



Montgomery County Department of Park and Planning
THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION
8787 Georgia Avenue
Silver Spring, Maryland 20901

Item 8

November 25, 2005

Memorandum

TO: The Montgomery County Planning Board

VIA: William Mooney, Acting Deputy Director

FROM: Rose Krasnow, Chief, Development Review Division

SUBJECT: Controlling Development Plan Approval Documents for the
Clarksburg Town Center Project

I. Introduction

This public hearing is the sixth in a series of public hearings that the Planning Board has held to determine whether the project named “Clarksburg Town Center” is being built in conformance with the Planning Board’s original approvals.¹ This cover memorandum summarizes staff’s conclusions and recommendations on the governing documents, and based on those conclusions makes several recommendations to the Board on how to proceed from this point forward. Staff simultaneously is transmitting a detailed memorandum that contains staff’s analysis, for Board review and consideration.

Understanding that the Board’s fact finding will turn on a determination of the status of certain approvals, staff has looked to the documents to make a recommendation of what should control for purposes of finding violations. At a minimum, the staff-approved site plan documents are deficient in at least two respects. First, a necessary condition of height in vertical feet is not present in amendment “C” or in the Phase II signature set, both of which staff signed. And second, several data tables are inconsistent with drawings in the site plan

¹ The applicable approvals include Project Plan No. 9-94004 (approved in 1995) (“Project Plan”), Preliminary Plan No. 1-95042 (approved in 1996) (“Preliminary Plan”); Phase I Site Plan No. 8-98001 (approved in 1998) (“Phase I Site Plan”); the Phase II Site Plan No. 8-02014 (approved in 2002) (“Phase II Site Plan”); and Site Plan Nos. 8-98001G and 8-02014B (approved in 2005) (“Manor Home Site Plan Amendments”). There also are multiple “minor” amendments that have been approved since 1998.

signature sets. Beyond being deficient, the multiple changes from the Planning Board approved Phase 1 Site Plan constituted a “major” amendment that should have been approved by the Planning Board but was not submitted for approval nor approved.

Staff also recommends that the Board find that the developer and builders have violated two provisions of Montgomery County law, i.e., the developer filed record plats that were not in accordance with an approved site plan (Phase II signature set); and the builders filed for building permits before they had received a signed signature set (Phase II signature set and Manor Home Nos.7 and 9.) In addition, staff recommends that the Board assess a fine against one builder for commencing construction before the signature set had been signed, in violation of the conditions of approval.

There remain multiple pending alleged violations in this matter.² Staff has been investigating these allegations, through its own independent fact finding and by evaluating voluminous information submitted by multiple parties in this matter. It has become clear that whether many of these allegations constitute violations will turn on whether certain key amendments in fact were properly approved by staff. Stated another way, if certain documents were properly approved then many of the allegations do not give rise to violations; if certain documents were not approved with proper authority then many of the allegations, in fact, would merit findings of violations.

² The following pending alleged violations remain:

1. Setback violations with respect to side and rear yards, as well as the minimum space required between end buildings for townhomes and multi-family dwellings
2. Minimum net lot area
3. Lot width minimum at building line
4. Lot coverage standards for accessory buildings
5. Elimination, rerouting and/or reduction in size of alleys and roadways
6. Changes to blocks with respect to unit types and configuration without Planning Board approval
7. Changes in grading from signature site plan to actual
8. Modification of Environmentally-related features
9. Reduction in required green space
10. Record Plat Irregularities
11. Issues related to the manor House Amendment
12. Parking Requirements
13. Elimination of “O” Street and the Pedestrian Mews (deferred from 10/06/05)
14. Discrepancies regarding the Site Plan for Phase II (deferred from 10/06/05)
15. Alteration of Clarksburg Town Center Documents (deferred from 10/06/05)

Based upon its review of the record in its entirety to date, staff concludes that a preponderance of evidence in the record demonstrates that staff implemented a major amendment to the Clarksburg Town Center project in the form of multiple, sequential amendments to Phase I of the Clarksburg Town Center project. Staff concludes that through its reliance on Condition No. 38, staff exceeded the authority delegated to it both through that condition and through the minor amendment approval process. Specifically, staff concludes that Development Review staff improperly signed off on the May 30, 2003 "Amendment C," and the Phase II signature set, both of which eliminated entirely height limitations in the Project Data Table.

During the course of its review of the governing documents, staff also has concluded that the developer improperly filed record plats that were not in accordance with an approved site plan (Phase II signature set); and the builders filed for building permits before they had received a signed signature set (Phase II signature set and Manor Home Nos. 7 and 9.) To the extent that the developer and builders assert that they relied on staff's consent to file the plats and obtain the building permits, staff concludes that this reliance was unreasonable, in that both actions violate clear provisions of Montgomery County law. As a result, staff recommends that the Board find the developer and builders in violation of those provisions of the County Code and assess fines against the builders for those violations. Staff further recommends sanctions for Bozzuto for seeking building permits for 12 unit manor houses that were not in strict compliance with an approved site plan and for beginning construction before the signature set was signed.

Additionally, based upon staff's conclusion that approvals in both Phase I and Phase II were either unauthorized or deficient, staff further suggests that additional evaluation of the alleged violations becomes primarily an academic exercise, in that the Board will be assessing alleged violations against improperly approved plan amendments. As such, staff recommends that the Board, based upon the site plan violations found to date, require that the developer submit a comprehensive, project-wide plan of compliance that (a) takes into consideration the concepts suggested by the Community Based Planning Staff; (b) requires early *public* input to the Board on the plan of compliance; and (c) establishes a single, comprehensive set of development standards for the project.

This summary memorandum outlines staff's recommendations. The attached memorandum details the analysis that staff undertook in reaching its conclusions and making its recommendations.

Staff Recommendations:

1. The Board recognize that staff, acting in good faith at the time, did interpret Condition No. 38 as providing the authority to make amendments to the site plans.
2. Find that staff-approved amendments did not fall within the scope for minor amendments and therefore should not have been approved by staff under 59-D-3.7 and 59-D-2.6.
3. Find that record plats were recorded and building permits issued before the Phase II signature set was completed, in violation of Zoning Ordinance provisions governing the implementation of site plan approvals. To the extent that the Board finds plats were recorded and building permits were issued based on direction from staff, the staff was acting beyond its authority in so directing.
4. Impose fine of \$140,000 against Newlands for recording plats before Phase II signature set was approved in derogation of Montgomery County law.³
5. Impose fine of \$1,930,000 against builders for obtaining building permits before the Phase II signature set was approved in derogation of Montgomery County law.⁴
6. Impose fine of \$20,000 against Bozzuto for seeking building permits that were not in strict compliance with a site plan.⁵
7. Impose fine of \$20,000 against Bozzuto for beginning construction before a signature set was signed⁶.
8. Direct Newlands to submit a plan of compliance (a) to institute a comprehensive set of development standards for the entire project; and (b) to address the land use issues raised in Community Based Planning staff's memorandum addressing comprehensive remedial measures to consider in mitigating the impact of buildout pursuant to an invalid amendment.
9. Suspend pending hearings on remaining violations until the Board reviews and considers a plan of compliance for the entire project.
10. Suspend imposition of part or all of the fines, including the previously recommended fines for height and setback, pending receipt and approval of the plan of compliance and reconsider the fine amounts at that time.

³ Fourteen plats were issued and all were issued at least 20 days prior to the signature set. This fine recommendation is for \$500 per permit per day for 20 days.

⁴ 193 permits were issued and all were issued at least 20 days prior to the signature set. This fine recommendation is for \$500 per permit per day for 20 days.

⁵ Two permits were issued and all were issued at least 20 days prior to the sight plan approval. This fine recommendation is for \$500 per permit per day for 20 days.

⁶ Two buildings were under construction at least 20 days prior to the signature set approval. This fine recommendation is for \$500 per permit per day for 20 days.