

M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

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MCPB
Item # 3
07/07/05

MEMORANDUM:

TO: Montgomery County Planning Board

VIA: **Charles R. Loehr, Director, Department of Park and Planning**

FROM: Rose Krasnow, Chief, Development Review Division

SUBJECT: **PLAN OF COMPLIANCE for Height and Setback Violations**

REVIEW BASIS: **50-41 of the Montgomery County Subdivision Regulations (Enforcement) and 59-D-3 6.6 of the Montgomery County Zoning Ordinance (Failure to Comply)**

PROJECT NAME: **Clarksburg Town Center**

CASE #: **8-98001 & amendments and 8-02014 & amendments**

ZONE: RMX-2

LOCATION: In the northeastern quadrant of the intersection of Stringtown Road and Frederick Ave (MD RT. 355), Clarksburg

MASTER PLAN: Clarksburg and Vicinity Master Plan

HEARING DATE: July 7, 2005

STAFF RECOMMENDATION:

- (1) That the Board direct staff to issue citations pursuant to Section 50-41 of the Montgomery County Subdivision Regulations for each height and setback violation found; and
- (2) That the Board approve a Plan of Compliance pursuant to Section 59-D-3.6 of the Montgomery County Zoning Ordinance that (a) escrows all fines assessed under Section 50-41 until the time of Planning Board review of Phase III of the Clarksburg Town Center Project for use in whole or in part for corrective mitigation of the violations; (b) authorizes staff to approve a new Project Plan and Site Plan signature sets that conform with the Board's original Project Plan approval of 45 feet/4 stories for all townhomes; (c) approves the height of all built and unbuilt 2-over-2s and Building 6; and (d) requires Building No. 3 to be redesigned to no more than 45 feet in height.

BACKGROUND:

Staff had four overriding goals in its recommendations on the Clarksburg Town Center matter:

1. To sanction the builders, through fines, for failing to comply with the Site Plan Enforcement Agreement and Signature Set – **notwithstanding the fact that they were more stringent than the Board's underlying approvals.** This is designed to act as a deterrent to similar disregard for implementing documents in the future.
2. To give to existing and prospective innocent third-party purchasers immediate assurance that their homes do not suffer from any cloud of title. This can be done through a "Plan of Compliance," authorized under Section 59-D-3.6 (failure to comply with a site plan) as detailed below.
3. To recommend that a portion of the fines be escrowed with MNCPPC for the provision of additional amenities within the Clarksburg Town Center. During the course of this investigation, numerous issues were raised with respect to the amenities that were to be provided within the Clarksburg Town Center. Staff recommends that a suggested amenity package be brought back to the Board during consideration of the Site Plan for Phase III of Clarksburg Town Center in October, 2005. This process will allow the Board, after input from all stakeholders, to make a considered and reasoned decision as to what additional amenities would be appropriate in the context of the final buildout phase of the Clarksburg Town Center.

4. To advise the Board that in the opinion of staff, it is difficult to find that extensive damage to the community has resulted from the “as built” environment in Clarksburg. This is because, although there are many violations of the development standards contained in the Signature Set, the heights as built actually largely conform to the height limitations established by the Project Plan. The setbacks pose a somewhat different situation, because the Board clearly had the authority to take the setback down to zero but instead imposed a 10-foot setback. In the context of a neo-traditional development a ten-foot setback seems quite large. Therefore, Staff does not find that smaller setbacks compromise the overall quality of the development.

I. HEIGHT:

A. Enforcement Action:

Staff believes that regulatory approvals as implemented through the Site Plan Enforcement Agreement and other post-approval documents such as the Signature Set, Development Program and Phasing Plan should be strictly enforced. The builders’ position is that the heights in the Project Data Table of the Signature Set were erroneously included in that document. Even assuming for the moment this is factually true, staff does not agree with the conclusion that errors in this phase of the review process justify construction of non-compliant units. Under the express language of the Site Plan Enforcement Agreement (SPEA) all participants in the development process (from original applicant through all successive builder interests) are bound by the standards in the SPEA and attached documents (including the signature set). Thus all builders involved in the development of Clarksburg Town Center have a due diligence obligation to ensure that construction occurs in conformance with all implementing documents.

Staff recommends that pursuant to the Board’s authority under Section 50-41 of the Subdivision Regulations that the Board direct staff to issue citations for each unit in each structure that exceeds the height limitation specified in the site plan signature set. For purposes of the fine, staff has assumed all townhomes, all 2-over-2s that are built or under construction, and the multi-family building (Building No. 3) exceed the Signature Set height limitation of 35’ (and 45 feet for Building No. 3). Staff further recommends that for each of these units that there be one citation for each building permit application filed for these units, and a separate citation issued for the date of the commencement of construction for each of these units. Staff believes that these events reflect direct actions taken in violation of the Signature Set and Site Plan Enforcement Agreement.

Staff recommends that each of these citations be issued to Newlands in the amount of \$500.00 per unit that exceeds the height limitation in the Signature Set project data table (*i.e.*, each unit within a 2-over 2 building, or a multifamily building, should be assessed an individual fine).

Staff also recommends that each individual builder be issued two citations in the amount of \$500.00 for the same units and on the same grounds.¹

Based on staff's initial recommended findings of violation, this would result in a cumulative fine of \$489,000.00 to be assessed against Newlands, and \$489,000 to be assessed against the collective individual developers.²

B. Recommended Plan of Compliance:

1. Single-Family Attached and Detached Units:

As noted in the Memorandum staff prepared in anticipation of the July 7, 2005 hearing date **most of the single-family attached and detached units comply with the 45-foot height restriction imposed by the Project Plan approval (Planning Board Opinion dated March 3, 1998).** Staff strongly recommends that the Board find, with respect to those residential units that were built below 45 feet in height, that the original Master Plan vision **has** been implemented as envisioned by the original Project Plan approval³ and subsequent Site Plan Opinion,⁴ and, as such, corrective action should be implemented through amendment of the post-approval implementing documents.⁵

CTCAC has requested certain specific corrective actions. First CTCAC has requested stop work orders on the project.⁶ Staff does not recommend that stop-work

¹ Section 50-41 of the Subdivision Regulations authorized the Board to issue a fine in the maximum amount of \$500.00 per day against the person charged for each day that the violation has occurred.

² Staff continues to determine precisely which units are in violation. The numbers recommended above are based on staff's preliminary analysis, and the actual amount of the cumulative fine will be determined by the time the Plan of Compliance is finalized, as discussed below.

³ Four story, 45-foot height limit.

⁴ The Site Plan Opinion adopts a four story height limit. Staff finds this limitation consistent with, and not an amendment to, the the four story, 45-foot height limit adopted by the Board in the underlying Project Plan.

⁵ The Board makes a finding of conformance with the Master Plan at the time of Project Plan, not at Site Plan. Montgomery County Code § 59-D-2.42. At Site Plan, the Board simply must find that the site plan "is consistent with an approved . . . project plan." Montgomery County Code § 59-D-3.4.

⁶ The Board should know that as of June 6, 2005, the developers within the Clarksburg Town Center voluntarily suspended all new construction pending a Board decision on these violations.

orders should be issued for any of the single-family attached units based on staff's conclusion that they do not violate the underlying Project Plan conditions of approval.

CTCAC also has asked that future development of all residential units be limited to a 35-foot height limit, which staff also concludes is not appropriate, based on staff's reasoning in its staff report of July 27, concluding that the 45-foot height limit for all residential units conforms to Project Plan height limit imposed by the Board and in fact conforms with the Master Plan recommendations for this project.

Staff does recommend that timely corrective action be taken to remove any cloud of title from **all** single-family units (built; unbuilt and under contract; and unbuilt with no contract). To implement this corrective action, staff recommends that Newlands submit a revised set of Project Plan drawings, and a revised Site Plan Enforcement Agreement and related Signature Set that accurately reflects the height for single-family attached and detached units, consistent with the Board's original approval at the time of project plan, *i.e.*, 4 stories (45 feet). This process (1) will confirm that these units have been built in conformance with the original approval; (2) will remove any cloud of title from all of these units; and (3) can be implemented quickly, so as to protect the equity interests of innocent third-party purchasers who currently live in these units and who have contracted to purchase unbuilt units.

2. 2 Over 2s

Only four buildings containing 2 over 2s are included in the phases of Clarksburg Town Center that have been approved to date. The builder for all four is Craftstar. Three of the four buildings, containing a total of 26 units, have been built, are occupied, and exceed the 45-foot height limit established by the Project Plan Opinion. The units in the unbuilt building already have third-party contract purchasers, some or all of whom have made personal plans in reliance on those units being built. As stated above, Staff recommends that a fine be collected for each of the built units. Staff further recommends that fines be collected for the 16 units in the remaining building, but that construction be allowed to proceed as planned so that third-party purchasers, who bought in good faith, will not be harmed.⁷ The record includes evidence from such purchasers who would suffer financial and personal hardship and should not be penalized. Staff recommends that the Board authorize Staff to approve a revised Signature Set that includes the existing three buildings, and the unconstructed building, at the height at which they received building permits. This process (1) will confirm that these units have Planning Board approval to remain at their current heights;⁸ (2) will remove any cloud of title from all of

⁷ As noted earlier, the builders earlier agreed not to begin construction on units that potentially violated height limits.

⁸ At the time of Site Plan, the Board must determine that it is "consistent with" an approved project plan. Montgomery County Code § 59-D-3.4. In the opinion of staff, the height overages on these three buildings is *de minimus* in the context of the overall project, and should be found consistent with the overall Project Plan approval.

these units; and (3) can be implemented quickly, so as to protect the equity interests of innocent third-party purchasers who currently live in these units and who have contracted to purchase unbuilt units.

3. Multi-Family Units:

a. Built Units

The Project Plan height limit of 4 stories and 45-feet applies to multi-family units. One multi-family building has been built that exceeds the 45-foot height limit (Building No. 3, a four-story, 30-unit multi-family building that is more than 53-feet tall). As above, Staff believes that timely corrective action be taken to remove any cloud of title from the units in this structure, through the Board's direction that the builders submit Project Plan drawings and a Site Plan Signature Set that expressly authorizes these height limits. Again, the Staff recommends this remedy on behalf of the third-party purchasers who now occupy these units, and to ensure that there is no cloud on their property as a result of the non-compliant height of the building.

b. Unbuilt Building No. 6 (30-unit multi-family building)

One multi-family unit building (Building No. 6 with 30 units) has been approved but is not yet under construction. It is identical in design to Building No. 3 and also will exceed the 45-foot height limitation. The Plan of Compliance should require that this building be redesigned to conform to the 45-foot height limitation.

II. Setbacks

A. Citations:

Staff has recommend that the Board find that those units that are built less than 10 feet from the street violate the 10-foot front setback standard. Staff further recommends that for each of these units there be one citation issued for each building permit application filed for these units, and a separate citation issued for the commencement of construction for each of these units. Staff believes that these events reflect direct actions taken in violation of the Signature Set and Site Plan Enforcement Agreement.

Staff recommends that each of these two citations be issued to Newlands in the amount of \$500.00 per unit that exceeds the front-yard setback, and also recommends that each individual builder be issued two citations in the amount of \$500.00 for the same units and on the same grounds.⁹

⁹ Section 50-41 of the Subdivision Regulations authorized the Board to issue a fine in the maximum amount of \$500.00 per day against the person charged for each day that the violation has occurred.

Staff recommends that fines be assessed whether the building is a single family attached or detached dwelling or a multi-family building. The fine against Newland will be \$102,000. The fine against the builders will be a total of \$102,000. The cumulative fine will be \$204,000.

B. Plan of Compliance Recommendations:

Staff recommends that all unbuilt units, **except for those under a purchase contract to a third-party purchaser pre-dating June 6, 2005,¹⁰** be required to conform to a 10-foot front yard setback standard.

Additionally, the Signature Set should be resubmitted with precise dimensions shown on a lot-by-lot basis for all units, to “grandfather” those units that have a setback of less than 10 (in accordance with the Board’s authority to reduce setbacks to 0’), and to ensure that all unbuilt units conform with the 10’ setback originally imposed.

¹⁰ The date the builders agreed that no new construction would begin on units (even with building permits) that would potentially violate either height or setback restrictions).