

PRINCE GEORGE'S COUNTY COUNCIL

COMMITTEE REPORT

2023 Legislative Session

Reference No.: CB-054-2023

Draft No.: 2

Committee: PLANNING, HOUSING AND ECONOMIC DEVELOPMENT

Date: 6/15/2023

Action: FAV (A)

REPORT:

Committee Vote: Favorable as amended, 4-0 (In favor: Council Members Ivey, Dernoga, Olson and Oriadha)

The Planning, Housing and Economic Development (PHED) Committee convened on June 15, 2023, to consider CB-54-2023. The PHED Committee Director summarized the purpose of the legislation and informed the Committee of written comments received on referral. As presented on April 25, 2023, Draft-1 of the bill amends the Zoning Ordinance standard review procedures for County zoning/development applications to enhance public understanding of an administrative body's decision by requiring an assessment of opposition arguments and testimony within the administrative record for these applications. CB-54-2023 was discussed in conjunction with CB-55-2023, a Subdivision Bill for the purpose of including a procedural requirement to incorporate a summary and assessment of all testimony, both offered in opposition to and support of a subdivision application, within the administrative record.

The Planning Board voted to support the bill with amendments in an alternate draft as explained in a June 8, 2023, letter to the Council Chairman with the following analysis:

“CB-54-2023 and CB-55-2023 are essentially the same bill but for different Subtitles; the Planning Board analysis will address both bills. Although well-intentioned and in accordance with common practice of peer jurisdictions to summarize and address pertinent comments and arguments raised by the opposition to development applications, as drafted CB-54-2023 and CB-55-2023 are overly broad and would result in significant additional work while raising potential concerns as to the relevance of opposition testimony to the review and decision standards of any given development application.

The Planning Board notes that technical staff reports, and Planning Board resolutions already include summaries of opposition and how pertinent comments have been addressed, without the need for codification. All parties agree that such summaries and responses are important. However, should the Council wish to proceed to codify these summaries, the Planning Board recommends several revisions to better clarify the intent of the bills to directly address concerns. The Planning Board has prepared two proposed Alternate Draft 2 bills that incorporate our recommendations.

As drafted, CB-54-2023 will affect all development applications that require the preparation of a

technical staff report by requiring these reports to include summarization of opposition. CB-55-2023 will affect all subdivision applications in which a technical staff report is prepared.

Additional summaries would be required for any development application subject to a recommendation by the Planning Board or Zoning Hearing Examiner, to any development application where the District Council, Planning Board, Board of Appeals, or Zoning Hearing Examiner makes the final decision, and to any subdivision application where the Planning Board makes the final decision.”

The Zoning Hearing Examiners (ZHE) submitted a May 17, 2023, memorandum to the PHED Committee Director noting the following concerns with the bill as drafted:

“The amendment to Section 27-3406 found on page 2 of the bill will require the Technical Staff to summarize each issue raised by the opposition and make it part of the record. The Zoning Ordinance requires individuals to express in writing to the Zoning Hearing Examiner, or in person at a hearing, their intent to become Persons of Record. Once they become Persons of Record, they can testify and note their position on a particular application. Most importantly, they do these things under oath, where credibility may be weighed, and where their testimony is subject to cross-examination. It would, therefore, be improper to allow the “opposition“ (who may or may not become Persons of Record) to submit their concerns at the time of Technical Staff Review and have Staff include them in the record. As a practical matter, the Technical Staff may not even be aware of any opposition when it prepares its report. Finally, if the language is included, it should be revised to direct staff to gather any lay statements since unopposed individuals sometimes wish to have questions addressed or request that certain conditions be imposed.

When the ZHE reviews an application, it acts as an adjudicative body. Its findings of fact must address how an application does or does not comply with all applicable criteria. (Bucktail LLC v. County Council of Talbot County, 352 Md 530 (1999)) In other words, the findings must include the facts relied upon in reaching the conclusion. The ZHE generally summarizes all credible, relevant evidence presented by Applicant and its witnesses, those opposed to the request and those who simply wish to testify about the request. It then provides a conclusion that makes specific reference to all relevant evidence (or lack thereof) and addresses the criteria that must be satisfied. The ZHE also prepares the record of exhibits, an exhibit list that describes each, and transcripts of all hearings held on a particular application. Since COVID and the resulting pivot to a virtual world, the ZHE hearings have been streamed and taped, effectively memorializing all arguments and testimony of all who appear at the hearings. Thus, the spirit of the bill is already addressed, and requiring a specific listing of all exhibits submitted by the opposition and a summary of each person’s objections and argument would be redundant. It could also raise an argument that a decision is illegally based on plebiscite (that is, on the number of individuals for or against the request).

Nonetheless, if the sponsors wish to add the additional language in Sections 27-3408 and 27-3409, the bill should be revised as follows (using the correct terminology for the appropriate section):

‘When recommending/making a decision, the advisory/decision-making board/body or official shall include a summary of the testimony and evidence presented by all parties and persons of record in each evidentiary case that responds to the objections and arguments made.’

This clarifies that the summary must address everyone’s position, which would be required under general tenets of fairness and due process.”

The Council's Zoning and Legislative Counsel summarized revisions in a Proposed Draft-2 (DR-2) prepared at the bill sponsor's request as follows:

27-3406. Staff Review and Action

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(c) Application Subject to Staff Recommendation

(1) Technical Staff Report

Except for variances decided by the BOA (Section 27-3613, Variance) and appeals to the BOA (Section 27-3616, Appeal to Board of Appeals), if an application is subject to a decision by the District Council, Planning Board, or ZHE in accordance with Section 27-3200, Summary Table of Development Review Responsibilities, the Planning Director shall, following completion of staff and agency review, prepare a Technical Staff Report that:

(E) FOR DEVELOPMENT APPLICATIONS SUBJECT TO EVIDENTIARY HEARINGS IN SECTIONS 27-3412 AND 27-3413 OF THIS CODE, summarizes any written communications RELEVANT TO THE REVIEW STANDARDS APPLICABLE FOR THE APPLICATION TYPE provided by the opposition; AND RECEIVED BY THE PLANNING DIRECTOR AT LEAST ONE (1) WEEK PRIOR TO THE PUBLICATION OF THE TECHNICAL STAFF REPORT. Such summary shall INCLUDE THE PLANNING DIRECTOR'S RESPONSE
~~respond~~ to the objections and arguments made by the opposition and shall be made part of the record. If there are objections and arguments made by multiple people or organizations in opposition, the ~~Technical Staff~~ PLANNING DIRECTOR shall summarize each separate issue raised instead of addressing each individual person or organization. THE SUMMARY SHOULD ALSO COMMENT ON OBJECTIONS AND ARGUMENTS MADE BY THE OPPOSITION THAT, WHILE NOT RELEVANT TO THE REVIEW STANDARDS APPLICABLE FOR THE APPLICATION TYPE, WOULD BE RELEVANT TO OTHER APPROVALS REQUIRED IN THE DEVELOPMENT PROCESS.

27-3408. Review and Recommendation by Advisory Board or Official

(a) General

(2) When recommending a decision FOR A DEVELOPMENT APPLICATION SUBJECT TO AN EVIDENTIARY HEARING IN SECTIONS 27-3412 OR 27-3413 OF THIS CODE, the advisory board or official shall include a summary of the ~~record~~ ORAL AND WRITTEN testimony SUBMITTED BY THE OPPOSITION THAT IS RELEVANT TO THE REVIEW STANDARDS APPLICABLE FOR THE APPLICATION TYPE. ~~(including exhibits~~

by reference) by the opposition in each evidentiary case. Such summary shall respond to the objections and arguments made by the opposition and shall be made a part of the record. THE SUMMARY SHOULD ALSO COMMENT ON OBJECTIONS AND ARGUMENTS MADE BY THE OPPOSITION THAT, WHILE NOT RELEVANT TO THE REVIEW STANDARDS APPLICABLE FOR THE APPLICATION TYPE, WOULD BE RELEVANT TO OTHER APPROVALS REQUIRED IN THE DEVELOPMENT PROCESS.

27-3409. Review and Decision by Decision-Making Body or Official

(2) ~~In making its decision~~ WHEN MAKING A FINAL DECISION ON A DEVELOPMENT APPLICATION SUBJECT TO EVIDENTIARY HEARING PROCEDURES IN SECTIONS 27-3412 OR 27-3413, the decision-making body or official shall include a summary of the ~~record~~ ORAL AND WRITTEN testimony (including exhibits by reference) by the opposition in each evidentiary case. SUBMITTED BY THE OPPOSITION THAT IS RELEVANT TO THE REVIEW STANDARDS APPLICABLE FOR THE APPLICATION TYPE. Such summary shall respond to the objections and arguments made by the opposition.

Zoning and Legislative Counsel also noted additional amendments on Page 3, Line 1, and Line 29, to change RELEVANT to PERTINENT and revisions to the bill title on Page 1, lines 2-6 as necessary to reflect other revisions in Proposed DR-2.

Maurene McNeil, Chief Zoning Hearing Examiner, was present to comment on remaining concerns with the alternate drafts that only require a summary for those in opposition, but not those in support and also as explained in the Zoning Hearing Examiners' June 8, 2023, memorandum as follows:

“The revisions to Section 27-3406 in Draft 2 require the Planning Director to include a summary of the objections and arguments made by the opposition that are relevant to the review standards applicable to the application. “Relevancy” is a legal finding to be made by the trier of fact. It cannot be made by the Planning Director, who may or may not be an attorney, and is not the trier of fact. The revisions also require the Planning Director to summarize objections and arguments that are *not* relevant to the application but might be relevant to other approvals. Since the trier of fact may only admit evidence that is relevant to the application under consideration, it would be improper to require the Planning Director to include the arguments/objections of the opposition on some other request.

Similar revisions were added to Section 27-3408. The trier of fact must also include a separate summary of the oral and written testimony submitted by the opposition that is relevant to the review standards. The Zoning Hearing Examiners currently discuss all oral and written testimony of all witnesses, although we may not always mention the names of those testifying for the sake of brevity. We are not opposed to this language, (except for the requirement that we only do this for the opposition.) We are opposed to the revision that requires a summary of objections and arguments made by the opposition that is not relevant to the review standards for the application because we are required to only consider relevant evidence and because we only have jurisdiction to hear the particular application pending before us.

In closing, the bill, as drafted, might be confusing and could lead the parties to believe they have the right to put in evidence that is not within the parameters of the trier of fact's jurisdiction or that is not relevant and cannot, therefore, be the basis for the ultimate decision/recommendation."

Sakinda Skinner, County Council Liaison, stated that the County Executive is in support of the legislation. Ms. Skinner observed that the Agenda Item Summary for companion legislation to this bill, CB-055-2023, addresses the ZHE's concern of the variety of comments to be weighed and assessed: "[t]his bill proposes to include a procedural requirement to incorporate a summary and assessment of all testimony, both offered in opposition to and support of . . . [an] application, within the administrative record."

The Office of Law finds CB-54-2023 to be in proper legislative form with no legal impediments to its enactment.

Council Chair Dernoga, the bill sponsor, suggested that Zoning and Legislative Counsel include additional revisions in Proposed DR-2 to address the ZHE's comment that the summary should also include those in support of a development application; and directed that the legislative history for CB-054-2023 incorporate the explanatory language within the Agenda Item Summary for CB-055-2023, as referenced by the County Council Liaison.

After discussion, on a motion by Council Chair Dernoga, seconded by Council Member Olson, the Committee voted favorably on CB-54-2023 Proposed DR-2 including the additional revisions.