interchangeably.
4. It is the Planning Board’s practice to evaluate resubdivisions for residentially used lots in the RDT zone according to the requirements for residential resubdivisions. But the RDT zone is an agricultural zone rather than a residential zone, so the term “residential lot” must be applied to use and not zoning. That is to say, if the term “residential lot” meant any lot in a residential zone, then residentially used lots in the RDT zone would not be subject to the resubdivision analysis prescribed in §50-29.
5. At least one of the resubdivision criteria makes little sense when applied to a non-residential use. The final resubdivision criterion is “suitability for residential use.” Because a non-residential lot is unlikely to be suitable for residential use in many respects, it would make little sense for the County Council to have intended to subject non-residential uses to this standard. Therefore, we would surmise that the Council did not intend the resubdivision criteria to apply to non-residential uses.

Next Steps

The Planning Board has scheduled a February 18, 2010, hearing to fully vet and discuss this issue. Interested parties must submit written testimony to the Planning Board no later than January 29, 2010, so that the Board is able to undertake a more thorough decision-making process.

Attachment One: §50-29 of the subdivision regulations
Attachment Two: §50-38 of the subdivision regulations

MONTGOMERY COUNTY CODE

Chapter 50

Sec. 50-29. Lot design.

(a) *General provisions.*

- (1) Lot Dimensions. Lot size, width, shape and orientation shall be appropriate for the location of the subdivision taking into account the recommendations included in the applicable master plan, and for the type of development or use contemplated in order to be approved by the board.
- (2) Lots To Abut on Public Street. Except as otherwise provided in the zoning ordinance, every lot shall abut on a street or road which has been dedicated to public use or which has acquired the status of a public road. In exceptional circumstances, the board may approve not more than two (2) lots on a private driveway or private right-of-way; provided, that proper showing is made that such access is adequate to serve the lots for emergency vehicles, for installation of public utilities, is accessible for other public services, and is not detrimental to future subdivision of adjacent lands. In multi-family and town house development, not subdivided into individually recorded lots, the board may approve more than two (2) lots or buildings on private roads or drives, provided there is adequate access from such roads or drives to a public street, as above.

The board may approve more than two (2) lots on private roads or driveways if such private roads and driveways are needed for the creation of new lots to be used as a one-family residence by a child of the property owner or the spouse of a child or by the parents of the property owner. This provision shall apply to only one (1) lot for each child, whether created for the child or the spouse of a child and only one (1) lot for the parents, whether created for one (1) or both parents.

Further, this provision shall apply only upon a finding by the board that such access is adequate to serve the lots for emergency vehicles, for installation of public utilities, and the lot is accessible for other public services, and is not detrimental to future subdivision of adjacent lands.

- (3) Side Lines. Side lines of interior lots shall be perpendicular to the street line, or radial to a curved street line, unless determined by the board that a variation from this rule will result in a better layout.
- (4) Double Frontage Lots. Double frontage lots, meaning a block having only one (1) tier of lots between two (2) streets or roads, shall not be approved except:
 - a. Where unusual topography, orientation or the size of the subdivision permit no other feasible way to subdivide; or
 - b. Where access to one (1) of the streets may be controlled by the board as provided in subsection (g) of section 50-25 or paragraph (4) of subsection (a) of section 50-28.

(b) *Additional requirements for residential lots.*

ATTACHMENT 1

- (1) *Pedestrian paths or Alleys.* If midblock pedestrian path or alley is provided in a residential subdivision, the lots adjoining the path or alley must be increased in width sufficient to provide for a side building restriction line running parallel to the path or alley 15 feet from it.
- (2) *Resubdivision.* 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.
- (c) *Nonresidential lots.* Depth and width of lots reserved or laid out for commercial and industrial purposes shall be adequate for the off-street service and parking requirements needed by the type of use and development proposed. (Mont. Co. Code 1965, § 104-18; Ord. No. 6-5, § 2; Ord. No. 6-207, § 3; Ord. No. 10-41, § 1; Ord. No. 11-28, § 1, Ord. No. 16-05, § 1.)

Editor's note –Section 50-29 is quoted in Remes v. Montgomery County, 387 Md. 52, 874 A.2d 470 (2005). Section 50-29 is interpreted in Capital Commercial Properties, Inc. v. Montgomery County Planning Board, 158 Md. 88, 854 A.2d 283 (2004). Section 50-29 [formerly § 104-18] is cited and quoted in part in Lee v. Maryland-National Capital Park & Planning Commission, 107 Md.App. 486, 668 A.2d 980 (1995).

MONTGOMERY COUNTY CODE

Chapter 50

Sec. 50-38. Waivers from this chapter.(a) *Authority of Board.*

- (1) The Board may grant a waiver from the requirements of this Chapter upon a determination that practical difficulties or unusual circumstances exist that prevent full compliance with the requirements from being achieved, and that the waiver is: 1) the minimum necessary to provide relief from the requirements; 2) not inconsistent with the purposes and objectives of the General Plan; and 3) not adverse to the public interest.
- (2) Large Scale Development or Preservation of Open Space, Forest and Tree Conservation, Environmentally Sensitive Areas, or Prevention of Soil Erosion. The standards and requirements of this Chapter may be modified by the Board if it determines that:
 - a. a plan and program for a new town, a complete community or a neighborhood unit will provide adequate public spaces and improvements for the circulation of traffic, recreation, light, air, and service needs of the tract when fully developed and populated, and that legal provisions to assure conformity to the plan are satisfactory; or
 - b. a variance will promote the preservation or creation of open space, forest and tree conservation, preservation of environmentally sensitive areas, or the prevention of soil erosion in the public interest. The Board shall also have the power to modify or vary the requirements of this Chapter where, in the opinion of the Board, the preservation or creation of open space, the prevention of soil erosion or the preservation of exceptional natural topography and trees worthy of preservation in the public interest will be best served thereby.
- (3) Moderate Price Development. Approval for such a subdivision shall not be granted until the Board shall have reviewed all of the plans of subdivision and development, including the dwelling units and community facilities to be constructed to ascertain the feasibility and practicability that the objectives of this variation from the requirements of the chapter will be achieved. In determining such feasibility and practicality the Board shall obtain assurances that any and all waivers required of other land development codes, rules and regulations shall have been granted by the appropriate authorities. The Board shall also determine and be satisfied that at least a substantial number of dwelling units in a proposed subdivision shall not exceed a sale price of twenty-five thousand dollars (\$25,000.00). When any such subdivision includes, abuts, or is in the immediate vicinity of any recorded subdivision or developed neighborhood then the Board may hold a public hearing on the proposed subdivision before approving same. Where a variation for an increase in density is requested in a town sector zone or planned neighborhood zone, the Board shall be satisfied that all increased numbers of dwelling units may be accomplished without adverse impact on the

school, water, road and sewer systems necessary to support the development of the affected property; shall be satisfied that all increased numbers of dwelling units shall not exceed a sale price of twenty thousand dollars (\$20,000.00); shall be satisfied that the increase in development of dwelling units shall provide for at least 0.75 people per acre on the whole zone plan; and shall increase dwelling units proportionately only to the maximum of an additional 1.5 people per acre on such zone plan.

(b) *Procedure for granting variations.*

- (1) **Written Request to the Board.** A request for a variation from this chapter shall be addressed to the board in writing, stating all facts warranting variation.
- (2) **Referral for Recommendations.** The Board must refer a copy of each request to the Chief Planning Engineer, the Department of Transportation, the Washington Suburban Sanitary Commission, and the Board of Education for investigation, report, and written recommendation before acting on the request. Any report and recommendation must be submitted to the Board within 30 days after the staff receives it, or the recommendation must be treated as favorable. A request for a variation, filed under this section, waives the time requirements in Sections 50-35 and 50-36 and extends the time for review for 45 more days.
- (3) **Resolution.** The decision of the Board shall be in the form of a resolution adopted by the Board by a majority of those voting; and a copy of said resolution shall be forwarded to each agency mentioned in paragraph (2) above.
- (4) **Conditions.** In granting a variation, the Board may require such conditions in lieu of full compliance as will, in its judgment, secure substantially the objectives of the requirements so modified and protect the public interest.
- (5) **General Considerations.** Notwithstanding the provisions herein, the Board shall not be authorized to vary or modify the provisions of Chapter 59 of this Code, the road construction code, the building code, health laws or other ordinances or regulations of the County. Pursuant to a moderate price development as contemplated in this Chapter, the Board and the County Council shall cooperate to achieve such waiver within their respective jurisdictions as may enhance the objectives, fulfillments and purposes of that development.

(c) *Board may require special conditions.* In granting a variation, the Board may require such conditions in lieu of full compliance as will, in its judgment, secure substantially the objectives of the requirements so modified and protect the public interest.

(d) *Nonwaiver of other ordinances.* Notwithstanding the provisions herein, the Board shall not be authorized to vary or modify the provisions of Chapter 59 of this Code, the road construction code, the building code, health laws or other ordinances or regulations of the County. (Mont. Co. Code 1965, § 104-27; Ord. No. 6-26; Ord. No. 6-123; Ord. No. 6-168; 1973 L.M.C., ch. 25, § 8; Ord. No. 12-16, § 1; Ord. No. 13-26, § 1; Ord. 13-57, § 6; Ord. No. 16-16, § 1.)