

M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

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**MCPB
Item # 2 & 3
11/17/05**

MEMORANDUM:

TO: Montgomery County Planning Board

FROM: Rose Krasnow, Chief, Development Review Division *RK*

SUBJECT: **CONSIDERATION of Alleged Setback Violations
Santions/Plan of Compliance**

PROJECT NAME: Goodwill Property (Bethesda Crest)

REVIEW BASIS: Div. 59-D-3.6 of the Montgomery County Zoning Ordinance

Case #: **820030050 (Formerly 8-03005)**

ZONE: R-60

LOCATION: On Wisconsin Avenue, approximately 400 feet north of Cedar Lane

MASTER PLAN: Bethesda – Chevy Chase

HEARING DATE: November 17, 2005

STAFF RECOMMENDATION:

Finding that setbacks do not comply with site plan approvals.

PROCEDURAL PREFACE:

This item has been noticed as a public hearing during which the Board will consider whether there have been site plan violations with respect to certain building setbacks. If the Board does not find any violations, then its consideration of this matter is concluded. If the Board does find violations, then it will proceed immediately to consider any citations and/or

corrective action that it may elect to impose. Based on staff's recommendation that the Board find violations, staff has also included herein a recommended plan of compliance.

I. Project Description Site and Surrounding Vicinity

The Goodwill site consists of 4.97 acres and sits to the west of Wisconsin Avenue (MD Rte. 355), approximately 400 feet north of Cedar Lane. The topography of the property slopes steeply upward from the southern and eastern property boundaries to a knoll close to the center of the property. The topography from the center north/south spine towards the west is much gentler. The site is within the Rock Creek watershed and contains no forest, streams, wetlands or other environmentally sensitive areas. A large WMATA air vent is located within the northeastern corner of the site.

The property formerly served as the home of Goodwill Industries, a charitable institution. The Goodwill facility had a single access drive to Wisconsin Avenue. Temple Hill Baptist Church, formerly known as the Bethesda Meeting House, sits immediately adjacent to the property to the Northeast. The Church is on the National Register of Historic Places. South of the site is Cedar Lane, immediately beyond which is the National Institutes of Health. The NIH metro stop is 1,500 feet from the site to the South. Further west and south beyond the site are the Longmeadow and Maplewood subdivisions, both of which are R-60 subdivisions with single-family detached homes. Acacia Drive, Benton Avenue, and Corsica Drive are immediately adjacent to the property on the western edge of the site. These streets provide access to the R-60 subdivisions just mentioned.

One home confronts the site, sitting across Corsica Drive from the Goodwill Property. Six homes are immediately adjacent to the site on the North, West and South sides of the property. With respect to the adjacent properties, it is either their side or rear yards that abut the property. The adjacent homes are setback from the common boundary (from the north going counter clockwise) 11 feet, 6 feet, 13 feet, 44 feet, 23 feet and 49 feet respectively. Mature vegetation is present in many of the side and rear yards.

II. Original Project Proposal

On September 27, 2002, Elm Street Development submitted a plan to build a 28 unit townhouse, semi-detached and attached home community (Attachment 1) Although the underlying zone was R-60, the applicant sought to build using an optional method. At that time, projects of fewer than 50 units did not require MPDUs. By agreeing to provide MPDUs, the applicant could apply to build the project with a mix of 40% detached and 60% attached units. In addition, the applicant applied for a waiver on environmental and compatibility grounds that, if granted, would allow the development to consist of 100% attached units.

The market rate units were proposed to be divided in groups of 2, 4 and five units, with individual townhouses varying in width from 24 to 32 feet and in length from 63 to 87 feet. Each was to have a garage in the rear. The MPDUs were to be two over two's, with surface parking to the front and rear of the units.

The project was controversial from the outset, with many citizens communicating their concerns by email, phone calls and letters. Residents were worried about cut-through traffic from the new road connection to Corsica Drive, the discrepancy in building size between the existing and proposed housing, the type of architectural finishes to be used, the preservation of plant material along the buffers, the adequacy of parking (and whether cars from the new townhouse project would end up parking on the adjacent residential streets), the location of the tot lot and the MPDU's, the proposed utilization of the 100% attached development provision, and drainage issues between Acadia Drive and Cedar Way.

Nevertheless, staff recommended approval of the MPDU option, with an environmental waiver that would permit 100% attached units, based on the following reasons.

- 1) The development as proposed would retain most of the R-60 zoning yield, despite the steep slopes present on the property that served to make it a difficult site to develop.
- 2) The development as proposed would allow the existing mature stands of trees to be preserved. Overall on-site green space would increase from 2.1 acres or 42% with the 60/40 option to 2.8 acres or 57% of the site with the one hundred percent attached plan.
- 3) The location of the property, inside the I-495 Beltway, on a bus route, and within reasonable walking distance from the NIH Metro, made the site a good candidate for utilizing the principals of smart growth.
- 4) The development as proposed would provide needed MPDUs inside the beltway.
- 5) The development as proposed would allow for the provision of extraordinary buffers between the proposed dwellings and the adjacent homes, enhancing compatibility. The underlying R-60 zone requires setbacks of only 8 feet for the side yard and 20 feet for the rear yard versus the 40 foot and 35 foot setbacks established in the plan as proposed. As a result the perimeter green space would increase threefold from .30 acres using the 60/40 plan to .95 acres using the 100% attached unit plan.

The Board approved the Preliminary Plan (#1-02038) and the Site Plan (8-03005) on April 10, 2003. The Opinion was mailed on September 15, 2003, the Site Plan Enforcement Agreement was executed by Michael Ma on July 6, 2004, and the Signature Set was signed by Rick Hawthorne on July 7, 2004. The first record plats were recorded on July 16, 2004. The first building permit was released on August 25, 2004. The MPDU agreement was signed with DHCA on March 31, 2005. Although by law the MPDU agreement is supposed to be signed prior to the release of the first building permit, this law was not being enforced prior to the events that have been taking place with respect to Clarksburg Town Center.

III. Issues Surrounding the Alleged Violation

MNCPPC began to receive complaints about the project almost as soon as construction began. Residents adjacent to the development, as well as the Maplewood Citizens Association, have alleged a number of violations, including the removal of trees that were to be saved, buildings that were too tall, and buffers that were too small. Elm Street Developers were notified

of the complaints, and a meeting was held on June 2, 2005, between Rose Krasnow and Michael Ma, of Development Review, John Clarke of Elm Street, and Les Powell, Engineer for Charles P. Johnson (CPJ). At that meeting Mr. Clarke stated that the height standard was 40 feet. He proceeded to describe the height of each structure, stating that all of them fell within the height requirement except for the unbuilt two over two's, which he promised to modify. With respect to setbacks, Mr. Clarke stated that all conformed with the drawings that were submitted as part of the Signature Set approved by MNCPPC.

Further review by staff found a number of inconsistencies between the original promises made by the developer and included in the staff report, the statements made in front of the board at the hearing on April 10, the standards promulgated in the opinion (and included as Page 2 of the Signature Set), and the standards shown on the drawings themselves (and included as Page 1 of the Signature Set). This made it difficult for staff to know just what standards the Board had, in fact, approved. A review of these discrepancies is merited.

- 1) On April 4, 2003, Les Powell, engineer with CPJ, sent a letter (Attachment 2) to Malcolm Shaneman of MNCPPC that listed several benefits to be derived from approving the Goodwill plan with 100% townhouses. In it, he lists the perimeter buffers as follows:

	<u>60% TH</u>	<u>100% TH</u>
South	30'	45-50'
Southwest Corner	20'	75'
West	15'	40'
Northwest Corner	20'	55'
North	30'	35'

He concluded his letter by stating, "We feel that the environmental benefit, increase in buffers and the transitional location of the site, justifies our request for 100% townhouses."

- 2) The data table in the staff report specifies the setbacks to be as follows:

	<u>Permitted/Required</u>	<u>Proposed</u>
Setbacks from street	20 ft.	35 ft. at Corsica Drive
Front yard	N/A	35 feet at Corsica Dr.
Side yard	8 feet	40 feet
Rear Yard	20 feet	40 feet

- 3) The transcript of the hearing makes it clear that setbacks were discussed at length. Some examples of the discussion are highlighted below:
 - a. P. 9: Wynn Witthans: "On the western property line and on the southern property line, and for this area where we are adjacent, next to existing homes, the buffer is a 40 foot buffer.
 - b. P. 10: Wynn Witthans: "And here, where they are adjacent to the Baptist church, they are set back 35 feet. So there's a generous setback there."

- c. P.11: Wynn Witthans: "Cross-section C, which is along here, which is up at the intersection of Benton and Corsica and down through the site. So here is a version of the home and that intersection may have a 12 foot setback to the property line. And the first townhome is 40 feet away.
 - d. P. 18 and 19: Mr. Clarke: "I'd really, really like to comment on why this particular plan is here today..... We met with many of the adjacent neighbors....and one of the main comments that many of them made was the desire to increase the buffers on the plans that we showed them. Basically, the goal to, the request for us to take out whatever open space we had from the interior of the site and put it around the perimeter so that it would be as beneficial to them as possible."
 - e. P. 25 and 26: Mr. Allen Meyers: "The residents abutting and adjacent to the Goodwill site are willing to sacrifice the optional method setback in favor of the detached housing setback"
 - f. P. 37: Wynn Witthans: "Just to reiterate the major advantages of going with the 100 percent townhouses is we're able to achieve more compatibility by having a larger buffer. Forty feet is an extraordinary buffer."
 - g. P. 44: Wynn Witthans: And on the south, the rear yard of the existing home is just over 20 feet and the proposed townhouse unit is fifty feet away. But if it were a standard method of development in the corner, the rear yard setback is 20 feet. So it would be 40 feet unit-to-unit for the rear yard." Chairman Berlage: "And what is it here?" Ms. Wittans: "I'm measuring 75."
- 4) The project data table in the opinion seems to have disregarded the discussion at the hearing and simply incorporates the data table that was included in the staff report. This would imply that all side and rear yard setbacks have to be 40 feet (Attachment 3).
- 5) The approved signature set drawings show a number of setbacks that do not conform to any of the above. For example, units #3 and #4, adjacent to the church, show dimensioned setbacks of 33'7" and 33'5" respectively. This differs significantly from the 40 foot setback specified in the opinion, and is still less than the 35 foot minimum setback adjacent to the church that appeared to be approved at the Planning Board Hearing. Likewise, unit #9, which is the unit facing Corsica Drive, shows a dimensioned setback of 34'9", yet the staff report and the opinion are clear that unit #9 was supposed to be set back 35 feet. Unit #19, which is the unit in the southwest corner of the site, is setback only 65 feet, as opposed to the 75 foot setback specified in the opinion.

These inconsistencies cloud the issue, but there is nothing to indicate that, at any point, a perimeter setback of less than 35 feet was ever proposed, discussed, or approved. Indeed, it is important to remember that the increased perimeter setbacks, often cited as "extraordinary" in the hearing record, appeared to be the primary reason why the Board approved the 100% townhouse option. The applicant claims that they simply built according to the drawings utterly disregards the careful thought the Board put into this approval and, moreover, disregards that fact that the signature set should conform to the development standards of the Board's opinion because the drawings showed lesser setbacks. The applicant stated in his letter of September 8, 2005 (Attachment 4) that the exhibit shown to the Planning Board at the hearing in 2003 showed

the rear setbacks of two houses adjacent to the church as less than 35 feet and that these were the setbacks that were carried forward to the signature set. However, staff has seen this rendering, and it does not include any dimensions. For the applicant to agree at the hearing that a 35 foot setback should apply near the church, and then later claim that the drawing that the board was looking at, if scaled, revealed setbacks of less than 35 feet, does not lend credence to their argument that this was a mistake but appears to be a flagrant attempt to circumvent the very standards they agreed to comply with at the hearing in order to win the Board's approval of their proposal to build a project with 100% attached units. Furthermore, it should be pointed out that when the opinion was issued stating that the side and rear setbacks were 40 feet, the applicant did not exercise his right to seek a revision, which would appear to signify that the applicant had no issue with the opinion at that time. For all of these reasons, staff feels strongly that violations with respect to setbacks did, indeed, occur.

As staff continued to discuss these apparent violations with the applicant, Mr. Clarke made it clear that he was eager to resolve these discrepancies by bringing an amended plan before the Board that would clarify what the standards were and would amend the data table to allow those units that had already been constructed to be in conformance. The wish to do this quickly was to ensure that third party purchasers would be able to move in as soon as the units were ready. However, as a result of the events that have unfolded with respect to the Clarksburg Town Center project, the County Council ordered DPS and MNCPPC to audit all site plan projects that had been approved by the Planning Board since January of 2003 for conformity with all standards and conditions. The Goodwill Property fell within this audit period, and staff felt that any action on Goodwill should be put on hold pending the result of the audit for all similar projects.

On July 29, 2005, Les Powell of Charles P. Johnson & Associated submitted an amended Site Plan Application to MNCPPC and sent notice of the proposed amendment to the parties of record (Attachment 5). Rather than acknowledge that an amended plan was required in order to bring any setback or height irregularities into compliance, the notice listed the nature of the amendment as "Clarification of typographical errors in planning board opinion." As pointed out in a letter received from Robert and Barbara Hilberg and Emanuel Jimenez (Attachment 6), the notice sent to the parties did not detail what those typographical errors might be or what changes would, in fact, be covered by the amendment.

DPS took a number of onsite measurements at Goodwill in September and October (Attachment 7), and they concurred that setback violations did exist, given the forty-foot setback requirement stated in the opinion. As a result, DPS did not move forward with final close-in inspections, pending direction from MNCPPC. A stop work order was issued on October 26, 2005. (Attachment 8) and a violation hearing date was set.

Again, staff finds that setback violations have occurred with respect to the following units, which are already built:

- 5001 Cedar Croft Lane: Rear setback is 33' 7" from the property line, adjacent to the church.
- 5003 Cedar Croft Lane: Rear setback is 33' 5" from the property line, adjacent to the church.

5007 Cedar Croft Lane: Although dimensioned at 35' 7" on the signature set drawings, this unit had to be moved back so that it did not extend over the front property line. As a result, the rear setback is only 34' 6 inches.

In addition, one unbuilt unit (#19) would have a setback issue, if built according to the signature set drawings. The setback for the unit at the southwest corner of the site was supposed to be 75 feet. In the rendering seen by the Board, the unit had a two car garage. However, when the signature set drawings were submitted, the unit showed a three car garage and the setback standard was not met.

The Board should also be aware of setback concerns regarding 5015 Cedar Croft Lane, which is the unit facing Corsica Drive. It was agreed at the hearing and is verified in the opinion that the setback from the property line should be 35 feet. The signature set drawings actually show a setback of only 34 feet 9 inches. However, field measurements indicate that the unit is, in fact, set 35 feet back so staff does not find that a violation has occurred.

IV. Other Alleged Violations (Not for Board Decision Today)

In order to be as comprehensive as possible, staff has looked at other violations alleged in a letter received from the Maplewood Citizens Association, dated September 16, 2005 (Attachment 9). The discussion that follows looks at each of these.

Road Way Widths: It has been alleged that the private roads on the Goodwill property do not meet the road code standard for a two way street. MNCPPC often has approved widths narrower than that required by the road code in projects where an effort was being made to protect green space. The independent engineer hired by MNCPPC measured the private roads within Bethesda Crest and, using this information, staff has found that the roads, as built, are as wide as dimensioned in the signature set drawings.

Tree Save: It has been alleged that one of two specimen trees that were supposed to be saved was, in fact, removed and that other smaller trees have been removed as well. Inspector Marco Fuster looked into the question of the specimen tree and replied as follows:

"I have revisited the site today (11/7/05) in response to the recent complaints you received about alleged excess clearing at the Goodwill site. The tree in question, as identified on the approved NRI/FSD was a 34" Norway Maple in poor health (tree # 53).

The approved FCP did not call for the preservation of this tree. Each of the save trees over 24" diameter are clearly distinguished on the plan with a gray shading over the saved portion of the critical root zones. The tree was already recognized as being in poor health more than 5 years ago (at the time of NRI approval) and would have posed a hazard to either the proposed lot 10, or the existing off site property at 5002 Benton Ave. By overlaying the NRI and examining aerial photography, the tree was located either inside the LOD of very near the edge of the LOD (where it would have posed an even greater hazard due to approved construction impacts).

Furthermore, Norway Maples (*Acer platanoides*) are invasive species of trees which have been categorized by the MD DNR as the "most serious threat to natural areas".

During the pre construction meeting (which was attended by Elm Street's retained arborist), I clearly recall clarifying that permission was granted to remove this tree."

Inspector Fuster found the site to be in compliance with the tree save plan. It should be added, moreover, that while some tree clearing did occur in October of 2003, this was done by Goodwill before Elm Street became the owner of the property and was done to remove trees damaged in a storm. However, it has come to staff's attention that clearing and grading of this site did occur prior to the signature set being signed, in violation of Condition #6 of the Site Plan Opinion. Staff acknowledges the lengthy period between plan approval (April 10, 2003) and release of the signature set 15 months later (July 7, 2004). However, while applicants often seek Board approval to begin clearing and grading before the signature set has been signed, that did not occur in this instance.

Moderately Priced Dwelling Units: It has been alleged that Section 25-A5(i) of the Zoning Ordinance requires that MPDUs be constructed before or along with the market rate units, and that no MPDU's have been built to date. However, review of the MPDU agreement signed with DHCA on March 31, 2005 (Attachment 10), clearly details the expected construction schedule for the entire project and shows that the 4 unit MPDU building (2 over 2's) are to be built between February of '06 and July of '06. The agreement specifies only that the last building to be built must not contain only MPDU's, and the construction schedule indicates that the single family attached units on Lots 23 and 24, which are not MPDU's, will be the last units constructed.

Height: The issue of height is a tricky one to address because, again, it is not clear what the Board actually approved. The height in the underlying R-60 zone is 40 feet. The data table included as part of the staff report indicates that the height will be 30 ½ feet for the market rate units and 31 ½ feet for the MPDU's. Discussions regarding height in the transcript of the hearing vary. There appears to be an indication early on that the heights are supposed to equal the setbacks. While describing the project, Wynn Witthans states, "On the western property line and on the southern property line.....the buffer is a forty foot buffer. This is approximately the same height as the units. The units, I think, are just under 40 feet." (p. 9).

Later on, Commission Wellington asks how tall the units closest to the single family homes will be. Mr. Clarke responds (p. 34), "As measured by the County they run from the first floor to the height calculation is I believe 31 ½ feet. It only goes up to the midpoint of the roof. That's from the first floor. The total height is, I think, 38 or 39 feet."

However, on page 41, in response to another question from Commissioner Wellington about the height of single family detached units vs. the attached units, Mr. Clarke states: "The height requirement is based on a midpoint to the roof line, which is the, that's the 35 foot requirement. We will meet that 35 foot requirement just like we would with single family detached."

Meanwhile, the data table in the opinion lists the height to be provide by the applicant to be 31.5 ft. for MPDU's and 30.5 ft. for market rate units but states that these heights do not include the elevation change for the front steps. Since the steps on the site vary in height from 0 to as much as 6.7 feet (on the units already built), this alone would indicate that the heights could end up significantly above the 30.5 feet specified for market rate units.

Further complicating matters is the fact that the multiple height measurements taken by DPS, as part of the audit required by the county, yielded different results than the height measurements taken by KCI, an independent engineering firm hired by MNCPPC. DPS (measuring from curb, which is deemed to be equal to the centerline of the street) found the shortest of the built units to be 30.9 feet and the tallest to be 35.3 feet. KCI found the heights (as measured from the centerline of the street) to vary from a low of 32.61 to 36.88. Moreover, given that these are private streets, one could make a case that height should be measured from the ground level to the mid-point of the roof. KCI found these heights to vary from 31.93 feet to 36.46 feet. Staff believes that all of these numbers indicate the difficulties inherent in accurately measuring height, using the code's definitions.

Given the inconsistencies that appear in the various documents, staff does not believe that it is possible to find that a violation has occurred with respect to height. What is clear is that none of the units built to date exceed the maximum allowed in the zone, which is forty feet. In the amendment submitted by the applicant, they are requesting that the height requirement be set at 40 feet.

V. Plan of Compliance

As has been stated above, staff believes that violations have occurred with respect to setbacks. Although the applicant does not necessarily agree with this finding, they did attend a number of meetings to discuss a possible plan of compliance. Given the fact that the three built units that violate the 35-foot setback near the church have a combined variance of 3.2 feet, staff believes that the setback in the southwest corner of the site (units 23 and 24) should be increased by 3.2 feet. (See Attachment 11). This will require the applicant to reduce the size of one or both of these single-family attached units. In addition, the garage on Unit 24 must be reduced from a three car garage to a two car garage as was originally shown to the Board. Finally, staff believes that a masonry or stone fence, 147 feet in length, should be constructed instead of a 4 foot high board on board fence along the southwest edge of the property to further enhance the buffer between the Goodwill site and the adjacent single family homes. Staff wants to reiterate that while the variance involved is not large, applicants should be held accountable to build projects that adhere to the standards set by the Board.

Attachment 1: Bethesda Crest Site Plan

Attachment 2: Letter from Les Powell to Malcolm Shaneman, dated April 4, 2003

Attachment 3: Data Table from Site Plan Opinion

Attachment 4: Letter from Elm Street Development to Derick Berlage, dated September 8, 2005

Attachment 5: Notice of Amended Site Plan Application to Adjacent Property Owners

Attachment 6: Letter to Rose Krasnow from Robert and Barbara Hilberg and Emanuel Jiminez, dated August 8, 2005

Attachment 7: Memos from DPS to Rose Krasnow regarding Inspection Results at Bethesda Crest

Attachment 8: Stop Work Order for Bethesda Crest

Attachment 9: Letter from Maplewood Citizens Association to Derick Berlage, dated September 16, 2005

Attachment 10: MPDU Agreement between DHCA and Elm Street Development

Attachment 11: Illustration of Proposed Plan of Compliance