

**Office of the County Attorney  
Montgomery County, Maryland**

**MEMORANDUM**

September 2, 1997

TO: Robert C. Hubbard, Director  
Department of Permitting Services

FROM: A. Katherine Hart *A. K. Hart*  
Senior Assistant County Attorney

RE: Sidewalk Waivers

You have requested our advice concerning the granting of sidewalk waivers according to the standards set forth in Section 49-43 (b)(1) of the Montgomery County Code 1994, as amended, as well as certain related issues pertaining to sidewalk requirements.

Questions Presented

You presented the following questions for response:

- (1) How much discretion does DPS have to waive sidewalks under the current laws, and may a sidewalk waiver be granted informally during the preliminary subdivision plan review process? How much leeway does DPS have to inject engineering judgment or common sense into the process when you receive a formal waiver request, rather than evaluating the request solely based on the standards established in Section 49-43 (b)(1)?
- (2) Can DPS charge "in lieu of" fees, when sidewalks are waived, with the "in lieu of" fees directed to the Sidewalk Construction Program (CIP #506747)?
- (3) DPS believes that the authority for sidewalk waivers on tertiary streets should not be vested with the Planning Board. In order to give this authority to DPS, would this require a change to Chapter 50 of the County Code?
- (4) The County Code is silent with respect to appellate authority for sidewalk waivers under Section 49-43 (b)(1). DPS is seeking clarification on whether the Director's decision on sidewalk waivers is final, and whether the Board of Appeals has appellate authority, and if so, what is the appeal time?

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### Background

In 1992, the County Council adopted legislation which requires sidewalks on lots that: 1) front on public roads; 2) are located in residential zones; and 3) have a minimum net lot area of 25,000 square feet or less. This sidewalk requirement is subject to certain exceptions set forth at Section 49-35(e) of the Montgomery County Code 1994, as amended.<sup>1</sup> DPS has the authority to grant sidewalk waivers according to the standards set forth in Section 49-43 (b)(1). The Planning Board has the authority to waive the sidewalk requirements on tertiary streets under the Subdivision Regulations. See Section 50-26 (h) (3).

Further, Section 50-24 (a) of the Subdivision Regulations provide that "the ... sidewalks ... in each new development must be constructed by the subdivider or developer under the specifications of the road construction code [Chapter 49] or the requirements of a municipality, whichever is applicable. Sidewalks in connection with a tertiary street must be constructed in accordance with Section 50-26 (h) of this chapter."

The requests to DPS for sidewalk waivers have become more frequent, especially for small infill type projects in which one or two lots are being subdivided in an older neighborhood where there are currently no sidewalks. In some cases, requiring sidewalks for these infill projects would result in a "sidewalk to nowhere" and be out of character with the neighborhood.

### Analysis

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<sup>1</sup> Section 49-35 (e) of the Montgomery County Code 1994, as amended provides that:

Where a lot or lots front on a public road sidewalks and curbs and gutters must be installed, except as provided in the next sentence. Any requirement to install sidewalks or curbs and gutters on any residential road, service drive, marginal access road, or dual lane road (as those terms are used in Section 49-34) does not apply to a road fronting on any lot in a residential zone where the minimum net lot area for a one-family detached dwelling is larger than 25,000 square feet, unless the Planning Board finds, as a condition of approval of a preliminary subdivision plan or site plan, that sidewalks or curbs and gutters at that location are necessary to allow access to ...

certain persons and facilities, assuming that certain other conditions have been met. This provision makes clear that the general rule is that sidewalks are required for new development where a lot fronts on a public road and is 25,000 square feet or less.

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#### QUESTION 1

Section 49-43 provides that the Director of DPS has limited waiver authority over the sidewalk requirement. Section 49-43 (b) (1) requires that the Director of DPS must use the following standards for granting or denying a waiver for sidewalks:

Upon a finding that the lots abutting the right-of-way are unimproved or that the street was lawfully graded prior to August 15, 1950, and the terrain is so steep and uneven that the grading for sidewalks cannot be done except at excessive cost, or that houses or buildings abutting the right-of-way which were constructed prior to August 15, 1950, are so situated and the property upon which such houses or buildings are located is so graded that the construction of sidewalks is undesirable, the waiver may be granted. Notwithstanding the above, upon a finding that the street involved is a primarily residential road or an arterial road or that the sidewalks which are the subject of the application are necessary or desirable to provide safe access for pedestrians, the waiver may be denied.

I interpret this provision as follows:

The Director may grant a sidewalk waiver if the waiver application meets one of the following requirements:

- A. 1) lots abutting the right-of-way are unimproved or the street was lawfully graded prior to August 15, 1950; and  
2) the terrain is so steep and uneven that the grading for the sidewalks cannot be done except at excessive cost; or
- B. 1) the houses or buildings abutting the right-of-way were constructed prior to August 15, 1950; and  
2) the property upon which the houses or buildings are located is so graded that the construction of sidewalks is undesirable.

Even if the Director finds the conditions in either A. or B. above exist, the Director may deny the sidewalk waiver if the Director finds that:

- 1) the street involved is a primarily residential road or an arterial road; or
- 2) the sidewalks which are the subject of the application are necessary and desirable to provide safe access for pedestrians.

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As can be seen, Section 49-43 does not provide the Director with much discretion to grant a sidewalk waiver.

Nor may the DPS staff waive informally the sidewalk requirements of the road construction code at the time of preliminary subdivision plan review, because Section 49-35 (e) of the road construction code and Section 50-24 (a) of the Subdivision Regulations require that sidewalks must be built under certain conditions, unless a formal waiver has been granted pursuant to Section 49-43.

The Director of DPS should use common sense and good engineering judgment when deciding a sidewalk waiver request, but only in the context of applying the standards set forth in Section 49-43 (b)(1). For example, the Director may certainly use common sense and good engineering judgment to determine if the construction of a sidewalk is "necessary and desirable to provide safe access for pedestrians."

The waiver standards of Section 49-43 (b)(1), of course, could be amended to provide the Director greater leeway to waive the sidewalk requirement based exclusively on the basis of good engineering practices or some other appropriate safety standard. Another alternative to this approach may be to amend the law to provide the Director, as part of the preliminary subdivision plan review process, the authority to waive the sidewalk requirement based on good engineering practices or some other appropriate safety standard.

In summary, the Director of DPS has limited discretion to grant sidewalk waivers under the current law, and the DPS staff may not informally waive the sidewalk requirement at preliminary subdivision plan review.

## QUESTION 2

Your second inquiry pertains to the authority of DPS to charge an "in lieu of" fee when the sidewalk requirement has been waived, with the fee to be directed to the Sidewalk Construction Program (CIP #506747). You have indicated that you understand that charging this kind of fee would require an amendment to Chapter 49 of the County Code. It is my understanding that the "in lieu of" fee would not be used to fund sidewalks in the waiver area, but would be used to fund sidewalk construction in unrelated areas of the County.

The first inquiry in this regard is whether authority exists for the County to charge this type of fee under its police powers. There is a distinction between the imposition of a fee for regulatory purposes and the imposition of a charge for revenue purposes. A regulatory measure may produce revenue, but in such a case the amount must be reasonable and have some definite relationship to the regulatory purpose of the Act. A revenue measure may provide for regulation, but if the raising of revenue is the primary purpose then it will be considered a tax. Eastern Diversified Properties, Inc. v. Montgomery County, 319 Md. 45, 53, 570 A.2d 850 (1990). "Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper,

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imposed by virtue of the police power; but when it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax." Id. 319 Md. at 53.

Therefore, an "in lieu of " fee may not be required as part of a sidewalk waiver in Chapter 49, since the fee appears to be strictly a revenue raising measure that does not meet the regulatory fee requirements. However, our preliminary review suggests that the "in lieu of " fee may be imposed as an excise tax under the County's taxing authority.

### QUESTION 3

You have pointed out that Section 50-26 (h)(3) of the County Code provides that: "Sidewalks must be provided on both sides of a tertiary street unless the Planning Board waives the requirement for one or both sides of the street, based upon a finding that pedestrians will be able to safely use the roadway." This section of the County Code gives the authority for sidewalk waivers for tertiary streets to the Planning Board. If DPS desires to have this waiver authority rather than the Planning Board, then an amendment to both Chapters 49 and 50 of the County Code would be necessary to give this waiver authority to DPS.

### QUESTION 4

Your last inquiry pertains to whether the decision of the Director of DPS concerning a sidewalk waiver request is final, or whether the County Board of Appeals has jurisdiction over an appeal from the Director's sidewalk waiver decision, and if so, what is the appeal time ? There is a limited appeal provision under Section 49-39A which provides for an appeal to the County Board of Appeals from the issuance of a stop-work order or the imposition of additional conditions on work for which a permit has been issued under Section 49-39. In addition, Section 2-112 (a) (31) of the County Code provides for an appeal to the Board of Appeals concerning permits for grading and construction of roads, sidewalks, and curbs. It then cross-references that the Board of Appeals hears and decides all appeals taken under Section 49-39A. These appeal provisions do not appear to apply to the grant or denial of a sidewalk waiver by the Director

Accordingly, the decision of the Director under Section 49-43 (b)(1) to grant or deny the requested sidewalk waiver is a final decision. There is no authority under either Chapter 49 or the Board's authority to hear appeals under Section 2-112 which indicates that the County Board of Appeals has appellate jurisdiction over the Director's sidewalk waiver decision. The Board of Appeals, however, has jurisdiction to hear an appeal from the Director's decision to require sidewalk construction. Therefore, the Board of Appeals is not authorized to hear or decide any appeal from a decision of the Director concerning a sidewalk waiver request. The only appellate recourse appears to be the filing of an action in the Montgomery County Circuit Court.

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Conclusion

The Director of DPS has limited authority under existing law to grant a sidewalk waiver. Further, DPS may not collect an "in lieu of" fee if a sidewalk waiver is granted, unless it is authorized as an excise tax. Amendments to Chapters 49 and 50 of the County Code are necessary to remove the authority of the Planning Board to grant sidewalk waivers for tertiary streets and to grant this waiver authority to the Director of DPS. The decision of the Director to grant or deny a sidewalk waiver is final, and the Board of Appeals does not have jurisdiction over an appeal from the Director's sidewalk waiver decision.

If you have any questions regarding this opinion, please contact me.

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