

MCPB

Items #1 & #2
6/29/06

MEMORANDUM

DATE: June 19, 2006
TO: Montgomery County Planning Board
VIA: Farroll Hamer, Acting Director

FROM: Rose Krasnow, Chief, Development Review Division
Michael Ma, Supervisor, Development Review Division
Margaret K. Rifkin RLA AICP CNU, Coordinator/Urban Designer,
Community-Based Planning Division
John Henderson, Enforcement Coordinator, Development Review
Division

REVIEW TYPE Public Hearing Regarding

- Acts of non-compliance with site plan approval, Zoning Ordinance and approved right-of-way (*Action Item*)
- Other Deficiencies (*Action Item*)
- Compliance Program (*Discussion Item*)

REVIEW BASIS PROJECT NUMBER Division 59-D-3.6 of the Montgomery County Zoning Ordinance
Site Plans 820030020 (Formerly 8-03002)

PROJECT NAME ZONES Clarksburg Village Phase One
R-200/TDR3
R-200/ MPDU

LOCATION Southwest Quadrant of the Intersection of Stringtown Road and
Piedmont Road

MASTER PLAN RESPONDENT HEARING DATE Clarksburg Master Plan
Elm Street Development
June 29, 2006

Staff Recommendations:

- That the Planning Board find that the following constitute one or more acts of non-compliance with either the Zoning Ordinance, previous approvals of right-of-way or Site Plan approval 82003002:
 - Discrepancies between the Planning Board opinion and the signature set in terms of the number of one-family detached dwelling units and the number of townhouse dwelling units, as well as the types of dwelling units.
 - Thirty-six (36) multiple-family dwelling units shown where they are not permitted; in the R-200 zone where the moderately priced dwelling unit optional method of development (59-C-1.6) is used (R-200/MPDU zone).
 - Lot sizes that do not conform to the standards in the R-200/MPDU zone.
 - Setbacks that do not conform to the standards in the R-200/MPDU zone.
 - Right-of-way width that does not conform to that specified in the Master Plan and approved in the Preliminary Plan.
- That the Planning Board make the finding that there are other deficiencies, which consist of inadequate development standards in the R-200 zone where the optional method of development using transfer development rights (TDR's) is used (R-200/TDR3).
- That the Planning Board provide guidance concerning fines and a compliance program.

PART ONE

BACKGROUND

Organization of this Report

The purpose of this staff report is to address alleged acts of non-compliances and alleged deficiencies for Planning Board action as well as to present proposals for a compliance program for Planning Board discussion.

Part One addresses the background, including a description of the project and the process.

Part Two is an action item, and expresses the recommendations of the staff concerning the alleged acts of non-compliance with site plan approval, with the zoning ordinance and with an approved right-of-way width.. The Planning Board is expected to make findings at this time as to whether or not the *alleged acts of non-compliance* are indeed that.

In addition, this staff report provides information in response to the Planning Board's questions of May 4, 2006. The Planning Board was particularly interested in understanding how the acts of non-compliance came about and if there is any evidence that either error (mistake) or fraud was involved.

Part Three of this staff report addresses another action item: deficiencies in the development standards in the area zoned R-200/TDR3.

Part Four of the staff report addresses sanctions and a compliance program. This section is not for action but is for discussion. This is an opportunity for the Planning Board to provide staff with guidance. The staff will then prepare recommendations for the Planning Board concerning sanctions and a compliance program. These will be brought to the Planning Board at a public hearing for action, before the Planning Board's August break.

Previous Planning Board Actions

May 4, 2006- Initial Public Hearing-An initial public hearing and staff report afforded notice to the developer, and relevant information to the Planning Board, regarding the nature and extent of the alleged acts of non-compliance and deficiencies discovered by staff . Both the developer and general public had an opportunity to respond to the information provided in the staff report, and also to provide any additional information that might be relevant to a Planning Board decision. Six alleged "violations" were identified (These are referred to in this staff report, more correctly as "acts of non-compliance" and "deficiencies".)

The Planning Board requested a continuation of the Public Hearing on May 11, 2006, to accommodate the developer's request for resumption by M-NCPPC of the review of building permits for 83 lots.

The Planning Board also requested that the staff provide information concerning how each alleged "violation" came to pass and whether or not there is any evidence that error/mistake or fraud were involved. At that time the Planning Board received testimony from the Developer acknowledging mistakes.. The May 4, 2006 staff report is attached. (Recordings of the May 4, 2006 and May 11, 2006 sessions are available at www.mc-mncppc.org. Click on the "weekly agenda" tab and then click on "Recordings of the Planning Board Meetings".)

May 11, 2006 – Continuation of May 4, 2006 Item: Issuance of Corrective Order

On May 11, 2006 the Planning Board issued a Corrective Order for eighty-three lots to establish development standards on those lots and thereby allow M-NCPPC to resume the review of these building permits. The staff report and Corrective Order are attached. The developer has entered into “stipulations of fact” as part of the Corrective Order. The stipulations identify certain matters of fact that are not contested by the developer – and therefore deemed resolved for the purpose of the Planning Board’s decision on the merits – as opposed to any other facts relating to the project that remain open to dispute. These stipulations of fact can be found attached.

Procedural Posture

Under Section 59-D-3.6 of the Zoning Ordinance, if the Planning Board finds that “any term, condition, or restriction in a certified site plan is not being complied with,” the Board may take the following actions:

- 1) impose a civil fine or penalty authorized by Section 50-41;
- 2) suspend or revoke the site plan;
- 3) approve a compliance program which would permit the developer to take corrective action to comply with the certified site plan;
- 4) allow the developer to propose modifications to the certified site plan, or
- 5) take any combination of these actions.

Part Four of this staff report provides the basis for Planning Board discussion concerning which of the above actions may be appropriate should the Board make findings of acts of non-compliance.

Future Planning Board Actions

The Planning Board will have an opportunity to make final decisions concerning what actions to take in response to acts of non-compliance. This will be brought to the Planning Board for action in July 2006. The staff will prepare a proposal that reflects guidance from the Planning Board, taking into consideration testimony received.

The Planning Board will also be brought for approval an amendment to the site plan for Phase One. The amendment will include any features required by the Planning Board as well as any revisions the developer wishes to propose. The amendment will also update the site plan to reflect any changes required by other government agencies since the original approval.

Sources of Allegations of Acts of Non-Compliance

The alleged acts of non-compliance discussed in this staff report came to the attention of M-NCPPC staff from several sources. These included the Department of Permitting Services, a contract purchaser and the developer. They also surfaced as the result of an

extensive site plan audit by M-NCPPC.

A contract purchaser raised concerns about a proposed “trellis” to connect one or more dwelling units as early as last summer. (June 2005).

The Department of Permitting Services (DPS) identified the Foreman Boulevard right-of-way issue at the time of review of the record plat. DPS also identified issues of lot size and setback non-compliance at the time of building permit review, wall checks and site inspections.

As the Board is aware, Montgomery County Council Resolution No. 15-1125 (July 26, 2005) called for staff to conduct a quality control audit intended to evaluate the status of each site plan approved by the Planning Board on or after January 1, 2003. This project fell within the scope of the audit. Staff discovered a number of the potential acts of non-compliance discussed in this staff report based upon the work undertaken in connection with that audit.

As stated earlier, the developer filed Amendment B to address a variety of outstanding issues before the staff investigation of alleged violations began. This was shortly after the Planning Board’s initial finding of violations in Clarksburg Town Center. The issues being addressed initially in the amendment were the multiple family buildings in a zone where they are not permitted, and the proposed structures to transform one family detached dwelling units into semidetached dwelling units, and thereby address lot size and setback issues.

The Montgomery County Civic Federation’s Site Plan Enforcement Addendum, dated January 23, 2006, noted that they had become aware that staff had uncovered potential acts of non-compliance, causing the Civic Federation to formally request a hearing on this project.

As of the date of this staff report, the Planning Staff is not aware of any acts of non-compliance that have been alleged but not investigated for the purpose of presenting this report.

General Description of the Development Project

Overview. Clarksburg Village is a 771-acre, large-scale development that was proposed for a mix of uses in three different phases. The Planning Board’s Preliminary Plan opinion, which was amended twice, ultimately approved 2,654 dwelling units, 20,000 square feet of office/retail, and 5,000 square feet of daycare. The plan also called for two school sites, parks, greenways, trails, and recreational facilities.

Site Vicinity/Description. Clarksburg Village is located in Clarksburg, Maryland. It is bounded to the north by Stringtown Road, which separates it from Clarksburg Town Center. The eastern portion of the site is bounded by a stream, beyond which is Greenway Village (a.k.a. Arora Hills). The Clarksburg Greenway bounds the western

edge of the site, beyond which is Frederick Road (MD 355). The southern boundary of Clarksburg Village is Ridge Road.

The first phase is the northern half of the site closest to Stringtown Road and Clarksburg Town Center. The second phase is to the south. The third phase is the village center, which consists of several blocks of primarily commercial development next to Greenway Village/Arora Hills, along Newcut Road.

Note: The potential acts of non-compliance described in the balance of this report relate to Phase One only.

Plan Approvals

Preliminary Plan- The Planning Board approved the Preliminary Plan 1-01030 and Special Protection Area Water Quality Plan for Clarksburg Village for all phases on July 30, 2001. The Plan was subsequently amended twice in January 2003 and December 2004 to incorporate additional land and dwelling units into the development. The latest amendment authorized development of 2,654 dwelling units, 20,000 square feet of office/retail and 5,000 square feet of daycare on approximately 770 acres.

Infrastructure Plan- The Planning Board approved Site Plan 8-02038 for Clarksburg Village Infrastructure Plan for all phases in July 2003. The Planning Board approved the overall concept for all phases of the project for roads, stormwater management, school sites, parks, the Clarksburg Greenway, recreational facilities, and location and phasing of moderately priced dwelling units.

Phase One Site Plan- The Planning Board approved the Site and Water Quality Plan 82003002 (8-03002) for Phase One of the development on July 31, 2003 for 933 dwelling units on 333.87 acres. The site development plan of the signature set was approved on August 9, 2004. The entire signature set package, inclusive of the Site Plan Enforcement Agreement and Development Program was approved on May 12, 2005.

The Planning Board opinion for Site Plan 82003002 (8-03002) approved 933 dwelling units, including 471 one-family detached dwelling units , 414 “Townhouses”, inclusive of 44 MPDU “Townhomes”, and 48 multiple family dwelling units in four buildings, which were all MPDU’s.¹

The approved Signature Set for Site Plan 82003002 (8-03002) showed a different mix of dwelling units , including 481 one-family detached dwelling units , 360 “Townhomes/Semi-detached” dwelling units , 44 MPDU “Townhomes” and 48 MPDU multiple family dwelling units . Although the total number of dwelling units remained at 933, in the Signature Set the number of one-family detached dwelling units increased by 10, the number of “townhomes” decreased by 10, and semidetached dwelling units were

¹ The remaining MPDUs required for Phase One are to be provided “off-site” in Phase Two. Building permits for 231 market rate units in Phase One were to be withheld until the building permits were issued for the required MPDUs off-site in Phase Two.

added as a unit type. This discrepancy is listed below as an alleged act of non-compliance.

Amended Phase One Site Plan- An amended site plan (82003002 (8-03002)A) was approved by the Planning Board on December 23, 2004, to add 30 acres (for a total of 363.87 acres) near Stringtown Road to Phase One and revise the layout in that area. The amendment approved 997 dwelling units in Phase One. This is an increase of 64 dwelling units over the original site plan approval.²

Development Status

Phase One of Clarksburg Village is under construction and approximately 200 households have bought homes and many have already moved in. According to recent information provided by the developer on April 1, 2006, 41 dwelling units were under construction at that time. Construction on approximately 20 additional homes has been stopped until outstanding issues are resolved. No new building permits were being issued at the time. After the Planning Board’s Corrective Order of May 11, 2006 creating development standards for 83 dwelling units, M-NCPPC has been reviewing building permits for those dwelling units .

Development Standards for Phase One

Phase One of the development is split zoned: R-200 and R-200/TDR 3. There is one area zoned R-200/TDR3 and there are two separate areas zoned R-200. The Zoning Ordinance provides different standards for the R-200/MPDU and the R-200/TDR3 zones. The R-200/TDR3 zone requires that certain standards, such as the lot sizes, building heights and setbacks, be determined and approved by the Planning Board. These standards may be modified through approval of site plan amendments.

R-200/MPDU Zone

In the R-200/MPDU zone, the following standards under Section C-1.62 of the Zoning Ordinance apply:

| | R-200 /MPDU |
|--|-----------------|
| 59-C-1.622. Density of development. The maximum number of dwelling units per acre of usable area, as defined in section 59-C-1.628(a), is | 2.44 |
| 59-C-1.623. Setbacks from street (in feet). | |
| No detached dwelling must be nearer to any public street than: | 25 ⁷ |

² The applicant presented a proposed signature set for site plan for 82003002A, but that signature set has not been finalized because staff discovered the alleged acts of non-compliance. Applicant has submitted a “B” amendment to the approved site plan to address these issues. It is under review and will reflect the Board’s decision on the alleged acts of non-compliance and compliance program.

| | |
|---|--------------------|
| | R-200 /MPDU |
| 59-C-1.624. Yard requirements (in feet). For a side or rear yard that abuts a lot that is not developed under the provisions of this section 59-C-1.6, the setback must be at least equal to that required for the abutting lot, provided that no rear yard is less than | 20 |
| 59-C-1.625. Lot area and width. | |
| (a) Minimum net lot area (in sq.ft.): | |
| (1) For a one-family detached dwelling unit | 6,000 ⁷ |
| (2) For each one-family semidetached dwelling unit | 3,500 |
| (3) For a townhouse, unless a smaller lot size is approved by the planning board. | 1,500 |
| (4) Where an individual lot for each dwelling unit is deemed to be infeasible because of the manner in which individual units are attached to each other the Board may approve a site plan depicting more than one dwelling unit on a lot. | |
| (b) Minimum lot width for a one-family detached dwelling unit at existing or proposed street line (in feet): | 25 |
| 59-C-1.626. Maximum Building Height (in Feet) | |
| (a) For a main building. The height must not exceed 3 stories or 40 feet. If the abutting lot is not developed under the provisions of this section 59-C-1.6, the yard abutting that lot must be increased by one foot for each 2 feet of height above 35 feet | |
| (b) For an accessory building. The height must not exceed 2 stories or 25 feet. | |
| 59-C-1.627. Green area. Green area must be provided for each townhouse or one-family attached dwelling unit erected in the subdivision, at the rate, in square feet per unit, of | 2,000 |

7 For Moderately Priced Dwelling Unit lots designated as such on a site plan, the minimum lot area must not be less than 3,000 square feet and the setback from a public street must not be less than 15 feet. For each one-family detached dwelling unit with a lot area less than 3,500 square feet, 500 square feet of green area must be provided in the subdivision.

R-200/TDR 3

In the R-200/TDR 3 zone, the following development standards apply:

The second table under Section C-1.395 of the Zoning Ordinance provides standards for 1) minimum percentage of one-family detached dwelling units ; 2) maximum percentage and height (in stories) for multiple-family dwelling units ; and 3) minimum green area as follows:

| <i>TDR Density per Acre Shown on Master Plan</i> | <i>Size of Development³</i> | <i>Minimum (Maximum) percentage required¹</i> | | | |
|--|--|--|--|---|-------------------|
| | | <i>One-Family Detached</i> | <i>One-Family Townhouse and Attached</i> | <i>Multiple Family² Four-Story or Less⁴</i> | <i>Green Area</i> |
| 3-5 | 800 dwelling units or more | 30 ⁶ | P | P(20) | 35 |

6 Development may utilize the R-60/MPDU standards as set forth in Sec. 59-C-1.625(a)(1).

Development may utilize the R-60/MPDU lot size standard for one-family detached dwelling units per Footnote #6, but is not required to do so.

Per Section C-1.394 (b) of the Zoning Ordinance, the lot sizes and other development standards, including height (in feet) and setback, must be determined by the Planning Board for conformance with applicable master plan guidelines and in accordance with the purposes and provisions of the PD zone.

Part R-200/TDR3 and part R-200 MPDU

There are a number of lots which are zoned partly R-200/TDR3 and partly R-200/MPDU. Whatever the majority of the lot area is zoned, determines which development standards apply. There is one case where the lot is 50% in one zone and 50% in the other. In that case, staff has agreed with the developer to use the R-200/TDR3 standards as he originally intended. Staff does not support the interpretation reflected in the Signature Set Data Table (Sheet 14 of 14) which places all split zoned lots automatically in the more flexible zone (R-200/TDR3) regardless of distribution of the area.

Developer's Approach

The developer has explained that the acts of non-compliance are errors.

In a letter dated June 12, 2006, addressed to the Chairman of the Planning Board, the Developer's attorneys wrote:

“...none of the Alleged Violations represents anything more than, at worst, inadvertent missteps by Respondent (and to varying degrees, Staff and even the Board) in obtaining Respondent's various approvals for this Project. No fraud or bad faith on the part of the Respondent has been or could be alleged in regard to any Alleged Violations.”

The developer has already offered proposals to address many of the allegations described in this report. Indeed the developer filed on May 5, 2005, a proposed site plan amendment that includes changes that if approved by the Planning Board, might resolve several of the issues or more of the alleged acts of non-compliance. The developer also submitted further revisions to the amendment, the most recent being submitted June 9, 2006. The most recent submittal was intended to meet the requirements of the Planning

Board's Corrective Order of May 11, 2006. The Corrective Order, which sets development standards for 83 specific lots, requires that the developer submit a proposal for all missing development standards by June 10, 2006 as follows:

“ ORDERED, FURTHER, THAT within 30 days of the date of this Order, Respondent shall prepare and file with the Board a Plan of Compliance, Site Plan Amendment or other petition for Planning Board action that is reasonably satisfactory to the Planning Board Staff to establish appropriate height and other necessary development standards with respect to any and all structures within the Project.”

PART TWO

Acts of Non-Compliance

with Site Plan Approval 82003002, the Zoning Ordinance, and with an approved right-of-way width

This part discusses and presents staff recommendations on the followed five alleged acts of non-compliance:

- 1. Discrepancies between the planning board opinion and the signature set in terms of the number of one-family detached dwelling units and the number of townhouse dwelling units , as well as the types of dwelling units*
- 2. Thirty-six (36) multiple-family dwelling units shown in the R-200/MPDU zone where they are not permitted*
- 3. Twenty-two (22) lots where the size does not conform to the standards in the R-200/MPDU zone*
- 4. Thirty (30) buildings where the setbacks do not conform to the standards in the R-200/MPDU zone*
- 5. One road (1), Foreman Boulevard, where the right-of-way is shown as 70 feet where the approved width is 80 feet.*

- 1. Discrepancies between the planning board opinion and the signature set in terms of the number of one-family detached dwelling units and the number of townhouse dwelling units , as well as the types of dwelling units .**

Description- The 471 one-family detached dwelling units approved by the Board in its opinion increased by 10 to 481 in the approved Signature Set. Similarly, the total number of townhouses decreased by 10. In addition, the Board approved only townhouses, but the

approved signature set calls for “Townhomes/*Semi-detached*” dwellings. In this respect the Signature Set does not conform to the relevant Planning Board opinion.

Discussion

The number of one-family detached dwelling units and the number of townhouses:

The developer has stated that this was a mistake. He has explained that site plan drawings did not change from the time of Planning Board approval to the time of signature set approval. He has stated that the total count of one-family detached homes always should have been 481, in contrast to the original staff report and site plan opinion which show 471.

Staff conducted a thorough investigation of the records and found that the number of one-family detached dwelling units (471) and the total number of dwelling units (933) is stated in two different places in the staff report. In addition, at the public hearing there was no mention of the number of one-family detached dwelling units or townhouses. Four months later, the opinion was mailed consistent with the count in the staff report.

A year after the public hearing, the number of one-family detached dwelling units is shown as 481 in the data table on the first sheet of the Signature Set Site Development Plan drawings. On the same sheet, there is a copy of the opinion with the original number: 471.

Staff finds it credible that the difference in the numbers is an error. The total number of dwelling units remains the same.

The addition of “semi-detached” dwelling units to the “Townhomes” category in the data table

Records show that within six months of the Planning Board approval, discussions started about how to address problems discovered in the site plan. The discussions included a proposal from the developer to address the problems by changing a number of one-family detached dwelling units into semidetached dwelling units. This occurred months before the Signature Set drawings were signed by M-NCPPC. When the drawings were signed by M-NCPPC, the word “semi-detached” appears for the first time in the data table.

In those same drawings, the developer has explained, there are trellis connections shown between pairs of specific dwelling units to change them from one-family detached dwelling units into semidetached dwelling units. However, the connections are not identified with labels, listed in the legend, notes, nor shown in architectural details. The lines between the dwelling units that represent “connections” are thin and difficult to discern. The thickness of the lines is finer than that used for footprints of the dwelling

units they connect. To an observer, they could be defining squares of concrete pavement, for example, rather than connecting structures creating semidetached dwelling units .

Nine months after the Signature Set drawings were signed by M-NCPPC, Staff requested in writing that the developer:

“show the structure that makes the SFD (single family detached units) [into] attached units in the R-200 [MPDU zone area]” (May 13, 2005)

By this time, the developer had also applied and received Planning Board approval to add acreage and dwelling units as part of a single-focus amendment. Neither the staff report, nor the public hearing for that amendment mentioned changing one-family detached dwelling units into either semidetached dwelling units nor did they show a design for a connection. In the staff report; however, the data table lists *“Town homes/Semi-detached”* and lists the minimum lot size in the R-200/MPDUzone for semidetached dwelling units as 3,500 square feet.

Records indicate that the addition of the “semidetached ” category and the design of an attachment to convert a one family detached home to a semidetached home, were never discussed in a staff report or public hearing; nor was either the subject of an administrative amendment.

Conclusion: Staff recommends that the Planning Board make a finding of acts of non-compliance with the Planning Board opinion with respect to discrepancies between the opinion and the signature set in terms of the number of one-family detached dwelling units and the number of townhouse dwelling units , as well as the types of dwelling units.

2. Thirty-six (36) multiple-family dwelling units shown in the R-200/MPDU zone where they are not permitted

Description

Approved Site Plan 82003002 (8-03002) proposes 48 multiple-family dwelling units (MPDU’s) in four buildings in Block T. Block T includes the southernmost area zoned R-200. However, on the approved site plan, Block T appears to be entirely in the R-200/TDR3 zoned portion of the development because the zoning lines through the block are missing. Three of the four multiple-family buildings, Buildings 1, 3, and 4, are actually located in the area where the developer is using the R-200/MPDU.³ Multiple-family dwelling units are not permitted in the R-200/MPDU zone per Section C-1.621 of the Zoning Ordinance.

³ None of these buildings have been constructed.

Discussion

The developer has explained that this was a mistake. He knew that the Block T included areas with a base zone of R-200 but did not show the zoning information on the site plan. In the course of responding to staff requests to revise the site plan and the locations of the multiple family buildings, he moved them into the R-200 area in error. Since the R-200 zoning was apparently not shown on the site plan, this issue was not discovered by staff and the plan was approved by the Planning Board.

Staff conducted a thorough investigation of the records and found that there were inconsistencies in various submittals from the developer that may have lead to this confusion. Some early applications either did not account numerically for the R-200 acreage in this southern portion of Phase One on the actual application form, or did not reflect the correct zoning on the plans. In fact, even the staff report did not account for this southern area of R-200 zoning. The analysis in the staff report addresses only the R-200 zoning in the northwest corner of the site. There is no plan in the staff report or in the files correctly showing existing zoning on the site.

Conclusion: Staff recommends that the Planning Board make a finding of acts of non-compliance with the zoning ordinance with respect to the thirty-six (36) multiple-family dwelling units shown in the R-200/MPDU zone where they are not permitted

3. Twenty-two (22) lots where the size does not conform to the standards in the R-200/MPDU zone (and definition of semidetached dwelling units)

Description

In the R-200/MPDU zone the minimum lot size for a market-rate one-family detached home is 6000 square feet (59-C-1.625 (a)(1)). The twenty-two (22) lots shown in the table below are less than 6000 square feet.⁴ On the signature set for approved Site Plan 82003002 (8-03002) each of the lots is shown with a one-family detached home. The lot size can be reduced to 3,500 square feet if the home is a MPDU, or even to 3,000 square feet if it is an MPDU and additional common open space is provided. None of the homes on the lots listed in the Table are MPDU's.

⁴ Many of these lots also have setback issues .

Table – Lot Size: Summary of Status

Key:

Homeowner: Home settled, private homeowners now owns the house and lot

Developer: Elm Street Development still owns lot

Builder: Lot closed and builder now owns the lot

Not Started: DPS restricted start of construction

Stopped: DPS halted construction, construction started but not finished

| Block | Lots (22 total) | Lot Size on Signature Set | Construction Status | Ownership |
|--------------|--------------------------------|--|----------------------------|------------------|
| F | 51 | 5083 | Built | Homeowner |
| G | 12 | 5500 | Built | Homeowner |
| | 13 | 5845 | Stopped | Builder |
| | 21 | 4000 | Not Started | Developer |
| | 22 | 5000 | Not Started | Developer |
| | 32 | 4400 | Not Started | Developer |
| | 33 | 4400 | Not Started | Developer |
| | 34 | 5500 | Not Started | Developer |
| | 35 | 5500 | Not Started | Developer |
| | 36 | 5500 | Not Started | Builder |
| H | 6 | 4802 | Not Started | Developer |
| | 7 | 4039 | Not Started | Developer |
| | 8 | 4039 | Not Started | Developer |
| | 9 | 5145 | Under Construction | Builder |
| K | 11 | 4371 | Not Started | Developer |
| | 12 | 4200 | Not Started | Developer |
| | 13 | 5663 | Stopped | Builder |
| L | 11 | 5960 | Not Built | Developer |
| | 12 | 4200 | Not Built | Developer |
| V | 98 | 5603 | Not Built | Developer |
| | 99 | 5487 | Not Built | Developer |
| | 100 | 5772 | Not Built | Developer |

Discussion

The Developer has explained that the one-family detached dwelling units on the lots that are less than 6000 square feet were intended to be one-family attached dwelling units .

A letter dated June 12, 2006 from the Developer’s attorneys states:

“...the alleged lots that the Staff Report describes as detached, single-family dwelling (“SFD”) were never intended by Elm Street or Staff as anything other than to be attached units.”

Staff certainly finds it credible that there was never any intention to include a dwelling unit type that did not meet the standards in the zone. However, the signature set shows these dwelling units as one -family detached – not semidetached and not attached.

Secondly, there are several indications that the desired unit type that the Developer wished to create using a connection, was “semidetached ” not “attached”. In fact, the dwelling type added to the Signature Set was indeed semidetached . “Attached” and “semidetached ” have different definitions in the zoning ordinance.

The minimum lot size for each semidetached dwelling unit in the R-200/MPDU zone is 3,500 square feet. The lots in question would meet that standard. The developer asked certain purchasers to agree to the construction of a trellis between their house and an adjacent house, in order to satisfy the definition of semidetached unit subject to the approval of M-NCPPC and thereby ensure that the lot size was consistent with the development standards. However, the zoning code definition of one-family semidetached dwelling units states that the dwelling units *must share a party wall.*⁵

Staff conducted a thorough investigation of the records and found that in the staff report for the site plan approval, the data table clearly states that the minimum lot size for one -family detached homes is 6000 square feet in the R-200/MPDU zone. The data table also states that these standards apply in the northwest corner of the site; an area zoned R-200/MPDU where lot sizes have since been identified as being smaller than allowed.

The data table shows that the *proposed* minimum lot size for one -family detached homes in the zone is 6,012 square feet. This is a number that customarily is provided by the developer. However, if the number were under discussion, staff could condition the approval on either meeting that minimum or on converting one-family detached homes on lots smaller than 6000 square feet to semidetached dwelling units. This was not discussed in the staff report nor was any aspect of lot size discussed at the public hearing. The staff found the site plan in conformance with the standards in the zones at the time of the public hearing.

The record is inconclusive as to how the submittal and approval of the signature set, record plats and in some cases building permits occurred where lots sizes do not meet the standards in the zone.

⁵ Section 59-A-2.1 of the Zoning Ordinance provides the following definition for one-family semidetached units:

Dwelling unit, one-family semidetached (duplex): One of 2 attached dwelling units located on abutting lots, separated from each other by a party wall along the common lot line, and separated and detached from any other dwelling unit on all sides.

Conclusion: Staff recommends that the Planning Board make a finding of acts of non-compliance with the zoning ordinance. with respect to twenty-two (22) lots where the size does not conform to the standards in the R-200/MPDU zone

4. Thirty (30) Buildings where the setbacks do not conform to the standards in the R-200/MPDU zone

Description

Setbacks from the public street do not meet the development standards for a number of one-family detached dwelling units in the R-200/MPDU zone as listed in the following table.⁶ The minimum setback from a public street for a one-family detached home is 25 feet (Section 59-C-1.6).

The only provision for the reduction of this setback in the R-200/MPDU zone is for Moderately Priced Dwelling Units (Section 59-C-1.6). The homes in question are not Moderately Priced Dwelling Units. Once the Moderately Priced Dwelling Unit optional method of development is selected, as it is here, all of the requirements from that section apply.

The following table is a summary of the lots and their status.

Table – Setbacks: Summary of Status

Homeowner: Home Settled, Private Homeowners now owns the house and lot
 Developer: Elm Street Development still owns lot
 Builder: Lot Closed = Builder now owns the lot
 Not Started: DPS Restricted Start of Construction
 Stopped: DPS Halted Construction, Construction Started but not finished

| Block | Lots (30 total) | Setback from Public Street per signature set | Construction Status | Ownership | Notes |
|-------|-----------------|--|--------------------------|--------------|------------|
| F | 51 | 21 feet | Built | Home settled | |
| G | 1 | 15 feet | Built | Home settled | Corner lot |
| | 12 | 15 feet | Built | Home settled | |
| | 13 | 15 feet | not started | builder | |
| | 21 | 21.5 feet | not started not built | developer | |
| | 22 | 22 feet | not started | developer | |
| | 23 | 20 feet | built | home settled | |
| | 26 | 15 feet | built | home settled | |

⁶ some of these lots also have lot size issues (see Section VIII.3 above).

| Block | Lots (30 total) | Setback from Public Street per signature set | Construction Status | Ownership | Notes |
|----------|-----------------|--|------------------------------------|--------------------|--|
| | 30 | 15 feet | not started | developer | |
| | 31 | 20 feet | not started | developer | |
| | 32 | 23 feet | not started | developer | |
| | 33 | 23 feet | not started | developer | |
| | 34 | 15 feet | not started | developer | |
| | 35 | 20 feet | not started | developer | |
| | 36 | 20 feet | not started | lot closed builder | |
| | 37 | 15 feet | built | home settled | corner lot |
| H | 1 | 15 feet | built | home settled | corner lot |
| | 6 | 15 feet | not started | developer | |
| | 10 | 22 feet | built | home settled | |
| | 15 | 18 feet | built | home settled | corner lot |
| I | 16 | 15 feet | built | home settled | corner lot |
| K | 1 | 15 feet | not on developer list not built | developer | corner lot replaced in amendment A |
| | 10 | 23 feet | built | home settled | |
| | 11 | 21.5 feet | not started | developer | |
| | 12 | 21.5 feet | not started | developer | |
| | 13 | 21.5 & 15 feet | stopped | builder | |
| L | 1 | 15 feet | no developer comments not built | developer | corner lot replaced in amendment A |
| | 10 | 18 feet & 20 feet | built | home settled | |
| | 11 | 23 feet | not built | developer | |
| | 12 | 23 feet | not built | developer | |

Discussion

Corner Lots

In certain instances, houses on corner lots were located with side yards 15 feet from the street. The developer has explained that he was using a provision in the R-200 standard method zone, 59-C-1.323 (a). Upon study, staff finds that this provision is not applicable in the R-200/MPDU zone. This is because once the MPDU option is used, only the provisions in the MPDU section are applicable, 59-C-1.61. He has requested Zoning Text Amendment 06-12, which the Planning Board made recommendations on June 15, 2006. The Planning Board *supported* the amendment, which would also allow the

flexibility provision to be used when the MPDU option is used. If the County Council adopts the Zoning Text Amendment, then these homes on corner lots with side yards 15 feet from the street could be found in conformance with the zoning ordinance.

Other Lots in the Table

The developer has stated that the setbacks that are smaller than the development standards for the R-200/MPDU allow, are a mistake except where he explains that the reduced setback is allowed for corner lots per provisions in the zoning ordinance for the R-200 standard method of development.

Staff conducted a thorough investigation of the records and found once again, that in the staff report for the site plan approval, the data table clearly states that the minimum setback for a one family detached home “front yard” is 25 feet in the R-200/MPDU zone.

The zoning ordinance actually states “ *no detached dwelling unit must be nearer to any public street than*” :... 25 feet. This setback requirement applies to side yards along public streets as well as front yards. As before, the data table states that these standards apply in the northwest corner of the site; the area where setbacks from streets have since been identified as being smaller than allowed.

The data table clearly shows that the developer’s proposed minimum setback for *front yards* for one -family detached homes in the zone is 25 feet. This is a number that customarily is provided by the developer.. However, if the number were under discussion, staff could condition the approval on either meeting that minimum or on converting single family detached homes with smaller setbacks to semidetached dwelling units. There is no setback requirement for the semidetached units specified in the zoning ordinance. The Planning Board could establish the setbacks at the time of site plan review. This was not discussed in the staff report. While the sizes of front and rear yards were briefly discussed at the public hearing, there were no revisions requested by the Planning Board. The staff found the site plan in conformance with the standards in the zones at the time of the public hearing.

Summary

The record is inconclusive as to how the submittal and approval of the signature set, record plats and in some cases building permits occurred where setbacks do not meet the standards in the zone.

Conclusion: Staff recommends that the Planning Board make a finding of acts of non-compliance with the zoning ordinance with respect to thirty (30) Buildings where the setbacks do not conform to the standards in the R-200/MPDU zone

4. One road Foreman Boulevard, where the right-of-way is shown as 70 feet where the correct width is 80 feet.

Description

At the time of Preliminary Plan, the Board approved Foreman Boulevard with an 80-foot right-of-way. The approved Site Plan 82003002 (8-03002), however, provides only 70 feet.

Discussion

In the June 12, 2006 letter from the Developer's attorneys, the Foreman Boulevard situation is described as an "innocent and inadvertent mistake on the 70' vs 80' ROW for Foreman Blvd." Staff conducted a thorough investigation of the records and found no evidence to the contrary.

The Planning Board makes the final decision regarding the classification and the required right-of-way width of a road at the time of Preliminary Plan. After that, the Montgomery County Department of Permitting Services and the Department of Public Works and Transportation (DPW&T) make the final decision regarding the *design* of the road within the required right-of-way. There are standard road designs in a publication called "Design Standards" prepared by DPW&T that are referenced.

In the case of Foreman Boulevard, the Preliminary Plan conditions require Foreman Boulevard to be a *two-lane arterial road* between Snowden Farm Parkway and Timber Creek Lane with an 80 foot right-of-way. This is consistent with the master plan, which specifies an 80-foot right-of-way.

Later, the Site Plan conditions require compliance with a memo from the Department of Permitting Service concerning the road *design*. The design was to be that for an alternative primary. The alternative primary is customarily used to reduce impacts on the environment. This design was to apply to the portion of Foreman Boulevard, which included a stream valley crossing.

There is no specific discussion of Foreman Boulevard in the staff report for the site plan, nor was there any discussion of it at the public hearing.

The signature set was submitted and approved by M-NCPPC with Foreman Boulevard shown with 70 feet of right-of-way, which is the right-of-way width for an alternative primary. However, it was supposed to be 80 feet, the standard right-of-way width for a two lane arterial, per the Preliminary Plan.

The record is inconclusive as to exactly how the mistake on the Site Plan drawing occurred. The reference to the alternative primary *design* appears to have been a contributing factor.

Conclusion: Staff recommends that the Planning Board Make a Finding of acts of non-compliance with an approved right-of-way width for Foreman Boulevard.

Conclusion of Part Two

Staff has identified alleged acts of non-compliance of the Planning Board approvals and the zoning ordinance requirements. These recommendations take into consideration testimony that the Board received at the hearing on May 4, 2006 and since that time, as well as the Developer's "Proposed Plan of Compliance/Correction Proffer" (June 12, 2006), and guidance provided by the Board. The staff is not able to construct with certainty, how each of these acts of non-compliance occurred. The evidence reviewed in connection with this investigation, in staff's opinion, does not support any finding of fraud.

PART THREE Other Deficiencies

which consist of inadequate development standards in the R-200/TDR 3 zoned area

The approved Signature Set for Site Plan 82003002 (8-03002) includes a data table that sets some but not all development standards. It establishes front and side yard setbacks (15 feet and 3 feet, respectively) for one-family detached dwelling units only,⁹ not for other dwelling types. No other development standards, such as lot size or building height¹⁰, were provided for detached dwelling units or other dwelling types. Therefore, there are deficiencies in the data table because of missing development standards.

In addition, construction of some dwelling units was stopped by the Department of Permitting Services (DPS). In this area of the plan where the principles of "new urbanism" are used, front yards sometimes face a mews and do not front on a street. Ambiguity in the development standards there was ambiguity about where the front yard should be measured is also a deficiency.

In the R-200/TDR3 zone, the optional method of development with MPDU's is subject to the purposes and provisions of the PD zone except as shown in the following table which appeared earlier in this staff report:

⁷ A note on the signature set states that rear yard setbacks for one-family detached units are as shown on the site plan, but each unit would have to be individually scaled to determine the rear setback.

⁸ The multiple-family units are limited to four stories under the zoning ordinance but the approved signature set does not identify the height in feet for any of the dwelling unit types including multiple-family in the R-200/TDR3 zone.

⁹ A note on the signature set states that rear yard setbacks for one-family detached units are as shown on the site plan, but each unit would have to be individually scaled to determine the rear setback.

¹⁰ The multiple-family units are limited to four stories under the zoning ordinance but the approved signature set does not identify the height in feet for any of the dwelling unit types including multiple-family in the R-200/TDR3 zone.

Section C-1.395

| <i>TDR Density per Acre Shown on Master Plan</i> | <i>Size of Development³</i> | <i>Minimum (Maximum) percentage required¹</i> | | | |
|--|--|--|--|---|-------------------|
| | | <i>One-Family Detached</i> | <i>One-Family Townhouse and Attached</i> | <i>Multiple Family² Four-Story or Less⁴</i> | <i>Green Area</i> |
| 3-5 | 800 dwelling units or more | 30 ⁶ | P | P(20) | 35 |

6 Development may utilize the R-60/MPDU standards as set forth in Sec. 59-C-1.625(a)(1).

Development may utilize the R-60/MPDU lot size standard for one-family detached units per Footnote #6, but is not required to do so.

Per Section C-1.394(b) of the Zoning Ordinance, the lot sizes and other development standards, including height (in feet) and setback, must be determined by the Planning Board for conformance with applicable master plan guidelines and in accordance with the purposes and provisions of the PD zone.

A primary purpose of the PD zone is to:

“Provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories.”

Per Section 59-D-3.23(a) of the Zoning Ordinance the contents of a site plan should include the “location, height, ground coverage and use of all structures.”

Therefore, while greater flexibility is allowed in the PD zone, any time a site plan is required, it is to provide specific information such as height. In this instance, height standards were not provided. They were not referenced in notes in the signature set; nor were they mentioned in the staff report.

The developer was required to provide signature set drawings that showed graphically what the setbacks would be for each unit. The developer also created a table (Sheet 14 of 14) as requested, that included setbacks for each lot. In some cases instead of providing the setback in feet, the table referenced the drawing by saying “as shown.”

The record is inconclusive concerning how this happened.

Conclusion: The Planning Board should make a finding that the lack of complete development standards creates deficiencies in the site plan.

PART FOUR

DISCUSSION ITEM

SANCTIONS AND COMPLIANCE PROGRAM

Staff has carefully analyzed the Clarksburg Village plans and has recommended that the Board find non-compliance with respect to five out of six of the items presented. Assuming that the Board finds agrees with respect to some or all of these items, it will be necessary to determine appropriate sanctions and/or a compliance program.. In past violation cases, fines have been issued under the authority of the subdivision regulations (50-41) and a plan of compliance was set forth under the authority of 59-D- 3. However, the County Council recently amended the zoning code, effective April 1, 2006, giving the Board the ability both to collect a fine and approve a plan of compliance under 59-D-3.6. The new language appears below:

Section 59-D-3.6. Failure to Comply

(a) If the Planning Board finds on its own motion or after a complaint is filed with the Planning Board or the Department, and after giving due notice to the applicant, the complainant, and all parties previously before the Board on this plan and holding a public hearing or receiving a report of a public hearing held by a designated hearing officer, that any term, condition, or restriction in a certified site plan is not being complied with, the Planning Board may:

- (1) impose a civil fine or penalty authorized by Section 50-41;
- (2) suspend or revoke the site plan;
- (3) approve a compliance program which would permit that applicant to take corrective action to comply with the certified site plan;
- (4) allow the applicant to propose modifications to the certified site plan, or
- (5) take any combination of these actions.

The acts of non-compliance uncovered in Clarksburg Village are numerous and not easily categorized. In all cases the developer argues that these issues arose as a result of mistakes that were made, and staff was unable to find conclusive evidence that this was not the case. Moreover, some of the alleged violations are relatively easy to correct, such as the width of Foreman Boulevard, while others are seemingly incurable. Staff has spent a significant amount of time trying to determine the appropriate penalties that should be required of the developer as well as an appropriate compliance program that will be in the public interest and improve the community. It should be added that the applicant did present a proffer, but it was viewed as non-responsive so it is not analyzed herein.

Staff's thoughts on the fines and compliance program are presented below. However, since no decision regarding the sanctions and/or compliance program will be made on June 29th, staff is looking forward to receiving guidance, from both the Planning Board

and the public regarding these suggestions. The matter will then be brought back to the Board for a decision later in July.

5. **Discrepancy between Planning Board opinion and Signature Set for Site Plan 82003002 (8-03002)**

There are two different aspects to this alleged violation. The first is that the approved signature set showed a different number of single family and townhouse units from that which the Board actually approved. In addition, the signature set called for townhouses/semi-detached units, but only townhouses were discussed in the staff report and at the board hearing. The Board did not actually approve semi-detached units.

Staff recommends the following fine and compliance program:

Fine:

The signature set was signed on August 9, 2004, and the applicant submitted an amendment to correct the error on May 2, 2005. This is a period of 265 days.¹¹ Staff recommends that a fine of \$50.00 per day be assessed for this 265 day period for a total of \$13,250.

Compliance Program:

- Add the category of “semidetached” units to the site plan to Amendment B, and specify the number of semidetached units.
- Correct the numbers of dwelling units in Amendment B. Provide a guarantee (affidavit) that the data table accurately reflects the drawings and vice versa and that the “as built” unit types will match the numbers set forth in the certified plans.
- Show, in Amendment B, a data table that identifies semidetached units as a unit type distinct from “townhouses” for clarity in enforcement.
- Solve the problems with the site plan without proposing trellises as a strategy to transform one-family detached units into “semidetached” units.

2. **Multiple-Family Units in the R-200/MPDU Zone**

At the time this project was originally proposed, the applicant did not choose to seek rezoning of this split-zoned property to a flexible floating zone, as is permitted. However, it has become apparent that the split-zoning that is still in place on this property

¹¹ Staff did not count either August 9th or May 2nd in this calculation.

has made it particularly difficult to implement the approved plans correctly. Different reasons have been advanced to explain why multiple-family units were placed in the R-200/MPDU zone where they are not allowed. Fortunately, none of these units had been built when the problem was uncovered, so it is not difficult to cure. Therefore, staff recommends the following:

Fine:

As calculated above, charge \$50.00/day for 265 days (date of approval of the signature set to the date an amendment was submitted) for a total of \$13, 250.

Compliance Program:

- Ensure that there are no multiple-family units within the R-200 zone.
- If the multiple-family buildings are replaced by two-over-twos, ensure that these units meet the requirements of “attached dwelling units” (i.e. usable outdoor space at ground level for each unit, and so forth)
- Revise Amendment B accordingly and, at the same time, design each block with diverse unit types using principles of new urbanism. Create a circulation system primarily of local streets and enhanced pedestrian routes, rather than parking lots with aisles, and create an open space system that emphasizes physical and visual connectivity to the bike path on Snowden Farm Parkway with the Greenway Trail.

3. Lot Size in the R-200/MPDU Zone (Definition of Dwelling Units)

The R-200/MPDU zone clearly specifies that the minimum lot size for single family detached units is 6000 square feet, and the staff report actually calls out a minimum lot size of 6,012. At some point, however, lots were platted that were significantly less than what the zone allowed. It appears that the developer became aware of this problem and initiated discussions with staff about the possibility of changing the unit type to semi-detached. However, there is no indication that staff and the developer came to any conclusion as to how that could be done. Nevertheless, the developer requested that purchasers of certain units sign a document that would give permission for their home to be connected to another with a trellis. However, the zoning code definition of semi-detached dwellings states that the units must share a party wall. Clearly, a trellis does not meet this definition. Fortunately, not all of the proposed trellis units have been constructed. Those that have not been constructed constitute a curable violation, while those that have been constructed are, in effect, incurable, because, in most cases, third party purchasers now own these properties, so that neither the developer nor the builder can make modifications without the permission of the property owner. Therefore, staff recommends the following:

Fine:¹²

Four of the dwelling units are built and occupied, and therefore, the problem is difficult to cure. Charge each of these units at the rate of \$250 per day for the 265 day period from approval of the signature set to the date an amendment was submitted for a total of \$265,000.

Fourteen lots can still be corrected. Charge each of these units \$50.00 a day for the same 265 day period for a total (for all 14) of \$185,500.

Compliance Program:

- Enlarge the lots to meet the minimum standards in the zone where possible and reflect in Amendment B.
- On those lots where the homes are complete and occupied, attempt to get permission to build connecting structures consisting of enclosed habitable space, with roofs and temperature control, no more than one-story in height, that would meet the zoning code definition of semidetached dwelling units and would be consistent/compatible in exterior design with the house to which it is attached.
- Obtain approval of these connecting structures in a plan amendment.

¹² The table below shows a total of 22 lots that are too small, but staff has only assessed a fine on 18 of these. One unit, F-51, is split 50/50 between the two zones. The applicant has argued that this lot was always supposed to be in the R200/TDR3 zone, in which case the lot size would be acceptable. The other 3 units are V-98, 99, and 100. In the signature set that was originally approved by the Board, these lots were all too small. However, the applicant changed these units to townhouses in the A amendment, which was approved by the Board. Even though the signature set was never signed for the A amendment because a number of discrepancies were uncovered, staff felt that a case could be made that these units should not be fined.

Table Lot Size: Summary of Status

Homeowner: Home Settled ,Private Homeowners now owns the house and lot
 Developer: Elm Street Development still owns lot
 Builder: Lot Closed = Builder now owns the lot
 Not Started: DPS Restricted Start of Construction
 Stopped: DPS Halted Construction. Construction Started but not finished

| Block | Lots (22 total) | Lot Size on Signature Set | Construction Status | Ownership |
|--------------|--------------------------------|--|--------------------------------|------------------|
| F | 51 | 5083 | Built | Homeowner |
| G | 12 | 5500 | Built | Homeowner |
| | 13 | 5845 | Stopped | Builder |
| | 21 | 4000 | Not Started | Developer |
| | 22 | 5000 | Not Started | Developer |
| | 32 | 4400 | Not Started | Developer |
| | 33 | 4400 | Not Started | Developer |
| | 34 | 5500 | Not Started | Developer |
| | 35 | 5500 | Not Started | Developer |
| | 36 | 5500 | Not Started | Builder |
| H | 6 | 4802 | Not Started | Developer |
| | 7 | 4039 | Not Started | Developer |
| | 8 | 4039 | Not Started | Developer |
| | 9 | 5145 | Under Construction | Builder |
| K | 11 | 4371 | Not Started | Developer |
| | 12 | 4200 | Not Started | Developer |
| | 13 | 5663 | Stopped | Builder |
| L | 11 | 5960 | Not Built | Developer |
| | 12 | 4200 | Not Built | Developer |
| V | 98 | 5603 | Not Built | Developer |
| | 99 | 5487 | Not Built | Developer |
| | 100 | 5772 | Not Built | Developer |

4. Building Setbacks in the R-200/MPDU Zone

Staff identified a total of 29 lots that have setback problems¹³. Five of these lots are corner lots, where the problem arose because the developer incorrectly assumed that the same standards that applied in the R-200 zone with respect to setbacks for corner lots would apply in the R-200/MPDU Zone as well. A review of the zoning code revealed that this was not the case. However, the developer has sought a text amendment that would, in fact, make the setback standard for corner lots the same in both the R-200 and the R-200/MPDU zone. If the text amendment passes, the setback problem for these lots will be cured.

The majority of the lots that have setback issues are those that are also on lot sizes that are too small. Again, as explained above, when the developer discovered this problem he attempted to solve it by proposing trellises to connect two units in an effort to make them semi-detached. However, staff does not believe the trellis in any way meets the zoning code definition, since a party wall is required. Therefore, staff recommends the following:

Fine:

Four units are built and occupied and two others are substantially complete so the non-compliance is difficult to cure. Charge each of these six units at the rate of \$250 per day for the 265 day period from approval of the signature set to the date an amendment was submitted for a total of \$397,500.

Twenty-three lots can be corrected. Charge each of these units \$50.00 a day for the same 265 day period for a total (for all 23) of \$304,750.

Compliance Program:

- Seek approval of the Zoning Text Amendment that would alleviate the setback issue for the five corner lots.
- Enlarge the lots or reduce the size of the units to meet the minimum setback standards in the zone where possible and reflect in Amendment B.
- On those lots where the homes are complete and occupied, attempt to get permission to build connecting structures as described above, that would meet the zoning code definition of semi-detached units.
- Obtain approval of the connecting structures in a plan amendment.

¹³ Again, staff has not counted the unit located on F-51 because the applicant argues that it should be in the R200/TDR3 zone, which would mean the unit can comply when the development standards are established in the zone.

Table – Setbacks: Summary of Status
and Compliance Program Recommendations

Homeowner: Home Settled ,Private Homeowners now owns the house and lot
 Developer: Elm Street Development still owns lot
 Builder: Lot Closed = Builder now owns the lot
 Not Started: DPS Restricted Start of Construction
 Stopped: DPS Halted Construction. Construction Started but not finished

| Block | Lots (30 total) | Setback from Public Street per signature set | Construction Status | Ownership |
|--------------|--------------------------------|---|------------------------------------|-----------------------|
| F | 51 | 21 feet | Built | Home Settled |
| G | 1 | 15 feet | Built | Home Settled |
| | 12 | 15 feet | Built | Home Settled |
| | 13 | 15 feet | Not Started | Builder |
| | 21 | 21.5 feet | Not Started Not Built | Developer |
| | 22 | 22 feet | Not Started | Developer |
| | 23 | 20 feet | Built | Home Settled |
| | 26 | 15 feet | Built | Home Settled |
| | 30 | 15 feet | Not Started | Developer |
| | 31 | 20 feet | Not Started | Developer |
| | 32 | 23 feet | Not Started | Developer |
| | 33 | 23 feet | Not Started | Developer |
| | 34 | 15 feet | Not Started | Developer |
| | 35 | 20 feet | Not Started | Developer |
| | 36 | 20 feet | Not Started | Lot Closed Builder |
| | 37 | 15 feet | Built | Home Settled |
| H | 1 | 15 feet | Built | Home Settled |
| | 6 | 15 feet | Not Started | Developer |
| | 10 | 22 feet | Built | Home Settled |
| | 15 | 18 feet | Built | Home Settled |
| I | 16 | 15 feet | Built | Home Settled |
| K | 1 | 15 feet | Not on developer list Not Built | Developer |
| | 10 | 23 feet | Built | Home Settled |
| | 11 | 21.5 feet | Not Started | Developer |
| | 12 | 21.5 feet | Not Started | Developer |
| | 13 | 21.5 & 15 feet | Stopped | Builder |
| L | 1 | 15 feet | No developer comments | Developer |

| Block | Lots (30 total) | Setback from Public Street per signature set | Construction Status | Ownership |
|-------|-----------------|--|---------------------|--------------|
| | | | Not Built | |
| | 10 | 18 feet & 20 feet | Built | Home Settled |
| | 11 | 23 feet | Not Built | Developer |
| | 12 | 23 feet | Not Built | Developer |

5. Foreman Boulevard

As discussed, both the Preliminary Plan and the Master Plan call for the construction of Foreman Boulevard as a two-lane arterial that must have a right of way that is 80-foot wide, but the site plan signature set shows the right-of-way with a 70-foot width. The applicant is willing to dedicate the 80-feet required. Therefore, staff recommends the following:

Fine:

Since this is a correctable error, staff recommends assessing a fine of \$50.00 per day for 265 days for a total of \$13,250.

Compliance Program:

- Amend the Site Plan to set the right-of-way width of Foreman Boulevard at 80-feet and construct the road to the required alternative primary standards.

6. Lack of Complete Development Standards in the R-200/TDR3 zone

The development of Clarksburg Village was definitely complicated by the fact that the property was split zoned: R-200 and R-200/TDR3. Although the zoning code sets standards for the R-200 zone, it addresses only a few standards for the R-200/TDR3 zone. Staff does not view this as a violation, but it is important that these standards be set before development is allowed to proceed. Therefore, staff does not recommend any fines but suggests the following:

Compliance Program:

- Set forth a full set of development standards for the area developed under the R-200/TDR3 zone and have these approved as part of the site plan amendment.

Alternate Staff Suggestion with Respect to Fines and the Compliance Program

The fines put forth by staff can be summed up as follows:

| | |
|--|------------|
| 1. Discrepancy between # of SFD's and TH's: | \$ 13,250 |
| 6. Multiple Family Units in the R-200/MPDU Zone: | \$ 13,250 |
| 7. Insufficient Lot Size in the R-200/MPDU Zone: | |
| a. 4 Uncorrectable units: | \$ 265,000 |
| b. 14 Correctable Units | \$ 185,500 |
| 8. Setback violations in the R200/MPDU Zone | |
| a. 6 Uncorrectable Units | \$ 397,500 |
| b. 23 Correctable Units | \$ 304,750 |
| 9. Foreman Boulevard Right of Way | \$ 13,250 |
| 10. Lack of Full Development Standards | \$ n/a |

The total for all of the above is **\$1,192,500**, which is a significant sum. Staff suggests, however, that certain areas of Clarksburg Village which have already been approved could be significantly enhanced if the original design were changed to better reflect the principles of new urbanism. The costs inherent in such a redesign, including the possible loss of some units, might be viewed as an acceptable alternative to the assessment of some or all of the proposed fines.

Summary

These recommendations take into consideration testimony that the Board received at the hearing on May 4, 2006 and since that time, as well as the Developer's Proposed Plan of Compliance/Correction Proffer (June 12, 2006), and guidance provided by the Board.

