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June 4, 2011

**VIA EMAIL**

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**Re: Adoption of the Municipal Growth Element and Comprehensive Plan—The Power to Approve and Change Recommendations of the Planning Commission**

Dear Mayor Rockinberg and Members of the Town Council:

I have been asked to provide an opinion as to the process relative to the adoption of the Municipal Growth Element (“MGE”), and the “master” or comprehensive plan in general. I have been asked by the Mayor, the Council and specifically Councilman Pyatt to render an opinion as to whether it is the Town Council or the Town’s Planning Commission that has the ultimate power in approving a master plan, including the MGE, and whether the Town Council



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has the power to substantially change the recommendations of the Planning Commission. Councilman Pyatt had addressed similar questions to counsel for the Maryland State Department of Planning given apparent concerns about certain zoning changes that the MGE might propose, as I understand it. Although counsel for the Maryland State Department of Planning had indicated by return email that it would be better practice to refer back to the Planning Commission for review and recommendation any proposed changes that the Town Council might make, a statement with which I agree, her return email communication did not directly address Councilman Pyatt's legal question. It is my understanding that I was not only charged with providing my own opinion with respect to the Town Council's powers in these regards, but to also write to the Maryland Attorney General's Office to obtain a legal advice on the issue, if that office would so oblige. Toward that end, please find attached in Word format a letter to the Maryland Attorney General's Office to be sent under the Mayor's signature. The Attorney General's Office has a program of assistance to local governments. Guidelines adopted for this program require that the request be sent by the Mayor or President of the Council on behalf of the entire Council and must attach a copy of the legal opinion from the municipality's legal advisor. Therefore, this letter should accompany the request.

The critical sections regarding the adoption of an original comprehensive plan, amendments thereto and the MGE are found in the Maryland Code, Article 66B, Section 3.05-3.08. It is Section 3.05 that addresses the MGE, as well as other elements of the comprehensive plan. The MGE is to include consideration of such things as anticipated future growth outside the existing boundaries, past growth patterns, the capacity of land areas available for development within the municipal boundaries, the land area needed to satisfy demand for development at densities consistent with the long-term development policy, public services and infrastructure needed to accommodate future growth, among other considerations.

There is no legal requirement that the MGE necessarily address proposed zoning changes, at least not with specificity, understanding that the MGE might well imply changes in zoning depending on areas designated for various types of growth. I also realize that since adoption of House Bill 1141, certain municipal action in terms of annexation and granting of special exceptions, for example, must have greater consistency with a municipality's comprehensive plan than before, although master plans may be changed more frequently than the mandated six year review pursuant to Article 66B, as long as the appropriate procedures are followed. Art. 66B, Section 3.05(b)(2) ("At least once every 6 years, each planning commission shall review and if necessary revise or amend the local plan . . ."). It should also be pointed out that neither the MGE nor the master plan themselves put into effect zoning changes, as counsel to the Maryland Department of Planning stated in her April 14, 2011 return email to Councilman Pyatt. The MGE and the master plan are instead planning documents. *Washington County Taxpayers Ass'n, Inc. v. Board of County Commissioners of Washington County*, 269 Md. 454, 455-56 (1973) (discussing the difference between planning and zoning).

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Turning to the question presented, as to the Comprehensive Plan in general, Section 3.05 states “[a] Planning Commission shall make and approve a plan *which the Commission shall recommend to the local legislative body* for adoption [emphasis added].” Two sections that were *not* amended by House Bill 1141 are Article 66B, Sections 3.06 through 3.08. Section 3.06 states that when a local jurisdiction first adopts zoning powers, “the Planning Commission shall *recommend* the boundaries of the various original districts and appropriate regulations to be enforced in those districts [emphasis added].” That Section goes on to state that the Planning Commission shall make a preliminary report and hold at least one public hearing before submitting its final report. Subsection (a)(3) states that a “local legislative body” may not hold a public hearing or take action until it has received the final report of the Planning Commission.

Furthermore, Section 3.07 states that a Planning Commission may “recommend” adoption of a whole plan, successive parts of a plan or any amendment to the plan. That section goes on to state that the Planning Commission shall provide copies of the recommended plan and all amendments to the plan, to adjoining jurisdictions, and essentially hold a hearing.

Section 3.08 states that “if a *local legislative body* has adopted a whole plan or a plan for one or more geographic sections or divisions of the local jurisdiction, no building, structure or utility may be constructed or authorized in the jurisdiction without submission to the Planning Commission. Section 3.08(a). That section goes on to state that if a local legislative body or other body having jurisdiction fails to act within 60 days after the date of submission of the “*recommendation*” of the Planning Commission, the local legislative body shall be considered to have concurred with the recommendation of the Planning Commission.

Finally, Subsection (2)(ii) to Section 3.08 states:

The local legislative body shall adopt the plan as a whole or for one or more major geographic sections or division of the jurisdiction and further shall adopt any amendment or extension thereof or addition thereto.

In *Washington County Taxpayers Ass’n*, 269 Md. 454, Maryland’s highest court, the Court of Appeals, addressed whether there had been adequate notice and an adequate public hearing held by the Washington County Planning and Zoning Commission before adoption of the Washington County Comprehensive Plan. In holding that both the notice and hearing were adequate, the Court stated the following, which I think to be instructive here:

It must be borne in mind that the planning commission was not the legislative body. Insofar as this plan was concerned it had one function and only one function, to devise and to transmit to the county commissioners the best possible plan for Washington County . . . . It was not the function of the commission to determine whether there should be a

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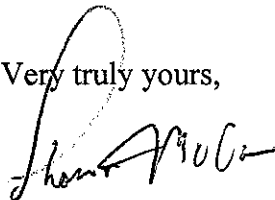
plan . . . . If the appellants wished to oppose adoption of this particular plan or, notwithstanding the earlier decision of the legislative body to formulate and adopt a plan, they still wished to oppose adoption of any plan, then the place for such opposition was before the legislative body, not the planning commission.

*Id.*, 269 Md. at 464.

Therefore, it is my opinion based upon the statutory language and the case law that as between the Planning Commission and the Town Council, the ultimate say with respect to approval of the MGE, or the Comprehensive Plan in general or any part thereof, lies with the Town Council and not the Planning Commission. Presumably, this implicitly permits the Town Council in the end to make any changes to the recommendations of the Planning Commission that a majority of the Council deems necessary and appropriate, though again it is probably good practice to submit major changes to the Planning Commission for comment before adopting them. It should also be remembered that pursuant to Art. 66B, Section 3.05(e), adoption of the MGE requires significant interaction and input from Frederick and Carroll Counties.

We will see what guidance the Maryland Attorney General's office provides.

Very truly yours,



Thomas V. McCarron  
Town Attorney  
Town of Mt. Airy, Maryland