

# Does Your City or Town Need Zoning Approval to Develop Land for a Public Building or Facility?

By Kevin J. Best, Esq.

This article is written primarily for those cities and towns in Prince George's and Montgomery Counties that do not currently possess their own planning and zoning authority. However, the discussion of the Mandatory Referral statutes described below generally applies to all zoning authorities throughout the State.<sup>1</sup> For many local governments in Maryland, the law typically exempts a local government's public<sup>2</sup> facilities and projects from the regulations found in the local zoning code. However, a local government has the authority to make those zoning regulations applicable to its own activities despite the exemption.

## Zoning Immunity Doctrine

The reason a government's use of land is typically immune from local zoning regulations is based on the same rationale articulated for sovereign immunity. Sovereign immunity originates from the English common law concepts that (1) the "King can do no wrong" (from the time it was thought that kings ruled by divine right and that all rights flowed from the sovereign); and, (2) that there can be no legal right as against the authority that makes the law on which the right depends.

Under Maryland law, State owned property used for public purposes is not subject to the controls and restrictions of local planning and zoning authorities, absent a specific grant of authority by the General Assembly.<sup>3</sup> Neither are a local government's public facilities generally subject

to planning and zoning control by another zoning authority.<sup>4</sup>

Generally, counties and municipalities are immune from the zoning authority wielded by another local government.<sup>1</sup> An exception to this rule applies to regulations governing historic districts since historic district zoning regulations primarily serve to protect unique historic structures and do not typically prohibit specific uses within the district.<sup>2</sup> According to the Attorney General of Maryland:

The application of a traditional municipal zoning ordinance to property owned by a county could interfere significantly with a county's ability to establish facilities or uses needed to carry out the county's functions. For example, the zoning ordinance amendments proposed by the Town of Poolesville would, if valid, appear to permit the Town's Commissioners to prevent Montgomery County from establishing a governmental facility if the Commissioners disagreed with the County's determination of the need for the facility. Thus, the proposed amendments could lead to disruption of the County's ability to carry out its functions.<sup>3</sup>

Conversely, the same argument could be made regarding a county's attempts to assert land use control over a municipal corporation. Municipal governments are usually not beholden to other local governments and, relative to counties, are legally considered co-equal "creatures of the State."<sup>4</sup>

<sup>1</sup> Md. Code Ann., Article 66B, §3.08 and Article 28, §7-112.

<sup>2</sup> As opposed to proprietary uses; for example, the building and maintenance of a public park or courthouse has been held by the courts to be a governmental (public) function, while construction and maintenance of public roads, garbage removal and sewers have been held to be proprietary (corporate) activities.

<sup>3</sup> *Board of Child Care v. Harker*, 316 Md. 683, 561 A.2d 219 (1989); *City of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977), *City of Baltimore v. State Dep't of Health and Mental Hygiene*, 38 Md. App. 570, 381 A. 2d 1188 (1978).

<sup>4</sup> 73 Opinions of the Attorney General 238 (1988). See also 57 Opinions of the Attorney General 121, 125 (1972).

<sup>5</sup> See 20 Op. Atty Gen. Md. 244 (1972) (stating that regulation of governmental uses may constitute a restraint upon the free exercise of the police powers). Similarly the federal government (e.g. the U.S. Postal Service) normally is not subject to local regulation due in large part to the Supremacy Clause of the U.S. Constitution.

# Mandatory Referral

As stated above, land used for a public purpose is generally immune from local planning and zoning control. For example, if the State of Maryland (or one of its political subdivisions) wished to build a new courthouse or maintenance facility in the City of Hyattsville, the local zoning authority known as the Maryland-National Capital Park and Planning Commission (M-NCPPC), would have no power to deny this use. However, despite this immunity, a mandatory courtesy is statutorily afforded local planning bodies in Maryland to permit their review of construction plans for facilities or buildings of a public entity. Furthermore, the governing body of the referral entity has the authority to overrule any disapproval of the proposed facility by the local planning body under Mandatory Referral.

In the example above, the Mandatory Referral provision of Article 28, §7-112 of Md. Code Ann. serves to allow the M-NCPPC to disapprove, but not altogether prevent, the construction of public facilities over which local planning and zoning authorities would normally have no authority. The applicable language of the statute is as follows:

No road, park, or other public way or ground, no public (including federal) buildings or structures, and no public utility, whether publicly or privately owned, shall be...constructed in the regional district until and unless the proposed location... thereof has been submitted to and approved by the Commission. In case of disapproval, the Commission shall communicate its reasons to the body or official proposing to construct... such...structure, or utility. Thereupon the board, body or official in its discretion may overrule the disapproval and proceed.<sup>1</sup>

The Mandatory Referral Statute (§7-112) expressly mandates that the M-NCPPC adopt uniform mandatory referral review standards to be followed in reviewing changes

to public property located in the regional district. The Montgomery County Uniform Standards for Mandatory Referral Review were officially adopted on April 19, 2001 and subsequently twice amended by the Montgomery County Planning Board in its role as "the Commission" under the Regional District Act (Art. 28).<sup>2</sup> The Prince George's County Planning Board has yet to adopt similar review standards.

## Conclusion

Finally, the answer to the question posed in the title to this article is typically, no. Mandatory Referral requires the public entity to submit plans in accordance with adopted procedures, but the final decision of the planning body is not binding on the applicant. Since the 1930's when Mandatory Referral was first enacted, it has almost been forgotten by municipal officials (along with the zoning immunity doctrine) in much of the State and especially in Prince George's County, where 17 percent of the State's municipal corporations are located.

My research reveals that the municipal corporations in Prince George's County and elsewhere have often been unaware of or have chosen not to exercise their rights under the zoning immunity doctrine and Mandatory Referral. However, if the State of Maryland, or a municipal government for that matter wishes to build an office building, police station, city hall, or public works facility, the local zoning authority would be prevented from denying these "public purpose" land uses without additional authority from the General Assembly of Maryland. If this were not the case, one local government (or agency) could thwart the duly delegated powers of another local government. ■

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<sup>6</sup> See *Annapolis v. Anne Arundel County*, 271 Md. 265 (1974); See also 20 Op. Atty Gen. Md. 244 (1972).

<sup>7</sup> 73 Op. Atty Gen. 238 (1988).

<sup>8</sup> *But see*, Md. Ann. Code, Art. 23A § 2B (under certain circumstances the county may enact laws applicable within a municipal corporation since municipal residents are also county residents).

<sup>9</sup> Article 28, §7-112 of Md. Code Ann. (emphasis added). See also, *Pan American Health Organization v. Montgomery County*, 338 Md. 214, 657 A.2d 1163 (1995).

<sup>10</sup> Montgomery County Department of Park and Planning, *Uniform Standards for Mandatory Referral Review*, available online at [http://www.mc-mncppc.org/info/mr\\_standards.pdf](http://www.mc-mncppc.org/info/mr_standards.pdf).