

April 6, 2007
Planning and Land Use Committee,
Montgomery County Civic Federation

SITE PLAN ENFORCEMENT STUDY - SUMMARY OF EVENTS

HIGHLIGHTS OF THE TIMELINE

By late spring of 2004, homeowners in the new Clarksburg Town Center subdivision, which was still under construction, had determined that the project was not being built according to the Site Plan that the Montgomery County Planning Board had approved. They contacted then-County Executive Doug Duncan, their District 2 Council member Mike Knapp, and then-Planning Board Chairman Derick Berlage, and alleged that some homes had been built taller and closer to the street than had been approved. And, they asserted that the developer's proposal for construction of the retail section of the new subdivision did not agree with the approved Project Plan or with the objectives in the Clarksburg Master Plan.

There was no official response from any entity of County government until the Planning Board agreed to hear the citizen allegations at their April 14, 2005 session. The Board initially ruled that there was no basis for concern but the homeowners, now organized as the Clarksburg Town Center Advisory Committee, continued to investigate and assert that there was indeed a problem. The story was reported in a local newspaper on June 28, 2005. It became apparent that the problem of Site Plan violations was not restricted to one upcounty community, and the MCCF released its study of the issue on August 30, 2005. In total, citizens and/or the Planning Department staff have alleged that site plan violations occurred in at least twelve projects throughout the county. However, the issue of Site Plan violations has become linked with the name Clarksburg, due to the location where the problem was initially uncovered.

It is an appropriate time to release this summary of the issue. On March 22, the Planning Board concluded action on the eighth and final development project to receive a Site Plan violation hearing, all resulting from a single citizen complaint lodged three years earlier.

DEVELOPMENT PROJECTS FOR WHICH THE PLANNING BOARD HELD A HEARING ON SITE PLAN VIOLATIONS

CLARKSBURG TOWN CENTER

The Planning Board found that multiple violations of the approved Site Plan occurred in this project, including relocation and resizing of lots without approval and construction of dwelling units that exceeded the maximum allowed height and were closer to the street than the minimum setback required. During a months-long discovery period, the Board also admitted that acts of omission had occurred during their approval process, and that amendments to the Plan which must by law be approved by the Board had instead been allowed to be approved by staff. As a result, the lead Planning staffer on the project, Wynn Witthans, resigned her position at Park & Planning. Charles Loehr, Director of Parks and Planning, resigned shortly

thereafter. Following a prolonged mediation process involving developer Newland Communities, homeowners, and Planning staff, a Plan of Compliance was agreed to and then approved by the Planning Board. The new amenities and community features approved as part of the redesign of the unbuilt portions of Clarksburg Town Center will cost the developer an estimated \$15 million.

BETHESDA CREST

Residents of Bethesda's Maplewood neighborhood living adjacent to the project lodged complaints with the Planning Board about multiple issues, including failure to adhere to minimum setback standards and tree save provisions, and postponing construction of the Moderately Priced Dwelling Units (MPDUs) until the final stages of the project in violation of County Code Chapter 25A. The Planning Board discovered it had approved two sets of building standards for height and setback--one in the text of their approval and another on the set of drawings for the project--and enforced the more liberal of the two. The Board declined to pursue the tree save issue, required the footprint of one unbuilt unit to be altered, and fined the developer, Elm Street Development, \$6000 for starting the clearing and grading of the site prior to final approval of the project drawings.

CLARKSBURG VILLAGE

At their July 20, 2006 meeting, the Planning Board made a finding that several violations of the approved Site Plan for Phase I of this Elm Street Development project had occurred. A Plan of Compliance was approved that required revision to the size of some lots, relocation of specified Moderately Priced Dwelling Units, a change to the layout of Block T in the subdivision, and specification of building height and setback standards. During their October 5, 2006 meeting, the Board accepted a proffer from the developer of a payment of \$50,000 to the Clarksburg Village Homeowners' Association and \$100,000 to the Planning Board to be used to defer staff costs associated with review of the changes to the Site Plan for Phase I that were required by the Plan of Compliance. This past March 22, the Board approved an amended Site Plan for Phase I.

GREENWAY VILLAGE aka ARORA HILLS, Clarksburg

The zone category for this property is one for which the building standards--maximum allowable height and lot coverage, as well as minimum setback from the street--must be set by the Planning Board during project approval. However, the Board did not specify these standards in their approval for Phases I and II of the project, raising the question of how DPS could issue Building Permits for structures for which height and setback standards had not been established. The Planning Board ruled that no culpability for the omission would be assigned to Artery, the project developer.

The Board did find that the developer violated the approved Site Plan by failing to provide two sections of bike trails through the subdivision according to the required staging schedule, and imposed a total fine of \$36,750. In addition, building standards were instituted by the Board as part of a program of compliance.

MAPLE RIDGE TOWNHOUSES, aka SEATON SQUARE, White Oak

In 2005, violations of maximum building height were uncovered in this project by the Planning staff, while investigating all Site Plan projects that had been approved by the Planning Board

since January 1, 2003. The Department of Permitting Services (DPS) was asked to confirm how many of the 59 townhouses, some then still under construction, exceeded the maximum height allowed by both the approved Plan and the zoning. In a December 2005 memo, DPS concluded that all units exceeded allowable height. Then, in a January 2006 memo, DPS reversed this claim and stated that, by measuring height based on elevation of the nearest built street outside the project, the eight MPDUs met the height standard. In addition, the ridge line was removed from the roofs of six units still under construction and the new flat roof configuration met the allowable height. This left only 45 units that exceeded the permitted height. Finally, during the Planning Board violation hearing in February 2006, a DPS spokesperson reversed the January opinion and stated that the height of a townhouse must be measured from the elevation of the street directly in front of the unit--resulting in all 59 units having originally been built too tall, even though the roof lines of six units still under construction had subsequently been flattened and lowered. The Planning Board accepted a proffer from the developer, N.V.Ryan Homes, of a payment of \$276,750, in exchange for no finding of violation.

The problem remains that 53 of the townhouse units in this project are not lawful--that is, they do not meet the height requirement of the zone. This affects the resale of these units since county law requires that, when they are resold, these units must be brought into conformance with the zoning standard. We are unaware of whether any legally sustainable document has been crafted by the Planning Board or Department of Permitting Services which would allow the circumventing of this requirement. Also, the Planning Board had stated that they would publicly announce their plans for use of the \$276,750 proffer, but this has not yet been done.

GERMANTOWN PROFESSIONAL BUILDING

Another case uncovered by Planning staff, it was alleged that developer WILLCO had constructed this building taller than the Site Plan approved height. The Planning Board found that a violation had occurred and fined the developer \$37,000--\$200 per day for each of the 185 days from the date of issuance of the Building Permit to the date of the developer's application for a Site Plan amendment to allow the height as built.

GATEWAY COMMONS, Clarksburg

In December 2006, the Planning Board ruled that a change needed to be made to the previously approved lot layout, since it would place one townhouse within 100 feet of the nearby Clarksburg Elementary School which is closer than legally allowed. This, and the need to add emergency access driveways requested by the Department of Fire and Rescue Services, required relocation of some lots. Amendments were ordered to be made to the Site Plan as originally approved, in part to preempt possible future violation of the Plan, although the Board did not make a finding that any violation had occurred.

The PD zone category requires that the Board specify, point by point, how the proposed project is compatible with the recommendations of the applicable master plan, but the Board failed to do so in their 2003 Opinion of approval of the Gateway Commons Site Plan. The Board also failed to specify approved height and setback requirements, which is a requirement of the zone. During a December 2006 meeting, the Board rejected a request from the Clarksburg Town Center Advisory Committee to correct the omissions in the 2003 approval for this Planned Development Zone project, asserting that a considerable time had passed during which the

developer had relied on the previous approval and, therefore, it would not reopen the entire Plan for reapproval.

KING'S CROSSING, Germantown

Construction of the 102 MPDUs required of this project was delayed past the start date required in the Site Plan approved by the Planning Board, and long after all of the market rate single-family detached homes were built, sold and occupied--a violation of Chapter 25A of the County Code. The Planning Board did not find that a violation of the approved Site Plan occurred, and approved a modification to the already-approved Plan that required fewer but taller multi-family buildings containing the 102 MPDUs. In addition, an agreement was worked out between the Planning Board and Department of Housing and Community Affairs to target all of the MPDUs to applicants 55 years of age or older (waiving the requirement that MPDU applicants be first-time homebuyers). Any remaining units will be offered first to any MPDU applicant regardless of age, then to any applicant 55 years of age or older regardless of income level, and finally to any applicant until all of the units are sold.

SITE PLAN PROJECT VIOLATION WHICH RESULTED IN PLANNING DEPARTMENT ACTION AND FINE

U. S. PHARMACOPEIA BUILDING, Twinbrook

This was another instance in which the Planning staff uncovered the violation. In this case, as in the Bethesda Crest case mentioned above, the developer--U. S. Pharmacoepia--had allowed clearing and grading of the site prior to approval of the signature set of drawings. However, different from the Bethesda Crest case was the fact that, in this instance, M-NCPPC staff issued a violation notice and fined the developer \$8000 without bringing the case before the Planning Board for a hearing.

SITE PLAN PROJECTS IN WHICH VIOLATIONS WERE ALLEGED, BUT PLANNING BOARD HELD NO VIOLATIONS HEARING

CIDER BARREL, Germantown

Planning staff initially questioned whether a violation of the required garage setbacks along MD 355 had occurred in this Elm Street Development project. Alternating 14 and 15 foot setbacks had been approved by the Planning Board, while standard 14 foot garage setbacks existed in the built project. A Site Plan amendment was subsequently approved by the Board to clarify that the required setback for the garages matched what had been built. And, when an MCCF Planning and Land Use Committee member examined the signature set of drawings in the hard copy files at Park & Planning, the only version of the drawing in the file was one that showed a standardized 14 foot setback reflecting the location of the built garages.

LAYHILL VILLAGE EAST aka NICHOLSON PROPERTY, Aspen Hill

MCCF alleged violation of the tree save provision of the Forest Conservation Plan contained in the approved Site Plan for this project. The Planning Department Director responded that a certified arborist on their staff, rather than one hired by the developer as specified in the

approved Site Plan, had ascertained that the specimen tree in question was beyond saving and had approved its removal.

RESIDENCES AT ROSEDALE, Bethesda

MCCF alleged that "neighborhood protection measures" required in the approved Site Plan were not provided in the project as built. The Planning Department Acting Director responded that alleyway construction standards required to enhance pedestrian safety were handled by the Department of Public Works and Transportation. Either DPWT was not informed of standards approved in the Site Plan, or did not feel bound by them in overseeing construction of the alley entrances for this project. The Acting Director's response also stated that it was decided the provision which required solid panels to be installed on balconies in the project had been met by an agreement from the management company that they would require tenants to keep their balconies, now built with open railings, free of clutter.

LISTING OF MCCF RECOMMENDATIONS IN AUGUST 2005 STUDY AND CHANGES TO THE SITE PLAN APPROVAL & ENFORCEMENT PROCESSES

MCCF - Suggested comprehensive study of all Site Plan projects under construction

The Department of Permitting Services and M-NCPPC Planning Department undertook a field investigation of all Site Plan projects approved since January 1, 2003. Procedures are now in place for investigating and enforcing all newly approved Site Plans.

MCCF - Requested Board-approved version of Site Plans and related documents be made available online

Council has been told this is being worked on.

MCCF - Requested Moderately Priced Dwelling Unit Agreements entered into by DHCA be made available online

Not certain whether this is being done.

MCCF - Include neighbors and community groups from start of the development approval process, and provide them easier access to requested information

As a part of every development project plan submitted for approval, the Board now requires the developer to include a sworn statement listing all individuals and community groups they have contacted or met with to explain the proposed project, any comments or concerns voiced by those individuals or groups, and any developer response.

Although currently overburdened, most M-NCPPC staff members are responding to citizen inquiries as thoroughly, cordially, and quickly as can be expected. And, most of the staff reports on agenda items scheduled for Planning Board consideration are posted online at least 10 days prior to the hearing date, with agendas posted 2 weeks in advance.

MCCF - Suggested single office for citizens to contact with questions about compliance regarding a specific Site Plan project

DPS Zoning Hotline handles allegations of non-compliance with approved standards.

MCCF - Suggested establishment of an Office of Site Plan Investigation and Enforcement

County Council assigned authority over field investigation related to Site Plan enforcement to Department of Permitting Services. Planning Department staff held a series of bi-weekly sessions with DPS staff in 2006, to develop enforcement processes for specific requirements that could be contained in Site Plan approvals.

MCCF - Strive to make all online files easily downloadable, especially for those with dial-up internet service, by breaking large files into smaller, more manageable parts

Still not being done (file parts should be maximum 2.5 to 3.0 MB in size).

MCCF - Suggested additional on-site visit following clearing and grading and before construction begins, to check that trees marked for retention were saved, the Limit of Disturbance is clearly marked, and required tree protection devices are in place

Not certain whether this is being done.

MCCF - Suggested distinction between Major and Minor Site Plan Amendments be struck from law, and all proposed amendments be heard by the Planning Board

The County Council did strike language from the County Code that made a distinction between Major and Minor Site Plan Amendments. The Planning Board now disallows any amendments to be approved by staff, and hears all Plan Amendments that they believe require discussion. All other proposed Site Plan amendments are placed on the Consent Agenda, which requires a majority vote of the Board to be approved, unless a request is made to remove an item and hear it separately.

MCCF - Called for better County Council oversight of development approval and enforcement activities

From August 2005 to mid-2006, the Council Planning, Housing and Economic Development Committee held bi-weekly worksessions with representatives from the Planning Department at M-NCPPC, and Departments of Permitting Services and Housing and Community Affairs. Among the first improvements made was that all Building Permits now issued by DPS must contain language specifying the maximum allowed height of a structure in feet not stories.

MCCF - Called for better County Executive oversight of Departments involved with enforcement of development project standards and agreements

Shortly after taking office in January this year, the new County Executive Isiah Leggett called for the resignation of the Directors of the Department of Permitting Services and the Department of Housing and Community Affairs, and appointed new Directors.

MCCF - Called for a halt to the practice of letting land use attorneys working for developers write the draft of the Planning Board Opinions for decisions involving their clients' projects

The practice has been stopped. In addition, the Planning Board has adopted new Rules of Procedure, with County Council approval, and has drafted a new Development Approval manual. These documents will institutionalize processes so they can withstand changes in personnel and be more easily understood by the public. They should also aid in preventing the sort of omissions and errors on the part of the Board that occurred in past Plan approvals.