

Montgomery County Planning Board

Montgomery Regional Office Auditorium
8787 Georgia Avenue, Silver Spring, Maryland 20910

Public Hearing on Clarksburg Town Center

Thursday, July 7, 2005

9:35 a.m..

NOTE: The Board will make a decision on Items 1 and 2 before making a decision on Item 3. Speakers may combine their testimony for Items 1, 2 and 3 during their initial presentation. Speakers who testify about Item 3 during Items 1 and 2 may not sign up again for Item 3.

We encourage coordinated testimony and appreciate having one or two spokespersons for a group. Time used for questions by Board members will not be deducted from your time.

Written testimony is also appreciated and will be read by each Board member. If you turn in written testimony, please provide **10 copies**. Thank you for your interest and cooperation.

Name	Representing
Steve Kaufman	Master Developers and Builders
Rick Croteau	"
Colleen Dwelley	"
Clark Wagner	"
David Seal	"
Less Pavell	"
Barbara Sears	"
Kevin P. Kennedy	Craftstar Jp,es
Timothy Dugan	"
Norman Knopf	Plaintiff's Attorney
Amy Presley	Plaintiff
Kim Shiley	Plaintiff
Amy Friece	self
Katherine Orloff	self
Wayne Goldstein	Montgomery County Civic Federation

Kathy Hulley	Clarksburg Civic Assn
Paul Bandholz	self
George Spanos	
Tim DeArros	
Joel Richardson	
Caitlin Young	
Paul Majewski	
Michael Hulley	
Lisa Spencer	Senator Bob Garagiola
Delegate Jean Cryor	
F. J. Laban	
George Spanas	
Tim DeArros	
Joel Richardson	
Caitlin Young	
Esther King	Clarksburg United Methodist Church
Jama Nagda	
Niren Nagda	
Carol Smith	
Rev. Bill Maisch	
Dan Wilhelm	
Max Bronstein	Strathmore Bel-Pre Civic Assn
James Richard	

Lei Chen

Ginny Barnes

West Montgomery County Citizens Assn.

Lynn Fantle

Barry Fantle

Richard Kauffunger

Steven Burns

Kieth Berner

Between the Creeks Neighborhood Assn

John Parrish

Judith Koenick

Jim Willemsen

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

TRANSCRIPT OF

CLARKSBURG TOWN CENTER

SITE PLAN REVIEW NO. 8-98001 (PHASE I) AND AMENDMENTS,

SITE PLAN NO. 8-02014 (PHASE II) AND AMENDMENTS,

ITEMS 1, 2, AND 3, RESPECTIVELY:

RECONSIDERATION OF FAILURE TO COMPLY (BUILDING HEIGHT),

THRESHOLD HEARING: FAILURE TO COMPLY (BUILDING SETBACK),

ENFORCEMENT AND PLAN OF COMPLIANCE HEARING

BEFORE THE

MONTGOMERY COUNTY PLANNING BOARD

JULY 7, 2005

COMMISSIONERS PRESENT:

DERICK P. BERLAGE, CHAIRMAN

WENDY C. PERDUE, VICE CHAIR

ALLISON BRYANT

JOHN ROBINSON

MEREDITH WELLINGTON

1 CHAIRMAN BERLAGE: I do want to take this opportunity
2 to acknowledge a number of people we have in the audience,
3 Delegate Jean Cryor, Lisa Spencer, representing Senator Rob
4 Garagiola, and I know, I saw Bill Steiner (phonetic)
5 representing Council Member, Nancy Floreen. And if there
6 are any other elected officials or representatives, let me
7 know, I'd be happy to announce your presence as well. All
8 right then, we will proceed to items 1 and 2 on the agenda.

9 Item 1 is the Board's reconsideration of an alleged
10 failure to comply with building height with respect to site
11 plan number 8-98001 and site plan 8-02014.

12 Item 2 is a threshold hearing on an alleged failure to
13 comply with building setbacks with respect to the same two
14 site plans. We will begin with a report from the staff. For
15 the audience's benefit let me make you aware that the
16 schedule this morning will be roughly as follows.

17 We will get a staff presentation on these issues of
18 approximately half an hour. We will then receive an hour-
19 long presentation from the representatives of the
20 complainants followed by an hour-long presentation of
21 representatives of the respondents. And then after that we
22 will receive public testimony from individuals and groups
23 who have signed up to testify.

24 If you wish to testify, you do need to sign up. And
25 there will be some rebuttal after that from the complainants

1 and respondents, and then we will move to the Board
2 deliberations.

3 So, let's go ahead and get started. We have a good long
4 agenda ahead of us and we will turn initially to Rose
5 Krasnow and I guess initially, to Michele Rosenfeld, legal
6 counsel, to give us some procedural guidelines to get
7 started. Michele.

8 MS. ROSENFELD: Thank you, Mr. Chairman. Just
9 initially I would like to mention to the Board as the
10 Chairman noted earlier, the two issues that are before the
11 Board this morning are the reconsideration of the question
12 of alleged height violations as well as the question of
13 setbacks. There have been a number of other issues that
14 have been raised in the correspondence and I expect you may
15 well hear testimony this morning involving a pending request
16 for extension of the preliminary plan, potential amendments
17 to the project plan, recreational amenities and other
18 facilities. Those, while the Board is free to entertain
19 testimony on those issues, they are not before the Board
20 today for decision-making. Staff had been requested at
21 various points to bring those issues before the Board, those
22 factual issues were raised later in the process, and staff
23 felt it important to bring at this time, the issues of
24 height and setback because those very specific issues
25 involve homes that people live in and potential homes are

1 that are under contract and not yet constructed. And we
2 felt as a matter of public policy, it was important to bring
3 that to the Board for decision making today rather than
4 delay those issues until fact finding on the others. Thank
5 you.

6 CHAIRMAN BERLAGE: Thank you, Miss Rosenfeld. I now
7 turn to Rose Krasnow, Chief of the Development Review
8 Division.

9 MS. KRASNOW: Good morning, members of the Planning
10 Board, residents, and staff. I am Rose Krasnow, Chief of
11 Development Review. In the seven months that I have been
12 here, this is the first case that I have presented to you
13 the Board and I will admit that it is not the way that I had
14 hoped to start. However given the significance of this
15 matter and the issues that have been brought to light during
16 the course of our review, I thought I should be the one to
17 be before you here today. For the last several months, I
18 have pored over documents, talked to builders and citizens
19 and conferred with my staff in an attempt to construct
20 exactly what occurred. I will attempt to answer any
21 questions that will be raised by the Board, but given my
22 short tenure and the complexity of these issues, I may well
23 need to turn to Michael Ma, subdivision, excuse me, site
24 plan supervisor. Staff is recommending that you find the
25 developer, Newland Community, and the builders in violation

1 of the height and setback standards that were set for
2 Clarksburg Town Center at the time of project plan.
3 However, with respect to height, I do want to make one
4 correction here at the outset. The staff report states that
5 all four builders, Bozzuto, Craftstar, Miller & Smith and
6 Porten Home built units that violated the height standard.
7 In fact, Porten only constructed single-family homes and
8 none of those exceed the 35-foot height limit. I also want
9 to address upfront, the issue of the altered document.
10 Clearly, the fact that a document was altered is
11 inexcusable. That alteration was in large part responsible
12 for staff's earlier finding that no violation had occurred
13 and for the Board's 4 to 1 vote on April the 14th of this
14 year in support of staff's finding. Since that time the
15 staff member in question did come forward and admit what had
16 been done, and so we find ourselves here today after
17 additional investigation on the part of staff and CTCAC,
18 bringing this matter of the height violations back to you.
19 This is the first time we are bringing the setback issue to
20 you. Regardless of the altered document, I want to make it
21 clear to all of you that I feel the alteration was an
22 aberration, and is not reflective of the way business is
23 done in Development Review. Moreover, I believe that, that
24 document should now be set aside and it should not affect
25 the way we look at the picture of what is before us. I

1 think the story speaks for itself without the altered
2 document.

3 In my staff report I tried to outline the history of
4 the process as it relates to this project because I believe
5 it is extremely important. When the master plan for
6 Clarksburg was approved in 1994, it said in effect that a
7 rural, sleepy area of the county known as Clarksburg should
8 be developed intensely to satisfy the ever-growing need for
9 housing in Montgomery County. Basically, the master plan
10 gave the go ahead for thousands of new homes to be built.
11 Clarksburg Town Center was one of the first projects to be
12 put forward under this new plan, and I want to just point
13 out, where we are here. Is this on? We have here a
14 vicinity map for Clarksburg Town Center it is in the
15 northeast quadrant of the intersection of Stringtown Road
16 and Frederick Road or Maryland Route 355, basically
17 southeast of Maryland Route 121. The area outlined in red
18 here is the entire Clarksburg Town Center project. You will
19 notice that there are many other projects now under
20 construction in the vicinity including Greenway Village,
21 Clarksburg Village, Clarksburg Ridge, and others. So we are
22 talking about one project out of many.

23 When this project..., this project is really far
24 different from the usual suburban development that had been
25 the norm up until that time. In agreement with the master

1 plan, the Clarksburg Town Center proposal calls for a mix of
2 residential, office and retail, specifically upto 1,300
3 units of residential, a maximum of 150,000 square feet of
4 retail and 100,000 square feet of office. These were to be
5 built in close proximity to one another in order to create a
6 town center concept for what was basically going to become,
7 as pointed out here, an entirely new town.

8 Again per the master plan, the project plan as proposed
9 was to be built under the RMX-2 zone, which allowed for
10 greater flexibility with respect to standards so that a
11 pedestrian friendly mixed-use community could be created
12 that would seem to grow out of the existing small historic
13 district. As staff began to review this project, they had
14 to grapple with a number of significant issues, and I am
15 talking now here about staff review back in 1994 when this
16 project first came forward. Some of the issues that were
17 highlighted in the original reports included environmental
18 issues, the Park School site, the roadway network and
19 historic preservation. There are pages and pages of
20 documents about the discussion of these issues. Height as
21 far as I can ascertain was really not an issue but the
22 original project plan, submitted in 1994 contained the data
23 table that clearly shows the 35 foot and 45 foot height
24 standards that at that time undoubtedly seemed reasonable.
25 And I have here this document is the original project plan

1 submission that came to us back at that time, originally
2 submitted in November of 1994. And as you will see, it does
3 have that data table if you look at it more closely at some
4 point because I know you cannot see it from here. It does
5 show the height, the 35, 35, 35 and 45-foot height limits.

6 The project plan opinion captured that data table but
7 to a less rigid degree by stating that the height for
8 residential buildings should be no taller than four stories,
9 45 feet. However after the project plan was adopted, the
10 project plan drawings that I just showed you here, were
11 stamped as correct by John Carter in 1996, and that data
12 table showing the 35-foot and 45-height limit are a part of
13 that document. The same data table also appeared on the
14 preliminary plan documents, and on the first site plan
15 signature set even though the opinion for the site plan
16 approval simply said that the required height was four
17 stories and that the proposed height was four stories.
18 Moreover as was stated in the staff report, there really is
19 no inconsistency between the four stories stated in the
20 staff report and opinion on the 45 feet that appears on the
21 data table. It is certainly reasonable to assume you could
22 build a four-story 45-foot building.

23 It is my belief that the actions that bring us here
24 today begins sometime after the Signature Set and site plan
25 enforcement agreement were signed in 1999. Soon after some

1 of the first single-family homes were built under Phase one
2 of the plan and these did not violate any of the height
3 restrictions, these were done by the first owner of this
4 property, Klebenoff and Montgomery. But they then sold the
5 project to Terrabrook. As the purchaser, Terrabrook, which
6 was later subsumed by Newland, clearly had a responsibility
7 to perform their due diligence and study all of the
8 documents. If they did this, it should have been clear that
9 residential structures could be four stories but could not
10 exceed 45 feet. At that point the developer had two options
11 - build according to the standard or bring forth an
12 amendment to adjust the height and feet upward. Clearly
13 neither of these actions occurred. Whether they simply
14 failed to do their due diligence and were unaware of the
15 height restriction in feet or whether they were fully aware
16 of the restrictions and simply chose to ignore them, does
17 not really matter. Regardless of the cost, single-family
18 attached and multi-family units were constructed, and are
19 still being built that clearly violate the height standards
20 set forth in the legally enforceable site plan enforcement
21 agreement.

22 The builders maintain that they merely built what
23 Newland said they could build, but this too is not an
24 acceptable argument. Like the developer, each builder, and
25 we are not talking about small start-up companies, had a

1 responsibility to do their own due diligence before agreeing
2 to purchase the land in question for construction of housing
3 units, and clearly they failed to do this as well.

4 Therefore staff concludes that both the developer and the
5 builders violated the height standards. The setback
6 violations only seem to further indicate that there was a
7 rush to get homes built as quickly as possible and that
8 little attention was being paid to standards. The documents
9 are all quite clear that residential buildings are to be set
10 back 10 feet from any street and that the front yard setback
11 is also 10 feet. Homes on corners are considered to have
12 two front yards. This is not a new standard, and again
13 experienced builders such as these should have been well
14 aware of this fact. Therefore staff again urges the Board
15 to find both the developer Newland and the builders,
16 Craftstar, Bozzuto, Porten and Miller & Smith in violation
17 of the setback standards.

18 Which brings us back to why all of this wasn't caught
19 much earlier in the process. Both the developers and the
20 builders are all quick to point out that DPS after review by
21 Maryland National Capital Park and Planning issued building
22 permits for all the structures in question, and that the
23 drawing submitted to DPS clearly showed the height as taller
24 than the 35-foot and 45-foot height limitations and
25 apparently showed the setbacks to be less than 10 feet. I

1 will be the first to admit that in the process of my review
2 and as a newcomer here, it was startling to learn that there
3 was clearly a misunderstanding between Park and Planning and
4 DPS as to who was doing what. When I first became -- when I
5 first learned there were concerns with height in Clarksburg
6 Town Center, I asked who was responsible for measuring
7 height and was quickly told it was DPS. Since we do not
8 even receive drawings, that would enable us to measure
9 height, I had no reason to doubt at the time that this was
10 indeed the case. Yet, when I met with DPS they were just as
11 quick to say that they not only lacked the statutory
12 authority to measure heights but they also did not have the
13 standards given to them by which to measure for these
14 projects. It is for the glaring lapses such as these that
15 we have already announced that we will in conjunction with
16 all other involved agencies soon undertake a complete
17 process review. Yet our failure to enforce does not in
18 staff's opinion relieve the developer and the builders of
19 their responsibility to abide by the 35-foot, 45-foot
20 standard they agreed to in the site plan enforcement
21 agreement.

22 Let me also add that when the numbers came to light
23 that we had, we wanted to verify them but at this point in
24 time, we are mainly assuming that every townhouse is out of
25 compliance with the 35-foot height standard. We do not, at

1 | this point, have measurements for each of those. But I
2 | think what is also important to mention that since staff
3 | still believes that the prevailing standard in the site plan
4 | opinion was that the standard should be four stories and 45
5 | feet for residential structures, it is our belief that we
6 | are only talking about four built structures and one unbuilt
7 | structure that exceeds that limit. Specifically, let me
8 | just point these out to you. We have here four condo
9 | buildings built by Bozzuto, three of these are three-story
10 | condo buildings. This one here is a 30-unit four-story
11 | condo building, the building that generated much of the
12 | original controversy. This is one of the buildings that
13 | certainly exceed the 45-foot height limitation. Likewise we
14 | have three constructed two over two buildings, all of those
15 | exceed that 45-foot height limitation also. We have one
16 | unbuilt two over two building that we have reason to believe
17 | will exceed that height limit. It has all been sold and as
18 | we get further in this hearing we can discuss that building.
19 | As for the townhouse units that we are dealing with here,
20 | staff pretty much made an assumption that all of the
21 | townhouses and those are the units in green on here, the one
22 | thing green are the completed units so many of the ones in
23 | gray have not yet been built. Staff has pretty much assumed
24 | that all of those units would exceed the 35-foot height
25 | limitation but as we have pointed out, we feel that based on

1 the site plan opinion that they do not exceed the 45-foot
2 residential height limit.

3 So again just to summarize, of all these many units and
4 in my staff report I talk about 433 townhouse units, and at
5 this point 30 multi-family units and 42 two over twos. Of
6 all of those we are only talking about the 30 units multi-
7 family building and the two over twos units that actually
8 exceed the 45-foot height limit specified in the site plan
9 opinion. Let me conclude by saying I have numerous drawings
10 here behind me that show the status of the development, the
11 varying phases in the amendments, which units are assumed to
12 be in violation and so forth because all of these issues
13 were raised at the last hearing. However I'm not going to
14 take the time to go into those now, as questions arise and
15 after you hear from both the complainants and the builders,
16 I will be happy to refer to these but in the interest of
17 time I will not do so now. Thank you very much.

18 CHAIRMAN BERLAGE: Thank you very much Ms. Krasnow. We
19 will proceed now to the Clarksburg Town Center Advisory
20 Committee, and their attorney Mr. Knopf to present their
21 case in chief on behalf of the complainants. They will have
22 one hour to make their presentation.

23 And while they're coming up let me also acknowledge in
24 the audience we have Robert Hubbard, the director of the
25 Department of Permitting Services, very much appreciate your

1 | being here. And also former Commissioner, Pat Baptiste,
2 | welcome to both of you.

3 | If you need a moment to get settled, that's fine.

4 | MR. KNOPF: Thank you. Good afternoon - Good morning,
5 | actually.

6 | CHAIRMAN BERLAGE: Good morning.

7 | MR. KNOPF: Anticipating.

8 | CHAIRMAN BERLAGE: We'll still be here in the
9 | afternoon, so it's fine.

10 | MR. KNOPF: My name is Norman Knopf. And I'm with the
11 | firm of Knopf & Brown. We are representing the Clarksburg
12 | Town Center Advisory Committee, CTCAC. As you know my
13 | partner David Brown has been the one that has been in charge
14 | of this case and has communicated with you at length in
15 | writing. For some reason he chose not to be here today, he
16 | fled the jurisdiction. He is in Europe for his son's
17 | wedding. So I become the pinch hitter. That will be my
18 | last light remark because this is a serious matter that is
19 | before this Board.

20 | This is a matter of hundreds of violations in the
21 | Clarksburg area, which have more than undermined but
22 | effectively trashed your years of planning and your site
23 | plans that you have prepared, and the legal requirements
24 | that you have imposed on those site plans. And we're here
25 | today to decide what to do about that. What this matter is

1 not, is that it is not about staff shortage, it is not about
2 staff's deficiency, it is about a systematic pervasive
3 practice of developers in this county to ignore what is
4 being required by you, with the knowledge that if and when
5 caught, they will simply come back and ask for an amendment.
6 And which will be granted. At stake here is the integrity
7 of this Board. In fact the integrity of the entire planning
8 process is before you. We are here with my clients
9 particularly Amy Presley, Kim Shiley and Carol Smith who
10 have devoted hundreds of hours to ferreting out
11 irregularities. They are here not just to show you the
12 irregularities but to try to restore the integrity of the
13 planning process and the integrity of this Board. We want
14 to work with you to do that. The citizens require that,
15 public policy requires that, and we ask that you address
16 your attention to that. But unfortunately, what you have
17 done so far not only does not go to restore integrity it
18 undermines that goal.

19 At best, citizens view what you are doing now, and I
20 will explain, as disinterest in finding the truth and as
21 disinterest in imposing true sanctions. And at worst, the
22 citizens are saying it's an effort to sweep this under the
23 rug. Now, why do I say that? This hearing is on violations
24 but it's limited to two violations, height and setback. My
25 clients have advised the Board of many other setbacks, I

1 mean many other violations. And you will hear more about
2 that today, including violations that are equal to, if not
3 more important than what is before you today. And with all
4 due respect to your legal counsel, who said they wanted to
5 go ahead here because buildings are occupied and they have
6 to address that immediately, some of these violations affect
7 buildings occupied. For example the destruction of the Muse
8 as a planning concept involves houses occupied built, those
9 need to be addressed also, those violations. We ask this
10 Board to hear and find other violations. Now we understand
11 and respect your counsel's comment that there may not be
12 initial timely notice to developers to hear all these.
13 Schedule another session as soon as possible, certainly
14 before you go on vacation, to have a hearing on other
15 violations. Find all the violations before you go off and
16 set a remedy. What kind of rational system would say that
17 you're going to decree sanctions or remedy when you don't
18 even know what all the violations are! Your remedies are
19 inter-related depending on the violations. You're going
20 ahead and finding sanctions now is in effect saying to the
21 citizens, we will pigeonhole this, we will look at it with
22 myopic eyes, we're not really serious, and later we may
23 discover more violations, and gee we wish we knew that
24 originally when we prepared a recommendation for remedy. We
25 urge you if you have a sanction hearing, and you go ahead

1 with that this later, don't make a decision. Defer until
2 you have the hearing on violations, all of the violations
3 and then make a comprehensive decision.

4 Now, I'm -- my -- Amy Presley will be presenting the
5 substantial evidence. And I will just briefly outline what
6 we are going to propose in the way of the evidence. First,
7 we will address the height and setback limitations. And if
8 I may paraphrase Deep Throat in Watergate, when he said
9 follow the money, follow the legal documents, here. Don't
10 take your eyes off the legal binding documents in those
11 provisions. Don't be diverted by arguments about who said
12 what, and possibly the staff did this or something was
13 submitted. There's a whole series of legal documents
14 clearly setting forth the height and the setback
15 limitations. Those are legally binding and they were not
16 complied with. We have the -- those documents are based
17 upon the master plan. The master plan talked about
18 compatibility with the Historic District and height was a
19 key concept of compatibility. That was translated into a
20 project plan with height and setback limitations, a
21 preliminary plan of subdivision with height and setback
22 limitations, a site plan with height and setback
23 limitations, an enforcement agreement with height and
24 setback limitations, clearly set forth and they've all been
25 violated here. We now asked that that be enforced. Now, in

1 addition there are other equally important, if not more
2 important violations, these include the mews, pedestrian
3 paths mews, the O street concept connecting with the mews.
4 This was a central feature to the whole plan. It's gone,
5 not with your approval, not with anyone's approval. It's
6 been built on in a way that destroyed the concept. This
7 needs to be addressed by this Board along with the other
8 situations. There are in addition to the key feature, which
9 was in effect undermined, we have serious issues on the
10 MPDUs. You were shown an MPDU plan that's approved as part
11 of the site plan showing them integrated, scattered. They
12 now seem to be congregated, segregated. You need to get on
13 top of that. You have a site, you have phase two being
14 built, occupied in substantial portion before any site plan
15 was approved in terms of a Signature Set and enforcement
16 agreement, again a clear violation of law. We are told in
17 the staff report well there is a little mix up and they
18 referred to the site plan in phase one, and they applied
19 that to phase two. Fine, but phase one clearly had the 45-
20 35 feet height limits and the 10, so that's not an excuse.

21 There is a question regarding multiple family units.
22 They were supposed to be nine units. Some of these units
23 emerged as twelve units. Now this was subsequently ratified
24 by the Board well after they started. Again violations. I
25 can go on but I don't want to use up Ms. Presley's time, so

1 I will stop, the bottom line, please listen to all the
2 violations please schedule a hearing on all violations.
3 Defer any sanctions until you hear all the violations. Once
4 you hear all the violations perhaps you will recognize that
5 the staff's recommendation on sanctions of \$500 a violation
6 is really laughable. It's an open invitation to developers
7 to come to Montgomery County, violate whatever they want and
8 they might get not even a slap on the wrist. On \$500,000
9 town houses, a \$500 fine that's less than, that's one tenth
10 of 1%. Thank you.

11 MS. PRESLEY: Thank you. Thank you to the Board and
12 good morning.

13 CHAIRMAN BERLAGE: Good morning.

14 MS. PRESLEY: For the record, my name is Amy Presley.
15 I'm a co-Chair here of the Clarksburg Town Center Advisory
16 Committee. With me is Kim Shiley who is also a co-Chair,
17 and in the audience Carol Smith. I appreciate what Rose
18 Krasnow shared and agree with her in that the documents of
19 record do tell a story. We said this at the April 14th
20 hearing but I feel it warrants repeating, that the
21 development standards for Clarksburg Town Center have always
22 been clear through succession of developer submitted Board
23 approved and adopted legally binding documentation. The
24 clear development standards have been known to the developer
25 from the inception of the project to present. That includes

1 each developer with a counsel of record Linowes and Blocher
2 for each one. I think it's important for the Board to
3 recall too the history and chronology of these documents.
4 Rose mentioned that she was unaware or staff was unaware how
5 these heights seem to have originated or why there would be
6 staff opinions that merely stated four stories with no
7 apparent reasoning for the specific heights, but those are
8 present not only in the documentation but in all of the
9 files that we've reviewed in terms of DRC meetings, and
10 things that you do have on record as well as beginning with
11 the master plan.

12 For the record I want to read through these for the
13 document history. There was a master plan in Hyattstown
14 special study area, which was approved in June 1994. The
15 development application just shortly thereafter was
16 submitted in 1994, again November. Then the project plan
17 opinion which was approved in May of '95, the project plan,
18 signed drawings, which were submitted November 23, revised
19 December 22, and March 8, 1996 with the final approval, as
20 Ms. Krasnow mentioned, by John Carter on April 26, 1996.
21 Then they proceeded to the preliminary plan opinion, which
22 was approved September 28, 1995. A set of preliminary plan
23 signed drawings approved final submission, and approval
24 November 20, 1995, and then the site plan opinion for phase
25 one, that's 8-98001 which was approved January...

1 CHAIRMAN BERLAGE: Excuse me Ms. Presley, we need to
2 move the charts out of the way so everybody can see what
3 you're referring to. Maybe staff could help -- help her do
4 that.

5 COMMISSIONER WELLINGTON: Yes I'm not quite sure what's
6 blocking that, and Rose you might need to move a little bit,
7 I think...

8 CHAIRMAN BERLAGE: Yes, we often have this problem.
9 This chamber is not really set up for modern high tech
10 stuff.

11 MS. PRESLEY: Okay. Okay. People can hear. Then
12 again proceeding to the site plan 8-98001 Signature Set
13 which was approved by the developer March 8, 1999 by M-
14 NCPPC March 24, 1999, and then resulting in the final legal
15 document, which was the site plan enforcement agreement
16 submitted by Linowes and Blocher March 18, 1999, signed by
17 the developer and M-NCPPC on May 12, 1999. It's important
18 to note when you look at the master plan there was in fact
19 discussion of height in terms of key policies guiding the
20 master plan. Policy one on page 16 states that it will be a
21 town scale of development. "This plan includes the
22 Clarksburg Historic District as a key component of an
23 expanded town center." Policy number 6, page 26: The plan
24 proposes a transit oriented multiuse town center, which is
25 compatible with scale and character of the Clarksburg

1 Historic District. No master plan that I am aware of has
2 ever set a specific height for buildings. Its conceptual to
3 my understanding, it sets the vision and the tone and would
4 be, as is stated here, a guiding principle which you would
5 expect to then result in a specific height in the succession
6 of documents which are expected to be more specific, all the
7 way up through into the site plan and site plan enforcement
8 agreement.

9 Again in the ten key policies guiding the master plan,
10 policy number 6, page 26, this plan continues the historic
11 function of Clarksburg as a center of community life. It
12 will be part of an expanded town center. "Assuring
13 compatibility a future development with the Historic
14 District has been a guiding principal of the planning
15 process." It's very clear with the emphasis on these that,
16 the Historic District was to be integrated with the new
17 development, that the new development was to be integrated
18 with the Historic District, to be compatible. It is hard
19 for something to be compatible when it's segregated and when
20 heights are completely different. We see in the very first
21 development application, which was submitted by Steven
22 Klebenoff from Clarksburg Land Associates Limited
23 Partnership and Piedmont Land Associates Limited Partnership
24 at that time trading as Clarksburg Town Center venture that
25 the heights appear even with the application. So from the

1 | very first developer there is an understanding of a need for
2 | a maximum height, which appears in that documentation as 50
3 | feet. The attorney of record again was Linowes and Blocher.
4 | And I note at that point both the developer and the
5 | developer's counsel are aware that a maximum height is
6 | necessary, and as is staff at that point to ensure the
7 | master plan vision. That becomes more specific with the
8 | project plan. Number 9-94004. And I wanted to note here
9 | that the project plan really has two parts to it, that prior
10 | to today have not been referenced by the staff. In fact I
11 | note that part one in the project plan opinion, which is
12 | contained in your books under the staff report tab 2. And
13 | then there also is the project plan set of drawings, which
14 | was our exhibit A, which Ms. Krasnow referred to. And I
15 | need to note that that even in your staff report, that was
16 | not included in your staff report. And that's the very
17 | document we brought that exhibit in. That document, the
18 | data table, is the document that shows the specific 35 foot,
19 | 35 foot, 35 foot, and 45 foot references as well as the 10
20 | foot setback. And what I want to note there, is that you
21 | see the progression from the master plan, which talks about
22 | a concept to the project plan, which then starts to finalize
23 | and give a specific height. So although the project plan
24 | opinion does state in the 'proposed' column for development
25 | it shows building heights of four stories or parenthetically

1 50 feet for commercial. And four stories parenthetically 45
2 feet for residential, that the plans that were before the
3 Board with that project plan prior to the opinion stated
4 specifically the data table that had the 35-35-45 and also
5 the 10 foot minimum or for the setback. So I don't think
6 it's surprising that it -- there would not be a need in the
7 opinion to restate again each one of those that are
8 contained in the project plan set.

9 Again skipping forward to the preliminary plan. There
10 are two parts to that as well. There is the preliminary
11 plan opinion, which is contained on your staff report tab 3.
12 And then we have an exhibit B, which shows the signed
13 drawings, which were submitted the developer November 20,
14 1995, really as a basis for approval of the preliminary
15 plan, those were signed by Joseph R. Davis for M-NCPPC. And
16 we noted again both the developer and the developer's
17 counsel at that time are obviously aware of the specific
18 development standards that they themselves submitted and
19 were then approved by this Board. Right, and again the same
20 data table, so it's not erroneous, it's not a mistake, it's
21 a data table that's carried forward with an obvious reason.
22 Right, again just clear development standards. The
23 preliminary plan in the Board's opinion on page one notes
24 that the underlying development authority project plan
25 number 94004 was approved by the planning Board on May 11,

1 1995 after two prior planning Board meetings et cetera, et
2 cetera. And we noted here that the Board is recognizing the
3 project plan as the underlying development authority, and so
4 it's no wonder that everything that's part of that project
5 plan would be carried forward in documents that are then
6 signed by the developer. The preliminary plan under the
7 opinion again, condition 14, the preliminary plan 195042 is
8 expressly tied to and interdependent upon the continued
9 validity of project plan number 94004. Each term condition
10 and requirements set forth in the preliminary plan and
11 project plan are determined by the planning Board to be
12 essential components of the approved plans and are therefore
13 not automatically separable. We certainly would think that
14 height is an essential component, one of those that was
15 approved and expected not to be automatically separable or
16 changeable without an appropriate amendment process. Again,
17 I want to note on the preliminary plan, the preliminary plan
18 signed drawings, our exhibit B shows the maximum heights for
19 single-family townhome and courtyard townhomes of 35 feet,
20 for multi-family of 45 feet, and minimum front yard setbacks
21 for single-family townhome, courtyard townhome and multi-
22 family units of 10 feet.

23 Moving ahead to the site plan number 8-98001, we find
24 in the records two parts to that approved site plan as well,
25 and now going to the staff opinion, which was obviously

1 submitted prior, there is the site plan opinion, staff
2 report tab 4, and then there is the site plan Signature Set
3 which is our exhibit C. That site plan Signature Set was
4 submitted by the developer, the initial submission was in
5 December of '97, and the final submission and approval in
6 March of 1999. Again we have to note that through this
7 entire process here we're up to March 1999, and still both
8 the developer and developer's counsel are aware of the
9 specific development standards that are submitted and
10 approved. We take a look a little closer at the site plan
11 opinion. The site plan review submitted to the Board on
12 January 16, 1998 by development review staff was based on
13 the initial site plan drawings as submitted by the developer
14 in 1997. And again we noted that there were adjustments
15 discussed in the staff report but there were no amendments
16 to the project plan referencing height or setback, and if
17 that weren't enough to show that there is a clear and
18 understandable progression of the development standards, we
19 then have a site plan Signature Set, which again shows in
20 the data table the very same data table that first appeared
21 in the project plan set, showing specifically single-family
22 townhome and courtyard townhomes at 35 feet maximum, and
23 multi-family at 45 feet maximum. And again the minimum
24 front yard setbacks for single-family townhomes, and
25 courtyard townhomes and multi family units of 10 feet.

1 In the enforcement agreement, the site plan enforcement
2 agreement under your staff report tab 5 was prepared by
3 Linowes and Blocher for the developer and submitted to M-
4 NCPPC on March 18, 1999. The site plan enforcement
5 agreement was approved and signed by the developer and
6 Joseph R. Davis for M-NCPPC on May 12, 1999. It's hard for
7 me to believe that any attorney with the experience of those
8 that work with Linowes and Blocher would somehow miss that
9 they are signing an enforcement agreement or rather
10 preparing and allowing their client to sign an enforcement
11 agreement that somehow binds them legally to these standards
12 if they don't understand that they're, you know, a necessity
13 for the project. The site plan enforcement agreement
14 incorporates as its attachment exhibit C, the certified site
15 plan. So in case there was any accident or erroneous
16 inclusion by way of reference it's then a physical set
17 that's attached with it. The certified site plan contained
18 the exact development standards from the site plan signature
19 set with the maximum heights of 35 and 45 feet and the
20 minimum front yard setbacks of 10 feet. In reviewing this,
21 the citizens, who to this point probably didn't understand
22 the depth of the planning process we've been forced to
23 understand, it seems that this should have been painfully
24 clear back in August 2004, when the CTCAC first presented
25 this information. None of these documents have changed.

1 They're exactly the same, they're sitting in the files in an
2 agency that says in its own marketing literature, so here I
3 have to respectfully correct Ms. Krasnow, says that you have
4 the authority to enforce these, in fact that that's your job.
5 under this, I'll just quote "as the final arbiter,
6 implements the subdivision and Site Plan review processes to
7 ensure that proposed development complies with the
8 requirements of the applicable zone. Reviews and makes
9 recommendations to the council on rezoning." I'm just
10 trying to read here -- this is information that's in your
11 lobby for citizens to understand what the planning board is
12 responsible for. I'm trying to find the quote here, Kim
13 where it talks about the -- yes. Okay. Here we go, the
14 Maryland National Capital Park and Planning Commission
15 operates through a five-member planning board, which has
16 full and final authority to administer the sub-division
17 ordinance. The Site Plan process and the optional method
18 development process in Montgomery County, which as some may
19 not know here, but our Clarksburg Town Center is under the
20 RMX 2 optional method. So I find it alarming that anyone
21 would try to shift the responsibility over to DPS, and even
22 as such it's a totally separate issue. Who enforces has
23 nothing to do with the legally binding development
24 standards. That's as ridiculous as saying that if there's
25 no policeman on the street I can go 95 or even a 105 and

1 | it's going to be a policeman's fault for not standing in
2 | there to enforce it when I speed by and kill someone. So
3 | I'd like to put that aside and ask the Board to please
4 | concentrate as others come up and try to present little
5 | bunny trails of things that staff may have done or said or
6 | just met, and that to please continue focus on the documents
7 | or records legally binding unchanged, clear succession,
8 | clear reasoning for inclusion of heights to allow this Town
9 | Center to be compatible with the historic district. And
10 | it's just not being done. If you could flip through, what
11 | you're seeing on the screen right now is an area, the very
12 | first part of buildings that were completed in phase one of
13 | the Town Center which do indeed show a scale in
14 | compatibility with their historic district. But as you

15 | COMMISSIONER WELLINGTON: Now are the ones that did meet the
16 | 35 feet in Phase One that Rose Krasnow mentioned?

17 | MS. PRESLEY: Yes, that's correct.

18 | COMMISSIONER WELLINGTON: Rose, is that correct?

19 | MS. KRASNOW: Correct.

20 | MS. PRESLEY: Not these -- the ones prior. Yes, these are
21 | single-family units that do indeed meet the 35-foot
22 | requirement. And in fact, it might have been a little
23 | confusing based on Rose's description but the 35 foot
24 | applies to all residential other than the multi-family
25 | buildings which are allowed to go up to a 45 foot. So what

1 | you're seeing here is a, what you did see was the units that
2 | complied. This picture is illustrative of the multi-family
3 | units, which exceed the heights that are clearly not
4 | compatible with the historic district. Again, if you want to
5 | flip through really quickly, Kim I don't want to waste a lot
6 | of time on this, you get the picture. These are clearly out
7 | of scale. Not what anyone either in the civic association,
8 | the Town Center Advisory Committee or the residents believe
9 | was intended or was made clear through the from the master
10 | plan all the way through to the site plan.

11 | Okay now, unfortunately as we said earlier there are no
12 | height amendments on file with the M-NCPPC that would
13 | legally allow the developer to exceed the maximum heights
14 | that are present in the development standards that were
15 | approved.

16 |
17 | In the April 14th, 2004 height threshold hearing, staff
18 | stated "I made no amendments to height." And although we
19 | don't either want to go through the specifics of any staff
20 | malfeasance on this issue, because again that's secondary,
21 | that was all done after the violations occurred. We do want
22 | to point out that there is not an amendment on file. Neither
23 | do the developers nor the Developers Council presented any
24 | valid height amendment information during the hearing. Nor
25 | did the developer or developers council represent any valid
records that today would dismiss the legally binding height

1 restrictions present within the Site Plan Enforcement
2 Agreement.

3 As to setback violations, there is one setback
4 amendment on file, with M-NCPPC. We have represented that
5 in the packet that you have which is attachment A. This
6 amendment is documented in a letter dated January 25 by Wynn
7 Witthans to William Roberts of Miller & Smith. The letter
8 states "This amendment is necessary to amend a two foot by
9 12.5 foot foundation layout field mistake. The planning
10 board previously waived the unit to street setbacks from the
11 original approval from 30 feet to 10 feet. The presence of
12 this setback amendment indicates, one that an amendment is
13 necessary to change the setback from the originally approved
14 setback. The setback is depicted on the certified site plan
15 data table. And two, that the planning board did indeed
16 approve and adopt a 10 foot front yard setback." despite
17 what you're going to hear argued by developer and developers
18 counsel.

19 What we find overall is there has been blatant
20 violation of development standards. Even though there are
21 clear development standards existing that were submitted by
22 the developer with the full knowledge of developer council,
23 approved and adopted by the board in a succession of legally
24 binding documents, reinforced through a Site Plan
25 Enforcement Agreement, submitted by the developer council

1 and signed by the developer, yet still they've been
2 blatantly violated by the developer.

3 Unfortunately, as has been mentioned by our legal
4 counsel Norm Knoff, these are just some of the violations.
5 There are those that are equally egregious that show that
6 there's actually a pattern of violation happening, certainly
7 with Clarksburg Town Center, potentially even with other
8 things in Montgomery County, which were not apparently aware
9 of, but something that should cause the board to take
10 notice. The height and setback violations are not
11 inadvertent it appears that they are the results of
12 deliberate repetitive process of gross violation. Not
13 anything to do with confusion or messy records as was
14 presented at the April 14th hearing, and as with the blatant
15 height and setback violations, the equally or more egregious
16 violations must be heard by you in our opinion before you're
17 able to consider or even effectively determine appropriate
18 sanctions. So for the record, whether you address them or
19 not I feel it's necessary for me to go through some of
20 these.

21 First I'd like to start with the O Street Pedestrian
22 Mews. In the Site Plan review number 898001 the staff
23 report from the Wynn Witthans to the Montgomery County
24 Planning Board on January 16, 1998. This is under your
25 staff report tab four in your notebook. Page ten states

1 that close to the edge of the historic district is a
2 diagonal pedestrian mews. The mews contains sitting areas
3 and two large lawn panels and connecting walks linking the
4 Church with the town square. The sitting area closest to
5 the town square includes a trellis and a memorial to John
6 Clark, with the use of found headstones from the family's
7 gravesite. The mews develops a visual and walk able access
8 between the Church and the town square highlighting the
9 significant features of the existing and proposed
10 development.

11 Further on page 11, it states that quote "The extension
12 of O Street, perpendicular to Main Street, connects the
13 adjoining parcels to the south." Again in the site plan on
14 Montgomery County Planning Board opinion March 3rd, 1998
15 under you tab four, page five condition number 20,
16 "Dedication and construction of O Street extended to occur
17 prior to the recordation of the last lot in the entire
18 project or when the dedication of O Street by the adjacent
19 property owners is made in conjunction with future
20 development proposals."

21 Again under the Site Plan Enforcement Agreement Exhibit
22 B, development program B-6, "Developer shall dedicate and
23 construct O Street extended prior to the recordation of the
24 last lot in the entire project or when the dedication of the

1 O Street by the adjacent property owners is made in
2 conjunction with future development proposals."

3 Further in the Site Plan Enforcement Agreement under
4 exhibit C the particular pedestrian mews and O Street is
5 shown in that certified site plan. Again under exhibit D in
6 the certified landscape and lighting plan, there is actually
7 a detail down to the planting, as to what should appear in
8 that pedestrian mews. It depicts the detail of both O
9 Street and the mews, and the detail containing landscaping
10 plan includes the specific plantings along O Street and the
11 mews areas as well as the indication of the hard stated
12 details for the mews.

13 I'd like to point that out for you in fact -- what
14 you're seeing here is the town square area. The church,
15 Clarksburg United Methodist is over here in the pink. This
16 was to be a pedestrian mews, from the town square area all
17 the way up to the church linking the church. These are all
18 detailed sitting areas the Clark family memorial was to be
19 in this area, treescape, et cetera. What you have now, also
20 again the O Street which was to come up here, what you're
21 looking at from the view this would be Route 121. And this
22 would be coming behind the development, behind the church,
23 separating it, but then creating a feature here for a
24 walkable path up to the church.

1 Tim, could you flip to what is there now. What you
2 have now is, two rows of town homes, with an asphalt street
3 in the middle dead-ending to a burm, behind the church.
4 There's no amendment on file. There is nothing to show
5 anywhere how anything will be done to correct that aspect of
6 the town center. That was a key feature, a focal feature.
7 The Clark family memorial will be moved somewhere, which now
8 I can't even imagine how it would get pedestrian access with
9 traffic, but it should. And the linkage that this was
10 intended to create between the town center and the historic
11 Clarksburg is gone.

12 COMMISSIONER WELLINGTON: Now could you just - what are
13 those photographs that have just been put on the screen?

14 MS. PRESLEY: Kim, if you could show. This is the
15 church where Kim is standing now. And this is just to
16 indicate that what has been done instead of the road, which
17 should be coming out straight at me the O Street road to
18 separate this, buildings have been built all the way in, the
19 townhouse units have extended all the way into where the
20 road should have been. Yes, these are two sides. This road
21 should have come in, you can see my finger in here. This is
22 where O Street should have come in. The church should have
23 come in right over here. And instead you have built up all
24 the way to the very edge of where the road should have been
25 and in fact where O Street should have been. Additional

1 | townhouse units, no doubt because the developer needed to
2 | get as many as they could into the area because of
3 | difficulty with topography. But that certainly doesn't do
4 | anything for the town center in terms of what was to have
5 | been a focal point. It's horrific not just to the
6 | Clarksburg Town Advisory Committee; we're newcomers to this
7 | area, but the Clarksburg Civic Association and the citizens
8 | of Clarksburg who worked for 12 years in crafting a master
9 | plan and helping to craft that master plan, are left with
10 | nothing that was supposed to be there. And no explanation
11 | as to why, and the idea that today you're merely going to
12 | rule on height violations, slap the developer on the hand
13 | and let it go with that. And that is very, very
14 | distressing. Do you have anything to add about the church
15 | Kim?

16 | MS. SHILEY: So this is the church over on this side
17 | like that, like they were saying. So we're not quite sure
18 | what has happened here. This would have been the crosswalk
19 | from the church over until to the pedestrian mews. So, this
20 | would have been you know a linkage and it's now just,
21 | they're building up more and more in the tree areas creating
22 | a distance from the old with the new. And the master plan
23 | specifically said that they didn't want the new development
24 | to subsume the historic area and that's what we certainly

1 | feel is what's happening. There's a disconnect, and so it's
2 | a -- and there's no linkage.

3 | MS. PRESLEY: So in fact rather than integration, it's
4 | being segregated.

5 | COMMISSIONER WELLINGTON: But are you claiming that the
6 | town homes are actually on the-right-of way for the road
7 | that was supposed to be built.

8 | MS. PRESLEY: Correct.

9 | MS. SHILEY: Correct.

10 | COMMISSIONER WELLINGTON: Not just that it hasn't been
11 | built, but that...

12 | MS. PRESLEY: Right, there's no room left from my. We
13 | are certainly not builders or developers, so perhaps someone
14 | could go out and take a look at that and tell us otherwise
15 | but physically the location of those units is sitting on, at
16 | least midway to what would have been O Street.

17 | MS. SHILEY: Right this is the road here, or could have
18 | been the road here. I'm sorry, so this was the road. Thank
19 | you Michael. This townhouse that you're seeing right now
20 | sits right here, in this position. So the -- and then there
21 | are other town homes. This particular grouping is not sited
22 | as such. So there are other town houses then, that face
23 | each other the ones in the back and you create this.

24 | COMMISSIONER WELLINGTON: Okay, I understand, I
25 | understand. You answered my question.

1 CHAIRMAN BERLAGE: Let me just state for the record,
2 you have an hour. You're entitled to present whatever you
3 want during that time. I'm not going to limit anything you
4 want to bring in. But I would remind everyone that counsel
5 indicated the scope of the complaint that we're hearing
6 today and of course the respondents are here and on notice
7 to respond to the complaints that we are hearing today. And
8 it's not clear to me that this is part of that complaint
9 although it may be part of a future complaint. But you may
10 discuss whatever you want to discuss in your hour.

11 MS. PRESLEY: I acknowledge that, and thank you for the
12 reminder. I just think it's extremely -- it's critical that
13 the board understand the integration of the violations and
14 the impact to the community or I don't believe you can
15 successfully determine sanctions. It also speaks to a
16 pattern of continued flagrant violations by developers who
17 expect they will simply get away with it, you know business
18 as usual. So I'll try to move through some of these
19 quickly.

20 COMMISSIONER BRYANT: Let me ask a question of
21 clarification to the chair and legal counsel though, because
22 we did hear what the legal counsel said, we heard what the
23 chair said, and I understand what they said, and I agree
24 with what they said. But I'm just making sure that I am
25 understanding what the implications are of what was said.

1 And if I understand correctly what legal counsel is saying
2 is that what's before us today is what we're dealing with
3 today. What legal counsel did not say, at least I didn't
4 understand legal counsel to say that anything that occurs in
5 terms of concerns issues, et cetera they go beyond what is
6 specified today. It does not mean that those things are
7 dead.

8 MS. ROSENFELD: That's correct. The issues that have
9 been raised with respect to these other allegations are
10 separate substantive issues that staff will review and
11 consider and may well bring back to the board if the
12 allegations prove to be -- have merit.

13 COMMISSIONER ROBINSON: So also I would gather that the
14 fact is that if we want to postpone the issue of sanctions
15 until we've had a hearing on all the issues or all the
16 complaints that might be before us that would be within our
17 discretion?

18 MS. ROSENFELD: The board certainly could defer a
19 decision on sanctions to future date with respect to height
20 and setback. Alternatively, it's important for the board to
21 understand that a decision on the height and setback issues
22 do not preclude independent decisions on those other issues.

23 CHAIRMAN BERLAGE: And we will have testimony later
24 today on the sanctions if we get to that point. So we

1 really don't need to discuss the sanctions right now. But
2 again let's let the complainants make their case.

3 MS. PRESLEY: Again I'd have to say these things are
4 integrated, so I'll go on. In terms of MPDU discrepancies
5 I'm going to make one quick point. It appears, based on the
6 plans that were submitted to CTCAC, which was MPDU location
7 plan received by us on June 10, 2005. It appears based on
8 those plans that not only was there an assumption of
9 approval of supplemental family, multi-family units but it
10 will result from our calculations in a concentration of MPD
11 units and up to 44% within certain areas within the town
12 square, segregating rather than integrating the MPDUs
13 equally throughout the town center. We believe the board
14 needs to audit the current phasing plan and units on site so
15 that an accurate report can be provided prior to considering
16 any remedies or sanctions.

17 On the Amenity Phasing Plan there have been violations
18 and I have to refer again to the Site Plan Enforcement
19 Agreement, staff report tab 5, Exhibit E, phasing plan. All
20 community wide facilities within Site Plan 898001 must be
21 completed and conveyed to the association no later than the
22 earlier of the receipt of the building permit for the 540th
23 lot unit or by 15 years from the date of the site plan
24 approval, community wide facility's completion date. All
25 remaining community areas must be conveyed to the

1 association on or before the community wide facilities
2 completion date. The fact of the matter is that we're way
3 past the 540th building permit. Counsel has been trying to
4 flimflam you with information about present occupancy rate,
5 but the fact is that what they prepared for their client and
6 their clients signed states that they should have turned
7 over to the HOA all of the community wide facilities, by
8 now. It hasn't been done, and then if you look further in
9 the Site Plan Enforcement Agreement under stipulations,
10 developer must construct all recreational facilities and
11 convey such facilities and common areas within the
12 timeframes contemplated in the phasing schedule and these
13 binding elements. Developer must arrange for inspections by
14 staff, presumably board staff, to ensure that all facilities
15 are timely, correctly and completely constructed. E, unless
16 the planning board has agreed to modify the phasing schedule
17 which they hadn't done prior but we know that they're
18 builders going to be -- developers going to be asking you to
19 do that in the upcoming hearing, the developer's failure to
20 timely complete and turnover facilities in common areas
21 shall operate to preclude developer from receiving any
22 additional building permits for that particular phase and
23 all remaining phases until such time as the default is
24 cured. The default is not cured and just like with the
25 building heights that even though we've been notifying

1 people since October 2004, buildings have continued to go up
2 in violation. Now we're going to sit and have to listen to
3 how well gee, the poor third parties who live there can't do
4 anything. We're telling you now and that's why it's
5 important to say it today, that there are other violations
6 that cannot be ignored and that we can't wait to have heard.

7 The Amenity Phasing violation once again is just a
8 developer flagrantly violating legally binding Site Plan
9 Enforcement Agreements apparently without any fear of
10 enforcement or penalty of any kind.

11 The phase plan, phase two site plan, quite a few
12 discrepancies in this that you need to be aware of. Because
13 it's just not one document that had issues in terms of how
14 staff dealt with it, and I'll bring this up. The staff
15 report in the phase two of the site plan that was submitted
16 and then approved by the board on May 9, 2002, you have
17 copies of this in the packet that we gave to you. The staff
18 report contains reduced copies of site plans for phase two
19 that contain the same development standards submitted and
20 approved for phase one, those stating the 35 and 45 maximum
21 heights, and a 10 foot minimum front yard setbacks.

22 In the files on record, phase two Site Plan 802014, DRC
23 Transportation Planning Committee, comments, dated November
24 19, 2001, that's our attachment D to you. The DRC notes
25 file also contains a reduced site plan for phase two. It's

1 signed April 26, 2001 by Tracey Grace for the developer at
2 that time, April 27, 2001 by Ronald Collier professional
3 land surveyor, and Les Powells, CPJ. Those again show the
4 same height and setback limits as the phase one certified
5 site plan. Now here's where it starts to get curious.

6 The site plan signature set that's on file with Park
7 and Planning, the only one we could find on file is the site
8 plan signature set that's signed by M-NCPPC is actually a
9 Richard Hawthorne stamp, and dated October 14, 2004. So we
10 note that after CTCAC raised questions to the developer
11 regarding heights, et cetera from August 2004 forward, and
12 then a full two years after the board approval of the phase
13 two site plan miraculously there appears a signature set,
14 quote unquote, "absent any reference to height limitations
15 in stories or feet, and minus the 10 foot minimum front yard
16 setback." Again that Site Plan isn't even valid according
17 to the zoning ordinance 59 D 3-23 because without a specific
18 height reference, it's not a valid site plan, but that was
19 also initialed by board's legal counsel. We also note that
20 up to one-third or more of the units pertaining to phase
21 two, were already permitted, built and occupied prior to
22 October 14, 2004. We also show in the staff records that we
23 reviewed there is a pool and plaza amendment just labeled as
24 a minor revision. It's our attachment F in your package.
25 This minor revision quotes as a minor revision to the phase

1 two site plan. It's signed by Kim Ambrose for the developer
2 and Wynn Witthans for M-NCPPC on 11-12-03. Now we know
3 actually the two sheets that we've provided to you, sheets
4 of the same packet should be sheets L1 through L6. We've
5 given you sheets L1 and 2 as example. If you will note that
6 that is signed by Wynn Witthans both as 11-12-02 and 11-12-
7 03. It doesn't matter which date you pick because both of
8 them are allegedly before the signature site plan date that
9 you have on record. So we'd like to know how there can be a
10 revision dated prior to the date of an actual signature set.
11 We don't believe that's the case. In your files it
12 indicates that there was a signature set at that time, but
13 I'm sure that citizens would like to know what happened to
14 it and if it went the way of ...

15 MS. SHILEY: A shredder.

16 MS. PRESLEY: Yes. So basically another issue that
17 needs to be looked at, again pointing to a developer pattern
18 of submitting whatever they choose despite known standards.
19 We had a manor home hearing, the Bozzuto Manor Homes. In
20 fact Kim and I testified before the board on behalf of
21 Bozzuto at that time. That hearing was held on February 10,
22 2005 in order for Bozzuto to receive an amendment to go from
23 9-unit to 12-unit buildings. What we have later found is
24 that those manor homes that we're initially approved as nine
25 unit structures, that then in August of 2004, prior to the

1 amendment hearing, the builder developer submits the
2 application for approval for permitting approval. And the
3 application is submitted with 12-unit buildings. That's
4 done in August 2004. We have copies of those submissions, I
5 don't know if this is in the packet, Kim. This is copies of
6 prints from DPS and validated that there was an approval by
7 Wayne Cornelius for permitting for issue into the permit to
8 a 12-unit -- for a 12-unit buildings for manor homes, and
9 then the developer comes later February 10, 2005 before this
10 board to ask for an amendment. Now I've attached in your
11 packet a succession of e-mail back and forth between myself
12 and Michael Ma about this issue because what I was told
13 correctly by Michael, we had this discussion just a month
14 ago, was that until he received these site plans, the
15 revised site plans reflecting the approved amendment granted
16 by this board on February 10, 2005, that construction would
17 not begin. Of course that's appropriate. They should have
18 had a revised permit to go with that. But unbeknownst to
19 Michael those buildings were already under construction,
20 nearly complete for building number seven.

21 MS. SHILEY: Seven.

22 MS. PRESLEY: Without any type of amendment to the
23 permit, which was approved long ago at what the developer
24 expected 12 units. So.

25 CHAIRMAN BERLAGE: You have ten minutes remaining.

1 MS. PRESLEY: Okay. Again, I stated that those were
2 contained in your packets, copies of e-mails back and forth.
3 I was advised that you don't have records of what Wayne
4 Cornelius initially approved in terms of site plan but DPS
5 does, and it was 12 units. That begs an answer. Let's skip
6 forward. It's not just ...

7 CHAIRMAN BERLAGE: Why don't you set the clock now to
8 ten minutes so she knows exactly what she's got left.

9 MS. PRESLEY: Thank you.

10 CHAIRMAN BERLAGE: Thanks.

11 MS. PRESLEY: It's not just one violation here. Thank
12 you. It's not one, it's not just, just 400 some buildings
13 that exceed height or setback issue. It's the entire
14 Clarksburg Town Center project has been decimated. You're
15 missing the major element. One of the reasons that the site
16 was chosen to be located as it was, and the reason a
17 developer was granted the privilege to do develop at that
18 site was in keeping with the master plan guidelines, the
19 project plan to be able to create what the community
20 expected. Now developers and counsel can get up here and
21 talk to you about third party victims. There are lots of
22 third party victims here. No one from the Clarksburg Town
23 Center Advisory Committee wants to have people move out of
24 homes or not have people be able to move into homes that
25 are, that are even contracted and waiting to be built. But

1 the fact of the matter is, there's a greater third party
2 victim, many, many third party victims. You can start with
3 the existing Clarksburg town. They were here way before us,
4 they expected this to be built out, to be developed
5 according to the plan. To integrate the new development
6 with the historic district in the way that was promised.
7 And we're not seeing that, and to imagine that now we should
8 just go forward and tell the developer you know you've been
9 violating so long already, let's just make the violations
10 okay, by changing the heights and the setback standards. It
11 goes against the reasoning of the entire planning process,
12 everything that was done to date. There's a reason for the
13 standards that were set, and if now because someone's been
14 able to get away with violating them, we can just change
15 them what does it say to the citizens of Montgomery County?
16 It says that this is a waste of our time, and its not too
17 late if you address all the issues at once, it's not too
18 late to do something to get Clarksburg Town Center back on
19 track. You can have Community-Based Planning come back out
20 and try to asses the situation but without that happening I
21 can't see personally how anyone would even attempt to come
22 up with sanctions. And then again what I saw proposed in
23 terms of sanctions \$500 per home as Norm has said that's
24 less -- that's a tenth of a percent. That's a slap on the
25 wrist and it says we don't really care about what's happened

1 to the community. Pay your little fine, pay your permission
2 slip to continue violating and move ahead. This has been
3 clearly documented violation after violation flagrant
4 disregard for the planning board, the planning process and
5 for the community. And we as a committee representing a
6 much greater community ask you to stop it, to stop the
7 development, to do whatever you need to do to get it back on
8 track, and ensure, you know, help to instill confidence back
9 in the public in the planning process. That's all I have to
10 say.

11 MR. KNOPF: We would like to reserve the left time for
12 the rebuttal if we may. We have about five minutes left.

13 CHAIRMAN BERLAGE: Well, you have 15 minutes for
14 rebuttal already.

15 MR. KNOPF: Yes, absolutely. We have a feeling we
16 could use more.

17 CHAIRMAN BERLAGE: I'll consult with counsel about what
18 the terms of the agreement were but, I'll hold that question
19 under advisement. Thank you very much for that thorough
20 presentation. We'll now turn to the respondents. I
21 understand that Steve Kaufman is the -- okay.

22 (APPLAUD FROM THE AUDIENCE)

23 CHAIRMAN BERLAGE: Ladies and Gentleman, I know that
24 many of you are here for other types of proceedings. This
25 is a quasi-judicial proceeding. You all need to conduct

1 | yourselves as if you are in a court of the law. That means
2 | we do not want applause, we do not desire outbursts of any
3 | kind. You will please listen respectfully to all of the
4 | speakers. Thank you. And let me know when you're ready to
5 | get started, Mr. Kaufman. And if you have any conversations
6 | please take them outside. We want to make sure everybody
7 | has a chance to be heard. Are you ready Mr. Kaufman?

8 | MR. KAUFMAN: Yes, I am thank you.

9 | CHAIRMAN BERLAGE: All right, so you have one hour for
10 | all of the respondents, you may divide up that time anyway
11 | you wish. And I will let you know when there is ten minutes
12 | remaining.

13 | MR. KAUFMAN: Thank you. Good Morning. I wonder if we
14 | could wait till all the board members are present.

15 | CHAIRMAN BERLAGE: Certainly.

16 | MR. KAUFMAN: Yes.

17 | CHAIRMAN BERLAGE: You want to continue to wait.

18 | MR. KAUFMAN: Yes.

19 | CHAIRMAN BERLAGE: I'm sure Mr. Bryant will be back
20 | momentarily. So you may proceed Mr. Kaufman.

21 | MR. KAUFMAN: Good Morning Mr. Chairman and members of
22 | the board. My name is Steve Kaufman. I'm an attorney at
23 | the law firm of Linowes and Blocker. And we represent
24 | Newland Communities here, which is the master developer of
25 | the Clarksburg Town Center. And we have in fact represented

1 the previous developers of the, the previous master
2 developers. This morning I would just like to take a few
3 moments and explain how we intend to proceed and then I will
4 make some initial remarks and possibly some remarks at the
5 end, if time permits. What we proposed to do today is to
6 have you addressed by Mr. Rick Croto, who is the President
7 of the Mid Atlantic division of Newland, Miller & Smith
8 will be represented by Colleen Dweilly who is the vice-
9 president of Miller & Smith. If you don't mind don't need
10 that right in front of my face. The Bozzuto Company will be
11 represented by Clark Wagner, and the Craftstar Company will
12 be represented by Kurt Akins, NVR will be represented by
13 David Deal, and you will hear testimony also from one of our
14 engineers, Les Powell with the firm of CPJ. They will be
15 followed by comments for attorneys for Bozzuto represented
16 by Barbara Sears of my firm, and Kevin Kennedy who
17 represents Craftstar and NVR. And then finally we will
18 present to you a contextual overview of the community that
19 exists up there which Newland and the developers are very
20 proud of. And you will see is in conformity with the master
21 plan, and the zone, and the vision, all of which is being
22 told are not in conformity. And then finally I'll make a
23 few concluding remarks.

24 To begin, obviously this is a very complex set of facts
25 and a very emotionally charged issue before you. However

1 | what has not been set forth here is the fact that this is an
2 | intuitive process. It goes from the general to the
3 | specific. The project plan, which is supposedly the Holy
4 | Grail, is merely a concept plan. The key issues and the key
5 | documents, and I agree with Mr. Knopf that you should follow
6 | the documents, are the opinions of the board in the Site
7 | Plan and the discretion, which has been given and was
8 | exercised appropriately by your staff, not just Ms. Witthans
9 | but other members of your staff, who looked at these things
10 | as they went along. I'm sure the board is very familiar
11 | with the condition 38 in the site plan opinion, which
12 | delegated significant authority to your staff to make course
13 | adjustments.

14 | We refer to that in our letter to you dated June 10,
15 | and we also refer to a statement in our June 10 letter at
16 | the second site plan hearing, where the board was looking at
17 | a decision on the second site plan initiative and the
18 | opinion following that, where Ms. Witthans stood up in front
19 | of this board, and said, that she had been exercising that
20 | authority along with other members of your staff. We do
21 | strongly object to the impugning of the integrity of your
22 | staff and this agency that we believe acted in good faith,
23 | as did our clients, as did the builders, and as did the
24 | department of DPS. Although I do agree that there was some
25 | confusion between the two agencies.

1 Ms. Witthans said as follows, we had something like 43
2 conditions to it. And one of these conditions was to allow
3 staff to work with the applicant to change unit types, make
4 minor modifications to the layout. So they didn't come back
5 every change in the site plan, didn't come back with every
6 change in the site plan. And the applicant has kept us
7 pretty busy with a lot of changes. The single-family
8 detached section stayed the same. But there have been I
9 quote "significant I think improvements in the layout and
10 unit types and design relationships that were achieved and
11 other of their revisions in phase one approved buildings."

12 This was a unique process it was the first one where we
13 had a neo traditional set of circumstances. And this board
14 specifically knew and gave and acknowledged that staff would
15 have the power to make those course changes without the
16 necessity of coming back and seeking amendment for every
17 change. It is very clear other than this chart, which was
18 on the project plan, every single approval, every single
19 change indicated that the standards for height would be four
20 storey and at least 45 feet. Your staff has said in the
21 second memo, which you've received that in fact there seems
22 to be compliance with the vision, with the zone and that
23 there is in fact no damage that has occurred out there.

24 Now a number of other allegations have been made. We
25 are not going to address those today but we welcome staff

1 analysis of those. They've been taken out of context.
2 There have been appropriate proceedings where there were
3 changes either with staff or coming before this board
4 regarding all of these things. And I would point out to the
5 board that there are ample opportunities given the
6 amendments that we have requested and recommendations that
7 your staff has placed before you for changes for them to
8 fully air their opposition, to bring their points forward
9 and to have those things answered. We believe that every
10 change that occurred was either approved and reviewed by
11 your staff and/or came before this board.

12 I would also point out the following. There's a lot
13 made about this site plan enforcement agreement. Well a
14 couple of things, you cant have those ways. The site plan
15 enforcement agreement does carry forward the delegation of
16 authority to your staff. It also -- the site plan
17 enforcement agreement also has in it several areas where we
18 as the developers and the builders have the right to rely on
19 the reviews that staff has brought forward. I bring to your
20 attention of paragraph five, on page four of the Site Plan
21 enforcement agreement. I mean this agreement covers
22 everything it doesn't just cover the chart. It covers all
23 the conditions and it covers the rights and obligations of
24 both the governments and the developers in this case. "The
25 planning board shall recommend for issuance within a

1 reasonable time, any permit sort by developer when the
2 planning board determines that said permit requests are
3 consistent with the approved site plan and any amendments
4 there too. Such approval shall not be unreasonably
5 withheld." Now either this board saw in all of the site
6 plans that came before you and were approved by you where we
7 had height issues, height wasn't even a real issue, height
8 was not an issue but in the opinions, height was at four
9 stories or 45 feet. We have always understood that height
10 was to be in stories and reasonable stories, and your staff
11 has said to you just a few moments ago that there only a few
12 buildings that exceed in this entire community, 45 feet.
13 Excuse me for one second.

14 The condition where you delegated authority to your
15 staff is contained in exhibit B to the Site Plan Enforcement
16 Agreement as in parenthesis, double "n": Developer may
17 propose compatible changes to the units proposed as Mark and
18 Dick conditions may change. Provided the fundamental
19 findings of the planning board remain intact. And in order
20 to meet the project plan and site plan findings,
21 consideration shall be given to building type, location,
22 open space, recreation, pedestrian and vehicular
23 circulation, adequacy of parking, et cetera. If something,
24 when the final set of signature set for a site plan is
25 inconsistent with the findings of this board in its opinion,

1 it is not valid. And I propose to you that the inadvertent
2 continuance of this chart when all of these documents, which
3 the CTCAC people believed is the Holy Grail, and it's really
4 just a concept plan, are not valid and are not enforceable,
5 what is enforceable is what the opinions of this board say
6 and the delegated authority that you gave to your staff and
7 sign-offs when every permit by this agency and its
8 personnel, by the department of permitting services. I
9 don't understand how the department of permitting services
10 can say that they did not have a requirement, excuse me, to
11 look at height when in fact under section A-25 of the
12 Montgomery County code, chapter eight it states specifically
13 the following: "The director must examine or caused to be
14 examined each application for building permit for an
15 amendment to a permit within a reasonable time after the
16 application is filed. If the application or other plans do
17 not conform to all requirements of this chapter the director
18 must reject the application in writing and specify the
19 reasons for rejecting it. If the proposed work conforms to
20 all requirements of this chapter, and all other applicable
21 laws and regulations, the director must issue a permit for
22 the work as soon as practical." Then it goes on to say,
23 under sub-section G, chapter eight, page 8-27, "That they
24 have too look at compliance with zoning regulations. The
25 building a structure must comply with all applicable zoning

1 regulations including all conditions and development
2 standards attached to quote a site plan approved under this
3 chapter."

4 Now for them to say that they didn't have the statutory
5 authority and to be quite candid we were surprised -- by the
6 admission and we think a candid admission by your staff that
7 each department thought that the other was -- was checking
8 the height. But the height has not been violated because
9 your staff on continuous opportunities exercised the
10 discretion you gave them. If we didn't do this in this type
11 of development we would have a bureaucratic nightmare, we
12 would never get through all the hearings. And that is not
13 what this zone or this master plan called for. It called
14 for a new process -- with integrity. Now it's very
15 unfortunate -- that this incident occurred with Ms. Witthans
16 long after the fact. But the course of the dealing overtime
17 clearly indicates and all the documents, you can look at all
18 the documents that CTCAC has asked you. The weight of the
19 evident is that we are talking about stories, and we are not
20 talking about a linear height and I would suggest to you at
21 this point and I'll let the speakers speak in a minute that
22 there were three entities involved in this process, all in
23 good faith, there has been no duplicity, no fraud, none of
24 the allegations the McCarthy-ite type allegations to impugn

1 the integrity of my clients, the builders or this agency or
2 the government here. All of that is just nonsense.

3 There were three entities in this it was this agency
4 which we believe that in good faith. It was our clients,
5 which we believed acted in good faith. Do you think for one
6 moment, had we been put on notice by any regulatory agency
7 that we wouldn't have been in asking for a clarifying
8 amendment? We know how the process works, and we certainly
9 would not put either our clients nor would they put
10 themselves at risk not to come in and ask for those
11 clarifying amendments, the third party being, DPS. We
12 haven't gotten to and hope we don't get to a second hearing
13 talking about sanctions and fines.

14 For Mr. Knopf to say that that is a ridiculous amount
15 when we don't believe we violated anything. I believe it's
16 absurd. I'd like Mrs. - Ms. Colleen Dweilly to speak now
17 thank you.

18 CHAIRMAN BERLAGE: Go ahead Ma'am.

19 MR. KAUFMAN: I'm sorry. That would be first Mr. Rick
20 Croto.

21 CHAIRMAN BERLAGE: Good Morning.

22 MR. CROTO: Good Morning.

23 CHAIRMAN BERLAGE: Make sure he has a microphone close
24 at hand. I want everyone to hear what is being said.

25 MR. CROTO: Is that good?

1 CHAIRMAN BERLAGE: Yes, I think so, yes.

2 MR. CROTO: Again good morning. My name is Rick Croto.
3 I am the President of Newland Communities in the Mid-
4 Atlantic region. I'm officed out at McLean, Virginia, with
5 offices also at Clarksburg Town Center. I moved to this
6 area in June of 2004, after Newland's purchase of the
7 Clarksburg Town Center project in October of 2003 from the
8 Terrabrook organization. Clarksburg Town Center is one of
9 approximately 65 large-scale mixed-used communities
10 nationwide, that Newland builds and manages, and it's
11 Newland's first in Montgomery County. Newland's role as the
12 master developer of the project incorporating all what we
13 would call horizontal construction on grading roads, sewer,
14 water amenities, and provide finished residential and
15 commercial lots and parcels to homebuilders and commercial
16 developers. That is what we do nationwide.

17 In October of 2003, Newland purchased an ongoing
18 development called Clarksburg Town Center. We purchased it
19 because we felt it was a very significant event in
20 Clarksburg. We felt it was a good financial investment.
21 And we liked what we saw. Our diligence in projections of
22 future development for this purpose, were based on what was
23 already on the ground, which was substantial. Since then in
24 coordination with five builder groups also represented here,
25 we proceeded to continue, not change but to continue, the

1 previously approved development scheme, as we understood it.
2 Rose used the word startled. When this first came up
3 frankly I was surprised and a bit confused. We thought we
4 had done our homework as Newland. We had hired experienced
5 local consultants for engineering to be on board. We had
6 signature local, regional and national builders with stellar
7 reputations, in my view in the marketplace, who designed
8 products specifically for this community. I'm not the
9 legalese person, I'm just saying that we have a community on
10 the ground that frankly I'm proud of, and we thought we were
11 continuing what was already proved. That's the past. We've
12 been here for a little over 18 months. We're playing the
13 cards as we had them.

14 Our goal is to move forward and be the vehicle to get
15 past this. Finish the Clarksburg Town Center in accord with
16 the master plan vision, get final approval for the last
17 phases of residential, and finalize the site plan and get
18 approval for the Clarksburg Commercial Center. We are, all
19 of us intending to be a part of this go-forward solution.
20 I'm hopeful we can come to an understanding of what has to
21 change in process, and if necessary in home product, and get
22 Clarksburg Town Center community completed.

23 There are some things that have already changed. Some
24 due to the spotlight of this episode, highlighting day-to-
25 day needs of the community. I am, as of two weeks ago, the

1 day-to-day manager of Clarksburg Town Center and will remain
2 there to get this completed. We regret, and frankly are
3 embarrassed on one piece of continuing construction issues
4 that we have encountered surrounding the community pool
5 site. It's not an intentional "don't-build"; we're having
6 some issues. We are optimistic about frequent
7 communications through our current and future homeowners
8 regarding progress of development, homes, roads and
9 amenities. We've taken a positive step in the placement of
10 a new management company for the homeowner association in
11 Clarksburg Town Center. We're pleased with the library
12 resetting, the construction of an on-school site, the future
13 Piedmont Park are also good additions to the community. We
14 are also recruiting an additional engineer for our staff to
15 be within the project to ensure future go-forward validation
16 of future approvals.

17 Now we want to finish a community that you and our
18 residents can be proud of. We are committed to work with
19 the board and staff and our residents to get clear, approved
20 paths towards completing Clarksburg Town Center. Thank you
21 for your attention.

22 MR. KAUFMAN: Next would be Colleen Dweilly.

23 MS. DWEILLY: Good morning. My name is Colleen Dweilly
24 and I am Community Development Manager for Miller & Smith.
25 With me today is Chuck Ellison, Vice President of our

1 Maryland Communities. Miller & Smith is a local, privately
2 held homebuilder and developer who has been in business for
3 41 years. We enjoy a stellar reputation for quality and
4 innovation and are recognized year after year for our award
5 winning homes and communities. We have been a builder at
6 Clarksburg Town Center for three years and have received
7 awards for both our town and single-family homes. We have
8 many talented people at Miller & Smith who come up with the
9 ideas and designs for the homes people are living in today.
10 My role at Miller & Smith is to manage the engineering
11 process that transforms a flat drawing into reality. While
12 I was educated as a mechanical engineer, I have worked as an
13 inspector, estimator, heavy highway contractor, homebuilder,
14 and land development manager in the Washington Metropolitan
15 area for the past 20 years. This is my fifth year at Miller
16 & Smith, and Clarksburg Town Center has been one of my
17 projects since we started construction. I am sorry that the
18 citizens group is disappointed with the development of their
19 community. We regret the circumstances that have brought
20 about today's hearing, and that the board is having to
21 devote so much time to this issue. We apologize if the
22 staff believes that the development community has let them
23 down. And I would like to share with you how it is possible
24 for a builder to travel down this road with nothing but good
25 intentions.

1 Miller & Smith did not intentionally or wilfully
2 violate any county laws or regulations in our building of
3 homes at Clarksburg Town Center. We proceeded in good
4 faith, with meticulous care to get architectural approvals
5 from the developer, building permits from the county,
6 accurate stakeout from the engineers, wall checks and final
7 approvals from inspectors, final house locations surveys,
8 and mews and occupancy permits as required for the
9 settlement of every home we have built at Clarksburg Town
10 Center. There are two allegations being cited by citizens
11 and staff today. The first is the issue of height. The
12 developers' guidelines required us to build a three-story
13 slab on grade town home for a neo-traditional community. We
14 have done this beautifully as evidenced by our sales,
15 customer satisfaction, and design awards. As one of the
16 selected builders we bought finished lots from the
17 developers. We do not second-guess the approved site plan.
18 We do not question the history or authority of the project
19 plan. We do not study the consistency of charts and tables
20 from one phase to another. We have relied in good faith
21 over the past three years on the reviews and approvals we
22 received from a competent developer and a very sophisticated
23 government agency that has rigorous methodologies for
24 determining compliance.

1 Let me share with you some of the items we have relied
2 upon. The developer has a guideline of exactly what the
3 product is supposed to look like, the vision for the
4 community, the standards for the roof pitches, this is like
5 our project manual that's above and beyond any standards
6 that are created by the county on their site plans. We have
7 architectural drawings, that's that 20-page set that tells
8 you how to build this house. We don't vary, we don't all of
9 a sudden start doing it different another day in building a
10 taller unit. This is like our Bible and we build at the
11 same for every homeowner that buys at Clarksburg Town
12 Center. This is a small stack of final inspection,
13 approvals, and final location surveys that we received for
14 227 homes that are currently occupied at Clarksburg Town
15 Center. Miller & Smith never received a complaint, was
16 never questioned, was never cited with a violation or
17 mentioning correspondence regarding height or setback
18 issues, until late last year. If we had known there was a
19 concern with height, we could have, and would have corrected
20 the issue immediately. We always believed the three-story
21 descriptor was the prevailing factor in regard to height.
22 As a matter of fact, CTCAC used the picture of our town homes
23 as one of the complying units that relates to the historical
24 center that is currently being cited, as too tall and not

1 enough off-set or set back. I am sure that none of our
2 units exceed 45 feet at Clarksburg Town Center.

3 I believe just as strongly that the approved site plan
4 is a prevailing factor in regard to setback. I would like
5 to share with you now just a couple of quick slides on how
6 we actually site a house.

7 MR. KAUFMAN: You might want to turn the light down.

8 MS. DWEILLY: Ok. The first slide should show a site
9 plan as it was approved on the signature set by the engineer
10 for the developer. It's basically just a box that gives you
11 a building envelop on which to site your unit. The next
12 slide shows a lot grading plan that our own engineer
13 developed as a result of reviewing our architecture, which
14 shows all the bump outs, and steps, and yard drains, and
15 lead walks, and steps and stoops, and it fits exactly within
16 that box that was approved. We have not shifted the unit
17 forward or sideways or up. It is following the approved
18 site plan exactly, and I'm even sure that I can do overlays
19 of this for every unit that we have supposedly in violation.
20 We've matched the site plans.

21 As Steve mentioned earlier -- excuse me -- all of our units
22 demonstrate this kind of consistency and siting. For the
23 town homes we even meet or exceed the front yard set backs
24 that are on the approved site plan. In conclusion, we are
25 very proud of the work we have done in Clarksburg.

1 While citizens may have some legitimate concerns with
2 the community, we do not believe height or setback issues,
3 for 3-story town homes should be one of them. We would like
4 the Board to know that Miller & Smith is the kind of builder
5 who wants to do the right thing. We want to do what's right
6 for the residents of Clarksburg Town Center. What's right
7 for the town of Clarksburg, and what's right for an
8 expedient resolution to this matter. We stand ready to work
9 with the Board and its staff to fulfill our obligations and
10 to successfully complete the remainder of our 69 homes in
11 this community, with the same design care and passion that
12 we have delivered our first homes. Thank you for your time
13 and consideration.

14 MR. KAUFMAN: Clark Wagner from Bozzuto will be next.

15 MR. WAGNER: Good morning. I'll try to be brief. I
16 want to just mention a few comments about the Bozzuto group
17 and talk about the process. We went through within
18 Clarksburg much as Colleen did, I want to try and not be
19 repetitive as far as what Colleen said because much of what
20 we went through is very similar, and then address a couple
21 of the issues. As you are familiar with the Bozzuto Group
22 you know our founder Tom Bozzuto and our partners. As you
23 know we've been involved in many important projects here in
24 Montgomery County, in traditional neighborhood development
25 such as the Kentlands, the Lakelands, and the (inaudible).

1 In addition we've been involved with new infill community
2 such as the Whitney at Bethesda Theater, Montgomery at
3 Wheaton metro, and we hope to continue developing what we
4 feel are smart growth projects in Montgomery County.

5 Our corporate mission is to create the best possible
6 living environment for our customers and to do so in a way
7 that creates community and respects the world in which we
8 live. Our involvement in Clarksburg Town Center began three
9 years ago when we entered into a contract to purchase 125
10 multi-family units within seven buildings located at
11 Clarksburg Town Center. We spoke to the land planner
12 involved in the project, the county staff and the folks from
13 Terrabrook about the various architectural and site
14 development standards for the project some of which Kathleen
15 has talked -- Colleen has talked about. We understood from
16 all involved that four stories was the controlling height
17 standard. We then designed buildings to meet the
18 traditional and architectural design expectations and
19 created two building typologies. One of them was to be four
20 stories and have elevators to meet the strong demand in the
21 market from empty-nester buyers, and the second a three-
22 story walk-up building intended to meet the demand for first
23 time buyers, both, all of our buildings include MPDU's. We
24 then filed site plan amendments for staff approval for
25 portions of phase one and phase two and we receive those

1 | approvals. We did not believe any amendments were necessary
2 | for height. This filing included elevations of building 3,
3 | which depicted a height of 53 feet as measured from the
4 | finished grade to the mid-point of the roof, finished with
5 | street grade. We were told at the time that the data table
6 | question was a hold over from previous plan amendments and
7 | the numerical standard did not apply which is described in
8 | the letter from CPJ and Associates. We then filed a
9 | building permit for building 3 which depicted a building
10 | that is 53 feet in height measured from the finished street
11 | grade to the mid-point in the roof. Those plans were
12 | reviewed by DPS and signed off by Park and Planning staff,
13 | and we received all necessary permits to construct the
14 | building. The building was constructed and sold to third
15 | party buyers including both market rates units and MPDUs.
16 | We received all necessary inspections and approvals required
17 | to occupy the buildings.

18 | I would just like to address in conclusion a few
19 | additional points, the master plan clearly, I think it has
20 | been stated already, has no height standard other than the
21 | four stories as stated in the staff report on pages five and
22 | six. There seems to be a recurring indication that we have
23 | somehow violated the master plan, which we have not.
24 | Combining a numerical height restriction of 45 feet with
25 | four stories is a mistake, since most, if not all four-story

1 buildings built in the last 15 years have been built
2 substantially higher than 45 feet, especially those built in
3 traditional neighborhood developments such as Clarksburg
4 Town Center, Kentlands, Kingfarm, et cetera. In addition,
5 the fact that the measurement must be taken from the street
6 grade in cases where the buildings are less - or setbacks
7 less than 35 feet from the street instead of at the front
8 door has the effect of reducing the height restrictions
9 since all streets are lower than the front door by as much
10 as 5 to 10 feet. Since communities such as Clarksburg Town
11 Center are specifically designed to place buildings close to
12 the street, the height standards should always be in the
13 form of stories, and not a numerical number to avoid having
14 a standard that's virtually impossible to meet. We feel
15 we've designed and constructed homes that have quality built
16 and enjoyed immensely by those that now reside in them. We
17 also feel that the height standard of four stories is the
18 correct standard for multi-family buildings in a traditional
19 neighborhood such as Clarksburg Town Center.

20 Finally, we feel we did the best job we could have done
21 to comply with all zoning and building code requirements,
22 and built homes that have won awards, homes we can be proud
23 of. If we made a mistake in the process, which we believe
24 was not the case it was not done intentionally, and we

1 | sincerely wish to get this issue behind us and complete our
2 | portion of the community. Thank you.

3 | MR. KAUFMAN: Next would be Curt Adkins from Craftstar.

4 | MR. ADKINS: Good morning. For the record my name is
5 | Curt Adkins. I am the division manager for Craftstar Homes.
6 | We're located in McLain Virginia, 1320 Old Chain Bridge
7 | Road. I've been involved with the Clarksburg Town Center
8 | project from beginning. Craft Star Homes has built over 200
9 | homes there. We're very proud of our homes, we're very
10 | proud to be members of the Montgomery County community at
11 | large. I would like to say we're not trouble makers. I've
12 | always taught my people to try to understand the process,
13 | and follow the processes and do the job the way it's
14 | supposed to be done. We have tried to follow the rules.
15 | We've followed the same processes that Colleen and Clark
16 | have described, and I would say that I've worked in eight
17 | different jurisdictions in the surrounding area, and
18 | Montgomery County, I want to give credit to all of your
19 | employees, they do a thorough job. It's a very rigorous
20 | process. We followed that process, tried to play by the
21 | rules, and we hope that you will find that we did and that
22 | there are no violations. Bear with me a moment.

23 | CHAIRMAN BERLAGE: Sure.

24 | MR. ADKINS: In the future if there are -- if the rules
25 | change where we want to work with you to understand what

1 | those rules are, and we will follow any new rules that are
2 | imposed. We will look to the government for guidance and
3 | approval, and following those rules -- we're going through
4 | this process, we don't feel that we need to cross examine
5 | the folks involved and that the people that we're working
6 | with do understand the rules.

7 | CHAIRMAN BERLAGE: That's good. Thank you Curt.

8 | MR. KAUFMAN: Next would be David Deal from NVR.

9 | MR. DEAL: Good Morning. For the record my name is
10 | David Deal. I'm the vice-president and divisional manager
11 | of NV Homes. We're located in Gaithersburg off Quince
12 | Orchard Road. NV Homes has built over 150 homes in
13 | Clarksburg Town Center. We've built thousands of homes in
14 | Montgomery County. In fact some of you may live in some of
15 | our homes.

16 | CHAIRMAN BERLAGE: Allison does. (LAUGHS)

17 | MR. DEAL: We take great pride in the homes that we
18 | build, and we're very protective of our customers. They've
19 | invested dearly in their homes especially with the prices in
20 | Montgomery County. I'm not going to underscore the fact
21 | that there are many ambiguities that you've heard about
22 | today, we certainly didn't flout the regulations as you've
23 | heard from the other builders. We certainly went through
24 | the same steps. In fact, those steps are very challenging
25 | at many times, there are many crossroads to cross, and many

1 | approvals to gain in terms of building homes in Montgomery
2 | County, and we certainly followed all those regulations. We
3 | too have received all of our final approvals on all the
4 | homes that we've built and we're very proud again of
5 | Clarksburg Town Center. It's a fact that we find it very
6 | ironic that of all the communities that we survey, and we
7 | survey quite often in terms of homeowners' satisfaction,
8 | Clarksburg Town Center ranks as our company's most satisfied
9 | homebuyers, out of all the homes we've built, and we're very
10 | proud of that, and we think that the community's very happy
11 | with what we've built for them. I would respectfully ask
12 | that the Commission find that there has been no violation.
13 | And in the future if the rules do change we would be very
14 | happy to comply with all those rules and build the homes
15 | that would meet your requirements. Thank you.

16 | MR. KAUFMAN: The last speaker in this group would be
17 | Les Powell, an engineer with CPJ who will tell you in his
18 | own words, the process he went through with your staff and
19 | the permitting process.

20 | MR. POWELL: For the record my name is Les Powell with
21 | Charles. P. Jonathan and Associates, and I am a landscape
22 | architect and planner with the firm. We're one of three
23 | engineers in the land planning firms that took over this
24 | project from MK Development. I've submitted two letters
25 | that were a part of the record. The first letter was dated

1 July, June 21, 2005, which was addressed to Bozzuto Homes.
2 In it I stated that I provided architectural elevations that
3 included building number 3 that also included buildings 1, 2
4 and 4, Two and four being the same buildings. Along with
5 the site plan modifications that we had and that building 3
6 showed a height of 53 feet. It is our understanding through
7 Park and Planning whenever we talked about height,
8 everything was mentioned in stories. Throughout the entire
9 process the way staff spoke was in terms of stories. In
10 fact the staff reports for both phase one and two speak in
11 terms of stories, not feet. Staff did have us place on the
12 plans, that data table that was on the project plan. But we
13 understood it just to be a historical context because they
14 kept stressing that they had -- had been given more
15 flexibility, more authority on this project that they had on
16 any of the other ones. And they explained that to us along
17 several steps of the way. The second letter I submitted was
18 June 30th addressed to Rose Krasnow. In it I explained that
19 I did have a meeting with staff and that included Rich
20 Weaver, Wayne Cornelius, and Wynn Witthans, at the -- it was
21 an informal meeting just at the front counter. And in that
22 meeting, what we were talking about was we had met all the
23 requirements of the Planning Board conditions for approval
24 for phase two. What was happening though was because the
25 School Board and the Parks Department were ironing out all

1 | their issues with their combined sites that this process was
2 | going to go on for quite some time. Staff agreed that they
3 | could go ahead and release permits and record plats.
4 | Unfortunately, there was an inadvertent reference on the
5 | record plats to the phase one site plan enforcement
6 | agreement. But the record plats clearly stated phase two
7 | and they also showed a vicinity map showing the record plat
8 | being in phase two.. That's all I have to say, Thank you.

9 | MR. KAUFMAN: Thank you I would then ask if these
10 | groups could go to their seats that the attorneys for
11 | Bozzuto and Craft Star and NVR will come forward and make a
12 | presentation. I believe we have about twenty minutes left
13 | and I would like a few minutes at the end to have this
14 | PowerPoint and also make a few concluding remarks. Barbara
15 | Sears will speak for Bozzuto.

16 | MS. SEARS: I'll be brief. My name is Barbara Sears
17 | with Linowes and Blocher, and I represent Bozzuto Homes.
18 | We've heard a tremendous amount of facts and quite a bit of
19 | law as we go through this. I want to take a moment and
20 | bring it down to the specific example of Bozzuto and how
21 | they worked together and we believe show no violations
22 | occurred. The first issue to address in Bozzuto is they are
23 | alleged of violating one building, one 30-unit multi-family
24 | building called building 3. As Mr. Wagner indicated he got
25 | involved in 2002 on behalf of Bozzuto when they bought an

1 area within phase one, that area that contained building 3.
2 They needed to do some footprint and layout changes. They
3 also needed to figure out what the rules were. They worked
4 through CPJ, they worked with Park and Planning. The height
5 was never an issue it was always four stories, not 45 feet.
6 As you heard from both Mr. Les Powell and Mr. Wagner those
7 were the constraints, those were the guidelines that they
8 were given. They did their due diligence. Had they needed
9 to make an amendment they would have done it at that point
10 because they made other amendments at that point to lay out
11 the footprint, they did not need to do that, they did not do
12 that. They then move to actually filing. At the time they
13 filed these amendments, they filed the elevation for
14 building 3 showing 53 feet. If they had any intention of
15 violating the rules they would not have submitted elevations
16 showing 53-foot buildings. They did so. They did not need
17 to amend. They were told four stories and not 45 feet.
18 They moved on and filed their building permit. They filed
19 the same architecturals with the county DPS. Those
20 architecturals were to be reviewed pursuant to law that Mr.
21 Kaufman had mentioned, chapter 8 requires DPS to review
22 them, requires them only to issue permit if they in fact
23 conform with all conditions of the site plan. They also
24 reviewed and checked off on five Park and Planning. Park
25 and Planning required under the site plan enforcement

1 | agreement, paragraph 5, to only recommend approval to the
2 | building permit if it complies with all the conditions of
3 | the zoning development standards of the approval. They
4 | reviewed it they recommended it for approval. If there is
5 | any question about the height that was the time to have
6 | raised it. Instead the building permit was issued. No
7 | appeal to that building permit was filed. The building was
8 | built it was sold. Bozzuto was legitimate in relying on the
9 | process it went through, in relying on the records and the
10 | contract that is being used as a site plan enforcement
11 | agreement to say that the builders were subject to the very
12 | height that would put them in violation. Quite the contrary
13 | any ambiguity, any question about whether the height was
14 | four stories or 45 feet was resolved with issuance of those
15 | permits. So we believe as a legal matter there is an
16 | estoppel, there is not a justification or authority for
17 | penalties. With that I know my colleague has some comments
18 | and I don't want to take more time.

19 | MR. KENNEDY: Thank you Barbara. Good morning, Kevin
20 | Kennedy here from NV Homes and Craftstar Homes. Home
21 | builders' names I'm sure you've all have heard of -- law
22 | abiding, attempting to do it right. I think that the
23 | witnesses that came before you explained what they tried to
24 | do, which is figure it out and do it according to the rules
25 | and admittedly they do defer to your very capable staff at

1 times to direct them. In this instance, I think the record
2 is replete with evidence of at least facial ambiguity which
3 I think in this context is not a situation where we get the
4 benefit of the doubt to ourselves, err on the side of you
5 know self serving interpretations all about our business.
6 What we did and what we do as a matter of course is ask the
7 professional with the government to help us. And the way
8 that's done is exactly as Barbara described we submit a very
9 complete extensive pack and the materials to DPS, it is not
10 something that we try to get past them on some kind of
11 flimsy visceral reaction. They're pretty circumspect as are
12 your folks, and I think its clear that the presumption in
13 this context has to be in favor of all of the government
14 officials doing their jobs, which we believe they did
15 correctly in real time. It has become unfortunately through
16 a series of events, the need to reverse engineer and figure
17 out a way that this might result in a violation. I don't
18 think that effort is justified. I think the evidence is
19 overwhelming that the process was conducted in accordance
20 with the guidelines that were set up in the front end as
21 Steve mentioned earlier, and there are sections in the
22 record that folks don't like to cite but he had correctly
23 brought it to everyone's attention, I think, that there was
24 authority reposed in the staff not withstanding those
25 original approvals that left them latitude and they acted in

1 accordance with I believe good faith belief that they had
2 that power. This was not us ignoring the speed limit hoping
3 the police officer wasn't around, what this was, was at best
4 confusing signage, and because we couldn't figure it out on
5 its face it took staff two tries. I think the evidences is
6 that it's ambiguous based upon the fact that the folks who
7 were involved in real time couldn't reconstruct it because
8 of there are some record keeping issues. But what they come
9 up with the first time back in April is now the polar
10 opposite of what they come up with now. And I would urge
11 you to notice the conspicuous absence in the April report of
12 any mention of the suspect change of the record. That has
13 intervened unfortunately, but I do not see that as having a
14 pivotal effect on anything that's happened to date. It is
15 unfortunate. We don't believe that that's the basis for
16 repudiating everything with that I think a capable person
17 did through her tenure here at Park and Planning. The
18 agency personnel are presumed to do their job. The absence
19 of evidence to the contrary I think that's the right
20 presumption just like when someone's accused of negligence,
21 the party claiming negligence has the burden of proof.
22 There's no evidence that they didn't do their job, they may
23 not have understood precisely what everybody intended that
24 job to be but they acted in good faith in real time. And
25 that led to reliance. When they issued those permits that

1 we asked for every single time and we paid a significant fee
2 to obtain those and that's the pay for the folks that look
3 at them, there is a sign off by this agency. It is not, I
4 don't think fair, reconstructing to assume that was some
5 rubber stamp automatic pilot process that nobody was really
6 paying attention to it. The house construction plans that
7 were submitted show the heights, the elevations were very
8 clear. They also give full sheet sets of the site plan
9 showing where the house is going to be put. And as Ms. --
10 as Colleen indicated earlier that's where we put them,
11 exactly what was shown on the site plan, the footprint, the
12 envelop, the houses, the footprint of the envelop, the
13 houses that would fit inside these envelops. So what you
14 come with is a series of ambiguity reconciled by the folks
15 that you guys correctly entrusted with the task of telling
16 us what it meant in real time. Vetting by not one but two
17 government agencies for legal compliance, issuance upon that
18 permit based upon a reconciled ambiguity by those people in
19 charge signed off every single time. And then good faith
20 reliance on that with the tune of many, many houses being
21 built and we think correctly notwithstanding some at this
22 point we think 13th hour attempt to reconstruct it. So for
23 those reasons we think the equities and fairness must compel
24 finding of no violation in this instance. If we want to do
25 it differently next time we're all ears. But for this go

1 around. I think to change it retroactively would be unfair,
2 and we ask you simply not to do that.

3 MR. KAUFMAN: Thank you Kevin. We have a very short
4 presentation, which will be presented to you by Nancy
5 Hughes, one of the consultants to (inaudible). If we can
6 have the lights.

7 MS. HUGHES: Excuse me this first slide is an overall
8 view of the Clarksburg Town Center plan. These are Miller &
9 Smith town homes at Crystal Square. Miller & Smith single
10 family homes. Bozzuto condominium buildings number 4 and 3.
11 This is another view of a Bozzuto condominium building
12 number 4. It's a streetscape view of condominium buildings
13 4, 3 and one. This is a little pocket park in front of the
14 condominium buildings 3 and 2. There are the Craftstar two
15 over two condominiums and town homes under construction.
16 The Craftstar town homes at the news park. Craftstar and NV
17 town homes at (inaudible) park with the Bozzuto condominiums
18 in the background, the Craftstar carriage homes, NV and
19 Craftstar homes at Bristol Square park. This is a
20 photograph of Snow Hill Park with the Bozzuto condominiums
21 and NV and Craftstar town homes in the distance. And the
22 Porten single family homes at Ashford Square. Miller &
23 Smith single family homes at Brightwell Square. Bristol
24 Square Park with Craftstar and NV town homes as well as the
25 Bozzuto condominiums in the distance. NV town homes at

1 Brightwell Square, Miller & Smith at Brightwell Square,
2 Craftstar town homes at Clarksburg Town Center, and finally
3 Ashford Square park at Clarksburg Town Center.

4 MR. KAUFMAN: Thank you Nancy. Now we gave you this
5 contextual PowerPoint for a very specific reason. In every
6 one of these photos, some of the units are alleged to be in
7 violation, and some are not. And I would defy anyone in
8 this room to tell me which are which. It's a very
9 compatible community. Our clients the builders and
10 Newland's are very, very proud of it. We followed all the
11 rules. I would point out to you -- very specifically. This
12 is a process that goes from the general to the specific. A
13 project plan is nothing more than a concept plan. Why do we
14 have site plans? Why do we have site plan enforcement
15 agreements if that is not the case? It's very specific in
16 this zone and in the master plan that's how we will proceed.
17 This Board and its predecessors believe in its staff, gave
18 it authority. The staff exercised that authority. I know
19 Ms. Witthans for many, many years. This is a person of
20 integrity. I believe she made a judgment mistake long after
21 the fact. But I can tell you she was one of the toughest
22 reviewers in this agency and she was not alone. All your
23 other staff participated with her. DPS has a requirement as
24 we've pointed out to you to check the site plans, they can't
25 say that if it's a optional method they don't have to look

1 at it. The chapter is very clear. And I would point out
2 the following to you. You have to put -- if we could put
3 for one moment the politics and the emotion aside, the facts
4 and the logic do not support the recommendation of your
5 staff, that there is a violation here. We don't understand
6 why they would say in their report. What is unclear is why
7 the site plan enforcement agreement is more restrictive than
8 the standard set in the site plan opinions. The reason is
9 that there was this inadvertent chart cut. The site plans
10 themselves are not just a chart, they actually have all the
11 units cited. The opinions say 4 stories, 45 feet. And as I
12 pointed out to you for a minute, the reason -- the answer to
13 this question of your staff is that if any of us, that is my
14 client, the master developer, any of the builders, who are
15 before you today were told for any reason that they needed
16 an amendment of some kind to a project plan. First of all
17 you wouldn't amend the project plan. You will amend the
18 site plan, because the site plan has the controlling
19 document and the opinion that approves the site plan is a
20 controlling document. Many of you are lawyers that sit on
21 this Board, and you know that what I'm saying to you is
22 correct. We followed the master plan. We followed the
23 zone. We are very proud of what's been built there. This
24 is a power play to do other things before you. This whole
25 thing started because the CTAC people did not like the

1 retail development that they were getting. Now they've gone
2 through this and selectively picked things, impuned
3 everybody's reputation and expect that this Board will come
4 in and fine us for following the rules. That is unfair, its
5 not logical and the facts don't support it. And we welcome
6 any investigation that this agency or anybody else wants to
7 make. I have six minutes left.

8 CHAIRMAN BERLAGE: Six minutes left, sir.

9 MR. KAUFMAN: I would point out the following to you.
10 The weight of the evidence is that we were talking about
11 stories, height was not an issue. All the site plans show
12 where the buildings should have been set. If there was a
13 dispute between a DPS ad this agency as to where the set
14 backs were they had an affirmative duty to resolve that.
15 The zone specifically says that that is not required. The
16 flexibility in this zone was to be applied by this Board and
17 by the staff, it was. There is this long course of dealing,
18 that long, long preceded the unfortunate event with the
19 modification of the one page in a packet of site plan that
20 showed all the height, showed all the buildings located.

21 Excuse me one second. I believe that unfortunately
22 there have been some ambiguities and that the record keeping
23 unfortunately did not keep up with the pace. But Mr. Powell
24 was here. He explained to you his long dealings with your
25 staff, he explained why there was a -- why the chart was

1 kept on a project plan. It was kept there I believe for
2 historical context. Because the project plan could not be
3 amended, it was the site plans, the project plan merged into
4 the site plan. I believe that Ms. Witthans, in good faith,
5 had them keep the chart on there just to keep the project
6 plan intact. But just because the project plan shows that
7 and inadvertently the engineers kept the chart on as they
8 prepared the Signature Set. Now you know it's never been a
9 practice in this jurisdiction where lawyers get involved
10 beyond the opinions. The process for permitting is done by
11 the engineers, the developer and the builders, working with
12 your staff and working with DPS. We've never had a
13 situation where unless there was a problem that arose where
14 lawyers would get involved in that. Notwithstanding that
15 you know that may be the case going forward. And as my
16 client has said to you and as the other builders have said
17 to you, we welcome any changes that you want with regards to
18 the amendments that we have filed. We have taken corrective
19 steps to file the appropriate amendments to the project plan
20 now to the site plan and we have asked for approval of the
21 retail center site plan. All of these processes give the
22 antagonist here, the complainants, ample opportunity to
23 raise any issues that they want. Not in a shotgun out of
24 context approach. Now we do recognize they've done a lot of
25 research. But we don't think that they really understand

1 | this process or what went on, over the course of that time.
2 | With that I'll say thank you and finish my ...

3 | CHAIRMAN BERLAGE: Thank you very much. The next thing
4 | that we're going to do is receive limited testimony from the
5 | general public. I know that the staff has been sitting here
6 | for more than two hours, so we are going to take a short
7 | ten-minute break, and I emphasize we will reconvene in ten
8 | minutes at five minutes after 12:00. I'd also like to
9 | remind the audience that under the rules, the Board members
10 | until they finish their findings on this matter are ex
11 | parte, and we are not in a position to discuss this matter
12 | with anyone privately, so please don't try to speak to us
13 | during the break. We will reconvene in ten minutes.

14 | CHAIRMAN BERLAGE: If everyone would please take a
15 | seat. We're about ready to get started again. All Board
16 | members are present. And we'll now be taking testimonies
17 | from the members of the general public, who have signed up
18 | to testify. Some of you have signed up to testify on the
19 | violations only and some have signed up to testify on both
20 | the violation and the proposed remedies. And your time will
21 | be allocated, accordingly. The staff already has all of
22 | that set down on paper, so I rely on staff to set the
23 | appropriate time limits. The first speaker is Delegate Jean
24 | Cryor. Delegate Cryor, welcome. We'll take you first and
25 | then move on to the other speakers.

1 DELEGATE CRYOR: Thank you, I appreciate this time. Mr.
2 Chairman, members of the Commission, the planning Board has
3 been so important in the history of Montgomery County. I'm
4 sitting here for a couple of reasons, one as some of you
5 know I was involved with West Montgomery and the master
6 plans at one stage of my life, also with the newspapers and
7 following the Clarksburg development, and then I think I'm
8 one of the few people left who actually cutting the ribbon
9 at Clarksburg. I think the others had better sense and left
10 public life, I'm still here. And that very day, I have to
11 say, I can remember it so clearly because it was so
12 beautiful, it was -- you looked out on the countryside and
13 you knew it was as beautiful as it was ever going to be.
14 And I was ungracious enough to say that as I cut the ribbon.
15 That it will never be as beautiful as it is this very
16 moment. And several of the builders and the developers came
17 over to say, but we're really going to work on this to make
18 it possible that it will be as beautiful in another way as
19 possible, and I certainly believe them because I wanted to.

20 One of the key parts of this as it all started, and I
21 want to take it back to that if I could, is that Clarksburg
22 was unique when we started to look at it, the Clarksburg
23 master plan and what it was going to be. It already was a
24 little town, it already had it's own historical identity.
25 And we recognized this was not going to be one more

1 sprawling suburban development. It was going to actually
2 take what existed, which was the soul of Clarksburg, and we
3 were going to pull that in and connect the two together so
4 that it would be extraordinary. Not -- not inventing the
5 past, not inventing scenery and almost a backdrop like a
6 movie that would be -- it was real. It was absolutely real.
7 And how was that going to happen? And as you recall, some
8 of you, it was going to happen by linking the two together.
9 The historic part of Clarksburg, the spire of the church,
10 walkways to the town centre. And it would be quite
11 extraordinary. And I want to remind you what you already
12 know. There's plenty of money when you do things the right
13 way, the resale value on properties like that is very high,
14 the developers make money, the builders make money. And
15 guess what, the county makes money down with the property
16 taxes. So quality is always a plus, it's not a negative.
17 And having this historic soul of Clarksburg to be able to be
18 incorporated into this was indeed a plus for all of us. And
19 that's exactly what has not happened. I don't know where it
20 got lost. As you, I've been sitting here listening to the
21 testimony before I would sit down. And I kept hearing the
22 words of well-intentioned, ambiguities. I heard all these
23 things that we wanted to do the right thing. Most of the
24 builders who came forward to speak frankly were not part of
25 the master plan. They did not know what was supposed to

1 | happen here in Clarksburg, whether that's what happened or
2 | not I don't know. Because all I can say is this, it sounds
3 | as if we are caught in a room with the lights off. And no
4 | one has stepped forward and turned on the switch. They've
5 | been fumbling around in the dark and frankly from the
6 | accounts I've read in the newspaper, it's enough to say the
7 | people of Montgomery County we don't have enough instructors
8 | to do this. If that's the case today, then I think you'll
9 | have to say to the citizens and the residents of those
10 | areas, guess what, we can't do this job any more. So we
11 | need you to look out for what's happening here. It's not a
12 | very good idea. But if it's the only idea left, it's the
13 | one that's left. And you have heard today from some
14 | citizens who put together extraordinary testimony. Well
15 | documented.

16 | I have been in this room at least 100 times over a
17 | lifetime. I don't think I've ever heard testimony as well
18 | documented as this testimony. It goes through so clearly,
19 | so carefully, and in the absence of those who will be doing
20 | the job for whatever reason they didn't do the job, the
21 | citizens have a role in this that's far more important than
22 | it ever was before and they should be encouraged. And I
23 | have to say this I don't think it serves anyone well for an
24 | attorney to step forward here and to give different reasons
25 | for why citizens would come forward and talk about their own

1 | hometown and why they are struggling to make it what it's
2 | supposed to be. No one is served well by that at all. So
3 | we're here today and you have a mess on your hands. There's
4 | no two ways about it. I don't know how you're going to find
5 | your way through it. Because what you're talking about is
6 | people who said I didn't mean to make a mistake, if I made a
7 | mistake. I don't know how you handle that problem.

8 | I think you have to go back and look at the written
9 | record for data but also may I ask of you that you go back
10 | and look at what was wanted for this area. What this last
11 | large development in Montgomery County was to be. And I
12 | think you'll find that as lovely as it is today, it does not
13 | reach that which were the expectations of those you met
14 | earlier. And I have to remind you, one of our dearest
15 | citizens had cancer and stayed with this plan and died while
16 | she was working on it. She would not succumb to all that
17 | she should do, she would not succumb to her illness. She
18 | stayed working on it. Surely she must be watching us today
19 | and saying to herself "What happened to the historic value
20 | of Clarksburg?" Thank you very much.

21 | CHAIRMAN BERLAGE: Thank you very much, Delegate. The
22 | next group of speakers will be a group of three -- we'll
23 | take people in groups of three: Amy Friez, Katherine Orloff,
24 | and Wayne Goldstein. So all three of you should come up.
25 | You've all got different times. So I'm going to rely on the

1 | time-keeper and on yourselves to watch -- watch the clock
2 | there. Ms. Friez, you're first.

3 | MS. FRIEZ: Hi, my name's Amy Friez. I'm a resident of
4 | Germantown, Maryland. I hold a contract to purchase the un-
5 | built Craftstar two over two attached unit in the Clarksburg
6 | Town Center. My husband and I placed this contract on the
7 | unit last October, and we believe the unit will not take
8 | away from the historical value of the community. We think
9 | that it's -- that the unit is very well designed and
10 | attractive and will fit in with the currently constructed
11 | units that are surrounding it. All of the units surrounding
12 | it have already been built, and we believe that it will fit
13 | in quite well. Our personal circumstances argue in favor of
14 | imposing a height restriction of four stories as opposed to
15 | 45 feet. We will suffer emotional and financial damages if
16 | our unit is not built. Homes have appreciated since last
17 | October at a torrid pace over the Washington D.C. real
18 | estate market will make it impossible for us to find a
19 | comparable home for the same price. We will need to spend
20 | approximately \$75,000 more to find a home today. So I
21 | respectfully request that you grant the height restrictions
22 | of four stories. Thank you for your consideration.

23 | CHAIRMAN BERLAGE: Thank you very much. Katherine
24 | Orloff.

1 MS. ORLOFF: My name is Katherine Orloff and I
2 currently hold a contract on an NV town home. I know that
3 in Ms. Krasnow's report she said that it was her desire and
4 -- not that any innocent third party purchasers be harmed by
5 the issues brought up today. There are those groups who
6 have contracts on homes that have yet to be built, those
7 under construction, and people who already live in their
8 homes. The group that has been left out is those of us
9 affected. I think approximately fifteen families whose
10 homes are actually completed and sitting empty because we
11 can't move in. My closing was scheduled for June 22nd. I
12 had been notified by the builder four days before my closing
13 that the zoning issues had come up. I had a moving date
14 set. I've given my landlord notice. I had -- I have
15 appliances ready to be delivered. I have painters coming
16 in. All of that has gone away. I had a loan lock that's
17 expired and actually I'm homeless. I'm now faced with
18 moving into a hotel with my dog, putting all of my
19 belongings into storage. I work on -- I'm self-employed. I
20 work on a project-by-project basis. So I can now not take
21 work because I don't know where I live. So my request to
22 the committee -- to the Board, please find something for
23 those families who are caught in this limbo, and if you can
24 find it in your hearts to know that aside from having food
25 on the table, having a roof over your head is the most

1 fundamental need to be a productive member of -- of any kind
2 of community. And I think that's all that any of us are
3 looking to be, and whatever issues face Clarksburg Town
4 Center, whatever is decided I'm certain that all of the
5 sides will be heard and a resolution will -- will be
6 reached. My question to you is for those of us who are
7 waiting to move into our homes and have nowhere to go, when
8 can we expect some kind of answer about when we can move
9 into our homes? Thank you.

10 CHAIRMAN BERLAGE: Thank you very much. That answer
11 will be discussed this afternoon. I can promise you that.
12 Mr. Goldstein.

13 MR. GOLDSTEIN: Dan Wilhelm has agreed to cede three
14 minutes of his time to me. I'm Wayne Goldstein, President
15 of Montgomery Preservation Inc. and member of the Civic
16 Federation Land Use Committee. It's the Wild West up in
17 Clarksburg that is why I'm wearing this cowboy hat because
18 I'm volunteering to become one of their deputy sheriffs. I
19 had some experience, as I was a junior deputy sheriff in
20 Piedmont County Arizona in my youth. That's the last funny
21 remark I'm going to make. I'm here to talk about the
22 massive violations of height and setback requirements as
23 well as the failure to build a road and a commemorative
24 space, all of which threatened Clarksburg's Historic
25 District but more importantly, threatened the public trust

1 in the master plan and the individual plan approval process
2 and they will threaten the future viability of the planning
3 Board and its planning staff.

4 I know of no other county residents in recent years who
5 has spent as much time before the planning Board and in this
6 building interacting with its staff as I have. I don't
7 count the land use attorneys, builders, architects,
8 engineers and others who are here as part of their paying
9 jobs. I am here because of my interest in the important
10 work that's -- this agency does today and has done for 78
11 years. Based on my experience as an activist and researcher
12 for the last eight years, I believe that Clarksburg has
13 propelled Park and Planning into its worst crisis in forty
14 years, perhaps not since the days of the Diggs Council era
15 of 1962 to 1966. I haven't had time to read the 600 plus
16 pages of the appendix only released on Tuesday afternoon,
17 and even if I have, I wouldn't have the time to provide my
18 comments on the many pieces of this complex puzzle. I am
19 forced to make some broad generalizations. I have seen how
20 new master plans get altered and builders wait until the
21 last minute after the residents have gone home, to propose
22 projects far different than the original community consensus
23 version. I have seen how a series of zoning text amendments
24 can change a master plan in increments. But I've never seen
25 a single vehicle of enforcement being used to give builders

1 the master plan they want. The law firms representing the
2 builders have argued for their version of the master plan
3 and have persuaded staff to recommend making changes and
4 approve plans to support that version. This is a very
5 efficient way to open up the master plan without opening it
6 up, and also minimizing public participation. The Planning
7 Board obligated itself to inspect the entire town of
8 Clarksburg as it was built but it didn't know that it did
9 that despite the clear language in its site plan enforcement
10 agreement. It didn't have enough enforcement staff to even
11 handle its current workload and never did anything about
12 that except to approve more and more projects that staff to
13 not be able to inspect. It had a staffer who now claims she
14 made the alterations because she was overworked and just
15 wanted to edit some language years after it was approved.
16 As bad as these three facts are, what is worst of all, is
17 the recommendation to find that violations occurred, call
18 for the smallest possible fine and then eliminate the
19 violation. You cannot simultaneously punish and reward
20 someone for the same action and maintain or regain
21 credibility. You cannot simultaneously accept blame and
22 blame others for your mistakes and be believed that you
23 actually accept any blame at all or that others deserve the
24 blame you push onto them. Staff statements about protecting
25 innocent third parties seems to be right out of one law

1 firm's letter. There was a model for quick -- quickly and
2 effectively resolving a severe crisis. When several people
3 died from cyanide placed in Tylenol in a Chicago area in
4 October 1982, "these poisons made it necessary for Johnson &
5 Johnson to launch a public relations program immediately in
6 order to save the integrity of both their product and their
7 corporation as a whole." Johnson & Johnson's handling of
8 the Tylenol tampering crisis is considered by public
9 relations experts to be one of the best in the history of
10 public relations. As the plan was constructed, Johnson &
11 Johnson's top management put customer safety first before
12 they worried about their company's profit and other
13 financial concerns. The company immediately alerted
14 consumers across the nation, via the media, not to consume
15 any type of Tylenol product. They told consumers not to
16 resume using the product until the extent of the tampering
17 could be determined. Johnson & Johnson, along with stopping
18 the production in advertising in Tylenol, recalled all
19 Tylenol capsules from the market. The recall included
20 approximately 31 million bottles of Tylenol with a retail
21 value of more than \$100 million. This was unusual for a
22 large corporation facing a crisis. In many other similar
23 cases, companies had put themselves first and ended getting
24 more damage to their reputations than if they had
25 immediately taken responsibility for the crisis.

1 According to a November 1982 Washington Post article,
2 what Johnson & Johnson executives had done is communicate
3 the message that the company is candid, contrite, and
4 compassionate "Committed to solving the murders and
5 protecting the public." The planning for phase two of
6 Johnson & Johnson's public relations plan, or the comeback
7 phase was already in the works by the time the first phase
8 had been completed. Chairman of the Board, James E. Burk
9 said, in regard to the comeback, "It will take time, it will
10 take money, and it will be very difficult but we consider it
11 a moral imperative as well as good business to restore
12 Tylenol to its pre-eminent position." The New York Times
13 published an article by Tamara Lewin on December 21, 1982
14 that announced to consumers that Tylenol had, in a short
15 period of time, gained back much of the market that it lost
16 prior to the cyanide deaths "By creating a public relations
17 program that both protected the public interest and was
18 given full support by the media institutions in the U.S.,
19 Johnson & Johnson was able to recover quickly and painlessly
20 from possibly the greatest crisis ever to hit the
21 pharmaceutical industry." Johnson & Johnson solved its
22 crisis and saved the company in sixty days because it took
23 responsibility for everything it possibly could, thus
24 rapidly regaining the public trust for such a selfless act
25 and then move as swiftly as possible to solve the problem

1 and get back in business. The planning Board's crisis first
2 became known to some almost a year ago, although the
3 widespread phase only began about two weeks ago. The damage
4 is being done as the headlines are becoming harsher and
5 harsher, and the Planning Board keeps trying to have it both
6 ways. The entire County Council spent the afternoon of
7 Monday July 18th getting an unprecedented briefing of this
8 crisis.

9 If you want to emulate the Johnson & Johnson's model to
10 minimize any further damage to your reputation, you might
11 want to make July 18th your D Day. By that day, you will
12 need to: One, take full responsibility for the mess, stop
13 making excuses, stop blaming DPS, this does not take the
14 builders off the hook. Two, for the Clarksburg Town Center,
15 require that all future plans and plan amendments be
16 reviewed by the HPC to determine if the project or amendment
17 is compatible with the historic district. The HPC should
18 also be asked for its advice as to the impact of the alleged
19 violation on the historic district. Three, begin advertising
20 to hire twenty-five inspectors, or whatever number DPS would
21 hire for the workload that the Planning Board has. Measure
22 height and setbacks of large individual projects and at
23 least selectively a subdivision or take decisive steps to
24 turn over all inspections, and enforcement to DPS.

1 Including any enforcement fees collected and not spent on
2 enforcement.

3 Four, either ask for council funding for the number of
4 other staffers needed at development review to do the job
5 right or fees to cover the costs of the new employees. Or
6 significantly slow down the approval process in keeping with
7 staff size.

8 Five, reorganize as needed. Take decisive actions to
9 keep the public informed, such as arranging for Montgomery
10 Community Television to take and later televise all planning
11 board meetings. Require all applicants to show that they
12 met with the community or made heroic efforts to do so.
13 Require community input and perhaps support for all
14 community amenities for optional method projects. Post
15 online the attendees and subject of all staff meetings
16 unless confidential in accordance with the closed meetings
17 law.

18 I'd also like to suggest to the building industry and
19 developers and the land use attorneys involved in this that
20 they think about the possibility of using the Johnson and
21 Johnson model for themselves.

22 As for the sanctions, the starting points should be:
23 One, \$500 per day per violation. The issue is to determine
24 when the clock started running, another way to calculate the
25 violation cost could be the addition of gross profit based

1 on additional floor or square footage or perhaps cubic
2 footage of the taller house as compared to the permitted
3 shorter house, or it could be the cost to tear off the top
4 floor and rebuild the roof.

5 Two, for setback violations the buildings could be
6 moved back, both rows of town houses and individual houses.
7 Enormous buildings have been moved for the last 200 years in
8 this country, some of them up mountainsides. So moving a
9 row of townhouses or an individual house would not be that
10 difficult at all. We've seen some interesting examples in
11 recent months in the County.

12 Three, this may really come down to being an insurance
13 issue. Where various entities will be suing each other
14 trying to establish who is to blame and it is the insurance
15 companies that will bear the burden, not the new owners,
16 some who may have been already moved into buildings that
17 they should not have been allowed to occupy. The Planning
18 Board could, and perhaps should, require the builders to do
19 everything to help displace residence at the builders cost,
20 including putting them in a luxurious rental or luxury
21 hotel, pay all moving and inconvenience costs, business
22 costs, build them a better home at the same price that they
23 paid for the first house, no matter what the market is
24 currently doing. Basically do anything and everything to
25 keep them happy.

1 Four, I've seen how the Board of Appeals has shown no
2 mercy when someone built part of their house into the
3 setback, even if the person had been mislead by someone
4 else. If the Planning Board shows the same lack of mercy as
5 their colleagues to builders who should have known much
6 better than these hapless owners seeking a variance, it
7 would be able to immediately stop the current crisis and
8 begin to rebuild the trust of residents across the County
9 also gaining the undivided attention of their planning
10 counterparts across the country.

11 Five, I've asked the Board to refuse to approve
12 projects where the MPDUs had been bought out for a song.
13 I've asked this board to recommend against the mandatory
14 approval for a new school that would destroy a healthy
15 forest and have a negative impact on an area already
16 suffering from flooding. In all these cases the Board said
17 that the law prevented them from doing anything. Well, the
18 law is on your side this time, and it is time for you to put
19 on your judicial robes and issue the harshest possible
20 sentence to tame the Wild West up in Clarksburg and restore
21 your credibility. If you take the route of business as
22 usual, you will find out that your ability to conduct your
23 business will change in unexpected and probably unwanted
24 ways. Thank you.

1 CHAIRMAN BERLAGE: Thank you very much. I'm not going
2 to respond to a number of your comments right now but I can
3 assure you before the end of the day I will. But thank you
4 for your testimony.

5 The next group is Paul Majewski, Michael Hulley, and
6 F.J. Laban. Those are ceding. I'm sorry, okay, I get it.
7 So then we'll just need Paul Majewski, and then we'll take
8 George Spanos and Tim DeArros. George Spanos and Tim
9 DeArros, are you here? Come on up. Go ahead, Mr. Majewski.
10 Sorry.

11 MR. MAJEWSKI: Okay, I'm Paul Majewski, President for
12 the Clarksburg Civic Association and acting member of our
13 Planning Committee and resident, and a member of the CTCA
14 for sixteen years. It has taken eleven months to get to a
15 time when the problems in Clarksburg can be aired fully.
16 The staff report now recommends that the board find that
17 indeed violations did occur. Building heights have always
18 and continue to be of paramount importance to our town. The
19 scale of the building in the Town Center with relation to
20 the historic old town were widely 35 foot, 45 foot height
21 limits are in the project plan, the preliminary plan, and
22 then in the site plan and site plan enforcement agreement.
23 The elimination of these defined heights, which by no means
24 can be done as a minor amendment without public hearing and

1 input equates Clarksburg Town Center buildings with CBD
2 developments.

3 This is just not right for buildings in up County Town
4 Center. Even in Bethesda the TSR Zone immediately adjacent
5 to the CBD is limited to three-story town homes. It does
6 not make sense to build at this level in Clarksburg. The
7 master plan clearly states that the heights in the Town
8 Center should be lower with higher buildings allowable
9 nearer the transit stops. In section two of summary of
10 staff findings on height and setback issues of the staff
11 report it is stated that what is unclear is why the height
12 limitation set forth in the site plan enforcement agreement
13 are more restrictive than the standards set in the site plan
14 opinion. We have a problem with that statement. Clarksburg
15 has always had special requirements with regards to the
16 historic district in the 35 foot 45 foot restrictions where
17 they were there to safeguard the historic town and not
18 subsume it, which is a quote from the master plan.

19 The developers knew what the development standards were
20 when they bought into the project and they need to conform
21 to the parameters. To ruin the scale of building with
22 relation to the historic district because people want higher
23 ceilings is not what the plan for this area should be
24 reduced to. At the April 14th hearing it was stated that
25 the developers and builders should not be penalized for park

1 and planning shortcomings. The clean site plan and site
2 plan enforcement agreements were clear in what was expected.
3 The fault lies primarily with the developers. They were
4 signatories to those documents and the council knows and
5 knew full well what constitutes minor amendments, and what
6 has to go to a public hearing before changes can be
7 authorized. After all, the correct taxes still have to be
8 paid even if a tax payer does not get audited and moreover
9 even if advice was given by an IRS staff member the burden
10 is still on the taxpayer to pay all the applicable tax plus
11 any penalties incurred by the non-payment. I may deviate
12 from the written text a little bit because I've made some
13 notes, and I was shocked to hear the lawyer say that because
14 what was said to him allowed him to ignore what he signed.
15 Perhaps that was an honest mistake. Perhaps they didn't
16 want to bring out the fact when they discovered, and surely
17 they did, surely they have a review process when they review
18 documents signed. Surely that -- oh well, maybe not surely
19 --perhaps they saw the problem, and perhaps they were afraid
20 to bring up that point because they were afraid that that
21 would be officially recognized and known by everybody that
22 there was a 35-foot amendment. Let's see if I find that
23 place. In August 2004, the heights were clear to anyone who
24 took the time to read the pertaining documents. After eight
25 months with buildings progressing at a feverish pace a

1 violations hearing was eventually granted with the vote four
2 to one against the finding of violations. Once again it was
3 business as usual.

4 Following heroic efforts and further discoveries of
5 other violations it could no longer be denied that
6 violations have occurred. Now if the board agrees, a plan
7 of compliance has been submitted for board consideration and
8 approval, I'm sorry -- I just read that. If the board
9 agrees, they've been talking about a plan of compliance and
10 basically we don't think that plan of compliance should be
11 considered at this time. Part of the plan of compliance
12 includes a new project plan amendment, which contains
13 provisions for new buildings to be rebuilt at the very same
14 heights, which have been so disturbing. Once again, the
15 result would be business as usual. The plan of compliance
16 must not be considered at this time due to the following: a)
17 the full extent of the violations has not been determined.
18 This was the O Street issue, and without a public hearing it
19 is part of the site plan enforcement agreement, was this
20 another minor amendment? This road was key to the blending
21 and connecting of the old town with the new town, amenities,
22 which Amy had talked about were supposed to be in place by
23 the time of the issuance of the 540th permit. At that time
24 work was to halt until the amenities were completed, many
25 more than 700 permits have been issued to date. There needs

1 to be an investigation of the proper location of MPDU units.
2 We believe that the violations, which took place after
3 August 2004 are far more grievous than the earlier
4 violations, the finds and remediation should be much greater
5 for those later violations. An amended project plan was in
6 the works, with inputs from Park and Planning staff before
7 the April hearing. It was submitted in March and if
8 approved will cover up all the height and setback
9 violations. This plan is a travesty and must be removed
10 from any consideration. This amendment would allow the
11 buildings of the remainder of the Town Center to be built at
12 the very heights and setbacks of the violations. Why on
13 earth would we agree with that?

14 CCA reiterates its position that the heights in the
15 Clarksburg Town Center must conform to the site plan and
16 site plan enforcement agreement. What has happened since
17 August 2004? Building has proceeded at an even faster pace,
18 with no regard for their effect on the new homeowners
19 affected or the town of Clarksburg. Efforts to obtain the
20 heights of the building that approved entirely in vain,
21 still we do not have that information which was requested
22 months ago. How can the builders not know the heights of
23 what they build? Now Clarksburg may never be the town
24 envisioned by the first developer, the civic association and
25 the Planning staff involved. We can try however we can get

1 somewhat back on track by insisting that the original plans
2 be implemented in the remaining part of the Town Center. The
3 linkage between a new town and the historic old town has
4 been irreparably damaged. This linkage is one of the over
5 riding principles on which the board approved this
6 development as RMX optional method. Since August 2004 the
7 Town Center advisory committee has been hampered, hindered,
8 maligned and put down by the developer attorneys. This
9 committee did not act alone they have the support of
10 hundreds of Clarksburg residents. Our planning chair has
11 been involved with them in the process that has been
12 followed and has been to meetings with them in park and
13 planning staff. Their interest is solely in upholding what
14 was the vision and intent of the Clarksburg master plan and
15 its fulfillment. They are extraordinarily knowledgeable
16 about the master plan zoning and the process. We applaud
17 them. It's not easy to do the right thing while it's being
18 accused of being elitist and being against condominium
19 dwellers. Nothing is further from the truth.

20 In conclusion, I want to say that the accessibility of
21 developers and their staff to Park and Planning needs to be
22 monitored. Anyone walking in the Park and Planning offices
23 do not know who they are. How is it that staff have to wear
24 identification, but visitors do not? Usually the reverse is
25 true. Meetings in corners won't cut any mark. There should

1 be a proper sign process with accountability for each visit.
2 And an end to the present continuous informal contact, as
3 this is inappropriate given the relationship between a
4 regulatory agency, and those being regulated. That's the
5 end of one sheet. I do have another sheet. We had a change
6 in speakers. I'm the only speaker at the moment.

7 CHAIRMAN BERLAGE: You have two minutes left. You can
8 use it however you want.

9 MR. MAJEWSKI: Okay, thanks. The tallest of the
10 building, the 53 foot one had been said in April that it was
11 award winning. But to those who value views of the sky, the
12 historic steeple the distant trees and hills and the promise
13 of the master plan and the project plan, it could be
14 considered a monstrosity. It can be viewed from Stringtown
15 Road near Maryland 355 nearly a mile away from the
16 intersection of Clarksburg Road and the next road. It can
17 be viewed from Piedmont in Clarksburg Road. It does not
18 resemble a house being massive in height, width and breadth
19 compared to what one would expect in town setting. It can
20 be seen rising about the surrounding town homes.

21 At the April 14th consideration hearing I testified
22 that things that are just listed in this written -- I'll
23 just mention briefly. I hope, as said other places we've
24 worked, we've continually worked for this. We asked for
25 three stories, the community asked for three-story limit

1 through 1992 and later 1993 asked for a three or four- story
2 limit. Why a three or four-story limit? In talking with
3 Joan Woodson CCA historic committee chair, we remember a
4 discussion at a civic association meeting of how many
5 storeys were counted and there is an issue about the slope
6 you know from one side it might look like three and one side
7 it might be four. You know we're not planners. We don't
8 know exactly how you count things, so I believe that we
9 allowed for four stories for that reason. And I
10 communicated with as you remember, in April I did
11 communicate with three of the members of the Clarksburg
12 advisory committee for the master plan and they agreed.
13 We're talking about normal size stories. We unanimously
14 support the adherence to maximum height and feet that a
15 setback limitations. And the building of high buildings
16 does do a public harm. And I do take issue with the staff's
17 comment that height was not an issue at this site plan. We
18 thought things were pretty sure, we thought things were
19 final at the project plan with the feet and there were many
20 conditions. That's why it wasn't brought up again. It was
21 a settled ended project. Thank you.

22 CHAIRMAN BERLAGE: Thank you very much, Paul. George
23 Spanos.

24 MR. SPANOS: My name is George Spanos. In December
25 2004, I purchased a Craftstar property that is partly the

1 subject of this hearing today. My residence is yet to be
2 constructed. I had a whole series of things I was going to
3 follow with my testimony today but after hearing the
4 testimony today I'm going to change that and wing it from
5 here.

6 I think that the board has responsibility in this
7 process. One of the major responsibilities is to ensure
8 some degree of certainty with respect to the planning, and I
9 think everybody in this room will agree that it's a real
10 good idea that builders will build homes that people want
11 and people buy those homes. And for some reason in this
12 case, the certainty has been lost, and you will hear
13 hardship stories worse than mine about not being able to
14 move into a house. But, so I won't discuss that. I want to
15 talk about where we go from here or where you go from here
16 because you have to make these decisions. One thing that's,
17 I've read everything on the website they published. I've
18 read the latest report that I'll get to in a minute,
19 regarding the problems with the height restrictions. But
20 there is no, I have not seen one shred of evidence that
21 people in this process didn't act in good faith. It's not
22 there.. Or if it is somebody's has yet to point that out,
23 and I think it's been reiterated today. And when people act
24 in good faith and go through the process, then it should be
25 allowed to proceed. But we have a small group of people

1 with an agenda. Let's not kid ourselves. This group of
2 people who allegedly represent the community of Clarksburg
3 represent themselves. What Amy Presley came in here today
4 and said was, don't make a decision, check with me. Who
5 appointed Amy Pressley, the final arbiter of the vision of
6 Clarksburg? I think that's preposterous. That's a personal
7 opinion. But in some ways, you've lost control of this
8 situation, partly the reason you've lost control is a series
9 of reports where the story keeps changing. I think one of
10 the things that you have to do is examine the person, the
11 persons who made these reports where on April 14th they have
12 one story and then on July 7th you have another story. I
13 mean, that type of things doesn't inspire confidence when I
14 read it. If the information was there to reach the
15 conclusions in the July 7th report, why didn't that person
16 get to that conclusion a lot sooner and a whole lot of
17 people's would have been a lot smoother. Clearly somebody
18 dropped a bomb in the examination process, and you have to,
19 and I think to ensure confidence you have to go back and
20 find out what had happened. And that may mean some sort of
21 investigation of that, of the investigation. Go hire
22 outside counsel and have them find out why the story keeps
23 changing because clearly the staff story keeps changing.
24 And I don't know why and I'm not here to judge, but that
25 seems to be a problem. And maybe the citizens' confidence

1 in this process will be enhanced if you do that. I mean,
2 I'll get off of this box. But I think that people have a
3 right to get on with their lives and you have an obligation
4 to make a decision -- and make a decision today. Because if
5 it were, if the Amy Presleys of the of the world have their
6 way, we ain't never moving into Clarksburg. And that's just
7 wrong.

8 CHAIRMAN BERLAGE: Thank you, sir. Mr. DeArros.

9 MR. DeARROS: Good afternoon, members of the Planning
10 Board and county citizens. Thank you also to Steve for his
11 spirited testimony earlier. It was very enlightening. I'm
12 a three-year resident of the Clarksburg Town Center and I
13 settled into place in May of 2002. When we first looked
14 into Montgomery County for our relocation, the Clarksburg
15 Town Center was only a dream; it was just rolling hills and
16 up county Montgomery County, and it had yet to form out of
17 the dust. As a staff member of the CTCAC, I whole-heartedly
18 endorsed the testimony provided earlier by the co-chairs and
19 the counsel for the CTCAC. But I speak to you now not as a
20 member of that committee or of the Clarksburg Civic
21 Association which I am but I speak now as a concerned
22 resident of the greater Clarksburg community in general, and
23 just as an aside, what would be nice to come out of all of
24 this, it would be to see -- somehow the building codes could
25 map a little more closely to the zoning regulations. Of the

1 many points outlined in the letters, and the phone calls,
2 and the meetings, and e-mails and the excellent
3 presentations for everyone today at this hearing and the
4 further rebuttal and debate that which we're about to hear,
5 I'm most interested in calling out the four specific points.

6 The first is the height and setback violations because
7 they speak to a larger pattern of creative modification that
8 the developers made to the Town Center program, and then
9 other than greedily leveraging a wildly booming market I
10 can't fathom any other reason not to build this beautiful
11 community the way it was intended. Now on the other hand it
12 is impossible that there was not enough explosives on the
13 whole East Coast to loosen the bed rock enough to put the
14 basements in the ground? That's a matter for CPJ. A builder
15 can still have expensive homes with high ceilings if they
16 took the time to put the basement under the ground.

17 Second: Missing features from the town. The planned
18 and approved features such as O Street and the pedestrian
19 mews, and I'll skip over to the fundamental aspect of
20 Clarksburg as the rich history and I really appreciated Jean
21 Cryor's comments about the history. I must advice this
22 august body that the developer is going to submit the,
23 excuse me the seven amendment package coming up and among
24 those there is an attempt to wriggle out of moving the
25 historic Hars Wilson home, and I'd like to call attention to

1 the June 8th '05 historic preservation commission staff
2 report. Among other things later when they get to the
3 COMSAT discussion I'd like that to be thought of as part of
4 the Clarksburg as a whole not just the Town Center. Okay we
5 need to think of the greater Clarksburg community at all.
6 So if we could skip the sanctions until the entirety of all
7 issues have taken place and remember to put a moratorium on
8 any further construction of residences and such until Up
9 County Regional Services, DPWT and M-NCPPC could get
10 together.

11 CHAIRMAN BERLAGE: I'm afraid your time is up. Thank
12 you very much for your testimony. I just want to say to Mr.
13 Spanos and the other contract purchasers who spoke earlier
14 that we assure you that the Commission is very aware of the
15 situation of person's innocent third parties that have
16 bought properties in Clarksburg. We are not unaware of what
17 kind of complexities and emotional turmoil that might
18 provide for some of the prospective purchasers and we're
19 going to talk about that issue this afternoon. That is not
20 something we are putting aside. We're very, very focused on
21 it. Thank you. The next group is Joel Richardson, Caitlin
22 Young, and Esther King. Joel Richardson is first.

23 MR. RICHARDSON: I'd like to begin by apologizing for
24 my lack of discretion. Because I'm going to discuss issues
25 that others have seen fit to gloss over and not reflect on.

1 We've heard an incident by a staff member referred to as an
2 unfortunate mistake, a bad decision, an incident. What
3 happened was a crime, what happened was a violation of
4 Maryland criminal code section 8-606, referring to the
5 alteration and making false entries in public records.

6 The parties before you have claimed that all mistakes
7 were made in good faith. I think that remains to be seen.
8 I intend and I encourage this Board as well, to refer the
9 matter to Maryland Attorney General's office for further
10 investigation of any actions taken by that staff member or
11 any involvement or knowledge by the developers and the
12 builders in that action. It is highly likely, and I think
13 should be considered a possibility, that the developers at
14 least were aware of that alteration. In fact they had
15 signed on to a document, which had later been altered. They
16 sat here and listened to testimony about that alteration,
17 about that document and made no mention to you that that's
18 not the document they signed, that's not the situation that
19 was at that time. As a member of the bar of this state, I
20 find it disgraceful that a member of my profession came
21 before you and at the very least, exhibited gross negligence
22 with respect to the authenticity of the document before you
23 that they had signed on, to that they had accepted
24 responsibility to uphold. I encourage you to take these
25 matters into consideration. If you have any inclination of

1 not finding a violation I encourage you to wait for that
2 decision, wait for the criminal investigation to determine
3 if there was any involvement in that falsification. I think
4 these matters must be looked into more deeply. I think the
5 situation here points to a statement made by a wise man once
6 that, it's easier to act and later ask later ask for
7 forgiveness than to initially ask for permission. And I
8 think clearly that's what has happened here. Thank you.

9 CHAIRMAN BERLAGE: Thank you, sir. Caitlin Young.

10 MS. YOUNG: Hi, my name is Caitlin Young and I'm an
11 MCPS teacher, and in order to be here right now I'm missing
12 an MCPS grading reporting meeting which is an equally
13 contentious topic. So I don't really mind being here, and
14 I'm here because I love my condo in Clarksburg Town Center
15 and I would like to see it built. It has the perfect floor
16 plan for my daughter and me. It overlooks what will be a
17 beautiful tree-filled park for my daughter to play in, a
18 place for her to make new friends. We'll be able to walk to
19 the shopping center just a short stroll over the bridge and
20 eventually I'll walk her to the new elementary school down
21 the street. I love my condo so much that last November I
22 scraped together a down payment, borrowed from friends and
23 family and signed a contract to buy my first home 23902-A
24 Cataba Hill Drive. That was seven months ago and I still
25 love my condo even though it is yet to be built.

1. Apparently a lot has occurred in the last seven months
2 to hold up its construction. A document may or may not have
3 been altered, buildings may or may not be built too close to
4 the street, Giant may or my not be the neighborhood grocery
5 store, and the building in which my condo is located may or
6 may not be a few feet too tall. I don't know. What I do
7 know is that all of these maybes are wrecking havoc in my
8 life. I'm on a month-to-month lease awaiting construction.
9 My initial down payment, which could be occurring equity in
10 a finished home is sitting idle and would now be
11 insufficient as the down payment with escalating real estate
12 prices. What I gather from reading the papers is that this
13 group is gathered here to look at the big picture, to make
14 decisions about whether to levy fines, how much, and against
15 whom, essentially to determine who is at fault and to write
16 the wrongs as much as possible. Please don't forget to look
17 at the smaller picture as well, one prospective homeowner
18 whose troubles may get lost amidst the seemingly bigger
19 concerns of a small albeit outraged citizens group and out
20 of state developer and the many builders in Clarksburg Town
21 Center. The height and setback matters need to be resolved
22 as quickly as possible. I ask the Planning Board to apply
23 the height requirement of four stories not a numerical
24 height limit. My building will be beautiful and will fit

1 perfectly into the community. I love my condo and
2 desperately hope that you will allow it to be built.

3 CHAIRMAN BERLAGE: Thank you. Esther King.

4 MS. KING: Hi, my name is Esther King. And I've lived
5 in Clarksburg for over forty-nine years and I worked an
6 original master plan. What is being done is not anything
7 like what the master plan called for. Violations have been
8 made on both the building heights and setbacks. Retail has
9 been reduced in half and roads have not being built and what
10 roads we have the developers have torn up. I attended and
11 spoke at the last hearing in April both as a private citizen
12 and as a member of the Clarksburg United Methodist Church.
13 This church is in the historic district and backs up to the
14 Town Center, it's a beautiful historic church and sits on
15 one of the highest pieces of land in Clarksburg, and has
16 always been a focal point of Clarksburg. Our church was to
17 have been a focal point of the Town Center, and no houses
18 backing up to the church would have been any taller than the
19 church. But that is not what happened. We have three and
20 four-story townhouses right up to the church, and the road
21 in the Town Center, which was supposed to make the church
22 the focal point, does not exist, and neither does the park.
23 Also during the construction, and this is a new issue I
24 don't think you've heard it before. During the construction
25 of the Town Center, all the topsoil was piled up like a

1 mountain behind the church and it was much higher and due to
2 our well is down lower, and the result of the run off, it
3 contaminated our well there at the church. All the land had
4 been used for years behind the church as farmland and was
5 farmed for many years. And the farmers used fertilizers
6 with different kinds of chemicals, and those chemicals is
7 what contaminated our well, and due to this pile of soil
8 being left there for an extended period of time. Since our
9 well was contaminated we've had to use bottled water there
10 at the church. We're now in the process of hooking up to
11 city water and sewer, which is quite expensive. And we feel
12 that if the developer had not contaminated our well we would
13 not have had this expense. We also feel the developer
14 should be held responsible for this. When calculating the
15 fine on developers, you should take our expenses for hooking
16 up to the water and sewer under consideration for
17 reimbursement. Thank you.

18 CHAIRMAN BERLAGE: Thank you, Ma'am. That concludes
19 this group. The next group is Jaya Nagda, Niren Nagda, and
20 Carol Smith.

21 CHAIRMAN BERLAGE: Jaya Nagda, go ahead.

22 MS. NAGDA: Good Afternoon. Mr. Chairman and
23 Commissioners, I'm Jaya Nagda and I live with my husband in
24 Clarksburg Town Center. I'm truly disappointed at how much
25 we have been let down by the builders, Newland Communities

1 and the Parks and Planning. When we signed the contract to
2 buy a townhouse in 2003, several promises were made by the
3 builder and the developer but we have found that these were
4 just promises. Pedestrian friendly community and preserving
5 the historic character of Clarksburg have turned out to be
6 just dreams. Numerous conveniences and amenities were
7 promised, but very little has been delivered. We notice
8 that residential buildings that bring revenue and profit to
9 the developers and builders have been quickly completed. On
10 the other hand the construction of community amenities has
11 been endlessly delayed. Indeed, while we were promised a
12 pool and a community center some time ago, neither has been
13 completed to date. We have recently learned that no trees
14 can be planted on our street, Branch Briar Way due to
15 utility easement. This was never brought to our attention
16 when we were signing the contract. On the contrary such
17 basic items were explicitly promised by NV homes. We
18 believe this is just one more serious case of
19 misrepresentation. We are requesting you the Planning Board
20 to hold the developer and the builders responsible to follow
21 the rules and regulations associated with the master plan
22 and related planning documents. Thank you.

23 CHAIRMAN BERLAGE: Thank you. Niren Nagda.

24 MR. NAGDA: Mr. Chairman and Commissioners. I'm Niren
25 Nagda and I live with Jaya in Clarksburg Town Center. I'm a

1 member of the CTCAC and fully support the CTCAC position,
2 which was so aptly and so correctly and so precisely
3 described by Amy Presley as well as our counsel Mr. Knopf.

4 On April 14th our genuine appeals to the board to
5 seriously consider the issues related to Clarksburg Town
6 Center were summarily ignored. That has led to a deep
7 distrust of your staff, your process and not to mention the
8 decisions by the board. However, if you would like to show
9 us the citizens of Clarksburg and the rest of the county
10 that you'll take actions consistent with your charter, I
11 request you to please consider an act on the following three
12 items.

13 Number one, show respect to the Clarksburg master plan
14 and related planning documents and the process. As you
15 know, we have a lot of our tax dollars invested in the
16 process.

17 Number two, consider all violations together in terms
18 of the magnitude and their implications on the community.
19 As you are aware there are a number of violations that we,
20 the citizens, have uncovered. If you recall, on April 14th
21 you had considered only one issue namely the height
22 violation. Today, we are considering two violations, two
23 violation categories and that is height and setback. If we
24 continue to add one such violation at each new
25 reconsideration hearings, it would certainly take us six

1 months or more even to understand the vastness of the
2 problem created by the developer and the related parties.

3 Number three, equally importantly please don't hide
4 behind the excuses, such as, well our staff is overworked.
5 Sorry, we had one bad apple in terms of staff member who has
6 since resigned, or one that's in the current documents, due
7 to the confusion over whether the planning board or the
8 department of permitting services was supposed to monitor
9 the project, nobody did. These are worse than dog ate my
10 homework that an eight year old says to the teacher or their
11 parents. So these are just excuses for not taking a firm
12 action against the developer who has totally abused the
13 system. If these are not truly and comprehensively
14 addressed I believe that the charter of the Maryland-
15 National Capital Parks and Planning needs to be reevaluated.

16 CHAIRMAN BERLAGE: Your time is up.

17 MR. NAGDA: Thank you.

18 CHAIRMAN BERLAGE: Thank you, sir. Carol Smith.

19 MS. SMITH: My name is Carol Smith and I'm a co-chair
20 of the CTCAC and a resident in the Town Center. I'm also an
21 innocent third party.

22 In spring of 2003 my husband and I took a Sunday drive,
23 which led us to the Clarksburg Town Center. At the time we
24 had no intention of moving, we lived in Germantown for 13
25 years and it was finally starting to take shape and we were

1 comfortable. We were so enchanted by what we were told
2 about this new community, a neo-traditional community that
3 would be like Kentlands but would be surrounded by green
4 space and parklands connected by bike paths. A walking
5 community where we could stroll only a couple of blocks and
6 be in a new vibrant Town Center with fountains and park
7 benches, shops and boutiques, dining and cafés, a gathering
8 place. There would be an upscale grocer, doctors' offices
9 and more. And the best part; it was still in Montgomery
10 County.

11 My husband and I are not naïve or easily swayed by
12 impulse. We did our homework. We researched the master
13 plan and adjoining properties all throughout Clarksburg and
14 we decided we liked what this new community offered and
15 would soon become. We learned that the County intended to
16 correct all the issues they'd had with the building of
17 Germantown's Town Center. This community was considered the
18 last frontier in Montgomery County and a model for future
19 development in the County. In good faith, we decided to
20 invest in this community. At this stage in our lives and
21 with our children grown we were ready to enjoy ourselves, to
22 entertain in a home large enough in a community of
23 distinction where we would feel a sense of joy each time we
24 arrived at our new home. We love our home. NVR built a
25 beautiful home. But that is not the issue. What we did not

1 know at the time we invested in this community was that the
2 plans for our new community were on a collision course with
3 major disappointments and broken promises. Little did I
4 know that I would soon be called on by my more than one
5 hundred fellow neighbors to investigate and audit the
6 County's planning process. No tax paying citizen should
7 ever have to send countless hours auditing a system that is
8 governed by the County. No tax-paying citizen should have
9 to give up nights, weekends and vacation time to spend
10 poring over documents and site plans. Discovering violation
11 after violation. I believe in volunteering, but I was under
12 the impression this was work that developers, lawyers and
13 County officials were paid to pay attention to. There are
14 much greater causes in my life that I believe I should be
15 volunteering my time and energy to. We have a son in Iraq.
16 While my commitment to fighting for this community is solid,
17 my heart is with my son and his fellow soldiers. I too
18 would like to get on with my life.

19 It is true that some problems cannot be corrected.
20 Although issues were brought to light in enough time to make
21 appropriate alterations, additional damage has been done by
22 eliminating the pedestrian mews connecting the historic
23 district with the new Town Center. The gateway to the
24 community has been closed. I ask the board to call out
25 these violations, investigate all the issues brought to the

1 attention over the past year and the impact that they have
2 on this community and for those Clarksburg residents who
3 trusted the Clarksburg Town Center would be developed
4 according to all the years working and planning with the
5 County officials for the betterment of Clarksburg. It is
6 important that you take into account all that is before you
7 prior to considering appropriate sanctions. I was
8 disappointed that the Board had the opportunity on April 14
9 of this year to call out these violations but found language
10 that allowed a way out. This is not a case of ambiguity.
11 This is not a question of which department is supposed to
12 enforce which rules. There is no question that this is a
13 clear disregard for standards set by the County and agreed
14 upon by the developer. The site plan development standards
15 are clear as they also were in the project plan, preliminary
16 plan and site plan enforcement agreement. With the retail
17 section still to come, it is important that future
18 construction meets the vision and intent of the master plan.
19 This is an opportunity for the board to gain back the trust
20 of taxpayers in Montgomery County. Thank you.

21 CHAIRMAN BERLAGE: Thank you very much. The next group
22 is Dan Wilhelm, Max Brownstein, and James Richard. You may
23 go ahead, Mr. Wilhelm.

24 MR. DAN WILHILM: For the record, I'm Dan Wilhelm. I am
25 president of the Montgomery Civic Federation. Wayne spoke

1 for the civic federation today. I'm speaking as an
2 individual. My hats off to the local citizens for all the
3 homework they have done. It's an education just sitting
4 here listening, I've been involved in this stuff for like 25
5 years.

6 The problem before you is serious and it affects more
7 than just Clarksburg, it affects the whole County and the
8 integrity of the entire planning process. You need to take
9 actions to fix this process and all the pieces of it. I'm
10 sure we've heard all the pieces, one of them is the
11 relationship between yourselves and Department of Public
12 Permitting Services on the enforcement issues. And the
13 other is -- my understanding is that you have always done
14 some degree of enforcement and you need to beef that up and
15 improve that area. There's also a question that comes to my
16 mind listening to what kind of changes your staff has the
17 authority to make. And I would suggest that that be
18 clarified and made clear. My understanding has always been,
19 it's minor things, move a building a foot here, a foot
20 there, that type of stuff, nothing major. And anything
21 major needs to come back to you and go through the whole
22 hearing process. If there's, after you sort all this stuff
23 out, if there is legislation that needs to be done, I would
24 encourage you to propose that to the council and encourage
25 prompt action. My thing to you is we need to act promptly

1 on all these things. Wayne's comments about accepting
2 responsibilities and getting to the heart of it, I would
3 encourage you to do.

4 I would also suggest that the penalty of \$500 for
5 violation for just the heights and setbacks is insufficient.
6 You know I'm, at work I do a lot stuff, procurement, both
7 for the government and also I have done it for an industry.
8 When we have a requirement says four stories or 35 feet, I
9 would expect both those conditions to be met. You know, you
10 don't do one or you don't do the other. You have to meet
11 both of 'em. So you meet four stories and you meet 35 feet.
12 And I've been on the government side, federal government
13 now, evaluating things, and if I was doing an evaluation I
14 would say, a bidder's not responsive if they don't meet, in
15 this case the 35 feet. So the argument that you pick one or
16 the other I don't think holds water. I would also encourage
17 you to list all the other violations before you flip and
18 make a final decision on what the sanction should be.
19 That's all I have to say. Thank you.

20 CHAIRMAN BERLAGE: Max Brownstein.

21 MR. MAX BROWNSTEIN: Max Brownstein, speaking for the
22 Strathmore-Bel Pre civic association. Hello everybody. We
23 have before us today, a situation I thought we would never
24 see in Montgomery County. An occurrence wherein a member of
25 the planning staff altered a document and resigned after its

1 discovery. Of course, there should be an investigation as
2 to whether this was an isolated incident carried out for
3 honest but unwise reasons. The investigation should assure
4 us that other incidents of this type have not occurred
5 whether by the same individual or by others. As to the
6 violations of the site plan for the development in
7 Clarksburg, the absolute maximum penalties prescribed by the
8 laws and regulations should be levied in this matter. The
9 reason I favor the maximum is so that in the future no
10 builder or developer in their wildest dreams would even
11 think of violating the site plan for a development. Also
12 the violations of site plans should not be rewarded after
13 the fact by making them legal by changing the plans to
14 conform with the illegal action. That's utterly ridiculous.
15 If there is a need to hold current or pending property
16 owners in Clarksburg harmless from unclear titles, let the
17 guilty developer pay for the title insurance or whatever it
18 takes to give them a clear title. In addition no portion of
19 those fines should be escrowed for later use to pay for
20 amenities at Clarksburg. Those who were due to furnish
21 those amenities in the first place should pay for them over
22 and above any fines they pay. In all the reporting about
23 this matter some areas of urgent need have emerged. One
24 area is that involving the inspectors needed to check on
25 buildings as they are constructed to make sure they conform

1 to site plans and the pertinent codes. It appears to me
2 there is a need for another dozen inspectors, so that they
3 can proactively perform their duties as opposed to waiting
4 for a citizen's complaint before they act. Surely
5 developers and builders are aware of their shortage and may
6 take advantage of it.

7 Another item to have positively decided is the question
8 as to which unit, permitting services or development review
9 is supposed to be the height inspector. I hate to say this
10 but I'm reminded of that famous question. Who's on first?

11 In conclusion the area that also needs a proactive
12 approach is in the higher echelons of Montgomery County's
13 government. To Douglas Duncan and his staff, to Thomas
14 Perez and the members of the County council. To Derick
15 Berlarge and the members of the planning board and their
16 staff, I say please, please watch our store. Thank you

17 CHAIRMAN BERLAGE: Thank you. James Richard.

18 MR. JAMES RICHARD: I would like to take this
19 opportunity right now to thank all of the commissioners to
20 have allowed me the opportunity to share with you one day of
21 the ordeals that my wife, myself and my son we have been
22 going through. I myself am also a Montgomery County math
23 schoolteacher. We have poured all of our savings, 41K, 43B,
24 457, anything we can get our hands on to, to get this town
25 home that was built by NV Home. We have sold our town home

1 | since April because there was something that was going on
2 | that you know we said that we were supposed to be moving in
3 | around May or so, so ever since, by the end of April we had
4 | already sold our town home. Ever since then we've been
5 | renting back from the new owners. Three days prior to
6 | settlement, that Saturday we were very eager to move in into
7 | our town home, packed, both parties myself and my wife and
8 | the other party we packed ready to go. Then I came from
9 | church Saturday afternoon and I saw the light blinking. I'm
10 | like okay, then when I played the message, I almost passed
11 | out. The message says that we will not be able to move in
12 | into our new place due to some height and restrictions and
13 | setback. At that time my wife and I, we didn't know what to
14 | do, because by then we've already been renting from the new
15 | owner, 60 days.

16 | My biggest problem that I have at this point is, we've
17 | done the walk through on our home already. The house is
18 | just sitting there. The new homeowners that bought the
19 | house from our home, from us has decided to extended our
20 | lease for another 30 days, which is good but the problem
21 | is, we have 'till the end of this month to move out. My
22 | biggest concern is, I have a son who has special needs. For
23 | the past four months every single afternoon I've been taking
24 | him to the town house in Clarksburg that was built by NV
25 | Home to get him acclimated to the area, because any changes

1 in his social development sets him back about six or seven
2 months in his stages of developmental. So I have to make
3 sure that I keep up, I kept bringing him back, get him
4 acclimated to the park, seeing the new town home. This way
5 when we bring him there, it will not be all new to him. At
6 this stage of the game I feel like if I were to go move to
7 at an apartment to, let's say another building, it's going
8 to set my son back about six months. We already have enough
9 problem. I mean, if you guys have kids, especially kids
10 with special needs, especially kids with special needs, it's
11 a handful of work that we have to, that we're been committed
12 to work with my son. At times sometimes I wake up in the
13 morning I don't know how I'm going to make it through the
14 day and having to deal with this, it's another burden.

15 What I'm proposing, our townhouse right now is just
16 sitting there. We've done the walk through, everything is
17 ready to go. Our lives have been affected by this. So I'm
18 proposing whatever setback or violation have been occurred,
19 if there are any, I propose that you let the home owners
20 move in that has been affected by this ordeal and let, deal
21 with the builders by having paying the fine or look over the
22 site plans to rectify whatever situation needs to be
23 rectified. At this point of the game we are asking you guys
24 to please help us move into our new home because we have
25 nowhere else to turn. And I've given everything I've

1 gotten, in terms of money, resources into this town home and
2 we have nowhere else to go. Next step from here is becoming
3 homeless. And my biggest concern again is my son and my son
4 is my livelihood. As you know, through all these ordeals he
5 is going through, we still love him; we're willing to put
6 every effort, time. By the time I come out of work I'm so
7 dread -- as a teacher I feel like when I get home I don't
8 want to look at my son as another full time job. But for
9 the love of my son we do what we do for him. So I'm asking
10 you guys on my wife and my son's behalf please help us get
11 into our new town home. Thank you.

12 CHAIRMAN BERLAGE: Thank you very much, Mr. Richard,
13 and I am truly touched by your testimony. And I promise
14 you, we will take your concerns very seriously. Thank you.

15 MR. RICHARD: Thank you.

16 CHAIRMAN BERLAGE: The next group is Lee Chin, Lin
17 Fantle, and Ginny Barnes. Lee Chin is first.

18 MR. CHIN: Okay, my name is Lee Chin. About four years
19 ago we come from [inaudible], that is in northwest in Japan.
20 And actually sir, we purchased a home from the Craftstar
21 house at the end of December of last year.

22 This is the first time we bought a house. It's also my
23 American dreams. And we already invite my parents to visit
24 these countries. In my invitation letters, I told them I
25 would like you come here because we bought a new house and I

1 | would like to show you how great is this country. And I
2 | also, why I came here because I this country I think it's a
3 | very, it's dream country. It's a beautiful country. But I
4 | don't know what things happened here. My house cannot be
5 | finished. So I wish the board and people can give us a
6 | chance to finish our American dreams to let our house build
7 | it again. Thank you.

8 | CHAIRMAN BERLAGE: Thank you very much. I see that
9 | Barry Fantle is next, is also signed up. Why don't you come
10 | on up Mr. Fantle? Ginny Barnes is the next speaker. And
11 | then we'll get the Fantles. I assume you're probably
12 | related.

13 | MS. BARNES: For the record, my name is Ginny Barnes and
14 | I am speaking on behalf of the West Montgomery County
15 | citizens association. I'd like to read a brief letter to
16 | the planning board by our zoning chair and then I'd like to
17 | make a few personal comments.

18 | On behalf of our membership, we write to express our
19 | grave concern over the issues raised by allegations of
20 | violations of height and setback requirements in the
21 | development of Clarksburg. We have studied your staff
22 | recommendations and concur with your staff finding that
23 | these violations did in fact occur. It is our understanding
24 | that there are other allegations concerning violations,
25 | which have not yet been addressed by your staff. We would

1 submit that the planning board should make sure that all
2 such allegations have been fully and completely investigated
3 prior to any decisions regarding possible sanctions and/or
4 fines are made. There should be no questions in the minds
5 of the citizens who must deal with the planning board on a
6 regular basis that any impropriety, failure of enforcement
7 or negligence has occurred and certainly that no question
8 remains unanswered or has not yet seen the full light of the
9 board's scrutiny. We would also ask that you examine the
10 causes and circumstance, which have led to this distressing
11 turn of events, which has citizens rightfully questioning
12 the processes, which we are asked to rely on. Master plans,
13 site plans, inspections, permitting, these are things in
14 which we are asked to place our trust. We ask that you
15 fully and completely discover how and to what extent the
16 public trust has been violated. That's the extent of the
17 official statement but I would like to say, because I've sat
18 through the most all of this day's testimony that I'd like
19 to first commend the Clarksburg citizen's advisory committee
20 for the extensive work they did in their investigation, and
21 I'd like to say to those who have disparaged them for one
22 reason or another that as a citizen of this County who has
23 been an activist for the last 15 years, you do not get
24 involved in something like this, if you have some little

1 private agenda. You do it because you know something is
2 wrong in your community. It is an insult to all activists to
3 make the kind of comments about the work of these folks that
4 has been made today. And I'm particularly commending them
5 for the full range of violations that they've brought to
6 light. Because if this is in fact a quasi-judicial session,
7 then what I have seen goes to pattern, and the pattern here
8 is that the master plan even in concept has been violated.
9 Not to mention the site plans and setback restrictions that
10 have already been identified. And I, as someone who worked
11 on our master plan, would like to say that this violation of
12 the public trust which I think is so overriding for you to
13 address is causing me to think maybe I need to go back and
14 look at my master plan and Fortune Park and any of the other
15 big developments that are supposed to take place under it
16 and see whether there's been some discrepancies there
17 because it's obvious that if I don't do it, it's not going
18 to get done.

19 What happened here was the citizens, well-meaning and
20 very reluctant I might add, I'm sure of it because I've been
21 there myself, got themselves involved in something that was
22 not being taken care of by the agencies they trusted to do
23 so. And that's you're big issue.

24 Our Citizens Association has been in existence since
25 1947. It's one of the oldest citizens association in the
26 county. And I can assure the residents of Clarksburg that

1 are here today that this is not just a Clarksburg issue.
2 This speaks to the whole range of trust issues that we have
3 as citizens. I've always thought I could, if I couldn't
4 count on anything else in this world I could count on the
5 site plans and master plans and work that I've done with
6 planning Board staff, whose integrity I did not question.
7 And now I have questions, big questions and I'm hoping that
8 you will address that. I think that's of paramount
9 importance. And the people who are hurt here, the
10 individuals should look to the developers for their
11 solutions not just to you. Thank you.

12 CHAIRMAN BERLAGE: Thank you very much. Let me make a
13 scheduling announcement. We have 4 speakers left. We will
14 hear from those 4 speakers. We will then break for lunch.
15 The lunch break will be 45 minutes. At the end of the lunch
16 break the complainants and the respondents will each have 15
17 minutes additional rebuttal time and then the Board will
18 deliberate. Lynn Fantle is next.

19 MS. LYNN FANTLE: Good afternoon. My name is Lynn
20 Fantle and I live at 12711 Clark's Crossing Drive in
21 Clarksburg. It happens to be one of the houses that you saw
22 in those slides where they asked you to find the house with
23 the violation. I know this because my house was the house
24 with the violation in the picture. It's a single family
25 home and it's built by Miller & Smith. It's a very nice
26 house but we definitely have an issue on our side yard which

1 was first brought to my attention in 2002 when the
2 landscaping folks came out and tried to plant not one, not
3 two, not three, not four, but six trees in the 6 feet
4 between my house and the sidewalk. I'm not really sure why
5 they thought this was feasible. Perhaps it goes back to
6 some original plan but I literally had to walk out and stop
7 them as they were digging holes with a great big piece of
8 machinery in my front yard. And now I'd like to read
9 something.

10 I'm one of the first home owners in the development.
11 And I've watched the town center grow for about 3 years.
12 Before that I lived in Germantown where I watched the
13 planning process take place for Clarksburg Town Center as a
14 concerned Montgomery county resident and as a tax payer.
15 It's been obvious for many, many years that there is and has
16 long been a clear plan in place to (inaudible) the
17 development of this new town with connections to historic
18 Clarksburg. Ideally to phase it, but most importantly to
19 avoid overwhelming the old town and dividing the 2 parts.

20 The master plan itself acknowledges the time and effort
21 that went into the development of the vision for the new
22 town of Clarksburg in the very first paragraph I believe of
23 the introduction. And it reads as follows. This plan is a
24 combination of a 5 year process that has featured over 30
25 meetings of the Clarksburg master plan citizens advisory
26 committee, 13 planning Board work sessions, 17 county

1 council planning, housing and economic development committee
2 meetings, 7 county council work sessions, community
3 workshops and a variety of planning topics, property owners
4 workshops, technical worker meetings on staging and
5 implementation and close co-ordination with governmental
6 agencies affected by the plans recommendations. Indeed as a
7 member of the master plan citizens' advisory committee,
8 Steve Klebenoff, one of the first developers must certainly
9 have been aware of the vision that was being crafted for
10 this final frontier of Montgomery county. To argue as some
11 have that there's no clear vision, that it's unimportant
12 because it's outdated or that the vision ought to be revised
13 by current market forces is laughable.

14 There is and was a plan created because Clarksburg is a
15 valuable place in many ways and it is an honor to be able to
16 develop it on such a large scale. Subsequent developers and
17 builders have each signed site plan enforcement agreements
18 that held them to this vision, spelling it out in quite
19 specific detail for them. If for some reason, they could
20 not hold to these plans there are processes in place to make
21 modifications to the vision with the input of the community
22 and of the government. To argue further that lack of
23 enforcement of the vision equals revision of it or worse,
24 revocation of it, is specious. Newland Communities has made
25 numerous additions and subtractions to the original plan
26 they signed on to and up for. They've added more pavement

1 and building mass under the guise of market forces. They've
2 subtracted green space, community gathering areas,
3 architectural interest and most egregiously, connections and
4 continuity of the greater historical Clarksburg community.
5 They've done so without amendments, without community input
6 and without asking for permission to do so from the
7 government authority for these changes, namely, M-NCPPC,
8 excuse me. These changes have been methodical and they have
9 certainly been willful. The subtraction of a vista,
10 pedestrian mews and street connections do not accidentally
11 or mistakenly happen. Their deletion rather must be planned
12 and orchestrated.

13 I believe it's premature to call for specific sanctions
14 until the full spectrum of violations can be unveiled and
15 the magnitude of these changes is fully realized. A token
16 slap on the wrist would be nothing more than a slap in the
17 faces of the Montgomery county residents and tax payers,
18 particularly those in the Clarksburg area but also to every
19 one of them whose taxes went to pay for the planning process
20 for the last 10 plus years. It would not adequately
21 reinforce the importance of the general plan and the
22 individual area master plans with their accompanying project
23 and site plans to Montgomery County. Rather it would
24 emphasize the lack of esteem in which they are held by the
25 planning Board itself, an irony indeed.

26 CHAIRMAN BERLAGE: Thank you. Barry Fantle.

1 MR. BARRY FANTLE: Hi, my name is Barry Fantle. And I
2 live in Clarksburg Town Center with my wife Lynn. Newland
3 Communities' website states that the Clarksburg community
4 and Montgomery county Maryland is designed to reflect the
5 rich history of a town founded in 1752. Expertly crafted
6 homes reflect careful adherence to traditional architectural
7 styling. Homes will be surrounded by acres of lush parkland
8 and a retail district will be an integral part of the town
9 square. This is what I and numerous residents thought we
10 were buying into.

11 About a year ago Newland Communities unveiled its plan
12 for the retail section of Clarksburg Town Center. Residents
13 were shocked. Instead of the promised, traditional town
14 center that was pedestrian-friendly, Newland was building a
15 typical strip mall that was not only pedestrian-unfriendly
16 but probably dangerous to anyone that dared to leave their
17 car at home. In response concerned residents formed a group
18 that represented the community. The intention was to work
19 with the developer to come up with a better plan. The new
20 center would be closer to the originally promised town
21 center concept and in accordance with the original project
22 plan.

23 Well it turns out not only was Newland trying to get
24 away with building a sub-par retail area, they were reducing
25 the amount of retail space that was originally promised and
26 ignoring some of the set back and height restrictions in the

1 project plan. They have also not provided promised
2 amenities in a timely fashion. The pool, some parks, tennis
3 courts and trails were supposed to be completed by the time
4 the 540th permit was issued. There are now over 700
5 recorded permits and there are no trails. None of the pools
6 has opened. What we have here is a pattern. A pattern of
7 broken promises and a failure to abide by guidelines and
8 rules that Newland themselves agreed to. Which brings us
9 here today. Quite frankly I'm not even sure why we are
10 here. All this should have been taken care of in April.
11 It's obvious that Newland has allowed the height
12 restrictions to be ignored. The site plan clearly states
13 that multi-family buildings should not be over 45 feet and
14 that town homes should not be over 35 feet. The plan was
15 developed carefully by the county, developer and its
16 residents.

17 Plus I would hardly say that the scale of the multi-
18 family buildings are designed to reflect the rich history of
19 a town founded in 1752, nor would I say that they pay
20 careful adherence to traditional architectural styling. It
21 is shameful and inexcusable that the developer be allowed to
22 violate these plans unpunished. It is shameful that he even
23 got away with it in the first place and it's shameful that
24 it took a bunch of private citizens who have sacrificed
25 their time and money to bring something up to the county
26 that should have been caught by the county. Being

1 | overworked is not an excuse. Lots of people are overworked
2 | but they are still held responsible to do their jobs
3 | properly.

4 | Why have a project plan, if it's not meant to be
5 | followed, why even have a department of Park and Planning if
6 | they're not going to enforce the plans that they approved
7 | and helped developed. The county needs to step up and hold
8 | Newland accountable for their actions. To do nothing will
9 | send a message that developers do not need to work with the
10 | county, they run the county. To do nothing will let
11 | residents know that the department of Park and Planning is
12 | an irrelevant agency with no power except to assist
13 | developers. But acting now can send a positive message that
14 | residents can count on the county to not only help develop a
15 | project plan but that they are willing to make sure it's
16 | followed properly and hold developers accountable for
17 | violations. Thank you.

18 | CHAIRMAN BERLAGE: Thank you. The last 2 speakers are
19 | Richard Kauffinger, and Steven Burns.

20 | MR. RICHARD KAUFFINGER: For the record, my name is
21 | Richard Kauffinger and I'm appearing today on my own. I'm
22 | here today to present my observations on the specific issues
23 | involved in the Clarksburg Town Center and the optional
24 | method of development in general.

25 | My belief is that this crisis has been long coming.
26 | The systematic weaknesses in the optional method and its

1 processes became obvious to me 20 years ago during the
2 review of the Parker farm proposal for a PD zone. Those
3 weaknesses were that the developers and their attorneys
4 utilize a strategy, which is to push the regulatory envelope
5 to the maximum in every way and more importantly the binding
6 elements and site plans are not comprehensively policed by
7 the assigned authorities. These weaknesses are particularly
8 amplified when the finished lots are sold to other home
9 builders. I learned this first hand again with the
10 previously referenced Parker Farm project where the binding
11 elements specified that single family homes would have brick
12 fronts. A small, independent home builder purchased 4 or 5
13 finished lots and was completing units when I discovered
14 that none of his homes had brick fronts. Despite his
15 arguments that he was not told about this requirement by the
16 developer, that he had received all the necessary approvals
17 and finally at this point the addition of brick fronts would
18 create severe financial handicaps, he was ordered to provide
19 the brick fronts. But the action required the surveillance
20 by citizens, not the appointed authorities and this is an
21 ongoing problem. This failure of the authorities to closely
22 monitor the provisions stipulated in binding elements and
23 site plans hit a crescendo, in my view, 10 years, 10 plus
24 years ago. At the time a developer was planning to sell off
25 the green space for his project for the building of the new
26 Burtonsville post office. Steps were taken only after an

1 outcry by citizens to this outrageous violation of the
2 binding elements under the optional method. It's my belief
3 the problem is also tied to the simple fact that your staff
4 does not enjoy the day to day protection of ex parte
5 communications.

6 They are bombarded daily by developer attorneys and
7 their experts making points large and small about their
8 proposals. This incremental approach to getting approvals
9 for various elements and changes has often led to final
10 developments that differ greatly from the goals and visions
11 of the original concept plans and I see my time is up. Thank
12 you.

13 CHAIRMAN BERLAGE: Thank you very much. Mr. Burns.

14 MR. BURNS: Thank you very much for allowing me to
15 speak today. I spoke to you at the April 14th meeting also.
16 At that time my building, and I'm on a condo Board of 12824
17 Clarksburg Square Road, that's called building 3 in a lot of
18 the parlance here. And at that time, my building and a
19 couple of other buildings were in question for a possible
20 height violation. Now it looks like I have a lot of company
21 in that particular situation. I'm hearing hundreds. I
22 don't know.

23 Since then I've also spoke with CTCAC people and I
24 realize that they have very legitimate concerns. Therefore
25 I don't really have any, you know, I have no opinion
26 officially on investigations. I think any fines are between

1 | this council and the developers if there are any at all, the
2 | amenities, the set backs, all those things.

3 | I guess the number one thing I want to say here is that
4 | please do everything you can to keep my building legal.

5 | Please follow your staff recommendation. I mean there's a
6 | thing you have to understand is that our building was

7 | actually specifically mentioned on the April 14th hearing.

8 | So as of this minute we're really not in violation. I

9 | realize that's probably going to change after lunch possibly

10 | but, as of right now, I'm, myself and my fellow owners and

11 | residents are living in a legal building. And by then if

12 | that could switch, it's like we're on this legal roller

13 | coaster. Well you may be in violation, you're not in

14 | violation, you are in violation. So like the other people

15 | here that have buildings started and all like that, keep in

16 | mind that, you know, we need to have this settled quickly

17 | with respect to the height plan.

18 | I grew up in Columbia in neighboring Howard County

19 | which was one of the first mid-Atlantic experiments with

20 | planned housing. My father was in Rouse Company like that

21 | and I've seen that happen. I lived the last 18 years before

22 | I relocated to the metro area in Chesapeake city, Maryland.

23 | It's a historic town that actually had 2 booms. It had a

24 | colonial area 1830's, when the canal was built. And then a

25 | 1920s boom until the depression hit it. And it's

26 | interesting I mean each of those areas is going to look

1 different you know from the other one to this day. If you
2 look at it over centuries, I think it's just something you
3 have to keep in mind. The driving force here is the need of
4 housing. You're going to have housing somewhat different
5 than the area.

6 I walk around Clarksburg all the time. Most of it's
7 built or started at this point in the town center and one
8 thing I've noticed. I've brought a computer full of
9 pictures but I think everyone's pictured out right now. I
10 sent you a letter with one that shows that our building
11 height in particular is way below that of grade of some of
12 the town houses up by the swimming pool and community
13 center. It's a very contoured area. Some people are lower.
14 Some people are higher. You get some extreme angles based
15 especially during the construction process.

16 So basically I will just encourage you in my last few
17 seconds here, if at all possible, please drive out to the
18 area. Look around. Walk around it, and make sure that
19 comes into your final decisions on how to deal with this.
20 Thank you very much.

21 CHAIRMAN BERLAGE: Thank you very much, Mr. Burns, and
22 to everyone who has testified so far, thank you. Your
23 comments were very, very helpful and will be considered
24 carefully by the Board. We are going to take a lunch
25 recess. We will reconvene promptly at 2:30.

1 CHAIRMAN BERLAGE: We're about ready to get started again.

2 We will now proceed to receive rebuttal presentations
3 from the complainant and the respondents respectively, since
4 the original agreement worked out by counsel this week was
5 for 15 minutes for each side, I'm going to hold to that.
6 The Board will then deliberate the issue of whether or not
7 there are violations.

8 In the event that the Board does find violations, we
9 will then proceed to the second phase of this hearing,
10 dealing with the appropriate remedy. And if we get to that
11 stage, we will have additional presentations from staff, the
12 complainants, the respondents, and a small number of public
13 speakers who have signed up on that as well. But let us
14 proceed immediately to rebuttal presentations from CTCAC.
15 Welcome back Mr. Knopf and Ms. Presley.

16 MS. PRESLEY: Thank you.

17 MR.. KNOPF: Thank you. Good afternoon. In my opening
18 remarks, we said that we thought the, restoring the
19 integrity of this Board and the planning process required
20 that you find violations all at once, not piecemeal, and
21 that you defer any decision on sanctions until you know what
22 all the violations are. The testimony we have heard today
23 reinforced that position very, very strongly. Except I need
24 to make a little amendment. I had thought that perhaps you
25 could go ahead and make the findings on the height and the
26 set back today, 'cause the evidence clearly is overwhelming

1 | there are such violations. Then, quickly schedule another
2 | hearing, maybe next week even if you have to sit on a
3 | special day to get all the violations before you, before you
4 | make a sanctions decision, so that we can, those third
5 | parties caught up in this can get this thing very rapidly
6 | resolved. I must caution that I'm not sure you ought to be
7 | making a final finding on height and set back today, perhaps
8 | a preliminary one. What I have heard is the developers
9 | saying they dispute, some of them at least, dispute whether
10 | there is such a violation and I heard your staff say, they
11 | assume all of the townhouses are in violation. I'd love to
12 | have that case when it goes to court, to try to defend for
13 | you to fight that, because I think it will be reversed. You
14 | need to have before you each and every property and the
15 | developer that did it, and the height, if you find a
16 | violation, you need that information before you. Then you
17 | can find the number of violations and who did it. Just to
18 | say we're making an assumption, I'm afraid leaves you
19 | vulnerable to being overturned in court -- you heard it here
20 | first.

21 | I think also, you definitely need that information for
22 | any sanctions. Don't go blanket, consider a blanket removal
23 | of any, any impediment to moving in. Maybe there's a house
24 | in the middle of O street that that house might not want to
25 | be given a use and occupancy permit. You need to know the
26 | location of these violations, and what the impact is, before

1 | you make a decision. Later, I don't want it heard said,
2 | "Oh, I wish I had known that that one house on the corner,
3 | whatever, which is the real problem blocking the view," that
4 | we wouldn't have approved that. Please get all the
5 | information before you, before you make a decision.

6 | Now with that, I've just a couple more comments, 'cause
7 | this shows what is involved here. One of the developers
8 | truthfully said, and I have no reason to doubt it, their
9 | bible was the architectural plans that they submitted, and
10 | they built accordingly. That's the problem here, the bible
11 | is the site plan with the conditions established by this
12 | Board, and the supporting enforcement agreement. That's
13 | what you have to remind people is the bible.

14 | Now when it comes to the development standards, which
15 | are set forth on the project plan, on the preliminary plan,
16 | on the site plan, the enforcement plan, we are told, quote,
17 | It's a historical document. Unquote. Well wow, is that what
18 | you want to have as the law here? These documents are
19 | historical? You can ignore them?

20 | We are told, of course, forget about the project plan,
21 | it's the site plan that counts, you don't even have to amend
22 | the project plan. Let's remind the Board of section 59 D-
23 | 3.4, the first finding you must make in doing a site plan is
24 | quote, The site plan is consistent with the approved project
25 | plan. So, the development standards that's on those charts,
26 | that was on the project plan, got carried over to the site

1 plan, not for convenience or inadvertently. Its because the
2 law required that the two have to be consistent. And since
3 this is in a zone that has no height limits, it's more
4 crucial that you have something nailed down as to what the
5 height limits are. And that was done in this case, on the
6 project plan, and as you know, it's carried all the way
7 through. That's what's at stake here.

8 Please don't make a ruling, that will be viewed as
9 reducing all your development standards to historical
10 niceties. Now we're told it's historical because silence
11 reigned, and therefore we thought it was okay to ignore it.
12 That's an interesting approach. I hope this Board rejects
13 it.

14 We're also told it isn't the site plan and the
15 enforcement agreement which should govern, it's your
16 opinions, Board opinions. And they mentioned the fact that
17 they don't want to have any long hearings and disputes -
18 boy, if you want long hearings and disputes there'll be all
19 the lawyers arguing over what you meant in your opinions.
20 That's why there is a requirement for a site plan and an
21 enforcement plan that sets forth exactly the specifics of
22 what you held. And if the developer disagrees with the
23 staff's interpretation as they reduced it to the specifics,
24 they can come back and get an interpretation from you. That
25 wasn't done, because everybody knew what it said and
26 everybody knew what it meant.

1 Just a couple of more, couple of more comments. We
2 heard that because it was silence, or some unnamed people
3 did something or they had some conversation and they thought
4 it was all right, that now you're estopped to put in
5 penalties. The estoppel doctrine in the courts, you're all
6 familiar with it. The office building in Silver Spring where
7 they had to tear the top off, because it was too high. The
8 court held there, hey the height limit's in the zoning code,
9 its clear, everybody knew it, you violated it, that's it.

10 What the court did say is there are occasions where
11 there is estoppel. Where there's a very ambiguous situation
12 which has been the subject of a long term administrative
13 interpretation one way, then you can make an argument you
14 relied on that interpretation. There is no ambiguity here,
15 the site plan specifications in all is 35 feet, 45 feet, 10
16 feet is not ambiguous. And there's not some long standing
17 interpretation that says the staff can waive the development
18 standards across the Board under a provision where they have
19 discretion. We all know what that discretion means. There
20 may be an individual lot where there's some problem,
21 topography or whathaveyou, you may need to move things
22 around a little bit. Not granting 500 or whatever
23 violations or deviations so that you entirely change the
24 basic concept of the sector plan. This is what the master
25 plan and the site plan. This is what's involved here, this
26 is what the citizens are looking at.

1 You need to restore the integrity by having a clear
2 statement by this Board that you cannot violate those legal
3 documents, and not pay the repercussions. Please get all
4 the information before you, before you make a decision.

5 Thank you.

6 MS. PRESLEY: I'll just pick up a little where Norm
7 left off. I'm astounded to hear counsel for the developer
8 arguing both ways.

9 First, that there was no amendment needed because four
10 stories was what everyone understood the limit to be. If
11 that's the case, why did they also state that staff made
12 amendments under condition 38? Sorry, it's not logical.
13 And if staff did - let's assume they did make amendments
14 under condition 38, if you'll check DRC review notes, and
15 procedures as developed by Wynn Witthans, there's a document
16 filed in 2002, I don't have that here, but you can check the
17 records. She sets out a procedure. Les Powell was in
18 attendance at that meeting. He's on that list as is Tracey
19 Greys for the developer, sets out a procedure by which she
20 will administer these condition 38 approvals. And it has to
21 do with specific meetings and documentation. When you look
22 at her files, you do see that some amendments under
23 condition 38 actually follow that procedure.

24 There is no record on file of any amendment to height
25 and staff confirmed that herself at the April 14th hearing.
26 There are no amendments to set back, other than the one that

1 I presented today, which is dated January 25th, and
2 acknowledges the requirement for a setback amendment in
3 order to change a setback. So I think that's very clear.

4 I'm also astounded that counsel would argue that the
5 project plan is basically meaningless, because the Board
6 itself rules under condition 14, that it's the underlying
7 development authority, and ties it expressly to the
8 preliminary plan. I don't think there's any further comment
9 needed there. I would think the Board would, would find the
10 same way that you put that in there for a reason. Again, I
11 was astounded that, that certain things weren't read from
12 the site plan enforcement agreement pertaining to who does
13 enforcement. I would have to say that we need to question
14 the developer as to when the developer notified the Board as
15 it agreed to do, notified the planning Board that it was
16 ready for inspection.

17 They signed up to this, and I read from page 3, of the
18 site plan enforcement agreement. Representatives or
19 designees of the planning Board shall inspect each phase and
20 the construction thereon for compliance with site plan
21 number 8-98001, in accordance with the development program,
22 or any amendments thereto. Inspection of the subject
23 property shall be made promptly after receipt of written
24 notice from developer as set forth in the development
25 program and whenever possible, a representative of developer
26 shall be present at said inspection. The planning Board

1 shall promptly advise developer in writing concerning the
2 results of said inspection. All reasonable efforts will be
3 made to conduct the inspection and inform developer of the
4 results within 10 working days of the date of such written
5 notice.

6 There are no written notices that I or any of the CTCAC
7 have found in going through what we believe to be every
8 single document in your file. I think Rose can attest to
9 that. We were quarantined with those documents in the legal
10 office for over a week, and have been looking at them since
11 August of 2004, last year. So, I'm amazed that that would
12 be overlooked.

13 I would think that someone signing a document of this
14 magnitude and this legal implication would read the terms
15 and conditions and advise their client. I don't believe
16 that any positioning of confusion, or verbal staff amendment
17 after the fact, does anything to validly change the site
18 plan enforcement agreement, or the site plan itself and the
19 conditions that they signed up to. It makes me as a
20 citizen, ask the question, do we need a site plan
21 enforcement agreement enforcement agreement? And if so, if
22 the Board doesn't do anything about violations to it, then
23 it's just another worthless piece of paper in a trail of
24 worthless paper.

25 I have to go back to what I argued initially that the
26 development standards for the center, Clarksburg Town Center

1 have always been clear. If there's been a succession,
2 developers submitted, key there, developers submitted these
3 standards. They didn't just fall out of the sky and land on
4 a site plan because Wynn Witthans told somebody to stick
5 them on the front of a plan. They had a reason for coming
6 into being and the developers submitted them, agreed to
7 them. The Board approved them, they were adopted, they're
8 legally binding. And I don't think we can let developers
9 get away with changing that after the fact, for whatever the
10 reason, whether its ignorance or deliberate intention. It's
11 not comforting, as a citizen, to think that those changes
12 can be made.

13 I had, I had another couple of points regarding the
14 hearing from April 14th. We had developer counsel for
15 Bozzuto testifying. And also in correlation with what staff
16 at that time was testifying that the only thing present on
17 the site plan, the one they submitted to you, which had the
18 crossed out, the infamous four stories written over it.
19 They had counsel testifying to that. You had Mr. Wagner for
20 Bozzuto testifying to that. And you had your staff
21 testifying to that. All testifying the same thing.

22 And then we did uncover the document, the clean set,
23 which showed that Mr. Wagner actually signed a site plan
24 with a very clear depiction of the 35-35-45.

25 I'm concerned that those parties would have testified
26 before the Board knowing that what they actually signed was

1 a plan that did show clear standards. But they came before
2 this Board and testified that there was nothing other than
3 four stories. And we have wasted now between April and now
4 that much more time while other buildings were built, and
5 while citizens who were later maligned for taking on the
6 responsibility that shouldn't be ours in the first place,
7 spend time to ferret out the documents to prove what we know
8 to be true.

9 And some of the other violations that I pointed out to
10 you today have equal documentation in fact and research
11 behind them. That you know we'd be happy to deliver to you
12 another eight-inch stack of emails and correspondences which
13 I'm sure you wouldn't look forward to. But I can't impress
14 upon the Board enough the importance of looking at all of
15 the violations and a pattern that's been established by
16 developers thinking that they can do as they please and come
17 in later and wordsmith their way out of things.

18 As Norm said, it's not really possible for you to make
19 appropriate findings on the sanctions for violations, or
20 perhaps not even for the violations themselves, if you don't
21 know everything that needs to be known about the scope and
22 extent of violations, and the effect to the residents in the
23 community. I was grieved when I heard the people
24 testifying. Not that I didn't already know that people are
25 in the situation they are, trying to move into a home. But
26 the anger should not be directed at citizens who discover

1 the murder, it should be at the murderer. Let's look at the
2 people who have, who have been asked since August of last
3 year. We've asked the developers, it's on record in the
4 submissions that we've given to you, we've asked the
5 developers, we've implored your staff, we've come before
6 you, asking for something to be done. And again, we're here
7 with the same information that's been on file all this time.
8 And those folks who contracted in October of 2004. That's
9 after the fact, it's after we brought this to your
10 attention. There was ample time to have done something to
11 prevent some of these situations. But I maintain that the
12 developer knew about it. So if we're going to be upset and
13 direct sanctions so that we can help these people, we need
14 to direct them to the appropriate place, and from what we
15 can see, with all of the evidence, that would be the
16 developer. So I thank you for taking that into
17 consideration.

18 CHAIRMAN BERLAGE: Thank you very much. Mr. Kaufman.

19 MR. KAUFMAN: Just wait one second. Good afternoon,
20 it's been a long day, very emotional. With me are counsel
21 for the individual builders and I represent Newlands.

22 The first thing I'd like to point out to the Board is,
23 you know, this is a process that was a new process when we
24 came in. It was put in place with the delegation of
25 authority, so that there would be a way to avoid multiple
26 amendments to various applications. We certainly did not

1 say that the master plan, or the project plan are
2 meaningless. What we said was those are general documents.
3 The master plan is a visionary document, the project plan is
4 a concept plan, the plans that followed are the detailed
5 plans, that's the iterative process that we have in this
6 county. You tack your way to the final details because
7 these are very complex and very long in their implementation
8 projects..

9 That said, the process is one which we, the developer,
10 and the builders, if it is not working and there is a future
11 revision to that, which does put more review into it, we
12 certainly would abide by those rules and welcome those
13 rules. But the process is the one that we have, and if you
14 have to bring back every single change, and, that staff
15 wants to make, to this Board, we would have endless
16 hearings. So we are strongly recommending to you that that
17 not occur.

18 Also I do want to set the record straight here, because
19 of one of the comments that were made. I can assure you
20 that no one in my firm, nor the master builder, nor any of
21 the builders were aware of any unauthorized change made to a
22 document, just as your staff was not aware of that. So I
23 just want to be clear on that. Now this Board did make the
24 findings that Ms. Presley referred to, in both your site
25 plan opinions. That the site plans you were approving were
26 consistent with the goals and objectives and details of the

1 project plan. In each of the two site plan opinions you
2 made that finding. We, that is the developer community,
3 have the right to rely on those findings.

4 You know, it takes time for amenities and
5 infrastructure to be built in any new community. As
6 examples you can look at the Olney community which is now,
7 since 19 early 70s, in process, just now finishing its, all
8 of its amenities and infrastructure. Certainly Germantown
9 is another example. Newland is committed to providing all
10 of the amenities that have been required of it, is doing so,
11 and will continue to do so, and we'll provide all those
12 amenities in the time required. Excuse me, one minute. I
13 also want to point out to you, that in the second site plan
14 approval, and also in the site plan Signature Set, there is
15 no reference to height. The only reference, in that whole
16 issue of documents, including the staff report is to the
17 story's standard. Now if there's confusion and if, if for
18 some reason we're now going to have a situation where we
19 change from giving your staff the flexibility it needs for
20 these neotraditional approvals, then that is something that
21 we will live with, but that process has not been changed.
22 That is the process, and that's the process that we relied
23 on. Excuse me, one minute.

24 Lastly, I would bring to your attention, this statement
25 in your own staff report. This is in the second report,
26 which I understand we'll probably talk about in the near

1 future. But I think its very important, because the whole
2 issue here, is, has there been a damage or was there honest
3 following in good faith of the, of the procedures, which are
4 in place and which control this process? Your staff says on
5 page 3 of their second report, we advise the Board that in
6 the opinion of staff it is difficult to find extensive
7 damage to the community has resulted from the as built
8 environment in Clarksburg. This is because, although there
9 are many violations of the development standards contained
10 in the Signature Set, the heights as built actually largely
11 conform to the height limitations established by the Project
12 Plan. The setbacks pose a somewhat different situation,
13 because the Board clearly had authority to take setbacks
14 down to zero, but instead imposed a 10-foot setback. In the
15 context of the neo-traditional development, a 10-foot
16 setback seems quite large. Therefore staff does not find
17 that the smaller setbacks compromise the overall quality of
18 the development.

19 What this whole hearing is about, is whether we have a
20 process in place that is, that works and that is credible to
21 all concerned. And one last comment will I make, to the
22 extent that because of the emotion today, any of my comments
23 might be considered disrespectful of citizen participants, I
24 certainly apologize for that; I'm very respectful of that,
25 as are all the attorneys in my firm. We know the hard work
26 the citizens do. I would point out though that all of these

1 processes are public, and citizens, their attorneys and
2 advisors have the same access as developers and their
3 attorneys to your staff. They also have the same rights and
4 obligations to appear before you and testify as we are
5 today. Thank you for the time.

6 MS. BARBARA SEARS: Mr. Knopf, in his closing argument,
7 stated that if there was any question about any of these
8 things, why didn't the builders and the developers get an
9 opinion or interpretation from the Board.

10 I think that's exactly what the evidence showed
11 happened here. What happened, as established, was there was
12 an interpretation with reference to the height that it was
13 four stories. It was given and developed, and confirmed with
14 the staff, that's the evidence. You heard Mr. Powell, you
15 heard Mr. Clark, you heard others. You heard the same sort
16 of thing on the setbacks. That, once that was done, there
17 was no need for an amendment, the interpretation was given.
18 Once that interpretation was made, other amendments were
19 made, and they didn't include height, because they didn't
20 have to.

21 Then these two books, which evidence every single
22 permit which was issued over the last 4, 5 years, were
23 given, and they were given on the express recommendation, as
24 required by contract, that the planning Board found them
25 acceptable and in conformance with the site plan. That

1 ended any dispute about how that interpretation should be
2 construed.

3 It should be construed that the height was four
4 stories, it should be construed that the setbacks were in
5 accordance with the way the developers built. So with that
6 I'll let Mr. uh.

7 MALE VOICE: I'm going to let Mr. Brewer speak first
8 and anytime left, I will use that since he hasn't had a
9 chance to speak yet.

10 MR. BREWER: Thank you, Robbie Brewer of Lerch, Early
11 and Brewer, on behalf of one of the builders, Miller and
12 Smith. I have one brief supplement to the evidentiary
13 record. And it is an approval of a site plan amendment by
14 your staff Wynn Witthans in March of 2002 for a side yard
15 setback in one of the units. And this came to my attention
16 yesterday. And I'll ask Mr. Kaufman to hand it around while
17 I speak. As indicated, I represent, our firm represents
18 Miller and Smith. And Miller and Smith is one of the
19 builders here, and we implore the Board to do the right
20 thing for Clarksburg Town Center. Surely the Board
21 understands by now that in retrospect, most of the various
22 regulatory opinions and plans for Clarksburg Town Center are
23 not models of clarity. And given the complexity of this
24 first traditional neighborhood design community in
25 Montgomery County, this shouldn't be a surprise to anybody
26 who's knowledgeable as all of you are about the development

1 process. The Board also surely recognizes that your staff,
2 and DPS, and the developers, and Miller and Smith, all
3 believed that they were correctly implementing validly
4 approved plans at all times. I think whatever mistakes were
5 made by any of these parties were honest ones without deceit
6 or willfulness of any kind.

7 As you've heard Colleen Dweilly testify, Miller and
8 Smith unequivocally, intentionally neither intentionally nor
9 willfully violated any county laws or regulations, in all of
10 the 227 houses they built in the Clarksburg Town Center, and
11 acted in good faith over these 3 years to implement those
12 approved plans.

13 I won't repeat the discussion about obtaining the
14 permits and the like. I think you should understand Miller
15 and Smith's position is that we have fully met the
16 applicable 3 storey height limit and the side yard setbacks.
17 Whatever animus that citizens may have for Newland
18 Communities and its retail plans should not be the basis for
19 any action by this Board for unfair actions against Miller
20 and Smith or its customers, or any of the other current
21 residents of Clarksburg Town Center.

22 We think what we have here are a series of, at worst,
23 technical violations of very complicated site plans. We
24 think the appropriate course of action for the Board, would
25 be immediately to seek clarifications of any plans and
26 opinions which are confusing, to work with the community and

1 the developer and the builders to finish the implementation
2 of the as yet incomplete components of Clarksburg Town
3 Center. That's in everybody's best interests. I think this
4 case clearly has demonstrated that there is plenty of room
5 for improvement by all participants in the development
6 process, and I don't mean to exclude Miller and Smith from
7 that in any respect. In that regards, the methods and the
8 checks and the balances associated with complicated site
9 plans for major new developments. To believe otherwise that
10 these processes are simple and self executing, is I'm sure
11 you know those are very naïve and myopic and they belie
12 reality. So Miller and Smith pledges to participate and to
13 co-operate fully with the Board in any constructive
14 initiative to assure the successful completion of the
15 Clarksburg Town Center, to refine and strengthen the
16 development approval and verification processes if necessary
17 and help all the citizens of Clarksburg to fulfill the
18 vision of a Clarksburg master plan and the future vibrancy
19 of their community.

20 I've been asked by Miller and Smith to express its
21 regret for all the circumstances which have brought us here
22 today, all the time devoted by you, your staff and the
23 citizens of Clarksburg and others to these issues. We do
24 sincerely regret the attacks on the integrity of the
25 commission as an institution, the Board, its staff certainly
26 including Wynn Witthans, and the builders, all of whom have

1 long histories for stellar public and exemplary public
2 service and exemplary commitment to the highest principles
3 and ideals of community planning and development.

4 We apologize for anything that Miller and Smith did
5 that violates your laws. Miller and Smith accepts any of its
6 proportional responsibility for height limit and setback
7 violations that occurred. We do urge this Board to move
8 forward and to help ensure the completion of the Clarksburg
9 Town Center. We think given the facts of this record, that
10 findings of hundreds of site plan violations are not
11 warranted, and are not consistent with those moving forward
12 objectives. So we thank you for your careful consideration,
13 your dedication to the mission of this agency and Mr.
14 Kennedy, will have any concluding remarks.

15 MR. KENNEDY: Thank you, I want to echo Mr. Brewer's
16 comments as well on behalf of Craft Star and NV Homes. They
17 are earnest in their desire to comport and comply with the
18 rules and requirements endemic to their development and
19 building of homes. They honestly believed in real time,
20 they were doing that, and they're not here to try and dodge
21 or sidestep anything, but we do believe that in this
22 instance, it is perhaps a blueprint for future improvement,
23 rather than for retribution or punishment, in a penal or
24 some kind of punitive way. The reason we think that is
25 because we're not asking for silence to be validated. We did
26 in real time the only things that we knew for sure work and

1 have worked and are the way people are doing it, have been
2 doing it, and are still doing it.

3 We went to DPS, not to blame them, but to defer to
4 them, because frankly this was very complicated business.
5 The ambiguities that Mr. Knopf said were threshold
6 requirements for some kind of estoppel and that's not a,
7 some kind of castigation or you know, a hand-tying exercise,
8 estoppel is just a legal principle that says once there's an
9 ambiguity in the approval process when we seek and obtain a
10 clarification in the form of a permit, that is in real time
11 validated as lawful and correct. And then we move forward in
12 reliance on that, then we're entitled to treat that as
13 lawful and if its to change, would only change
14 prospectively.

15 That's inherent I think to due process. We are, it
16 isn't a situation where we sped without a police officer
17 present. We asked specifically, in regard to each
18 application. The DPS personnel interfaced with Park and
19 Planning in regard to each. And we weren't the only ones
20 that found this confusing. They obviously did too. There
21 are two diametrically opposed reports by staff, all of whom
22 we respect and appreciate.

23 They had to get it wrong at least once, because the
24 opinions have been polar opposites of one another, and I
25 think that evidence is the issue. The threshold ambiguity
26 that then lent us to needing clarification, getting it, and

1 acting in reliance on it. That's where the estoppel evolves
2 from, not any venal or bad behavior by anybody, but just an
3 innocent confluence of circumstances primarily arising out
4 of that ambiguity. And in the case law that we cited, the
5 permanent financial case is the rule in that regard. Thank
6 you.

7 CHAIRMAN BERLAGE: Thank you very much, I'd like to ask
8 you to step back. If we have questions for any of you, we
9 will bring you back to the table.

10 At this point, the Board is ready to deliberate, to
11 deliberate the issue of the alleged violations. We have
12 before us a staff report.

13 This is the staff report for Items 1 and 2. And, the
14 staff recommendation is a finding of site plan violation for
15 all buildings that exceed the site plan Signature Set height
16 restrictions of 35 feet for single family units, and 45 feet
17 for multi-family buildings.

18 Also the staff is recommending a finding that front
19 setbacks do not comply with site plan approvals.

20 At this point it is up to the Board to decide whether
21 it wishes to accept, reject or modify the staff's
22 recommendations. And the floor is open for discussion.

23 COMMISSIONER WELLINGTON: Well I would like to ask
24 staff just a couple of questions.

25 CHAIRMAN BERLAGE: Commissioner Wellington.

1 COMMISSIONER WELLINGTON: I would like to ask you
2 about, in your view, the significance of the signed approval
3 of the, first, the project plan drawings.

4 MR. MICHAEL MA: RMXs all require project plan before a
5 site plan. Project plan, as we explained before, is a very
6 conceptual plan establishing a framework for the future
7 development, especially a development of this scale. It
8 cannot detail all the standards at that point, but establish
9 some basic framework such as the density, such as building
10 height. That is what you see, and then in the approval
11 document, they are really a combination of two document and
12 one is the planning Board opinion on the project plan
13 approval.

14 The opinion states what was approved and what was
15 proposed and what's the standard, and also a approved plan
16 itself.

17 COMMISSIONER WELLINGTON: What, what do you, that's
18 what I was asking about. We have in the record, the signed,
19 I think, Rose did you have a copy of that? The signed
20 drawings of the project plan, signed by John Carter. What
21 was the use of those? How did staff view those?

22 MR. MA: Just like a approved site plan. It's a
23 combination of the opinion and site plans.

24 COMMISSIONER WELLINGTON: But the actual drawing, what
25 did you do, what did you do with the drawing?

1 MR. MA: Drawing, when we review the site plan, after
2 the approval of a project plan, we were using, we were used,
3 a drawing itself. Look at the graphic representation of the
4 overall development in general, like the street layout, like
5 landscaping concept, and all the development standards.

6 COMMISSIONER WELLINGTON: Okay and that, so that was
7 the first one. Then the preliminary plan was then same
8 drawings, same data table that's at issue was also submitted
9 in the preliminary plan and that was signed, I believe by
10 Joe Davis.

11 MR. MA: Correct.

12 COMMISSIONER WELLINGTON: Or it was signed by Joe
13 Davis. What was that drawing used for in the preliminary
14 plan?

15 MR. MA: Same situation, that when we review a site
16 plan, we use those standards to review the site plan.

17 COMMISSIONER WELLINGTON: And then, and for the site
18 plan, were those drawing submitted for the site plan?

19 MR. MA: Yes.

20 COMMISSIONER WELLINGTON: And show the same data table?

21 MR. MA: Yes.

22 COMMISSIONER WELLINGTON: And then was that the same
23 site plan data table that was certified, for, and attached
24 to the enforcement agreement?

25 MR. MA: That's correct.

1 COMMISSIONER WELLINGTON: Now who prepared, if you
2 know, the data table?

3 MR. MA: Normally the engineer for that particular
4 applicant. Of course, in this case, the applicant changed
5 from project plan to site plan. But normally there is one,
6 one applicant for the entire process. Normally they hire
7 the same engineer firm to prepare the document.

8 MS. KRASNOW: Let me just say, the, the applicant did
9 not change until after the site plan. It was still
10 Montgomery and Klebenoff for the first site plan. It did
11 change after that fact, before the second site plan came
12 forward.

13 COMMISSIONER WELLINGTON: So for the 98001, the one at
14 issue now is the same applicant?

15 MS. KRASNOW: Yes it was.

16 COMMISSIONER WELLINGTON: Did the applicant prepare the
17 drawing sets? Or who did? Who prepared them? I mean if you
18 don't know, you don't know.

19 MR. MA: (inaudible) Are you referring to the project
20 plan or referring to site?

21 CHAIRMAN BERLAGE: She's referring to the approved site
22 plans signed by Joe Davis, on behalf of Park and Planning
23 and Steve Klebenoff on behalf of the developers.

24 COMMISSIONER WELLINGTON: Yes, who prepared that
25 document?

1 CHAIRMAN BERLAGE: It was exhibit C, it was denoted
2 exhibit C by the complainants. They submitted it to us
3 earlier in this proceeding.

4 COMMISSIONER WELLINGTON: And it's also exhibit C of
5 the enforcement agreement.

6 CHAIRMAN BERLAGE: Take a moment to find it, 'cause I
7 want you to be sure what you're looking at. Do you have it
8 or do you need a copy?

9 MR. MA: I think the plan initially prepared by MK
10 Enterprise, that was

11 CHAIRMAN BERLAGE: I'm going to pass the copy down
12 because I can look at Commissioner Wellington's copy.

13 COMMISSIONER WELLINGTON: Was it submitted to the Board
14 by that group or?

15 MR. MA: It was prepared by, based on this drawing, was
16 prepared by MK Enterprise, that was the engineer firm.

17 COMMISSIONER ROBINSON: When is such a project plan
18 prepared?

19 CHAIRMAN BERLAGE: I'm sorry, we're talking about the
20 site plan?

21 COMMISSIONER ROBINSON: The site plan?

22 MR. MA: The site plan was, uh, the Signature Set was
23 approved in May 1999.

24 COMMISSIONER ROBINSON: That's not my question. My
25 question is when in our administrative process is that site
26 plan prepared? Or, is when such a project plan, detailed

1 project plan prepared? Does the Board have that document in
2 front of it when, during the application, when we vote on
3 our opinion?

4 MR. MA: The site plan was initially submitted, then
5 review it. And normally we don't keep the original
6 submitted plan in our file. We only keep the final approval
7 Signature Set in our file. That's this document.

8 CHAIRMAN BERLAGE: Let me see if I can follow up on
9 this. The staff report that you provided previously to
10 today indicates that the height limits were contained within
11 the site plan enforcement agreement. And that's, I guess
12 that's also in attachment C, I think it is. And you've made
13 the argument that a developer signed the site plan
14 agreement, they're bound by it, regardless of whether the
15 Board considered that or not. So that's clear.

16 Today we're presented with these documents, and this is
17 a document that is different from the document you gave us
18 previously, the site plan enforcement agreement. This says
19 approved site plan. And we're trying to understand, exactly
20 what this document was, when it was filed and whether it was
21 something the Board saw, or whether it was something that
22 came in after the Board had already approved the site plan.

23 MS. KRASNOW: If I can answer that question.

24 CHAIRMAN BERLAGE: Do you understand the question?

1 MS. KRASNOW: My understanding is that the site plan
2 comes to you for review; Signature Set is not prepared until
3 after both the site plan is approved and an opinion issued.

4 The Signature Set is then prepared by the applicant and
5 brought in for review by our staff. It is then signed by
6 our staff. It does not go in front of you.

7 CHAIRMAN BERLAGE: Okay. So this document was not
8 before us. Again was a document submitted later, but in so
9 far as it has the same height limitations in it, it
10 certainly does seem to corroborate the site plan enforcement
11 agreement.

12 MS. KRASNOW: Well the fact that

13 CHAIRMAN BERLAGE: that was also submitted after the
14 Board acted.

15 MS. KRASNOW: The site plan enforcement agreement
16 incorporates by reference, the Signature Set.

17 COMMISSIONER WELLINGTON: But Rose, if I could ask a
18 question? Under 59 D-3.23, when you apply for site plan,
19 you're supposed to prepare a whole list of documents. Now
20 were those documents prepared for the site plan that we have
21 today?

22 MR. MA: I believe you referred to the required content
23 of the site plan.

24 COMMISSIONER WELLINGTON: Right.

1 MR. MA: Yeah, when we receive site plan application,
2 we're supposed to make sure that submitted site plan
3 contains all the items, listing the zoning ordinance.

4 COMMISSIONER WELLINGTON: 3.23A, the location, height,
5 ground coverage and use of all structures.

6 MR. MA: That's right.

7 COMMISSIONER WELLINGTON: So the question was, was the
8 drawing that the data table which had been approved for the
9 project plan and also signed off by the preliminary plan was
10 that before the Board at the time of the site plan opinion?
11 Not the, not the Signature Set document, but just a copy of
12 that document?

13 MR. MA: Yes, and let me just add one point. the
14 Signature, as Rose explained to you, after the planning
15 Board approved, at public hearing, the applicant would
16 submit a plan, a site plan, supposedly address all the
17 approval condition. But that plan is supposed to reflect
18 what planning Board saw, at that public hearing, unless
19 there was a condition required them to amend certain part of
20 the plan. Otherwise, the Signature plan is supposed to
21 reflect what the planning Board reviewed at the public
22 hearing.

23 COMMISSIONER ROBINSON: So the theory is that if they
24 come in with, there's a site plan opinion that will be
25 issued by the Board. There's a staff report. You'll
26 normally attach to the staff report some document that

1 indicates what the site plan is going to look like. And is
2 your theory then that we've acted on that document even if
3 we don't, shall we say, consciously address every element on
4 it?

5 MR. MA: That's right.

6 CHAIRMAN BERLAGE: Excuse me, I do, because I think I
7 misspoke. I want to make sure that the record is clear. I
8 now understand you to be saying that the document attached
9 to your staff report, this is data table from quote Exhibit
10 C of site plan enforcement agreement. That's a blow up of
11 the very, the very engineer produced drawing that I just
12 passed down to you. Is that right?

13 MS. KRASNOW: That is correct.

14 CHAIRMAN BERLAGE: So there's not 2 documents, there's
15 one document. They're the same document. And that is the
16 critical document with the height listed. Okay, thank you.
17 Commissioner Wellington had the floor. So you may continue
18 if you have more.

19 COMMISSIONER WELLINGTON: My next question is. Is the
20 submission of these documents voluntary? I mean can they
21 decide they'd like to submit 40 feet, 20 feet. Can they
22 submit what they would like to build in the, in the data
23 table?

24 MS. KRASNOW: If I understand your question correctly,
25 the answer would be yes, it is up to the applicant to
26 propose what they want to build. They know the required

1 standard and they come forth and say we propose we're going
2 to build it at this height. Now that can be changed by the
3 Board, but they are the ones that come to us with their
4 proposal.

5 COMMISSIONER BRYANT: How does that relate to?

6 CHAIRMAN BERLAGE: Did you need to say something,
7 Michele? I thought you were trying to.

8 MS. ROSENFELD: I just wanted to, for the record,
9 elaborate a little bit on what Mr. Ma had stated earlier.

10 At the same time that you would have had the drawings
11 with the project data table, it said 35, 35, 35 and 45 feet,
12 there also was a staff report before the Board. And that
13 staff report contained a project data table. And that
14 project data table had 4 stories with no specific height
15 limit for all residential buildings. So there were 2 sets
16 of information before the Board at that period of time.

17 COMMISSIONER WELLINGTON: Right, that was what my
18 question was getting to, which is, is that um, the Board can
19 give an envelope of development that could be 4 stories, 5
20 stories and the applicant can submit a data table as to what
21 it intends to build that can be within that envelope and
22 they're not mutually inconsistent. Is that right, Michael?

23 MR. MA: I think the residential developments are
24 different from commercial development versus, for example,
25 downtown Silver Spring. They proposed 150 feet building
26 that's 150 feet building. They have to build that. But

1 residential, because the nature of a residential
2 development, the buyer, potential buyer may pick different
3 models. The developer may pick different builders that even
4 the individual builder have their own product. So the site
5 plan set the maximum height. Either 35 feet or 45 feet.

6 Then depends on the individual builder, it depends on
7 the individual buyer, pick whatever model as long as they
8 stay within the maximum height then they are, they are okay.
9 Because the, there's no way the approved site plan would
10 document (inaudible) every single model.

11 COMMISSIONER WELLINGTON: Yes, but what I'm saying is
12 that you could take, in this case, we had a data table that
13 showed 4 stories in the opinion. And we had a drawing that
14 was submitted at the time of the opinion and that was later
15 certified and attached by the developer to the site plan
16 enforcement agreement that has heights that are by number.
17 And there you can, you can, it's up to the developer to make
18 a decision as to what numbers to put in there, not up to us.
19 In other words, we can have one standard in our opinion and
20 as long as they don't put in something taller, they can do
21 that.

22 MR. MA: That's right.

23 COMMISSIONER WELLINGTON: It's up to them to call out.
24 And then if it turns out that's not what they can live with,
25 it's not working for them, they can seek an amendment?

26 MR. MA: That's correct.

1 COMMISSIONER ROBINSON: Well the project plan provides,
2 opinion provides for all residential structures not to
3 exceed 45 feet or 4 stories. So clearly the expectation for
4 long term planning created by the project plan is that any
5 residential structure could be up to 45 feet. The question
6 is why do we end up with 35 feet on the schematics? You say
7 you don't know but I guess that's, that's where Commissioner
8 Wellington's questions are taking us, which is why do we
9 have 45 feet and 50 feet in a project plan which interprets
10 the sector plan and establishes the broad expectations of
11 what the community is going to look like. Why do we end up
12 with 35 feet in these various prints, which everybody signed
13 and what's the implications of that?

14 CHAIRMAN BERLAGE: And the other question is does it
15 matter why it's there, if it's there and it was a signed
16 agreement?

17 COMMISSIONER ROBINSON: Maybe it doesn't matter why
18 it's there but it's clearly there so what are the
19 implications of the fact that it's there?

20 CHAIRMAN BERLAGE: I agree it would be nice to know why
21 it's there.

22 MS. KRASNOW: In my staff report, on this particular
23 issue, I made a case that because of the discussions that
24 had gone on during the master plan process where height
25 clearly was discussed, that I felt that the data table that
26 appeared with the project plan was very intentional. In

1 other words, I believed at that time that the builders were
2 saying that they felt that they would limit themselves to 3
3 stories, 35 feet. Or it really doesn't say 3 stories, it
4 just says that certain dwellings would be 35 feet, certain
5 would be 45 feet. It was my impression in all honesty that
6 the Board in their decision simply limited the height to no
7 more than 4 stories, 45 feet.

8 COMMISSIONER ROBINSON: So you're saying that you think
9 that the project plan opinion by the Board overrode the
10 information that was in the data table in the sense that we
11 put a general and broad cap of 45 feet or 4 storey
12 residential buildings?

13 MS. KRASNOW: That's what I believe but it, it then, it
14 is puzzling that that data table continues to appear on all
15 later documents.

16 VICE CHAIR PERDUE: Here's how I'm trying to go about
17 thinking about this. I would start with the question, did
18 the project plan include a height limit and if so what was
19 that height limit? The project plan opinion includes a data
20 table, I'm talking about the opinion. There, there were
21 other things that were before the Board in the staff report
22 but the opinion included a data table that said 4 stories,
23 45 feet.

24 Now although that data is in a column labeled
25 'Provided' I don't believe that should be understood as
26 informational but as, but that it was a condition of the

1 project plan. I think that's the way we've interpreted the
2 'Provided' list. So I read our opinion in the project plan
3 as imposing a 45 foot limit.

4 After the Board acted, there was a signed set of
5 drawings that the complainant has provided us and it may be
6 in all other material as well but it's drawings called
7 project plan. It's signed by John Carter on April 26th,
8 several days after the Board acted. That set of drawings,
9 as we talked about, includes a data table that has 35 feet.

10 So the first question that comes to my mind is we have
11 a Board opinion that says 45 feet that I interpret to mean
12 as a 45 foot maximum. Is, is that maximum, has that been
13 altered by a signed, this signed drawing that is different
14 from the Board opinion? My assumption and I guess I'll ask
15 Michele, I'm just talking about the project plan at this
16 point. My assumption is that, that a picture done after the
17 Board opinion does not alter the conditions of the project
18 plan. The project plan are what the Board did and that
19 that's, that's what we mean by the project plan and then we
20 get to site plan and we're referring back to project plan,
21 it would be what the Board did, not the subsequent drawing.
22 This is talking only about project plan. I'm going to get
23 to the site plan. So let me just start with project plan.

24 MS. ROSENFELD: That's absolutely correct. I do not
25 believe that staff, staff's action after the Board decision
26 amended the Board's decision on height.

1 COMMISSIONER WELLINGTON: Okay.

2 CHAIRMAN BERLAGE: What about the developer's action?
3 They signed it as well.

4 MS. ROSENFELD: They signed it. They submitted it.
5 They could restrict themselves but I don't believe that it
6 altered the Board's fundamental findings and decision on
7 height.

8 COMMISSIONER WELLINGTON: But it could be a statement
9 of what they intended to do even though they could do
10 something else based on the project plan?

11 MS. ROSENFELD: It could be.

12 COMMISSIONER WELLINGTON: Since they signed it.

13 VICE CHAIR PERDUE: So, so where that gets me is I, say
14 step number one is what did the project plan require? And
15 my conclusion is the project plan imposed a 45 foot height
16 limit. That's with the project plan.

17 Then we get to the site plan. Now the site plan, we
18 have had these drawings. I don't believe, as I said, I don't
19 think the drawings change the project plan. When we get to
20 site plan, site plan refers back to project plan.

21 So then the next question from me is did the site plan
22 impose a height limit and if so, what was it?

23 The, we had staff report that referred to stories and
24 not to height. Um, and we have a finding that the site plan
25 is consistent with project plan. The, the staff report, and
26 although the data table doesn't refer to feet, it refers

1 only to stories, we do have a report that lists adjustments
2 to the project plan and doesn't say anything about height.
3 Moreover as the developer notes, the site plan is intended
4 to be more specific than project plan and so the suggestion
5 that the project plan moved from the specific 45 foot to the
6 less specific 4 stories seems to me to be at odds with the
7 way we customarily move. And that, that leads me to
8 conclude that the site plan did incorporate a 45 foot height
9 limit. The project plan had 45. I believe the site plan
10 had a 45 foot height limit. That's got to set 45 foot.

11 Now we get, the question is what do we make of the
12 Signature Set after the site plan approval of the Board that
13 reintroduces this 35 foot limit?

14 CHAIRMAN BERLAGE: Signature Set meaning the drawings ...

15 VICE CHAIR PERDUE: Drawings.

16 CHAIRMAN BERLAGE: attached to the site plan
17 enforcement agreement.

18 VICE CHAIR PERDUE: Correct.

19 CHAIRMAN BERLAGE: Correct.

20 VICE CHAIR PERDUE: So, in thinking through it, what
21 did the project, did the project plan have a height limit,
22 and if so, what was it?

23 Did the site plan have a height limit and if so, what
24 was it?

25 And at that point where I am is the site plan did have
26 a limit, it was 45 feet. So now I get to what's the

1 significance of a Signature Set post site plan that has 35
2 feet and that is incorporated into a site plan enforcement
3 agreement?

4 VICE CHAIR PERDUE: With respect to a signature set, as
5 with the signature set for the project plan, I think it
6 would be quite odd if we said a signature set alters a site
7 plan. A site plan is what the board did, not, and isn't
8 altered -- a site plan is not altered by a subsequent -- the
9 drawings. Nonetheless, this is incorporated into a Site
10 Plan Enforcement Agreement. So the Site Plan Enforcement
11 Agreement is essentially a contractual arrangement and maybe
12 that contractual arrangement could include conditions that
13 in fact go beyond what's in the site plan.

14 COMMISSIONER WELLINGTON: Well, within the envelope of
15 what is allowed by the site plan?

16 VICE CHAIR PERDUE: That are more restrictive for the
17 develop -- that imposes restrictions on the developer that
18 the site plan does not impose.

19 COMMISSIONER WELLINGTON: Voluntarily.

20 VICE CHAIR PERDUE: Right, it's a contract. So, I
21 think conceptually that could happen, that seems to be --
22 it's a contract and the people can -- the developer could
23 agree to something different. But here is where I get -- is
24 it where that -- my problem with that, the Site Plan
25 Enforcement Agreement attached the signature set as Exhibit
26 C and called this a certified site plan. The Site Plan

1 Enforcement Agreement requires -- the language of it, it
2 requires compliance with the development program, that's
3 Exhibit B and it requires compliance with the site plan
4 number 8-98001. The Site Plan Enforcement Agreement does
5 not say, we hereby agree

6 CHAIRMAN BERLAGE: -- To Exhibit C.

7 VICE CHAIR PERDUE: It attaches Exhibit C, it doesn't
8 say we are going to do what's on the list in Exhibit C. So
9 it -- although the relevance of that is that although as I
10 said before I don't think that a signature set alters the
11 site plan and now the question is did, though the site plan
12 has a maximum of 45 feet, did the developer nonetheless bind
13 themselves to something less than 45 feet through this
14 contract and I don't see that they have bound themselves to
15 do something more than is in the site plan because again my
16 conclusion is that the site plan, the site plan does not
17 impose the 35 foot height limit. So that puts us to try to
18 figure out what the Site Plan Enforcement Agreement requires
19 if we were to follow that line of analysis and others might
20 read it differently and say, no the Site Plan Enforcement
21 Agreement requires the developer to do things that go beyond
22 the site plan, that I think that's not a -- it might be read
23 that way, it's not explicit and it would also, we would then
24 confront the reality of a course of action with respect to
25 that enforcement agreement. That is how it was viewed by
26 staff, I mean, we're then in interpretive level of trying to

1 sort out the Site Plan Enforcement Agreement. And that for
2 me, I have difficulty reading the Site Plan Enforcement
3 Agreement as imposing this additional requirement that goes
4 beyond the site plan.

5 CHAIRMAN BERLAGE: I would like to ask a follow-up to
6 that which is the following, the board approved a site plan,
7 issued in opinion with a set of conditions as has just been
8 described. And we have the power under County Law to
9 enforce our site plans, correct, with or without a
10 subsequent signed contractual agreement.

11 MS. ROSENFELD: Absolutely.

12 CHAIRMAN BERLAGE Why then, one might ask then, why
13 does one go to the additional step of creating and signing a
14 Site Plan Enforcement Agreement. What is the purpose of
15 that document generically?

16 MS. ROSENFELD: The genesis of the Site Plan
17 Enforcement Agreements arose many years at a time when the
18 board did not have enforcement authority to issue citations,
19 impose fines and issue stop-work orders and other
20 enforcement measures that it has available to it, under
21 current Statutory Law under Article 28 and under Chapter 50.

22 Site Plan Enforcement Agreements had been created as a
23 vehicle to allow enforcement at a time when our only means
24 of enforcement was through judiciary course to sue for
25 enforcement of contract. And this particular agreement as

1 are many from this point in time are basically, an appendage
2 as a result of

3 CHAIRMAN BERLAGE: But this agreement was signed after
4 we already had enforcement power.

5 MS. ROSENFELD: It was because at the time the zoning
6 ordinance required in Site Plan Enforcement Agreement and as
7 you may know recently we have abolished it because we
8 consider our citation authority to be far more effective
9 than trying to enforce to sue a contract.

10 CHAIRMAN BERLAGE: The zoning ordinance requires a Site
11 Plan Enforcement Agreement?

12 MS. ROSENFELD: It did at the time the site plan was
13 adopted.

14 VICE CHAIR PERDUE: Can I ask a question?

15 CHAIRMAN BERLAGE: Then presumably if the zoning
16 ordinance requires that agreement, the zoning ordinance
17 requires that that agreement be adhered to. No?

18 MS. ROSENFELD: At the time the zoning ordinance
19 required Site Plan Enforcement Agreement, it provided an
20 agreement shall be signed by the applicant and the planning
21 board designee requiring the applicant to execute all of the
22 features of the site plan noted in 59D3.23 in accordance
23 with the development program required by that same section.

24 VICE CHAIR PERDUE: The features of the site plan

25 MS. ROSENFELD: Right.

1 VICE CHAIR PERDUE: It requires that you agree to
2 comply with the site plan.

3 MS. ROSENFELD: That's correct.

4 COMMISSIONER WELLINGTON: What is this signature set?

5 MS. ROSENFELD: The signature set is a series of
6 drawings that are submitted after the planning board makes
7 its decision and it is required to comply with the elements
8 and the conditions of approval that the board adopted in its
9 opinion when it approved that particular project.

10 COMMISSIONER WELLINGTON: What was included in this
11 signature set?

12 MS. ROSENFELD: I believe it was 39 pages, how many
13 pages were the signature set? It was a lengthy set of
14 drawings that included all manner of features that were
15 provided for in this particular plan, the road network, the
16 road layout, the number of MPDUs, the amenities, all of
17 those types of things. The site plan, the opinion itself
18 had extensive conditions addressing APFO requirements, road
19 requirements, landscaping, all types of.

20 COMMISSIONER WELLINGTON: And is the certified site
21 plan part of the signature set?

22 MS. ROSENFELD: The certified site plan is the name for
23 the signature set.

24 COMMISSIONER WELLINGTON: It is?

25 MS. ROSENFELD: It is. It's the same document.

1 COMMISSIONER WELLINGTON: And it included the data
2 table.

3 MS. ROSENFELD: And it included the data table.

4 COMMISSIONER WELLINGTON: Well, I would just like to
5 say that that for me is the most critical fact in this
6 deliberation, and it's what the staff said in its report and
7 it's what the rule of law really is all about, I mean,
8 that's why we memorialize things in writing with the
9 details, with the signatures. That's why you stamp it in
10 the old days and you might have done by the official seal
11 and the ribbon, so that whatever discussion that went on
12 before and all the ins and outs and the changes, you finally
13 come down to one set of documents that tells you
14 definitively what is supposed to happen and what's going to
15 happen on the ground.

16 Now what my point was earlier is that the applicant
17 here prepared these materials and the applicant could have
18 put different things in there, I am not disagreeing with my
19 colleague that under the site plan opinion it could have
20 perhaps put in different heights. But they chose not to.
21 That was their decision and it was a decision that was
22 thoughtfully done throughout the entire process.

23 So to say that it was inadvertent, we don't know if it
24 was inadvertent, we just know they did it every time or it
25 may have been done as Rose was saying just in order to make
26 the project more attractive at the time, so that the heights

1 were 35 feet, but it was done and it was done with finality.
2 It was the basis for your being able to get a record plat.
3 You need your signatures -- is that correct -- you need your
4 signature set to get the records plats.

5 MS. ROSENFELD: You need an approved site plan, that's
6 correct.

7 CHAIRMAN BERLAGE: The Site Plan Enforcement Agreement
8 has been, I apologize, but you seem to be getting into an
9 argument which is fine except that I still have some
10 questions, which is the Site Plan Enforcement Agreement has
11 been described as a contract between the developer and the
12 commission. Do you agree with that characterization?

13 MS. ROSENFELD: That is correct.

14 CHAIRMAN BERLAGE: Okay.

15 COMMISSIONER WELLINGTON: But it is also part of zoning
16 code or it was at that time.

17 CHAIRMAN BERLAGE: And it's, yeah, which was explained
18 and I assume it's a public document.

19 MS. ROSENFELD: Absolutely.

20 CHAIRMAN BERLAGE: Okay, and if it's violated, who has
21 the power to sue to enforce it?

22 MS. ROSENFELD: The commission does.

23 CHAIRMAN BERLAGE: Would a third party in the community
24 who thought they were injured by the violation?

25 MS. ROSENFELD: No, I don't think so.

26 CHAIRMAN BERLAGE: Only the commission.

1 MS. ROSENFELD: Not under the terms of the agreement or
2 under the provisions of the zoning ordinance.

3 CHAIRMAN BERLAGE: Now, if the commission chose to sue
4 to enforce its Site Plan Enforcement Agreement alleging that
5 residential properties have been built in excess of a height
6 limit located within that Site Plan Enforcement Agreement,
7 would the fact that the previously approved site plan
8 opinion does not mention height, do you think that would be
9 defense against that kind of a suit.

10 MS. ROSENFELD: If I were defending that lawsuit,
11 that's certainly an argument I would make.

12 CHAIRMAN BERLAGE: Well, certainly you'd make that
13 argument, but

14 MS. ROSENFELD: I think it would be a compelling
15 argument to accord.

16 CHAIRMAN BERLAGE: But you describe it is a contract,
17 so I mean, a contract is a contract, isn't it? You're
18 saying it would be a contract without authority.

19 COMMISSIONER ROBINSON: Or without consideration if I
20 could make a follow-up question. My concern is a very
21 practical one, clearly in the signature set, there couldn't
22 be anything that was inconsistent with the board opinion.

23 CHAIRMAN BERLAGE: Okay, agreed.

24 COMMISSIONER ROBINSON: Now if there is a silence there
25 is an issue of consistency but there might, suppose if
26 there's silence, can the staff then after the planning board

1 issues its opinion, say, "Well, we think there's a problem
2 here, there we would like to add something to the signatures
3 set, in essence to take care of this problem." In essence
4 what they are doing is creating another condition, can the
5 staff do that?

6 MS. ROSENFELD: I think the staff would have the
7 authority to modify the signature set as long as it did not
8 become less restrictive than the conditions that the board
9 had imposed. I am not sure if that answers your question.

10 COMMISSIONER ROBINSON: Well, it does, it has answered
11 the question because there are three scenarios, everything,
12 and I am just trying to accord my way through this more
13 morass, but everything conforms to the signature set. I
14 mean, everything in the signature set conforms to the site
15 plan decision. You go to check it out, everything is fine.
16 You go down the signature set, look at it, compare it to the
17 site decision and there is something in the proposed
18 signature set that's clearly inconsistent with the site plan
19 decision, right. That falls because the board decision has
20 the higher authority. Now it's the intermediate ground
21 which is, there may be some ambiguity or there is just
22 silence in the prior board, in the board decision, what
23 authority does staff have to in essence clarify, modify,
24 round out the planning board decision to address an issue
25 for example it might be height, which is not addressed in
26 the board's opinion.

1 MS. KRASNOW: If I can try and answer that question if
2 I were reviewing that signature set and I had a site plan
3 opinion that said for height four storeys and I saw a data
4 table that said 35 feet and then 45 feet, it seems to me I
5 would have two choices, I can either decide there is no
6 inconsistency because four storeys can easily be 45 feet or
7 I could raise the question whether this data table was
8 inconsistent with the four storeys.

9 COMMISSIONER ROBINSON: Well, that's a fair answer, but
10 the question again is, then was it inconsistent because it's
11 35 feet Commissioner Wellington's making the point which is
12 a fairly good argument which is, it came from the
13 developers. So maybe what's clearly happened here is there
14 is at least two levels of expectations here, there is the
15 expectations that were created by the initial project plan,
16 which can't be modified in terms of specific, in the absence
17 of specific board action. I think we would agree on that.
18 The question is the developer through this data table, by
19 putting it on the signature set created a different set of
20 expectations or another set of expectations. That's why
21 they are having problems that they're having. And if that
22 data table wasn't there, we wouldn't be sitting here.

23 MS. ROSENFELD: Commissioner Robinson, if I can answer
24 that question a little bit differently, I was looking
25 through the zoning ordinance. I think your question was
26 what authority would the staff have to make that change.

1 And essentially through at least the minor plan amendment,
2 the staff has the authority to revise plans provided they
3 don't alter the intent, objections or requirements expressed
4 or imposed by the planning board in its review of the plan.
5 So to the extent that alterations to the project data table
6 remain consistent with the boards underlying approvals, I
7 certainly think the staff has the authority to make those
8 changes.

9 COMMISSIONER ROBINSON: And we wouldn't, you would
10 agree perhaps I think on your prior answers that a developer
11 could agree to a lesser level, although at this final stage
12 I have some problems with that because it might imply that
13 the staff was actually getting more than what they were
14 entitled to under the planning board opinion, we will see a
15 danger there, I think.

16 MS. ROSENFELD: Well, are you asking if the developer
17 could agree to a more restrictive standard?

18 COMMISSIONER ROBINSON: Yes.

19 MS. ROSENFELD: Absolutely.

20 CHAIRMAN BERLAGE: Yeah, well, let me, we ask you with
21 a less, you know, with a less emotionally laden example: the
22 site plan said the developer is to plant 25 trees and then a
23 Site Plan Enforcement Agreement is signed and it says 35
24 trees. Is the developer, is not the developer agreeing
25 voluntarily to plant 35 trees and is that not enforceable by
26 us?

1 MS. ROSENFELD: That's correct, perhaps I misunderstood
2 your previous question, yes, I would say that through the
3 contractual agreement they agreed to plant 35 trees and that
4 we could sue to enforce to require that.

5 CHAIRMAN BERLAGE: Even if the site plan opinion just
6 said 25.

7 MS. ROSENFELD: Correct.

8 CHAIRMAN BERLAGE: Okay.

9 VICE CHAIR PERDUE: Let me get clarity on that, we
10 could sue for breach of contract. Let's -- which is not
11 what this proceeding is at the moment.

12 COMMISSIONER WELLINGTON: I think it is.

13 CHAIRMAN BERLAGE: Well, let Vice Chair Perdue raise
14 her point.

15 VICE CHAIR PERDUE: Is this is a -- are we in
16 enforcement action, is this how, is we -- no, let me come
17 back to that. I believe, we have a site plan that requires
18 45 feet, so if we have a site plan that says 45 feet and a
19 signature set that says 35 feet, leave the Site Plan
20 Enforcement Agreement out of it at the moment, is the
21 signature set that is at odds with the site plan, I don't
22 mean at odds with four storeys, I mean 45 feet verses 35
23 feet. Is the signature set an independent basis for
24 enforcement, aside from the enforcement agreement? The site
25 plan that says 45 feet, there is a signature set that says

1 35 feet, is there a basis to issue a citation for failing to
2 comply with the signature set?

3 MS. ROSENFELD: I would argue that there is. That's
4 the implementation of the site plan approval that the board
5 made. That's it's the, that it's an implementing document
6 and even if some of those provisions are more restrictive
7 than perhaps the board had originally approved that you can
8 enforce that document.

9 VICE CHAIR PERDUE: You can enforce it although you
10 have just said the staff could modify it till the 45 that
11 that would be a minor amendment?

12 MS. ROSENFELD: I would agree. As long as the
13 modification, the height increase did not exceed the board's
14 opinion approval.

15 VICE CHAIR PERDUE: So staff could modify it to 45
16 feet?

17 MS. ROSENFELD: Correct.

18 VICE CHAIR PERDUE: And approve plans that were at 45
19 feet because as part of the modification say, yeah, you can
20 go ahead, can't go 55 feet but up to 45 feet, staff can
21 approve plans that go up to 45 feet.

22 MS. ROSENFELD: I would say yes.

23 VICE CHAIR PERDUE: So, then, what would be the basis
24 for enforcing against them when they did 45 feet, something
25 between 35 and 45, where our staff has, where the permits
26 have been issued and we have signed off on it.

1 MS. ROSENFELD: Because in the opinion of staff and as
2 is reflected in the staff report we consider that to be a
3 technical violation of the implementing documents for the
4 site plans and they should have been followed at the time of
5 building permit applications.

6 VICE CHAIR PERDUE: Because they didn't, if they said
7 to staff, will you do a technical amendment and staff had
8 said fine, they'd be okay, but if they just say would you
9 sign off on this, and don't say technical amendment then
10 it's not okay.

11 MS. ROSENFELD: That's correct, because

12 COMMISSIONER ROBINSON: Excuse me. Follow up question
13 if I might on that same line of reasoning. What you are
14 telling me is that the obligation on 45 feet is absolute.

15 MS. ROSENFELD: That's correct.

16 COMMISSIONER ROBINSON: You can't go above 45 feet
17 without coming back to the board.

18 MS. ROSENFELD: Without planning board approval.

19 COMMISSIONER ROBINSON: Now, to borrow a phrase from a
20 different venue, I would gather that the board's decision at
21 45 feet is the appropriate standard, is the public interest
22 standard consistent with the sector plan, consistent with
23 the previous plans, et cetera, et cetera. So at 45 feet we
24 have decided that's the public interest standard. If the
25 developer agrees to something less they're within a zone
26 which would also be consistent with the public interest, but

1 you seem to be telling me provided they follow the proper
2 protocols, they are always free to go back up to the board's
3 ceiling of 45 feet because we the board made the
4 determination that's the public interest standard.

5 MS. ROSENFELD: At the time the planning board reviews
6 and approves the project plan, one of the findings the board
7 makes is that the plan before is consistent with the master
8 plan recommendations, so following that line of reasoning at
9 the time the planning board made a determination that 45
10 feet and four storeys was consistent with the master plan
11 recommendations for this project.

12 COMMISSIONER ROBINSON: So certainly, to follow
13 Commissioner Perdue's line of questioning, to have gone with
14 the 45 foot building or say a 42 foot building when the
15 signature set said 35 feet, was a clear violation of the
16 signature set, we would say that that's undisputed. Now in
17 terms of the import of that breach, you seem to be telling
18 me that the developer's still within the 45-foot limit which
19 determines the maximum building height for what I will call
20 the public interest or consistent with the sector plan.

21 MS. ROSENFELD: For all but, I believe, five buildings,
22 that's correct.

23 COMMISSIONER WELLINGTON: But that was the
24 recommendation and the remedy. It was the staff's
25 recommendation, for the remedy wasn't it?

1 CHAIRMAN BERLAGE: Mr. Bryant, did you want to -- are
2 you done, Mr. Robinson?

3 COMMISSIONER ROBINSON: No I'll wait to make, I was
4 going to make some remarks, but I will wait until my
5 colleagues are done with their questions, Mr. Chairman. You
6 wore me down Allison.

7 COMMISSIONER BRYANT: Well, I am trying to be polite
8 and trying not to be a lawyer because I was entertained by
9 what I heard and -- but it is just simple question for me
10 and that is in the site plan number 898001, no there are two
11 questions. I heard it suggested that the data box, if it
12 had not been present then we wouldn't be here. And I sort
13 of smirked to myself if there were no box, no we wouldn't be
14 here because nothing would have been done because I don't
15 think that in the eight years that I have been here, we have
16 ever looked at any plan whatsoever where in fact the data
17 was not included in the site plan in that box.

18 COMMISSIONER ROBINSON: Yeah.

19 COMMISSIONER BRYANT: Let me ask that question if there
20 were no data in the box would we be here? I am asking for a
21 yes and no answer, please.

22 COMMISSIONER ROBINSON: He is not into nuances.

23 CHAIRMAN BERLAGE: I thought you said you weren't a
24 lawyer.

1 MR. MA: The standards may be included in the drawing
2 or in the opinion either one, then as long as there are
3 standards established through your action, then that's fine.

4 COMMISSIONER BRYANT: Okay, now, second question. In
5 terms of the site plan which it says the agreement in fact
6 talked in terms of in accordance with the approval of the
7 planning board site plan and what I am making reference to
8 is the agreement, the Site Plan Enforcement Agreement. What
9 that meant to me was that, putting anything else in the
10 agreement aside, if I really wanted to know what I need to
11 look at to enforce I go back to site plan 8-98001 because it
12 says this agreement is in accordance with that and then I go
13 and check and make sure that 898001 is consistent with the
14 planning board decision. Now with that idea in mind, the
15 planning board decision said 45 feet, is that correct?

16 COMMISSIONER ROBINSON: Four storeys.

17 COMMISSIONER BRYANT: Yes, it said four storeys.

18 COMMISSIONER ROBINSON: Up 45 feet.

19 COMMISSIONER BRYANT: Four storeys.

20 COMMISSIONER ROBINSON: Yeah.

21 COMMISSIONER BRYANT: All right. And so therefore as
22 long as they don't build over four storeys, theoretically at
23 least, they are consistent with what the planning board
24 said. Is that correct?

25 MS. ROSENFELD: The planning board opinion for the site
26 plans says four storeys, the planning board opinion

1 technically referenced the staff report which had a project
2 data table which said building height for residential, four
3 storeys. So yes, it would technically be in compliance with
4 the site plan approval.

5 COMMISSIONER BRYANT: All right, four storeys. All
6 right, now when it came to the number of feet in the height
7 of the four storeys, it's the chart essentially that
8 provided that information and I understood it to be said
9 that it is because of the fact that the applicant put in the
10 height in the chart that that becomes the basis of the
11 violation, if in fact they go, they do not conform to those
12 -- to the height described in the boxes in the chart.

13 Well, again because you guys are lawyers, for me what
14 it said was I don't really have to pay too much attention to
15 that because it's four storeys. Now if in fact the applicant
16 was to say, within four storeys I am going to make some four
17 storeys or some buildings, 35 feet, I am going to make some
18 buildings 45 feet, well then from my standpoint it's still
19 within the four storeys. My concern and this is my question
20 in terms of 45 feet, regardless of where it came from which
21 is an acceptable standard for four storeys, 45 feet for a
22 multi storey building, is there a violation that goes beyond
23 the 45 feet? That's for me, is what the critical issue is,
24 because if something was over 45 feet that's consistent from
25 my standpoint with the notion of four storeys and the
26 planning board's opinion.

1 MS. ROSENFELD: There are four buildings, five
2 buildings, potentially that exceed 45 feet. There is one
3 existing multi family building that has 30 units,
4 condominium units, there are three existing sticks of two
5 over twos, one un-built existing stick of two over twos,
6 which is under contract to purchasers.

7 COMMISSIONER BRYANT: Right, so for me the focal point
8 is on those buildings. And that's the question for me.
9 Although I can't, I am not going to try to stop my
10 colleagues from exploring all of the other ramifications of
11 whether or not is the signature set, the site plan agreement
12 et cetera. For me, I would like to focus on whether or not
13 in fact any of the buildings go beyond the 45 feet. That's
14 part of one of the question. And then part two of that
15 question is if in fact they go beyond the 45 feet, did we
16 authorize permit, condone they're going beyond the 45 feet.
17 See, a simple mind comes up with simple questions.

18 CHAIRMAN BERLAGE: The questions, let's take them one
19 at a time. The first question is, to what extent do the
20 buildings exceed 45 feet?

21 COMMISSIONER BRYANT: And so, not talking to legal
22 counsel for that, I go to staff, and staff has to
23 demonstrate the fact that there are some buildings that go
24 beyond 45 feet.

1 MS. KRASNOW: Yes there are, we feel four existing
2 buildings that go beyond 45 feet. As Michelle just
3 explained, we have three buildings of two over twos that

4 COMMISSIONER BRYANT: I got that. Next question. At
5 any point did our staff administratively allow them to go
6 over the 45 feet?

7 MS. KRASNOW: To my knowledge and based on testimony we
8 heard at the last hearing, no.

9 VICE CHAIR PERDUE: Well, I was going to suggest that -
10 - not to try and cut questions short but maybe to see if
11 there was, we could see where the board was and I was going
12 to suggest the following.

13 CHAIRMAN BERLAGE: Please.

14 VICE CHAIR PERDUE: That I would start by making a
15 motion that we find that the buildings that exceed 45 feet
16 are in violation. And we see when the board is and then if
17 then we might depending on where the board comes on that, we
18 could talk about buildings that exceed 35 feet.

19 COMMISSIONER ROBINSON: I agree the buildings over 45
20 feet are in clear violation.

21 CHAIRMAN BERLAGE: That is absolutely appropriate. In
22 point of fact we have here a number of violations.
23 Theoretically each and every of them is separable. So if
24 you want to make a motion dealing with the portions of the
25 alleged violations, go right ahead.

1 VICE CHAIR PERDUE: So I would like to make a motion
2 that the board finds that buildings that exceed 45 feet are
3 a violation.

4 COMMISSIONER BRYANT: And I would like to second that
5 motion based upon the direction that I was going, which is
6 in fact, from my standpoint that's what we should be here
7 about making a determination. And the second is based on
8 the fact that I was instructed by staff that no permission
9 was given in all the four buildings to exceed 45 feet. And
10 I am not getting into all of the circumstances of whether or
11 not documents were signed et cetera. It's for somebody else
12 to work out. But based on the 45 feet, you said no one
13 authorized that, and I am agreeing or seconding the motion
14 that any building found over 45 feet is clearly in
15 violation.

16 CHAIRMAN BERLAGE: So we have a motion and a second.
17 Now I want to ask the question, I think of legal counsel
18 when -- let me know when you are ready to receive it.

19 MS. ROSENFELD: I am ready.

20 CHAIRMAN BERLAGE: The motion has been expressed as any
21 building over 45 feet is a violation.

22 MS. ROSENFELD: Any residential.

23 CHAIRMAN BERLAGE: Any residential building. Is that,
24 legally is that a correct way to state the motion or should
25 the motion refer to specific buildings being over 45 feet,
26 namely the three that were.

1 MS. ROSENFELD: Since they have been specifically
2 identified in the record, you can simply reference the ones
3 that had been identified by the staff.

4 CHAIRMAN BERLAGE: All right, so I just wanted to make
5 sure your motion was one that you felt comfortable with that
6 was

7 COMMISSIONER WELLINGTON: And on what basis are you
8 making the motion?

9 VICE CHAIR PERDUE: I believe that the site plan
10 incorporates by a reference to project plan, which caps the
11 height at 45 feet. And therefore the site plan caps it at
12 45. I am leaving aside whether there might be something
13 else that brings it down to 35 feet, I don't think I need to
14 sort that out in order to find that 45 feet is a cap. And
15 so my theory is that the site plan imposed a cap of 45, at
16 least a cap of 45 feet. That's my basis.

17 I will clarify that I would say as to whether staff
18 authorized some other, something greater than 45 feet. I
19 don't know what staff authorized but if they did it went
20 beyond, I'll consider it a material, a material change that
21 would not be a minor amendment. So that's

22 CHAIRMAN BERLAGE: All right, we have a motion. Ms.
23 Krasnow.

24 MS. KRASNOW: I feel compelled to add one point here.
25 I hate to insert it, but Mr. Knopf made it and I think it's
26 valid. We tried very hard to find out the specific heights

1 | of these buildings. We have had representations by the
2 | builders that these buildings exceed 45 feet in height and
3 | then we have had representations from the builders that one
4 | of them may not. We made efforts to get these building
5 | heights measured. And for a variety of reasons, which I
6 | don't think are really relevant, we do not have that.
7 | Therefore, while it is my belief that all of these buildings
8 | that we just referenced are over 45 feet height, I think we
9 | need to have some way to verify that the -- whatever action
10 | we take is

11 | VICE CHAIR PERDUE: Then let me, then maybe -- that's
12 | the reason I framed it the way I did. Let me go back to
13 | saying, I guess, my motion would be that the board confirm
14 | that the site plan caps the height at 45 feet.

15 | COMMISSIONER ROBINSON: For residential buildings.

16 | VICE CHAIR PERDUE: For residential buildings. And if
17 | we have to

18 | COMMISSIONER ROBINSON: And therefore ant residential
19 | buildings

20 | VICE CHAIR PERDUE: So we got clarity on at least that
21 | what the height limit is and then

22 | CHAIRMAN BERLAGE: And then we CAN go on to discuss the
23 | significance of this Site Plan Enforcement Agreement and
24 | perhaps the significance or the issue of measuring some
25 | specific buildings.

1 The motion is clear. We have a motion and second that
2 the board find that residential buildings which exceed 45
3 feet are in violation of the approved site plan.

4 COMMISSIONER WELLINGTON: And I would like to speak to
5 the motion.

6 COMMISSIONER BRYANT: Well, I seconded to motion, the
7 original motion. Don't have to agree to this modification.

8 COMMISSIONER WELLINGTON: Sure.

9 COMMISSIONER BRYANT: All right, and I do say that I
10 agree to the modifications and the language.

11 COMMISSIONER WELLINGTON: I didn't know it was
12 modified, but

13 COMMISSIONER BRYANT: Yes, she changed it a little.

14 COMMISSIONER WELLINGTON: Okay, well I would like to
15 speak to

16 CHAIRMAN BERLAGE: On the motion.

17 COMMISSIONER WELLINGTON: Yes, I do agree there was a
18 violation of buildings over 45 feet and do not agree with
19 the rationale. I am sitting here listening to the undoing
20 of years and years of how the commission has done business
21 and I am appalled at what I'm hearing. And the reason for
22 the violation is it's in violation, for me, of the signature
23 set. And at the time because there was a Site Plan
24 Enforcement Agreement that agreement, those are the
25 inviolate documents, not the site plan opinion. If this
26 commission goes this way, you're going to have a 400 page

1 site plan opinion with everything in it, we will never be
2 able to do business. If we can just go back to how we
3 normally review these things, we normally only review what's
4 the issue, and meanwhile staff has before it and has with it
5 all these detailed documents and the layouts and all these
6 documents that are actually the site plan of what is going
7 to be built on a ground. We finish and we deal with the
8 issues of controversy and all of that then goes into the
9 signature set which is the final. As the staff points out
10 in the footnote, the set of engineer drawings that show the
11 multiple details of project including but not limited to the
12 landscaping and streetscaping plans, the amenity and
13 recreational elements required in the plan and the MPDU
14 locations and unit types. It also includes the project data
15 table which reflects dimensions such as heights,
16 limitations, setbacks et cetera.

17 We have never sat here on a Thursday and gone over
18 every single one of those things and adopted them
19 specifically. If we have to start doing that, we will never
20 even get through a normal six house subdivision. We have to
21 look at the zone, look at the statute and what it says about
22 it has to be a signed site plan, it has to be memorialized,
23 this agreement has to include all of those elements. All of
24 them were included. They're all in the signature set and we
25 cannot start undoing our support of those documents and go
26 to a more amorphous standard.

1 CHAIRMAN BERLAGE: Can I stop you for a second. If
2 what you are saying is true, then I probably don't
3 understand the motion.

4 COMMISSIONER WELLINGTON: She said that she was relying
5 on the site plan opinion.

6 CHAIRMAN BERLAGE: Well, what she said was that as a
7 first step, we should find that residential buildings, which
8 exceed 45 feet violate the site plans. My expectation was,
9 whether that motion carries or doesn't carry that we would
10 then go on to discuss whether residential structures might
11 also violate the 35 foot limit in the Site Plan Enforcement
12 Agreement. If you are characterizing her motion as the end
13 of the discussion

14 COMMISSIONER WELLINGTON: No I am not.

15 CHAIRMAN BERLAGE: That would be

16 COMMISSIONER WELLINGTON: No.

17 CHAIRMAN BERLAGE: Then I couldn't support it.

18 COMMISSIONER BRYANT: I understood her to be speaking
19 to the rationale for the basis of her motion.

20 COMMISSIONER WELLINGTON: Yes, the staff found that
21 staff did each one separately too, they didn't, they made
22 four separate findings.

23 CHAIRMAN BERLAGE: You're talking about sort of
24 creating a horrible precedent.

25 COMMISSIONER WELLINGTON: It does, it does.

26 CHAIRMAN BERLAGE: Well, we haven't talked about this

1 COMMISSIONER WELLINGTON: Well, hold on let me finish,
2 okay. What staff said was that the reason there was a
3 violation of the multi family buildings was that it violated
4 signature set which was incorporated by referencing into the
5 Site Plan Enforcement Agreement, it did not rely on the site
6 plan opinion. And I agree with staff in that.

7 VICE CHAIR PERDUE: Well, let me try again. So that
8 maybe we can move on. I am reading the Montgomery County
9 code which says the enforcement agent may deliver a citation
10 to a person believed to be in violation of a -- and then in
11 capital letters Planning Board Action. I would like to move
12 that we find buildings in excess of 45 feet are a violation
13 of a planning board action.

14 CHAIRMAN BERLAGE: Second.

15 COMMISSIONER BRYANT: Yes.

16 CHAIRMAN BERLAGE: Oh, there was already a second.

17 COMMISSIONER WELLINGTON: You have withdrawn your last
18 motion?

19 VICE CHAIR PERDUE: That's right, that's right. So
20 it's

21 CHAIRMAN BERLAGE: All right, we have a new motion.

22 COMMISSIONER BRYANT: And a second.

23 CHAIRMAN BERLAGE: And a second. Any further
24 discussion.

25 COMMISSIONER WELLINGTON: I have already spoken my
26 reasons for supporting that, so I do support it.

1 CHAIRMAN BERLAGE: Okay, all in favor of the motion,
2 please say aye.

3 ALL 5 COMMISSIONERS: Aye.

4 CHAIRMAN BERLAGE: Any opposition? Any abstentions?
5 All right, by vote of five to 0, that motion carries. And I
6 believe now we need to talk about whether there is also
7 violation of the Site Plan Enforcement Agreement.

8 COMMISSIONER ROBINSON: Mr. Chairman, that's a more
9 complicated issue, from my point of view. First of all
10 there is no doubt that there is a violation of the site plan
11 agreement because it says 35 feet and that's 35 feet is 35
12 feet, that's what everybody's signed. The question is the
13 implications to that violation.

14 COMMISSIONER WELLINGTON: The First issue is, is there
15 a violation. That's what we are discussing now.

16 COMMISSIONER ROBINSON: That's, no I think because
17 where it takes you is very important. The reason I made
18 that point is first of all, I think it is ridiculous that
19 one would say come into this agency, and look at the site
20 plan agreement and say you really don't have to worry about
21 that box up there. It's really not controlling. Everything
22 on the site plan signature set has legal import. So it's
23 not clear during the testimony who that opinion came from.
24 If it was our staff, well that's unfortunate. If it was an
25 outside attorney or engineer that was incompetent and if
26 they relied on the staff opinion they were fools. Why would

1 | you expose your client to that type of legal liability by
2 | saying just dismiss a box on the signature set that provides
3 | 35 feet.

4 | Now beyond that, so I am really irritated about that.
5 | So as far as I am concerned, there is a violation of the
6 | site plan agreement even if there was no harm to the public
7 | interest, in other words. And that gets, we will get to the
8 | remedy later, I realize that. So I think we are in an
9 | anomalous situation that I would have to find perhaps
10 | straddling two horses at the same time which is never a
11 | comfortable situation to be in, is that there was no harm to
12 | the public for building a building that was up to 45 feet as
13 | long as it was under 45 feet because that was what was
14 | authorized. Counsel has told us by administrative amendment
15 | you could come in and go from 35 feet to 39.99999 feet and
16 | have it consistent with the planning board opinion.

17 | So it's a little hard to say that the fundamental
18 | concerns that are expressed in the sector plan about
19 | compatibility with the historical center, all those other
20 | issues that have been discussed were harmed by a building
21 | that was 42 feet high because this planning board
22 | essentially found that any building up to 45 feet was
23 | consistent with the planning with the sector planning, so.

24 | COMMISSIONER WELLINGTON: But wait, we haven't done
25 | that, yet.

1 COMMISSIONER ROBINSON: Well, that's where I am going.
2 I would find that A, the buildings are consistent with the
3 sector plan, which will take us in one direction for one
4 remedy. And I will also find that the applicants, their
5 attorneys and their engineers are in violation of the site
6 plan agreement because they didn't come in and do what they
7 have to do. And the reason I feel so strongly about that is
8 we are getting into a smart growth area where this board is
9 going to have a lot of discretion on a lot of issues. And
10 whether we end up with 400 page opinions or just 40 page
11 opinions, there's going to be a lot of issues in under our
12 new zones, or our existing discretionary zones where we
13 better make damn sure we know whether it's 45 feet or 35
14 feet.

15 So, without going to a more extreme remedy that's been
16 suggested by some people in the audience I am prepared to
17 hold the applicants to their signature set at least
18 nominally through not a punitive fine but enough, I think
19 there is enough of a violation just of the agency's protocol
20 that I consider that to be an independent violation
21 regardless of whether the buildings themselves violate our
22 regulatory standards. The violation by my set of standards
23 is that they went naively off and built things in violation
24 of the signature set without going through the necessary
25 protocols. I don't think that there is a violation of the
26 project plans or the sector plans. And the buildings as

1 | they stand are fine but they sure violated the agency
2 | protocols. And I think that deserves a penalty in and of
3 | iteself.

4 | CHAIRMAN BERLAGE: Well, I have a follow-up to that
5 | which is, this is Commissioner Robinson is focused on
6 | exactly what I am focused on. The first issue was the easy
7 | one, this is the more difficult one, because we are here --
8 | as I understand it, we are here enforcing, using our
9 | enforcement powers under section 50-41, is that right?
10 | Okay, and 50-41, it was attachment one, I don't -- I'm not
11 | sure if everybody else has this, I have this.

12 | VICE CHAIR PERDUE: Right, you are reading from the
13 | code section.

14 | CHAIRMAN BERLAGE: I'm reading from the code. And the
15 | code says the enforcement agent, that's us, may deliver a
16 | citation to a person believed to be in violation of a
17 | planning board action, that's what Commissioner Perdue read
18 | earlier. So, you know, my understanding is if we are going
19 | to find a violation and then go on to issue fines or other
20 | kinds of remedies, we have to find a violation of a planning
21 | board action, is that fair?

22 | MS. ROSENFELD: That's correct.

23 | CHAIRMAN BERLAGE: All right. Now I look in the same
24 | section at the definition of planning board action which is
25 | (a)5, and it defines a planning board action as, "a final
26 | decision on a preliminary plan, site plan, project plans,

1 supplementary plan, water quality plan or other plan," and
2 this is, the next part is where I am going to emphasize,
3 "including all associated terms, conditions, requirements
4 and other obligations or limitations made by the planning
5 board, pursuant to its authority under Article 28." And I
6 am sorry, to be so lawyerly about this, but I don't know how
7 else to approach it.

8 It seems to me that if the Site Plan Enforcement
9 Agreement and specifically the data table that is part of
10 that comes under the definition of the limitation made by
11 the board pursuant to its authority under Article 28, then
12 there is no question we can find a violation. If it's not
13 within that, then we have a problem, and I assume what it
14 says about the planning board, it doesn't mean that the
15 board can delegate. But you tell me, how would you analyze
16 it?

17 COMMISSIONER BRYANT: May I also get a clarification
18 based upon what you are reading? And that is in response, in
19 turn, in addition to the response to the Chair would you
20 make me aware of that last sentence regarding Chapter 22A,
21 not a decision, not including Chapter 22A, what is that
22 about?

23 MS. ROSENFELD: Chapter 22A is the forest conservation
24 law and that has independent enforcement authority. There
25 really are two separate things before the planning board,
26 the first one is the Site Plan Enforcement Agreement itself

1 and whether or not as a matter of contract that document and
2 any attachments to it can be enforced under their terms.

3 The second, the certified site plan which is Exhibit C,
4 which is what we refer to around here generally as the
5 signature set. The signature set is an implementing
6 document that the applicant is required to submit after the
7 planning board action, it's signed by the applicant and it's
8 signed by staff as a certification, as an implementation of
9 what the board has done. And in my opinion that is an
10 implementing tool of the planning board action and failure
11 to abide by its terms in fact can be subject to enforcement.

12 CHAIRMAN BERLAGE: Under 50-41.

13 MS. ROSENFELD: Under 50-41. Now could the applicants
14 have returned to staff and would staff have had the
15 authority to change the data table up to 45 feet without
16 planning board action? Yes, I believe they could have done
17 that. They did not do that. And as an implementing
18 document it's my opinion that the board has the authority to
19 enforce the terms in that set of documents including the
20 restrictions in the data table.

21 CHAIRMAN BERLAGE: And that's a very important point
22 and not just for this proceeding. But as has been mentioned,
23 we in this community are going to increaseing, let's
24 acknowledge that our planning approvals are getting longer
25 and more complex all of the time because we are trying to do
26 our job better, because the community as a developmentally

1 mature community with a lot of infill development and with a
2 desire to implement the latest advanced concepts and
3 planning in neo-traditional development and smart growth,
4 you know, it's not -- approvals are not a cut and dried
5 matter any longer. Approvals for better or worse are now
6 documents that cannot be easily understood by the lay person
7 and need to be agreed to by developers with good competent
8 counsel and then need to be implemented by employees of the
9 developers who are well aware that this is a complex
10 approval with a complex set of conditions. And if those
11 conditions are not met, there will be consequences. And so
12 what you have just said to me is critical because, not just
13 for this case but for future cases, in terms of our ability
14 to enforce the agreements that people sign.

15 VICE CHAIR PERDUE: Can I get a quick -- this is very
16 helpful. What you said is focusing, I think on the
17 signatures. We no longer do a Site Plan Enforcement
18 Agreements.

19 MS. ROSENFELD: Correct.

20 VICE CHAIR PERDUE: Okay, but we still do the signature
21 sets.

22 MS. ROSENFELD: Correct, and the condition now requires
23 the submittal of the signature set and development program.

24 VICE CHAIR PERDUE: So, I want to -- from my own
25 thinking, I want to put the Site Plan Enforcement Agreement
26 aside for the moment and focus on the signature set and make

1 sure I understand what you are saying. Your view is that
2 looking at 50-41 that a planning board action -- that the
3 signature set is a planning board action, within the
4 definition as given in 50-41.

5 MS. ROSENFELD: Absolutely.

6 VICE CHAIR PERDUE: That it's -- the terms and
7 conditions and other limitations made by the planning board.

8 MS. ROSENFELD: And other obligations or limitations
9 made by the planning board, not only made by the planning
10 board but required by the zoning ordinance.

11 VICE CHAIR PERDUE: Okay.

12 MS. ROSENFELD: To be submitted, signed by the
13 applicant and then signed by the board chair or its
14 designee.

15 VICE CHAIR PERDUE: Okay, so that, as I was working my
16 way through trying to sort out the pieces of this, what I
17 was, one of the piece that I got to was trying to understand
18 the significance of a signature set. That -- I understand
19 the significance of a site plan, that's easy. But a
20 signature set does it have an independent effect over and
21 beyond the site plan. And up until this point, I hadn't
22 thought it did. We were kind of bringing it in through the
23 Site Plan Enforcement Agreement and we had other ways of
24 trying to give it some significance, some legal significance
25 from an enforcement point of view.

1 But what I understand you are saying now is you think
2 it does have independent significance aside from the Site
3 Plan Enforcement Agreement and that's -- that changes my
4 understanding. So that's very helpful. Thank you.

5 COMMISSIONER WELLINGTON: Well, the one question I was
6 going to ask, you mentioned, it's mentioned in the staff
7 report BUT we just haven't discussed here, section 59-D3.6,
8 which is additional enforcement authority and incorporates
9 50-41 which is failure to comply with a site plan, and this
10 is, if the planning board refines any plan approved under
11 this section on its own motion or after a complaint is
12 filed, this is actually what the complaint is filed based on
13 this, we can revoke a site -- we can revoke our approval of
14 a site plan under this condition. And we can take any other
15 action that is allowed under 50-41, so these things act
16 together in tandem. So our enforcement authority is in two
17 places in a code.

18 CHAIRMAN BERLAGE: Well, that leads me to conclude that
19 we have properties in excess of 35 feet that are in
20 violation of a planning board action.

21 COMMISSIONER ROBINSON: I second if that's a motion,
22 Mr. Chairman.

23 CHAIRMAN BERLAGE: I don't make motions, I'm the
24 Chairman. But somebody else can.

25 COMMISSIONER ROBINSON: I move that the buildings in
26 excess of 35 feet are in violation of the site agreement.

1 COMMISSIONER WELLINGTON: And the signature set.

2 COMMISSIONER ROBINSON: And the signature set -- no
3 they are in violation of the signature set

4 COMMISSIONER BRYANT: You can't say specifically
5 building, don't you have to be a little more specific?

6 CHAIRMAN BERLAGE: Residential buildings.

7 COMMISSIONER BRYANT: The residential buildings that
8 were designated to be built to a maximum ceiling height,
9 maximum height of 35 feet, as defined in the zoning
10 ordinance and exceed 35 feet are in violation of the
11 signature set.

12 VICE CHAIR PERDUE: Could we just at the risk of being,
13 would you accept a friendly amendment, I think it's friendly

14 CHAIRMAN BERLAGE: We don't have a second yet, so see
15 if you can make it more friendly

16 VICE CHAIR PERDUE: That it's in violation of a
17 planning board action.

18 COMMISSIONER ROBINSON: Yes, I will definitely accept
19 that. That's very appropriate, it's more precise.

20 VICE CHAIR PERDUE: That is the language of the code.

21 COMMISSIONER ROBINSON: It's much more precise.

22 VICE CHAIR PERDUE: Then you can offer whatever
23 rationale, I mean

24 CHAIRMAN BERLAGE: Is there a second to Mr. Robinson's
25 motion.

1 COMMISSIONER WELLINGTON: I second that. And on the
2 basis that planning board action which is includes the
3 signature set and which is incorporated by reference in the
4 Site Plan Enforcement Agreement.

5 CHAIRMAN BERLAGE: All right, we have a motion and a
6 second.

7 COMMISSIONER ROBINSON: I would like to speak

8 CHAIRMAN BERLAGE: Is there any discussion on the
9 motion?

10 COMMISSIONER ROBINSON: Yes, I would like to speak
11 briefly to the motion. I think I have made my feelings
12 fairly clear by prior remarks. In light of the distinction
13 between the limits that might have been allowed under the
14 project plan and those that are in the signature set I will
15 reserve the, how grave this violation is until we get to the
16 discussion of remedies.

17 COMMISSIONER WELLINGTON: Well, I will also like to
18 speak to, I supported the motion, I seconded the motion. I
19 believe that this is a serious violation. As I mentioned
20 earlier, but just to explain my rationale, the fact is that
21 the applicant prepared the documents and voluntarily limited
22 itself to the height of 35 feet for townhouses and single-
23 family homes and 45 feet for multifamily and their agents
24 were to act accordingly. And that didn't happen. So, on
25 that basis I find a violation and will deal with the remedy
26 when the time comes.

1 CHAIRMAN BERLAGE: Anything further? All right, on the
2 motion, all in favor of Mr. Robinson's motion, please say
3 aye.

4 ALL 5 COMMISSIONERS: Aye.

5 CHAIRMAN BERLAGE: Any opposed? Any abstentions? By
6 five to 0 vote that motion carries, now I think we are at
7 setbacks.

8 VICE CHAIR PERDUE: We have setbacks.

9 CHAIRMAN BERLAGE: Would staff like to -- were you
10 going to recommend a motion?

11 COMMISSIONER WELLINGTON: I was going to approve all
12 the staff recommendations as to setbacks.

13 COMMISSIONER ROBINSON: Second.

14 CHAIRMAN BERLAGE: All right. We have a motion and the
15 second. I would just like clarification as to whether this
16 particular violation would be based on a violation of the
17 site plan or a violation of the signature set or, you know,
18 is this in the first -- same category as the first motion,
19 or the second motion, or is this a third category? So the
20 record is clear.

21 MS. KRASNOW: It would appear to me that all the
22 documents, opinions, signature set et cetera, set forth a 10
23 foot front setback.

24 CHAIRMAN BERLAGE: Okay.

25 MS. KRASNOW: Requirements. And as has been explained
26 in my staff report, those structures that are located on a

1 corner, such that you might be looking at the front door and
2 realize that's the front yard and you may think the side of
3 that building is a side yard. The issue here is still that
4 the house on the corner is consider to have two front yards.
5 So the 10 foot setback would apply in each case.

6 VICE CHAIR PERDUE: Can I?

7 CHAIRMAN BERLAGE: Any discussion?

8 VICE CHAIR PERDUE: Yes, this one I had different
9 concerns about. But looking at the footnote in the site
10 plan, the footnote language which is discussed in your staff
11 report at page 11, the planning board reviewed the setback
12 and found that that no setback is necessary per approved
13 master plan. I guess, I find that language ambiguous, you
14 know. "No setback is necessary" sounds rather like no
15 setback is required.

16 COMMISSIONER BRYANT: Well, it says per the approved
17 master plan, though, doesn't it?

18 MS. KRASNOW: Right if you read the paragraphs
19 immediately underneath that where it says, this wording
20 seems to imply the board found at the time of site plan that
21 no setback from the street was required. But since the 10
22 foot standard still appears, one has to assume that the
23 wording of the footnote was meant to imply to the board
24 could have taken it down to zero.

25 VICE CHAIR PERDUE: Yes, I guess that's why, the problem
26 I'm having is that an alternative interpretation is that

1 there's this proposed language. And I know ordinarily
2 proposed means that's what we're approving. It's very odd
3 wording. So I am just trying to make head or tails of
4 language that says, it's in essence saying you didn't have
5 to do this, but since you have done it, we will stick you
6 with it.

7 MS. KRASNOW: The problem we had, the staff had in
8 terms of looking at this is, if you look up above where it
9 talks about the project plan opinion where it says, from any
10 street and there's once again an asterisk. The note there
11 is that no minimum setback is required in accordance with an
12 approved master plan.

13 VICE CHAIR PERDUE: If in accordance, and then we get
14 the next, that's the project plan. And then the site plan
15 says that the master plan does not require it.

16 MS. KRASNOW: It is my belief that the master plan does
17 not require it, but I am not aware of any planning board
18 specific action that said, we want it to be zero. It just
19 said the planning board recognized that it could be reduced
20 to zero.

21 VICE CHAIR PERDUE: Why did they say. It's just very
22 odd for the planning board to say, We are doing this, we
23 could have done something different, and that would have
24 been fine too.

1 MS. KRASNOW: I wish I could answer that question for
2 you. I agree that they are confusing and they seem to
3 contradict one another.

4 VICE CHAIR PERDUE: And does that.

5 COMMISSIONER BRYANT: May I ask a question?

6 VICE CHAIR PERDUE: I just want to find. Is that the
7 footnote is what, I was looking for it in the signature set
8 there.

9 MS. KRASNOW: It is not in the signature set data
10 table, if that's what you are asking.

11 VICE CHAIR PERDUE: The footnote is.

12 MS. KRASNOW: I don't believe.

13 VICE CHAIR PERDUE: We just have setbacks?

14 MS. KRASNOW: Let me just check before I say that.

15 CHAIRMAN BERLAGE: Take your time.

16 COMMISSIONER BRYANT: While she is looking that up, MA,
17 DPS essentially put the stop work order on this. Did they
18 indicate why they looked at the 10 foot as a violation?

19 MR. MA: Yes, because.

20 COMMISSIONER BRYANT: Why don't we talk about that?

21 MR. MA: I think it's always DPS and our
22 interpretation, any corner lots, there are two front yards.

23 COMMISSIONER BRYANT: Right.

24 VICE CHAIR PERDUE: Yes, but that's the two front
25 yards, but if there is no setback, did they find there is
26 setback requirement?

1 MR. MA: Yes.

2 VICE CHAIR PERDUE: Aside from front yards or no front
3 yards I am trying to figure out what the footnote means.
4 It, let me put it in this way, if the master, if the site
5 plan had said no setbacks are required, if it had said that,
6 would we have a discussion about front yards versus side
7 yards and two front yards?

8 MR. MA: Probably not. I think that the footnote's
9 really from the zoning ordinance and the zoning ordinance
10 says, no minimum setback required if accordance with master
11 plan. I, this is my understanding. The footnote is for
12 particular area, the master plan may say, Well for this
13 development, for this property setback from street is not
14 necessary. The master plan may say that and I am not
15 talking about for this area. Maybe for different areas for
16 master plan. That's why the zoning ordinance has that
17 footnote.

18 CHAIRMAN BERLAGE: I don't know if this helps, but then
19 I read on in the staff packet and it says, the data table on
20 all of the documents, project plan drawings, site plan
21 signature set, et cetera, clearly shows that the setback
22 from any street is 10 feet and that the front yard setback
23 is 10 feet. So is this a situation similar to the heights
24 over 35 feet where whatever the site plan says, the
25 signature set was clear that there needs to be a setback and
26 we can find a violation on that basis?

1 MS. KRASNOW: Indeed if you look at the data table, the
2 one that has been referred to so often in this exhibit, it
3 in fact has two different references to setbacks. One at
4 the top which talks about minimum building setbacks where it
5 says from any street 10 feet. And then in the middle part of
6 that table where we have the single family detached
7 townhouses, courtyard townhouses, and multifamily for a
8 front yard setback, it says 10 feet all the way across.
9 That is not.

10 CHAIRMAN BERLAGE: So if there is ambiguity in the site
11 plan and I don't concede that there is, but if there is, it
12 really doesn't matter because the signature set is clear?

13 MS. KRASNOW: I believe that to be true.

14 VICE CHAIR PERDUE: And the footnote. I am not looking
15 at that one, the footnote doesn't appear in the.

16 MS. KRASNOW: No, it does not.

17 VICE CHAIR PERDUE: In the signature set.

18 MS. KRASNOW: No, it does not.

19 VICE CHAIR PERDUE: Okay, thank you.

20 CHAIRMAN BERLAGE: We're still on the motion. Mr.
21 Robinson, Mr. Bryant.

22 COMMISSIONER BRYANT: I still have a question though,
23 only because of the fact I am intrigued by the concept of,
24 what was it, facial ambiguity. I love that, lawyers speak
25 nice.

26 COMMISSIONER WELLINGTON: What kind of ambiguity?

1 COMMISSIONER BRYANT: Facial.

2 COMMISSIONER WELLINGTON: Facial.

3 COMMISSIONER BRYANT: DPS however, is the agency that
4 in fact issued the stop work order.

5 MS. KRASNOW: That is correct.

6 COMMISSIONER BRYANT: Is there anyone from DPS here
7 today?

8 MS. KRASNOW: Yes, there is.

9 COMMISSIONER BRYANT: I am sure they have dying to come
10 up. And the reason why this is of interest to me is because
11 some of what we heard suggested that DPS was not involved in
12 other aspects. And so here, we have a clear indication that
13 DPS is involved. And so I just need to get the
14 clarification. Oh, Mr. Hubbard, I didn't know you were
15 here.

16 MR. HUBBARD: Robert Hubbard from the Department of
17 Permitting Services. Commissioner Bryant, we have not
18 stopped work on these, we have not approved a wall check,
19 which is a required inspection on buildings under permit.
20 We receive surveys from the builders during the course of
21 construction that show walls under construction and their
22 setback from adjacent properties and streets. We rely on
23 information that we receive from planning staff in terms of
24 what those setbacks are in the optional method zones.

25 In this instance, we were told it was 10 feet. So any
26 site plan that we received with less than 10 feet for yard

1 requirement, we would not approve the inspection. That then
2 stops the inspection process on those buildings. But we do
3 not issue a formal stop work order.

4 COMMISSIONER BRYANT: Okay, got you. That's very, very
5 helpful.

6 MR. HUBBARD: Okay, thank you.

7 COMMISSIONER BRYANT: Thank you very much.

8 CHAIRMAN BERLAGE: We have a motion before us to find
9 the setbacks in violation, as recommended by staff. Is
10 there further discussion. All in favor, please say Aye.

11 CHORUS OF AYES (PERDUE, BRYANT, ROBINSON, WELLINGTON,
12 BERLAGE): Aye.

13 CHAIRMAN BERLAGE: Any opposition, any abstentions? By
14 a vote of five to zero that motion carries.

15 The board at this point has essentially adopted the
16 staff's recommendations and found violations of height and
17 setback.

18 And we will therefore proceed to **item number three** on
19 the agenda, which is the proposed plan of compliance.

20 We will get a report from the staff and then we will
21 receive 30 minutes, up to 30 minutes of presentation from
22 the complainants. And up to 30 minutes of presentation from
23 the respondents, followed by a small amount of public
24 testimony. And then the board will decide what plan of
25 compliance it may chose to impose for these violations.

1 And I know everybody has been working hard all day.
2 But we are going to just keep right on going. And I will
3 turn to Rose Krasnow.

4 MS. KRASNOW: Thank you, Mr. Chairman. The issue of
5 compliance is not an easy one. I think that everyone here
6 would agree that Clarksburg Town Center has in fact been an
7 exceptionally successful project with buyers sleeping
8 overnight in their cars in order not to miss out on
9 purchasing units and with housing values rising steadily.
10 Moreover, as pointed out in the staff report, staff felt
11 that at least the majority of the units were in conformance
12 with the board's direction that buildings not to be taller
13 than, the residential buildings not be taller than 45 feet.

14 On the other hand, as planners we also recognize all
15 the work that went into the original vision of this
16 community. And so for me to say that the fact that the
17 property values have gone up does not perhaps alone talk
18 about any damage that may have been experienced here.

19 However, I think it's important to remember that this
20 is a project that still is in the process of being built.
21 Roads are still not topped, many trees either have not been
22 planted or haven't had a chance to grow, and construction
23 equipment is everywhere.

24 Having spent a great deal of time out at this community
25 this past weekend, it is small wonder that citizens feel a
26 great deal of frustration at this point in time but many of

1 | these concerns will be taken care off as this community
2 | matures.

3 | Nevertheless, I am in no way trying to minimize the
4 | seriousness of the violations that have occurred. With
5 | respect to the recommended citations, fines and plan of
6 | compliance, staff had to walk a fine line. Staff feels that
7 | it is critical to sanction the builders through fines for
8 | failing to comply with their site plan documents and their
9 | Site Plan Enforcement Agreement, notwithstanding the fact
10 | that they, that at least in case of Site Plan Enforcement
11 | Agreement it appears to be more stringent than the board's
12 | finding simply of four stories.

13 | These fines are designed to act as a deterrent to
14 | others who may have similar disregard for the actions of
15 | this board.

16 | At the same time staff is acutely aware and you heard
17 | it expressed today that the violations on the part of the
18 | developers and builders have put many innocent third party
19 | at risk. Those who have bought dwellings and who have lived
20 | in them for some time, now have a cloud of title on those
21 | residences. And those people that have placed down payments
22 | down and signed a contract and arranged mortgage loans and
23 | so on and so forth need immediate remedy from this board so
24 | that they can proceed.

25 | In this regard, and I really feel very strongly about
26 | this, we have heard from many people today about whether the

1 commission is just going to paper over these violations.
2 That is absolutely not a fair characterization in staff's
3 opinion. Even the complainants are willing to admit that
4 they do not feel that purchasers should be kicked out of
5 their homes so that these units can be torn down and rebuilt
6 to the stricter standards.

7 If we are not going to require such a drastic action,
8 then it is imperative that we amend the documents because we
9 can't have this inconsistency and have clear title. So it
10 would be imperative that we change the documents to reflect
11 the as-built environment for those units that are already
12 there.

13 Therefore, staff does indeed recommend that with
14 respect to the existing units, and the townhouses that are
15 over 35 feet that the board find that we can amend the plan
16 documents to reflect those as-built dwellings.

17 I was going to say that the townhouses that are
18 proposed that would also be over 35 feet would be allowed to
19 go forward but given your recent finding that anything over
20 35 feet is in violation, I am not going to go there.

21 With respect to unbuilt units, staff has in fact said
22 that the future multifamily buildings must comply with the
23 45-foot height limit and that all future structures must
24 comply with the 10-foot setback standard. So there I think
25 we are clear.

1 In other words on any other multifamily buildings that
2 have not yet been built, we would expect those to comply
3 with the 45 foot height limit.

4 But the bigger question for the board at this point is
5 for two-over-twos. Again there was one building of two over
6 twos where staff is recommending that even though it is not
7 built all of the contracts have been signed and we feel that
8 that building should be allow, fines should be assessed, but
9 that that building should be allowed to be built.

10 Furthermore, staff believes that through the assessment
11 of fines, additional amenities can be provided that will
12 help to mitigate any damage that may have occurred as a
13 result of these violations.

14 And again someone mentioned earlier today that it
15 didn't make sense to require amenities that the developers
16 are already required to provide. That is not what we are
17 talking about here. Developer is still expected to provide
18 all amenities. These fines if the board chooses to do so
19 could be directed toward the provision of additional
20 amenities that would benefit the entire Clarksburg Town
21 Center community.

22 Staff has not recommended a package of amenities at
23 this time because it was our hope that the parties could
24 come together and determine what would be best for all
25 concerned. What we have proposed is that an amenity package
26 be brought forward in conjunction with the board's

1 consideration of later Phases of Clarksburg Town Center,
2 specifically Phase three, which you are currently scheduled
3 to hear in October. That concludes my staff presentation.

4 CHAIRMAN BERLAGE: Did you state the proposed fines,
5 Ms. Krasnow?

6 MS. KRASNOW: I am sorry, I did not.

7 CHAIRMAN BERLAGE: I didn't hear that, okay. You need
8 to do that.

9 MS. KRASNOW: Yes, I do.

10 CHAIRMAN BERLAGE: And the basis for the number.

11 MS. KRASNOW: The fines that we are recommending, you
12 heard often mentioned the \$500 figure. We are basically
13 recommending that the \$500 be assigned for each unit found
14 in violation of height, twice. Let me explain that. On the
15 date that the building permit was issued, we feel that there
16 should be a violation charge of \$500 and on the date the
17 construction began, we assess the fine of \$500. So that for
18 each unit, and that would be a fine to Newland, the
19 developer, and a similar fine of \$1,000 to the builder in
20 question for each of those units.

21 What I can't tell you at this time, as we have already
22 indicated here is the exact number of units. It is going to
23 take us a little while, I think to verify every unit out
24 there that may not be in compliance. Our estimate is, based
25 on information we have received from developers, from our
26 own crews going out, is that with respect to building

1 heights, and I need to look at my own staff report, we are
2 talking about 433 townhouse units that exceed the 35 foot
3 height limit. We are talking about 26 unbuilt and, excuse
4 me, 26 built and 16 unbuilt two-over-two units. And we are
5 talking about 30 multifamily units in building three.

6 With respect to setbacks we have an estimate made at
7 102 violations. Again, we would like to verify those
8 numbers. And again we are recommending that two separate
9 \$500 fines be assessed for each of those, and that those be
10 assessed again against Newland and against the builder in
11 question.

12 CHAIRMAN BERLAGE: Then, so far as you don't have the
13 exact numbers today, are you in your staff report, and
14 probably Michele needs to get involved in this, are you
15 essentially recommending as we have just done with the
16 height issue that the board sets the parameters and then
17 you, at the staff level will issue the citations as
18 appropriate within those parameters, which I believe the
19 staff has the power to do. You don't need to come back to
20 us to issue a citation. Is that correct?

21 MS. KRASNOW: That is correct.

22 CHAIRMAN BERLAGE: All right, so in terms of nailing
23 down these last little details. If the board agrees with
24 your recommendation, you would be able to implement that at
25 the staff level, you would not have to come back a second
26 time?

1 MS. ROSENFELD: That's correct. The board would set
2 the parameters on the fines.

3 CHAIRMAN BERLAGE: I just want to be clear on that.
4 All right, and that's the staff presentation. Are there
5 questions for staff before we go to Mr. Knopf?

6 COMMISSIONER BRYANT: Yes. In terms of your
7 recommendation I've determined from my standpoint that there
8 are three types of essential homeowners. Those are, there
9 are those who are waiting to move into a complete, completed
10 unit. Those who have a contract and the unit is under
11 construction. And those who have a contract yet to start
12 construction.

13 If I understand your recommendations correctly, the
14 first two completed units and units under construction,
15 those people will be held harmless so to speak, because
16 those units will be allowed to move, to either remain and be
17 factored in as or quote grandfathered in or changed the
18 document in order to make them legitimate.

19 And the second one those the construction will continue
20 on.

21 But for the third one, those who have contracted to
22 build, to buy something where it has not started, that means
23 they will get caught in the revised process based upon
24 whatever decision comes out. Is that correct?

1 MS. KRASNOW: No sir. It is our recommendation that
2 anyone who has a contract to purchase, whether or not it has
3 been started, that those units should get to go forward.

4 COMMISSIONER BRYANT: Okay.

5 MS. KRASNOW: It is only on those units that have no
6 contract.

7 COMMISSIONER BRYANT: No contract.

8 MS. KRASNOW: No building permits.

9 COMMISSIONER BRYANT: Okay.

10 MS. KRASNOW: That we feel that that's another issue to
11 decide.

12 COMMISSIONER BRYANT: Okay.

13 COMMISSIONER WELLINGTON: So, the ones that, something
14 that is a future buildings, this does not apply to unbuilt
15 buildings.

16 MS. KRASNOW: Let me explain.

17 CHAIRMAN BERLAGE: Built and (inaudible)

18 MS. KRASNOW: Let me use the.

19 COMMISSIONER WELLINGTON: unbuilt without a contract.

20 MS. KRASNOW: That's correct. It does not apply to
21 unbuilt without any contract. But the board is going to
22 have decide whether they want to impose the lower
23 restriction. We had in, originally in the staff report. We
24 had recommended that the multifamily buildings over 45 feet,
25 proposed multifamily building, would have to be adjusted to
26 come below 45 feet.

1 If I understand the board's violation decision, they
2 are also saying that the townhouses that are over 35 feet
3 are in violation. We did, we had said that we felt the
4 townhouses could be approved up to 45 feet. The board may
5 not.

6 VICE CHAIR PERDUE: That's the board said they were in
7 violation because no amendment had been sought.

8 MS. KRASNOW: Correct.

9 VICE CHAIR PERDUE: That doesn't tell us.

10 COMMISSIONER BRYANT: That they can't seek amendments.

11 MS. KRASNOW: The board did not reach that issue for
12 purposes of a plan of compliance.

13 VICE CHAIR PERDUE: Yeah, I think that's not been
14 decided yet. We, it's just not been decided, I don't think
15 anything we did in that,

16 MS. KRASNOW: Okay. I just wasn't sure because the.

17 VICE CHAIR PERDUE: No, I don't think anything we did
18 there precludes.

19 COMMISSIONER WELLINGTON: No, wait, Rose. On page five
20 of your decision, when you said, second full paragraph,
21 staff does recommend timely corrective action from all
22 single family units. You have in parentheses built, unbuilt
23 and under contract, but then you also have and unbuilt with
24 no contract. So I thought that meant everything.

25 MS. KRASNOW: Yes, well

26 COMMISSIONER WELLINGTON: I didn't understand that.

1 MS. KRASNOW: Let me see if I can rephrase. When I
2 wrote what I wrote at the time, that was exactly what I was
3 trying to say. In light of the way the board acted I would
4 hesitate to say, it was our staff's opinion that townhouses
5 that were taller than 35 feet, even though the data table
6 said that townhouses could not be 35 feet. It was staff's
7 opinion that even unbuilt townhouses that were up to the 45
8 foot limit should be allowed to proceed as planned.

9 VICE CHAIR PERDUE: That was your recommendation.

10 MS. KRASNOW: That was staff's recommendation.

11 VICE CHAIR PERDUE: You are worrying whether we did
12 something that invalidated.

13 MS. KRASNOW: I am.

14 VICE CHAIR PERDUE: We will take. If we think would
15 invalidate it, we'll let you know.

16 COMMISSIONER WELLINGTON: But your recommendation went
17 to everything.

18 MS. KRASNOW: My recommendation went to everything.

19 COMMISSIONER WELLINGTON: Okay.

20 MS. KRASNOW: And to go back somewhat to what I said
21 earlier, if you go back and look at the master plan which
22 has been held up many times as what we are supposed to look
23 at for vision. In staff's opinion, the master plan sets
24 forth a height limitation for residential structures of four
25 stories.

1 COMMISSIONER WELLINGTON: No, I understood your
2 recommendation. It's just when you made that change I
3 thought I'd read it, that's. I just want to understand and I
4 do want to ask as we hear testimony if we know how many
5 units we have in these different categories. In other
6 words, completely built, partially built under contract.
7 You don't have to tell me right now, but I don't.

8 CHAIRMAN BERLAGE: Yeah, we have a piece of paper, I
9 just showed it to her.

10 COMMISSIONER WELLINGTON: I don't think it tells you
11 which are under contract.

12 MS. KRASNOW: No, it does not.

13 COMMISSIONER WELLINGTON: So we don't know that, okay.

14 MS. KRASNOW: We can find that out.

15 COMMISSIONER WELLINGTON: Okay.

16 MS. KRASNOW: But it basically says 400 and something
17 units have not been started yet and I don't know which of
18 those are under contract.

19 COMMISSIONER WELLINGTON: And you don't know if all the
20 others are under contract, the near completion ones?

21 MS. KRASNOW: They are.

22 COMMISSIONER WELLINGTON: They are.

23 CHAIRMAN BERLAGE: Mr. Knopf, on the plan of
24 compliance.

25 MR. KNOPF: we're going to switch order.

26 CHAIRMAN BERLAGE: As you wish.

1 MS. PRESLEY: First, as it pertains to possible limit
2 of sanctions or extent of those. I need to clarify for the
3 record what the board was discussing previously, pertinent
4 to the preliminary plan, the project plan, and site plan and
5 submission and when the drawing plans were submitted.

6 In every case as on file with your records beginning
7 with the project plan, the project plan is submitted by the
8 developer with signature prior to the hearing by the board
9 of that project plan drawing set. It is then modified, in
10 some cases twice, some cases three times, as with the
11 preliminary plan which was submitted November 23, 1994,
12 prior to the staff or excuse me, the board opinion which was
13 issued September 28, 1995.

14 So thereby I would like to clarify that the board did
15 in fact as did the staff have a drawing submitted with the
16 definitive table with an intent that the opinion was based
17 on. There would be no need in my opinion not as a legal
18 person, there would be no need for this board to have to
19 specifically detail everything that's contained in that
20 drawing or the drawing might as well be the opinion.

21 It's done, it's submitted to the staff, reviewed by the
22 staff, submitted to you, approved, and that's what in the
23 record.

24 So I get little worried when I start to hear language
25 that sounds like you're actually setting it up so that the
26 developer can later say, Well, no one ever really meant 35,

1 everybody meant 45. So let's not sanction any of that.
2 Let's just go on about our business doing what we please.
3 And then it's especially offensive, when everyone I believe
4 here today has heard and can look at the master plan that
5 had a specific reason, more than twice key policies driving
6 the master plan, compliance in scale and compatibility with
7 the historic district. To say that no damage is done at
8 this point is a travesty.

9 I am absolutely incensed. I've spent 700 hours
10 researching this and it's not for any personal motive, I can
11 guarantee you that. I have lost more than \$95,000 in
12 personal consulting time working on this. And to sit here
13 before a board that acts like they don't know how the
14 drawings are approved, it gives me no sense of security at
15 all.

16 And now regardless of what we stated to you and
17 implored you not to go forward to the sanctions till you
18 know the full extent of the implications of the violations,
19 here you go doing it again.

20 Does that mean I have to have a reconsideration and a
21 reconsideration of a reconsideration to get anything done
22 appropriately? I don't even know if I can say anything
23 else, Norm. I'm, I'll talk to a few of these.

24 As far as units that are already built and occupied.
25 No one among my committee would want to have to damage any
26 third party person including ourselves or the community that

1 was in existence before the project plan was approved and
2 the preliminary plan was approved and the developer chose to
3 willfully violate. We don't want to hurt any of the third
4 parties.

5 But there has been damage done to a greater number of
6 people, to a community at large, to the entire community,
7 the entire county's faith in this board and in the process.
8 And to sit here and say that's it's no big deal. Oh, well,
9 you know, they could just come in for an amendment. I am
10 just astounded.

11 There are buildings that are built that there was clear
12 definition of standards that had been violated. Those have
13 to be addressed. Without, if you can't even send someone
14 from community based planning back out to take a look at how
15 these effect what was intended to be the town center and
16 then you are going to sit here and impose the sanction, it
17 makes no sense at all. How do you know, can anyone among
18 you tell me what has happened to O Street and where those
19 buildings sitting right now whether or not you are going to
20 be approving today for someone to move into an area that
21 needs to be remedied.

22 And if they can't move in, then I say look to the
23 developer and impose a sanction that's going to cause the
24 developer to take care of that innocent victim. Certainly
25 at least look back to August of 2004 when we made clear to
26 the developer that there was an issue with the height. When

1 | we questioned your staff, we got it on record. You've got
2 | six inches of emails and documentation on file from us to
3 | your staff, from your staff to us, to developers, notes of
4 | meetings held and nothing has been done.

5 | And in the meanwhile now because they raced to build
6 | all the rest of those units, those are going to be included
7 | as those that, Well we can't really do anything about it.
8 | Let's not knock down ceilings and let's not do any of that
9 | because they're already built.

10 | Well, they are already built because the developer
11 | chose to ignore the warnings. Because this board wasn't able
12 | to hear appropriately since staff submitted continually
13 | false documentation and incomplete records. And now we are
14 | going to have to sit here and listen to you make a ruling on
15 | a violation. I don't have anything else to say, Norm,
16 | sorry.

17 | MR. KNOPF: As you have probably gathered citizens'
18 | worst fears has now been confirmed. This board has made
19 | very clear, one, they are not interested in finding out all
20 | violations before going ahead with the sanctions. You are
21 | foreclosing meaningful remedies such as on O Street and the
22 | mews if you go ahead and immediately adopt these sanctions.
23 | There is no other excuse. You are closing your eyes. This
24 | is exactly what I pleaded, we pleaded with you not to do to
25 | reestablish the integrity of the planning process.

1 CHAIRMAN BERLAGE: We're here listening to you, Mr.
2 Knopf. We are not closing our eyes. Give us your arguments.

3 MR. KNOPF: Maybe the eyes are the wrong, the ears I'm
4 worried about.

5 VICE CHAIR PERDUE: May I ask you a question.

6 MR. KNOPF: Yes.

7 VICE CHAIR PERDUE: I am confused. If with respect to
8 say that, if, for example, the townhouse that's on the O
9 Street location, if that turns out to be one of the houses
10 that's over 35 feet and if the board were to say okay, we
11 are going to say that as to that house it's all right that
12 it's over 35 feet. Suppose we did that. How does that
13 decide that it's all, that says nothing about whether it's
14 also okay that it's built in the wrong location.

15 MR. KNOPF: As I hear the staff's recommendation and
16 what I hear you entertaining is that you will okay those
17 things which have been built or are going to be built and
18 maybe what you have to do on certain units is literally tear
19 them down.

20 VICE CHAIR PERDUE: What I heard staff, maybe we have
21 some imposition of language, is that they're okay with
22 respect to height. And if it's built, if it's built where
23 the mews is supposed to be, that's a different issue that
24 hasn't been addressed. If it's built where a swimming pool
25 is supposed to be, that's a different issue. That saying
26 the building is not too tall wouldn't predetermine.

1 MS. PRESLEY: How would staff know whether that
2 particular building is going to be acceptable to be amended
3 when they don't even have on record the exact buildings?

4 VICE CHAIR PERDUE: They wouldn't.

5 MS. PRESLEY: The point is to height. Answering your
6 questions as to height.

7 VICE CHAIR PERDUE: I am still con.

8 MR. KNOPF: The answer.

9 VICE CHAIR PERDUE: How does deciding that its height
10 is all right predetermine whether its location is all right?

11 MR. KNOPF: What it's predetermining is it is a very
12 careful, precise analysis that you are doing, a pigeon
13 holing each violation, and you will assess it without
14 reflecting on the other violation. I would suggest if it's
15 in the wrong location, it's the wrong height, and has wrong
16 setback, you might be willing to lower the height or move
17 the building. But when you say it \$500 for the first two
18 and, Oh you are also on the wrong location, well that's a
19 lesser offense now because I didn't look it as a whole.

20 COMMISSIONER ROBINSON: Come on, Norm.

21 CHAIRMAN BERLAGE: This is my fault, I shouldn't have
22 interrupted you, except that I jus felt you were proceeding
23 on a false assumption. The board is here to listen to
24 anything you want to have to say. Please don't assume we
25 have decided the plan of compliance. We want to hear from
26 you, so we can then decide what the plan of compliance is.

1 MR. KNOPF: We would again.

2 COMMISSIONER ROBINSON: It does not help your cause by
3 accusing us of prejudgment.

4 CHAIRMAN BERLAGE: Go ahead, Mr. Knopf.

5 MR. KNOPF: I think I will, thank you.

6 CHAIRMAN BERLAGE: Let's let him finish.

7 MR. KNOPF: I would love to be, my fears to be proved
8 wrong, thank you.

9 What I, what we do hear is, one thing I think
10 everybody has agreed to and I hope you would keep that in
11 mind in the sanctions that on the setback violations that
12 was not only a violation of the signature set, but also your
13 opinions. It was in all the documents I believe Rose stated
14 that each of the documents had 10 feet. Your opinion and the
15 other documents. So it may be different than the height
16 which you correctly pointed out, the opinions said one thing
17 and perhaps one thing in the signature set said another. So
18 that is a very clear violation. And I hope you'll keep that
19 in mind when you consider the sanctions.

20 What I also hope we would keep in mind is what the
21 citizens is looking for to just truncate what Ms. Presley
22 said. The project plan by law has to be done before your
23 site plan. The project plan by law, I am referring to
24 section 59-D-3.4 must be done, and when you approve your
25 site plan, it has to be consistent with the project plan.
26 Your project plan before you at the time of the site plan

1 was signed and approved and had the 35 feet and the 45 feet
2 limitations. You had to find it was consistent with that.
3 If you didn't, you were making an illegal plan and that's
4 what's being violated. As Ms. Wellington said, it was very
5 clear and we find this to be a very slippery slope that you
6 would impose sanctions based upon what the planning board
7 opinion might have said some places to compare it with what
8 the final signature set said. A signature set must be taken
9 as the gospel and any violation of that has to be severely
10 sanctioned.

11 This is essential if we are to give any meaning to your
12 whole process which leads up to the signature set, that is
13 the culmination. And when I hear people say is, Well we had
14 some language in our opinion which didn't quite comport with
15 the signature set. The duty is on the developer before he
16 signs off on the signature set, before he prepares it and
17 submits it to you to say, Hey we don't agree with that's
18 what should be required in the signature set. He didn't do
19 that. He is bound by it. Otherwise this whole process as
20 far as the citizens are concerned is a charade. You go
21 through the whole process, get the final binding legal
22 document and guess what we discover, Well, if you violated
23 it's technical, because our opinion didn't really address it
24 or sort of indicated something else. Or as staff now
25 suggest, Or if you find something in the planning board
26 opinion which sort of indicated that you could have a little

1 more leeway, the staff has a discretion to change it. The
2 most fundamental thing, height, can be totally changed? I
3 am sorry this must be sanctioned and sanctioned severely.

4 In terms of sanction, the law is very clear. You can
5 revoke the site plan. That will send a message. Not only
6 would it send a message but it would give you total
7 discretion and flexibility to reinstate the site plan
8 according to whatever remedies you want, according to
9 whatever conditions you want, so that you can make
10 corrective action across the board. You have clearly that
11 authority.

12 It also talks as you know of civil fines. \$500 per day.
13 \$500 period or \$1,000, with all due respect to the staff,
14 although I know what the staff makes, that may be seen as
15 considerable, but to what these houses are selling for and
16 what the profits are and what the increase sales prices are
17 due to bigger buildings, taller buildings, \$1,000 is an
18 invitation to everyone to come and violate without any
19 concern.

20 We urge you to think outside the box. What do I mean
21 by that? Perhaps you should just figure out how much would
22 it cost to bring each of these height violations down so you
23 lower the building. When you figure out that cost, I'm not
24 saying you then lower the building, that's what you fine the
25 developer in terms of \$500 per day going back a year or two,
26 you can then get, at a rate of \$500 per day for each

1 violation, you could then recover that cost for lowering the
2 building.

3 Or why don't you compare what the building would sell
4 for if it was at the correct height and the correct
5 footprint compared to what it actually sold for. And that
6 difference is the fine. That's certainly beyond the profit
7 of the developer. But if you are only taking away a little
8 or all of his profit, he is not running any risk. A severe
9 message must be sent.

10 Let's think outside of the box. We think with MPDUs,
11 which we want you to look into, maybe some of these units
12 that are yet to be built that are not supposed to be MPDUs
13 should be MPDUs, as one of the sanctions. So lets get some
14 more MPDUs in there. The developer might have to take,
15 subsidize it in the sense if you applied the fines toward
16 the MPDUs.

17 We might have to take some of the fines or the
18 developers sanctions by removing some of the buildings if we
19 can reestablish the mews or at least get rid of the couple
20 of buildings the block the church the most. I don't know
21 what the situation is. You don't know what the situation is.
22 Your staff needs to go out and be told, Go out there and
23 take a look and see if you can come up with a remedial plan.
24 Maybe some buildings could be removed, maybe something could
25 be done. And if so, then come back and we will know when
26 it's time to sanction, which it wouldn't be today. As you

1 know, heard me say, We'll have a plan and maybe for a few
2 million dollars or a few this or whatever, this can be moved
3 around and that can be moved around and we can make some
4 meaningful remedy to the situation. But we don't know what
5 that is, what that situation is and we need to have some
6 investigation for that.

7 Certainly, persons who are caught in the squeeze right
8 now who have purchased homes and are waiting to move in and
9 so on, this is a horrendous situation. That's why we
10 suggest, you next week set the hearing for the sanctions
11 and, so you don't go with another week, and in the interim
12 you get the information that's needed including these
13 monetary figures I talked about, cost of removing the
14 buildings, probably trying finding out about the MPDUs,
15 seeing if there is some remedial plan by removing some of
16 these buildings or something can be done to reestablish a
17 portion of the mews.

18 But for goodness sakes, freeze what's going on now.
19 Don't give a blanket approval. And it's waited this long, I
20 know it is difficult, we can wait another week before you
21 lock yourself into the detriment of the planning process,
22 the integrity of the process and all those residents have
23 already bought thinking they are going to get certain
24 amenities and now they are gone. They also, there is a
25 responsibility to them also.

1 And as an old saying in the law, as I'm sure Ms. Perdue
2 knows, that you know, hard cases make bad law. You've heard
3 some very hard factual situations here today of people who
4 have purchased homes and they need to go in fast. But
5 please don't make bad policy decisions that will foreclose
6 any opportunity of perhaps correcting the situation or at
7 least some mitigating it in some way.

8 But most importantly you must come up with a meaningful
9 sanction that sends out the word to the developers not only
10 in Clarksburg but to the entire development community. This
11 board takes seriously all of its hard work in coming forth
12 with site plans, signature plans, project plans. And we do
13 not countenance going ahead and just ignoring those
14 provisions or treating silence or ambiguity as an okay.
15 That will not be acceptable. You will have to pay the
16 price. If you do that, you'll save yourself a lot more work
17 in the future, I would suggest because there will be a lot
18 more compliance.

19 I urge the board also to make clear that it is the
20 signature set, where there is a clear violation of the
21 signature set, that will carry the day and that's what
22 sanctions will be based on rather than what somebody
23 interpreted your multi page opinion to say on a given page
24 or what your thought was. It's got to be reduced to the
25 signature set or as one of the commissioners said, you are
26 talking about hundreds of pages of an opinion. And if you

1 think lawyers have a field day interpreting the signature
2 set you can imagine the field day we will have interpreting
3 your opinion. So please let's not go down that road.

4 In order to have a minimal chance here of
5 reestablishing some integrity it must come from this board
6 very and key heavy sanctions and it must be made clear that
7 they are based on the fact that the developer submitted a
8 set of criteria, and he'll be held to that. And if the
9 developer cannot live with that, has a problem with it,
10 there has to be a well documented procedure which is already
11 in place, we are not creating anything new, it's under
12 statutes and your procedures to come in and get some relief
13 from that. Where that's not followed, there must be severe
14 penalties.

15 So in conclusion, what we again ask is that you
16 withhold coming forth with your sanction proposal until you
17 can get more information on the monetary cost of some of
18 these sanctions in terms of profits, in terms of teardowns,
19 you will have more information on MPDUs, you'll find, you
20 have another violation hearing. You determine your mews
21 situation, you determine exactly the location of the houses
22 that are too high and the locations where there is no
23 setback and your staff while it's out there looking at this
24 comes back and reports to you, what the impact is of those
25 violations.

1 We definitely reject the broad statement that, Oh what
2 the heck, it's only 10 feet more or whatever or could have
3 been less. Go out and look and see what this did to the
4 actual design, the concept what was sought to be achieved
5 here and implemented. You worked very hard as an
6 institution on the plan and on the master plan. And this in
7 effect says, Not to worry, what's another 10 feet up or 10
8 feet out? Oh what a precedent, I shudder at that thought.

9 Okay, with that again I urge you please take the
10 necessary steps to restore the integrity of this board in
11 the whole process. And we have more time. And Ms. Presley
12 would like to make some more comments.

13 CHAIRMAN BERLAGE: Okay.

14 MS. PRESLEY: Just returning back to the need for
15 considering all of the violations before issuing any
16 sanctions. If you take a look at just the mews situation
17 alone. There are buildings also which block the spire of the
18 church, by nature of their height. You can get a little
19 glimpse of the church from certain angles. There is some
20 open space left. If you go forward today without knowing
21 where the buildings are, whether they be already contracted
22 or simply, you know, partially under construction, you don't
23 know what else you are taking out of the master plan intent
24 because there hasn't been someone there to really validate
25 that as there apparently was not someone there to enforce or
26 validate when the mews was being destroyed.

1 So there is a great concern to the citizens that
2 without knowledge of exactly which units and where they are
3 located and the impact and interrelationship between those
4 units and other areas in the development and in a historic
5 district, that you are not going to be able to find
6 appropriately the scale and compatibility issue. You now
7 have a trickier situation because the development in its
8 entirety has been materially changed by roughly 10% across
9 the board, just in terms of height. That doesn't take into
10 account the physical structures, the relocation of buildings
11 through this, you-can-do-anything-you-want clause 38 because
12 a lot of that has happened both documented and undocumented.
13 And without someone doing a complete audit on site of what
14 was prescribed and what was accepted versus what is out
15 there now, it's a disservice to the public to go forward.

16 Then I also have to say that consider even though we
17 weren't to have brought these other issues before you today,
18 consider my discussion of the amenity phasing as a formal
19 complaint. Issuance of a formal complaint because you have
20 within your power based on that alone according to the Site
21 Plan Enforcement Agreement to stop work and it should have
22 been stopped at the 540th permit, based on the fact that
23 those amenities are not in place. The community wide
24 facilities are not there. I would request that this board
25 look at your own files to find out when the developer issued
26 to you notification that those were to have been inspected.

1 Because that has not happened in terms of what we have been
2 able to see in the file. The public would like to know when
3 you intend to carry out that inspection and how quickly the
4 work is going to be stopped. Because otherwise who can then
5 find the board in violation for not enforcing under the Site
6 Plan Agreement what you have agreed to enforce. And to say
7 that you can sit here and do partial sanctions but, on the
8 development goes. Construction as we sit, it's happening
9 today. It's been happening since the last hearing, it's
10 been happening since August. And it's your responsibility
11 to enforce the master plans, the project plan, the site
12 plans to make sure that these things are being done
13 according to what was promised to the community. You have
14 to at least understand what's been violated before you can
15 go forward.

16 So I urge you to please take a look at things like that
17 and consider today, for the record, that that's my formal
18 complaint, so that you could please follow-up on that would
19 be appreciated.

20 And as with the mews. I don't know what can be done
21 with the mews. But horrifying is too kind a word. When you
22 stand there on that site and you understand that that was to
23 have been a focal point of that community and the very thing
24 that would create that interrelationship between the
25 historic and the new. And taking that away, segregating the
26 new development, and then also determining willfully without

1 amendment that they could build beyond the height limits,
2 has precluded all opportunities to link the new development
3 with that historic district, whether it be visually or
4 physically by the vista and the mews. It's not too late to
5 remedy some of that. But it's not going to be done sitting
6 here within, you know, within this hearing room without any
7 understanding of what's left out on the project and where
8 these buildings are sited and what has to be considered.

9 Again going back to some of Norm's suggestions. The
10 community is all for thinking out of the box in terms of how
11 to enforce appropriately, but make sure that takes into
12 consideration what needs to be done to remedy the harm
13 that's been done to the entire town of Clarksburg and to the
14 individuals that there might be some interim solution that
15 the board could rule, perhaps some of the fines allocated. I
16 personally believe that all of the fines should come back
17 into the community project. And there is no reason for any
18 of them to go anywhere else due to the extent of the damage
19 that has been done. But certainly the board must have at
20 its disposal a way to cause the developer to take care of
21 those third party victims who are here today waiting to move
22 into a home and have nowhere to go. I hope that's
23 considered. But, I guess that's it. In total, just please
24 don't go to sanctions today.

25 MR. KNOPF: One more thing that, trying to be, use a
26 neutral example, not less emotional example, which is very

1 relevant here. You have very commonly in preliminary plan,
2 site plans or in dealing with optional method of
3 development, say in residential subdivision, you might say
4 the developer, what's authorized is up to X number of
5 dwelling units, say a thousand. And the developer comes
6 back for the site plan and instead of building a thousand,
7 he has laid out 920. That's fine because you said up to
8 maximum of 1,000 and that's what he could fit in. Then he
9 does 920 and you approve that signature site and they start
10 building.

11 Would I hear the staff now, would I hear the board now
12 saying, I hope I misunderstand is, well the staff could then
13 go back and amend that and put in the other 75 because they
14 originally said up to a 1,000. Even though the signature
15 set and the whole design was based on 925 because the board
16 originally said up to a 1,000 would be all right with it,
17 but you did nail it down later to 925 and the site plan was
18 based on that.

19 And it seems to me that's what's going on here. You did
20 say, well up to 45 feet in your opinion would be all right
21 and they came in with a full plan of 35 feet for the
22 townhouses and up to 45 for some other buildings. And
23 that's what you nailed down. And I find this very
24 disturbing that because the initial concept was one thing
25 that somehow the staff has the discretion to really
26 radically change what you originally approved and what more

1 | importantly the public relied on in terms of the site plan
2 | as to what existed by simply saying, it is all right the
3 | staff could have approved it. Therefore, if the developer
4 | goes ahead and does that without approval it's wrong and we
5 | appreciate that. But we'll take it into account in
6 | sanctioning, we are not going really do much of the
7 | sanctions. Please consider the precedential value in the
8 | application and other context. Thank you.

9 | CHAIRMAN BERLAGE: Thank you very much. I have one
10 | question for you, Mr. Knopf. Your allegations about the
11 | mews and about MPDUs and about amenity phasing are serious
12 | allegations and they will be seriously evaluated. They're
13 | also fairly complicated issues. And could you lay out for
14 | us how does you feel that those three additional alleged
15 | violations could be effectively analyzed in a week. That
16 | seems an awfully short amount of time to handle that.

17 | MR. KNOPF: I think no, I think on the mews it's quite
18 | simple. There is a plan showing the mews. Your staff goes
19 | out and simply looks at what buildings have been built
20 | within the designated area or a plan to be built that should
21 | be a relatively easy to determine. And also in assessing
22 | the impact, you look at the goal of what your plan was such
23 | as to see church steeple and they can take pictures and say,
24 | this is what blocks it.

25 | It will be a little more difficult I understand to come
26 | up with a complete remedy, but they should be able to flag

1 the buildings that are the troublesome buildings and then
2 maybe you put those buildings on hold or put people on
3 notice that they are not getting an okay at this point.

4 And what were the other two?

5 CHAIRMAN BERLAGE: MPDUs and amenity.

6 MS. PRESLEY: Norm, I am sorry before you go on, on the
7 mews. There is an entire area that was all green area.
8 Where is that now? It's gone, it's on an approved site plan,
9 it's on the landscaping plan. It's gone, it's an asphalt
10 street. There's going to have be some really (inaudible).

11 CHAIRMAN BERLAGE: Yes, my question was can it be done
12 that quickly and your contention is it can. All right.

13 MR. KNOPF: I think it can be. In terms of the MPDUs.

14 CHAIRMAN BERLAGE: We will talk about it.

15 MR. KNOPF: you were submitted a plan by the applicant
16 showing the location of MPDUs. That's in the record and you
17 simply need to go and ask where in fact are they compared to
18 those plans? And for the ones that are missing, where are
19 you planning on putting them? You have very limited
20 flexibility because everything has been built out without
21 them and you know, they got to go in another areas. So it
22 will not take too great a mathematical ability to determine
23 the percentage elsewhere.

24 CHAIRMAN BERLAGE: Thank you, you have answered the
25 question. Thank you very much. Mr. Kaufman.

1 Items 9 and 10 have been withdrawn from the agenda.
2 They will be rescheduled at a later date. And we will get
3 to items four through nine, just as soon as possible. I
4 regret that the people here for those items have been
5 waiting for sometime. We will get to them as soon as we
6 can.

7 Mr. Kaufman?

8 MR. KAUFMAN: I guess the term, good evening is now in
9 order.

10 CHAIRMAN BERLAGE: It's 5:20.

11 MR. KAUFMAN: Let me first say that speaking for the
12 master developer, we take all of these issues very
13 seriously. No one is saying to gloss over anything. We
14 believe that when you look at the approval documents, you
15 have to look at all the approval documents just as the board
16 was discussing when you were in your deliberations as to
17 whether or not to find violations. We certainly are not
18 saying that any chart on any drawing should not be taken
19 seriously. What we are saying is if there is a chart that
20 disagrees with an action of this board then it is probably
21 not enforceable because the board makes that determination.
22 You had that discussion.

23 Let me also say to you that the master developer
24 certainly agrees that there should be a plan of compliance.
25 And we agree in essence with the staff's recommendation of
26 the steps that should be taken in that plan of compliance

1 and that the appropriate documents should be amended and
2 filed as soon as possible, so that all owners of units
3 there, people who are contractual owners of buildings under
4 contract, and people who are contractual owners of buildings
5 that are not under contract, are all given the validity of
6 an approved site plan, opinion and signature set and we
7 agree with staff totally with that.

8 With regard to that, I would point out one thing
9 concerning sanctions. The site plan, the signature set and
10 the opinion of Phase 1A and Phase two, you can see the two
11 Phases up there, they are color-coded, do not make any
12 reference to height.

13 Now there may be some setback issues in Phase two and
14 Phase 1A, but there are none and the 45 feet and four
15 stories would apply to those. That's almost 300 units that
16 are covered in that, and I would certainly suggest and
17 recommend to the board that in applying any sanctions and
18 any monetary sanctions that there is no damage there. It is
19 a nominal technical violation and there should not be any
20 monetary damages with regard to those.

21 Now, staff ties that back through the signature set of
22 Phase 1. Well, you can't do that. I mean, you can't have it
23 both ways. Either the signature set applies to Phase two
24 and Phase 1A or it doesn't apply. And in this case we
25 believe it does apply. You know, it's your own decision in
26 the previous discussion. It's an action of the board. So

1 we would certainly hope that you would take that into
2 account.

3 Now there may be some buildings that have exceeded four
4 stories and 45 feet and they may warrant some sort of
5 monetary sanction. You have repeatedly been asked to not
6 hurt people but stop everything. I don't see how those two
7 things make logical sense. We believe those people who are
8 in ownership, those people who will be in ownership should
9 be allowed to proceed to occupy their homes.

10 Your staff has recommended that there not be a stop
11 work order. We are in total agreement with that. If this
12 board decides there is a process for us to follow and follow
13 diligently and if you decide to change the iterative process
14 that you had up to now, where we go from the general to the
15 specific. And every time there is a change that you consider
16 material that we come in and get a development plan, or we
17 come in and get a site plan amendment, we will do so.

18 I would say to this board, you know in each case you
19 did find that the site plans adhered to the project plan.
20 The only thing in dispute is this chart. Everything else was
21 consistent. So we agree with the reasoning of Commissioner
22 Perdue that four stories and 45 feet, maybe there is a
23 technical violation, but it is without damage. We certainly
24 agree with the statement made by your staff in the second
25 memo on page three, at four, which I read into this record
26 that there is no damage, that it is in compliance with the

1 vision of the master plan and essentially in compliance with
2 the project plan and also in compliance with the board's
3 opinions with regard to Phase 1 and Phase two.

4 Just give me one moment here. I think at this point I
5 would stop and let the other attorneys make their arguments.
6 If there is any time left, I will use it.

7 MS. BARBARA SEARS: On behalf of Bozzuto, I want to make
8 a few comments. Again they are alleged to have violated and
9 now found to have violated the 45 foot height limitation.
10 The board has found for the building three multifamily
11 building. They are not alleged to have been involved in any
12 of the other, from what I understand from the discussion,
13 complaints that are being proffered today by the opposition
14 or complainants.

15 At this point I think at the phase, this phase we would
16 agree that a compliance plan is an order as recommended by
17 the staff. We would object to the monetary penalties. I
18 think now is the time that the board has the opportunity to
19 take into account mitigating factors and the actions and
20 intent and full scope of activities that occurred
21 surrounding the construction of this building at 53 feet.
22 And we talked about much of that in the evidence. But
23 certainly I think the evidence has shown that when Bozzuto
24 got involved in this in 2002 it did not have a development
25 attorney. It had its own staff, it had its engineer, it had
26 worked with staff to confirm what it understood to be the

1 rules to follow. There was a question. Is it four stories?
2 Is it 45 feet? They made efforts to find out, good faith
3 efforts to find out what was applicable. They thought they
4 understood what was applicable. They submitted exactly the
5 architecturals that showed 53 feet for this building. They
6 did not try to fool anybody, they did not try to willfully
7 disregard any rules. They tried to find out what the rules
8 were and to follow them.

9 Where they had to make amendments, they made
10 amendments. They both made minor amendments and they made
11 amendments in front of this board. Where they didn't think
12 they had to do them in good faith, they didn't make them.
13 Therefore, I think you need to take this into account. I
14 think the integrity of the planning process depends on a lot
15 of things and a lot of people. And one of them is depending
16 upon the regulatory bodies and the policy makers to exercise
17 discretion, judgment, and balance. And this is the phase in
18 which we would ask you to do that. And look at the entire
19 panoply of facts and people involved in this and not just
20 select the developers or the builders as the ones that
21 should be severely sanctioned.

22 But the penalty, if there is a penalty should be taken
23 with consideration of all these factors. It was nothing
24 willful here. This is a company like these other companies
25 who have stellar reputations who do excellent construction
26 in this county and have done so for many, many years. And

1 they are not about to ruin their reputations by something
2 like this when they could've asked for an amendment and
3 gotten it, most likely without any issues or problems. They
4 built an award winning building and this building is enjoyed
5 by those who live in it. You've heard from many of them.
6 So, we would ask you to take this into account in whatever
7 you decide.

8 The other thing on the staff report is there is an
9 error in the report that I'm not sure has been clarified.
10 It's on page 2 and it's paragraph 2 of the staff
11 recommendation. In the, in the last sentence of that
12 paragraph it refers to building number, 2-over-2d in
13 building 6. That should be building 3 and then it says and D
14 requires building 3 to be redesigned no more than 45 feet in
15 height. That should be building 6 and it should be really
16 deleted. The understanding is, from talking to Michele
17 Rosenfeld, was that a building permit had been issued for
18 that building. It has not. So, that would just be subject
19 to whatever you decided the constraints of the site plan
20 were. So, D should be removed and building 6 in the
21 sentence before it should read building 3. And I think the
22 staff concurs in, in that, in those comments.

23 Just in closing, we thank you for your time and we
24 thank you for your consideration of the points that we have
25 made and the efforts that we have done to build a fine
26 community. Thank you.

1 MR. KENNEDY: Kevin Kennedy again for Craftstar and NV.
2 I just would like to echo the substance of what Barbara and
3 Steve just said as well. Also I think just for the record
4 we should incorporate the points and authorities and
5 evidence that we submitted in the last hearing. I'm not
6 really sure procedurally whether they're bifurcated for
7 purposes of the record or not.

8 But obviously we do not accept, respectfully we
9 continue to dispute the validity of the violations. We
10 understand you've made your ruling. We're not going to
11 attempt to seek a reconsideration at this time, but we
12 didn't want to have it lost to some separation between
13 hearings, that the records are in fact a part of both
14 proceedings.

15 In regards to a couple of just housekeeping matters, I
16 think one of the 2 over 2 condominium town house buildings
17 that Ms. Krasnow mentioned is not in fact over 45 feet. It
18 is an MPDU, it is in fact a 2 over 2 but it is a hill house
19 in the sense it is 3 stories in the front, 4 stories in the
20 back. It's not measured from the street over 45 feet. So,
21 there are 2 built buildings, one proposed which has
22 contracts without sale purchasers, that is a 16 unit 2 over
23 2 built. So, there will be 3 in toto under the
24 grandfathering proposal which we will graciously accept that
25 idea. I think it's an excellent idea for purposes of
26 obviating the problem for these innocent customers and

1 whatever modification or plan of compliance for revision
2 purposes going forward not include those and those folks be
3 benefited by and expedited revision to the plans that hold
4 those as-built structures and the one as-planned building,
5 which is under contract inviolate as well.

6 With respect to the magnitude of the sanction that is
7 proposed, we heard from CTCAC that it should be much more in
8 order to be meaningful. I can tell you from my client's
9 perspective that, this process has been extremely
10 educational and we don't need any more sanctions for you to
11 get our attention. We're dialed in, antenna up and we're
12 going to follow this new method going forward, you can be
13 sure. And I've already got folks back in my office drafting
14 firm letters to all of my builder clients telling them that
15 you can no longer rely on DPS and the interface between DPS
16 and Park and Planning to verify the compliance of your as-
17 planned construction. That you must now as part of your due
18 diligence, I understand folks thought, Ms. Krasnow mentioned
19 before, that that should always have been a part of the due
20 diligence. In point of fact, it rarely is. We do look to
21 that agency to help us, tell us, when we can't figure out
22 what in fact all of the minutia devolving from this lengthy,
23 intelligent, complex process is and is not. We do in fact
24 look to staff to help us on those issues and we do in fact
25 look to DPS to tell us whether we can or can't. And they're
26 extremely vigilant, in our experience. So, but there is

1 | that initial layer going forward as I understand it, that
2 | were this to be the outcome that we should be mindful of
3 | going forward and I can assure you we will be.

4 | As far as the, sorry. Okay, I will submit the balance
5 | of my arguments in our briefs. But the magnitude of the
6 | sanction essentially \$4,000 potentially against each of the
7 | units that potentially violate both, I think is punitive
8 | and, like Barbara said, the circumstances leading up to
9 | that, I think betray some mitigating factors that we do hope
10 | are taken into consideration. Thank you.

11 | CHAIRMAN BERLAGE: Thank you.

12 | MR. BREWER: Mr. Berlage and members of the Board, once
13 | again Robbie Brewer on behalf of Miller & Smith. I would
14 | echo many of the comments made but have some supplements.
15 | We certainly concur that overall the plan of compliance the
16 | staff recommends is acceptable. We agree that the height
17 | limits should be clarified through conforming project plan
18 | and site plan amendments. We think this will enable Miller
19 | & Smith's home owners to be assured that their 3-storey
20 | homes comply with county law. It also will enable Miller &
21 | Smith to finish construction of its remaining homes on the
22 | same basis of the homes that are already been built. We
23 | think that the side yard setbacks for completed homes also
24 | should be validated through project plan and site plan
25 | amendments. However, we do believe that the unbuilt homes
26 | should have similar setbacks as the completed homes. To now

1 require an artificial and excessive 10 foot setback on a
2 side yard that's counted as a front yard is entirely
3 inconsistent with the principles of neo-traditional
4 neighborhood design. The principles of your staff report in
5 the existing built community. I think your staff report is
6 inconsistent in its recommendations. An earlier part of the
7 staff report concurs with what I've just said. A later part
8 appears to say that the new units should have a measured 10
9 foot setback. We don't believe that that's appropriate.

10 We also concur of course that no stop work orders
11 should be issued nor that any offending homes should be torn
12 down. There's absolutely no rational basis for any of those
13 actions. So, that's as to the plan of compliance.

14 On the proposed enforcement actions, specifically the
15 double fines proposed to be imposed on the builders for each
16 home which violates on height or setback standards, I have
17 several comments. We think those fines are punitive as
18 they're proposed. There's no reason for these large fines,
19 particularly in the circumstance Miller & Smith finds itself
20 in. If the Board intends to teach the builders a lesson, I
21 would concur with Mr. Kennedy, that lesson has largely been
22 taught. But there are plenty of other ways the Board can do
23 so without being punitive. We think the proposed fines are
24 grossly disproportionate to these offenses, even your staff
25 has acknowledged and they're certainly in a good position to
26 know that there is no damage here. The proposed fines in

1 our view will not achieve overall the objective of
2 successfully completing the Clarksburg Town Center. We have
3 some fear that further controversy and litigation will
4 persist for years to come in Clarksburg and that certainly
5 would be needless expense and delay for everybody concerned.
6 We don't believe that benefits anybody particularly the
7 citizens of Clarksburg. For Miller & Smith, some of their 3
8 storey units do violate the 35 foot height limit. But we're
9 talking here by a foot or 2 or at most 3 feet. You must
10 recognize, that that circumstance, as Mr. Robinson has
11 indicated, is different than your first motion and vote with
12 respect to 4 storey, 45 feet. The 3 storey 35 foot
13 discussion, I think it's clear that that is a far more
14 technical violation and particularly in the case of Miller &
15 Smith, where we're talking a violation under your theory of
16 a foot or 2 or 3, a penalty of \$1,000 for each of those
17 units imposed on Miller and Smith is not appropriate, it is
18 punitive.

19 With respect to setbacks, we still disagree that there
20 has been a violations in setbacks standard. I'm not sure
21 those overlay slides were understood by the Board. What we
22 tried to show you in those 3 overlay slides are that the
23 Signature Set of the site plan, the Signature Set for each
24 lot has a box showing where that house is to be built. We
25 built the house in the box, right as shown on the Signature
26 Set. The fact is the Signature Set showed a side yard

1 setback counted as a front yard in violation of what you now
2 construe to be a 10 foot minimum. We don't think that's a
3 violation. We strongly believe that if you must find that a
4 violation, that is at worst highly technical, and to impose
5 a \$1,000 fine on Miller & Smith for building in the box
6 that's on your Signature Set of the site plan is excessive.

7 So, in conclusion once again Miller & Smith asks the
8 Board to do the right thing. We believe you have an
9 important public objective here of assuring compliance with
10 your plans and as I said in the last hearing, we concur with
11 that objective wholeheartedly. But we think in this
12 sanctions hearing, as Mr. Robinson pointed out, you need to
13 be a little more discriminating. Which violation are we
14 talking about, what's the circumstance that arose, what is
15 the damage and what should the fine be? And so on that
16 basis, I close and I thank you once again.

17 MR. KAUFMAN: I just have a few more remarks and then
18 there might be a few other remarks from other counsel. I
19 would just bring to the Board's attention again that there
20 certainly has been, we believe no bad faith, no intent to in
21 any way not follow the requirements and the procedures of
22 not only this agency but also of the Department of
23 Permitting Services. At most if there is a violation, it
24 was certainly unintended and most of these would be
25 technical without damage.

1 We also would strongly recommend to the Board that you
2 not follow the advice of counsel for the protestants and
3 bring it before you very quickly without sufficient
4 investigation these other alleged charges. We believe that
5 your staff should look into this. If they think there's a
6 violation, they should bring it to you. We also are very
7 confident that there are necessary procedures that occurred
8 that approved these. For example, just for an example. On
9 April 7th, 2005, you were given a memo from John Carter, Sue
10 Edwards and Wynn Witthans and in that memo on the second, on
11 the third page they say, the conclusion: multi-family
12 building heights including apartment and 2 over 2 dwellings
13 for 4 stories in the town center are consistent with the
14 Clarksburg master plan and implement the vision of the plan.

15 Again, with all due respect you did delegate authority
16 to your staff; your staff exercised that authority. Now
17 whether you know they got caught up in some technical, legal
18 issues that maybe they should not have gotten caught up,
19 they thought you gave them this power. Also with regard to
20 this mews and the road, on the second site plan that is
21 already shown as not a mews but a road. In my remembrance
22 of this, there were several issues. Again in this, in this
23 memo on April 7th, what is, what is talked about in terms of
24 the Historic District is a buffer. All the single family
25 houses that are within that buffer are within the height
26 limits that they looked for. The vista to the church was to

1 | be maintained, not necessarily a mews. So, what I'm saying
2 | to you is, we welcome an analysis of all these issues that
3 | were raised to you. There is appropriate hearing time for
4 | this, for the protestants to make their points and also for
5 | the master developer to supply to you the rationale, the
6 | reasons and what this Board did in the way of actions in
7 | approving those changes. Remember, we have an iterative
8 | process, from the general to the specific. Now if we are
9 | going to have one size fits all from a project plan going
10 | forward, I would suggest that the nightmare that
11 | Commissioner Wellington talked to you about is really the
12 | nightmare you would experience.

13 | You have a process. It works. It may need some
14 | clarification; it may need a little bit more follow up. But
15 | I wouldn't throw out the baby with the bathwater, just
16 | because we have a glitch in it. This process came about
17 | after much thinking in this building and changes to the
18 | zoning ordinance and it's not something that you should just
19 | disregard. You also heard from your counsel that you no
20 | longer require site plan enforcement agreements. Because
21 | the Signature Set is now the key document. Well obviously
22 | Signature Sets are going to take a much higher profile in
23 | everything that developers, their counsel look at, and also
24 | their consultants. With that I'll stop and we have a few
25 | minutes left.

1 MR. KENNEDY: By way of supplementation. Some of the
2 mitigating factors we hope will be taken into consideration
3 is the difficulty inherent to getting a grasp on all of
4 these nuances. To understand a clear bright line
5 requirement. And because it is torturous at times to, as I
6 listen and tried to educate myself and read everything
7 myself. I've been practicing law over 20 years and read a
8 lot of complicated stuff. And this thing's hard to figure
9 out. You guys have done a great job educating us, figuring
10 it out yourself, your staff has attempted to unravel it a
11 little bit but in real time, the way this was really
12 working, was Wynn Witthans, a person who everybody had a lot
13 of faith in and certainly was not a pushover was involved in
14 the process in real time. As were the folks at DPS and
15 within your organization who were interfacing with them on
16 this permits. I'm not suggesting, I know you found that not
17 to be exculpatory and I respect that. I don't agree with it,
18 but I understand that decisions were made. But certainly
19 it's a relevant factor for determining the sanction to meet
20 the offense.

21 I know that Commissioner Perdue is familiar with the
22 Mallamansay (phonetic) prohibition distinction that the law
23 often times makes. As Steve is saying, this is at worst, a
24 technical violation by folks who were trying to get it
25 right. They'll do better next time. So, plenty of
26 incentive in here to get that done proactively. Hopefully,

1 you'll take that into consideration in deciding how if at
2 all to punish them.

3 On the 45 foot issue, I understand that's pretty much
4 established. Even below that between 35 and 45, I have to
5 agree with Commissioner Robinson to the extent he was
6 intimating that that might be a technical violation without
7 an inherent harm as well. Hopefully that will also weigh
8 heavily in your decision. Thank you.

9 MR. KAUFMAN: We have a little time, but not necessary
10 to use it, I think.

11 CHAIRMAN BERLAGE: Thank you very much. We have six
12 speakers from the general public. The first three are Keith
13 Berner, John Parrish, and Richard Kauffinger.

14 COMMISSIONER ROBINSON: I want to assure people that I
15 am listening, but my health is fading as we sit here. So,
16 if had my eyes closed, it's just the way of staying in the
17 game.

18 CHAIRMAN BERLAGE: It helps him concentrate. Keith
19 Berner, John Parrish and Richard Kauffinger. Go ahead, sir.

20 MR. BERNER: My name is Keith Berner. I'm from Takoma
21 Park, which is a long way from Clarksburg. But I'm here to
22 say, Eich ben en Clarksburger. In fact the citizens and
23 communities of Montgomery County are all Clarksburgers
24 because this is not an isolated incident, rather it's the
25 certain result of a political culture that favors narrow
26 interests over the public good. In Takoma Park I've been

1 part of a citizens' movement that sought compromise
2 regarding a massive hospital expansion in store for
3 residential neighborhood. The recent good news is that
4 we've apparently reached a compromise that serves all sides.
5 The bad news is that the possibility of compromise was
6 almost yanked away from us last summer when Park and
7 Planning staff met behind closed doors with development
8 interests to produce a zoning text amendment that would've
9 changed the rules in the middle of the game and taken away
10 all incentive from the hospitals from talking to the
11 communities.

12 Park and Planning had every intention of getting the
13 amendment to county council without any community input at
14 all. When we discovered at the last minute what was afoot
15 and shined a light in the room, what we saw was a pretty
16 picture. The lawyers and developers with their hands deep
17 into the cookie jar and Park and Planning staff standing
18 asking how they can sweeten the recipe for next time. When
19 I spoke to Steve Silverman earlier this year about the
20 zoning amendment itself and about the unsavory circumstances
21 surrounding (inaudible), he had no apologies. Instead he
22 blamed communities for standing in the way of progress. The
23 parallels to Clarksburg are obvious. In both cases,
24 developers simply expected to get whatever they wanted and
25 private citizens committing their own money and their own
26 pro-bono time had to investigate and fight entrenched power

1 to save their own skins. Now as the county council shows
2 it's dismay about wrongdoing in Clarksburg, I hear echoes
3 echoes of (inaudible). The powers that be will focus a
4 laser beam on a small number of scapegoats and express
5 complete bafflement at how such aberrant behavior could've
6 taken place.

7 Time out. I wrote that previous sentence before
8 hearing Rose Krasnow use the very word aberrant, in her
9 testimony this morning. Talk about predictable. As seems
10 to be the case at the Pentagon, the problem here is that Ms.
11 Krasnow and company apparently believe that the crime here
12 was getting caught not the wrongdoing itself. Who here
13 doubts for a minute that the ultimate responsibility of top
14 officials for inculcating a culture of abuse that flowed
15 down to (inaudible) regardless of whether any of them gave a
16 direct order. By the same token we don't need to find any
17 order from above to the woman who altered the Clarksburg
18 document. When the bulk of our elected officials make clear
19 that serving developers takes precedence over serving
20 communities and citizens, when they not only don't punish
21 staff for backroom dealings that are fundamentally anti-
22 democratic, but actually endorse such behavior, we know that
23 our focus must be much broader than the quote honest
24 mistakes unquote of a single staff member. And so I would
25 say that when we talk about sanctions today it's not just a
26 matter of sanctioning the developers and the builders. It's

1 a matter of sanctioning the public officials who have
2 established the climate where this happens. And it is time
3 for the voters of Montgomery County to demand this
4 accountability and to punish our public officials for
5 selling us out. Only when we decide as a county, that
6 business as usual will no longer be accepted here, will we
7 get public servants who serve us professionally and in the
8 full light of day. Thank you.

9 CHAIRMAN BERLAGE: John Parrish.

10 MR. PARRISH: Good evening, Board. Much of what I
11 wanted to say has already been said, so I'll be brief.
12 Please, at least, do not make a decision today regarding the
13 severity of the sanctions. Please wait until all the facts
14 are in after future hearings and the other allegations
15 you've heard today are explored further.

16 To help restore public trust, please conduct a thorough
17 investigation into the underlying causes of the violations
18 and make the final report available to the public.
19 Specifically, I would like you to please explain why the 35
20 feet was stipulated to begin with. I don't think enough has
21 been said about that. In my opinion what we have witnessed
22 today exposes much larger problems regarding process,
23 oversight and enforcement responsibilities within Montgomery
24 county government. This is not an isolated experience.
25 Perhaps the amount of attention it's getting is exceptional
26 but it goes on in lots of other ways in this county. And

1 too often the citizens are the ones who bear the
2 responsibility to bring it to light.

3 Sometimes I feel like you ought to pay me as an
4 enforcement arm to bring to light issues to you and many
5 other activists as well.

6 I applaud you for finding that violations did occur
7 regarding setback and height requirements. However, to gain
8 the public trust the commission must levy substantially
9 greater sanctions than the staff is requesting. If the
10 sanctions are not severe enough to deter the developers from
11 repeating similar violations then you have failed to do your
12 job. Please do not insult the integrity of the public
13 process by ignoring the serious issues brought before you
14 today. Again postpone imposing sanctions until you have a
15 better understanding of all the alleged violations. And
16 lastly, please issue a statement of apology and at least
17 assume some responsibility for the many faceted problems
18 that we are facing today in order to restore the public's
19 confidence. Thank you very much.

20 CHAIRMAN BERLAGE: Thank you. The next group is Judy
21 Koenig, Paul Majewski, and Jim Williamson. Judy Koenig.

22 MS. KOENIG: The situation in Clarksburg is not the
23 first or even the second time Park and Planning commission
24 staff and the commission has screwed up with their approval
25 of plans and lack of adequate supervision. Take a drive
26 down the 2700 block of Abilene Drive in Chevy Chase and

1 you'll notice the two houses attached in a single family
2 zone. If you can't figure out which they are, just find the
3 houses with two large separate garages and two front doors.
4 Notice the situation with several of the driveways. Park in
5 your driveway and you block the side-walks, since houses are
6 so close to the road. But you all approve this type of plan
7 and this type of situation where we have Siamese twins. Go
8 down to the stables with a copy of the testimony when the
9 concessionaire received permission to expand and renovate
10 the stables in December 2001. Where's the rustic setting
11 they promised to preserve and you said they would. They
12 lied and instead installed thousands of wattage of metal
13 (inaudible) lights, turning the area into a brighter area
14 than Home Depot and at RFK. Ask yourself, where are all the
15 trees? They cut down the 75 trees. Ask yourself why was
16 the new large structure built in the flood plain. They
17 brought in hundreds of truckloads of fill to alter the flood
18 plain so they could build the structure and not have to
19 worry about it being flooded. A large covered riding rink?
20 This caused massive flooding upstream, to the west and
21 extensive erosion of rock creek. And I see you have
22 something else that you're not going to have on the agenda
23 because if you're verbose and that is also talking about
24 erosion. Why must the deer walk down Meadowbrook Lane
25 because the concessionaire fenced in a large open field that
26 many people enjoy as did the fox, deer, raccoons, squirrels

1 and dogs. Did you know that rock creek does not flow North
2 to South? According to the concessionaire that is. They
3 claim that the area for the new covered riding rink would be
4 designed to allow the water to flow through it and not be
5 impeded. Well, the truckloads of fill, it would have to
6 rise probably about 15 feet and if we get the rain they're
7 talking about tonight, it might make it a couple of feet
8 because apparently they didn't want to have to worry about
9 it so they let them do it. Why did this occur and why has
10 the commission does nothing to correct the outright lies and
11 deceptions. Ask David Bradley how much he saved in his
12 income tax returns, with this 2 million plus contribution?
13 I call it a bribe. Where is the state of the art watering
14 system that was to install to control the dust? Of course
15 that in fact the system were not even used, what would you
16 expect? What about the commitment not to impact our
17 community with the cars from the stables? That also must've
18 been nothing more than false rhetoric. If you are going to
19 fine Clarksburg because of your staff mistakes, it is only
20 appropriate that you fine Meadowbrook Foundation Inc. and
21 David Bradley. Oh yes, how about Dan Snyder and the great
22 disappearing tree caper? Why didn't you do anything?
23 Blinders sometimes are used on horses; they should not be on
24 public officials. You promised me and council members, Mr.
25 Berlage, 14, 15, 16 months ago, that you would hold the

1 public, are you going to listen to me, or are you going to
2 talk to her? Well that didn't look like it.

3 COMMISSIONER WELLINGTON: Excuse us.

4 MS. KOENIG: Excuse me. You promised me that there would
5 be a meeting or hearing to discuss what went on down there,
6 you haven't done so. If your staff's going to continue to
7 screw up, then you're going to have to fine someone
8 (inaudible)equitably and you're not doing it. And I also did
9 notice since you all started speaking

10 CHAIRMAN BERLAGE: Your time has expired.

11 MS. KOENIG: the amount of humidity in this room has
12 increased significantly with the hot air rhetoric.

13 CHAIRMAN BERLAGE: Mr. Majewski.

14 MR. MAJEWSKI: I agree with putting off the Item 3
15 decisions. There's a number of considerations. One, the
16 harm, I'll remind you we've had loss of small town center
17 building, filling the views, the connection to the historic
18 district, connection to our history of fighting for a small
19 town and small, like the thousands of vistas of the church
20 and vistas of the views. Then there's fire fighting.
21 Exceeding the 45 feet by 8 feet puts a burden on fire
22 fighting. These, some of the buildings appear to the layman
23 as 5 storey buildings. From door of the building to the top,
24 we don't have ladder trucks in the area. A regular engine
25 costs 450,000. A ladder truck, I don't know, say about
26 \$150,000. Please consider that. The per day stipulation,

1 they certainly should see what the maximum of every fine is.
2 You know we're talking anywhere from 3 months to 3 years, I
3 heard, so we're talking about anything from 90 to 900 beyond
4 times. So, we're talking about, we're easily talking about
5 over \$100 million. Please consider just how lenient you
6 want to be. Do you want to be 7% lenient, 7% lenient maybe
7 they'll take you down to \$60 million depending of course on
8 every situation. Some are more egregious than others.

9 Consider the amount of money already as Mr. Knopf said is
10 the amount of money the developers have gained. Certainly
11 they should be fined an amount much higher than that.
12 Otherwise the risk for getting caught makes it worth it to
13 take the risk. He's made one good suggestion, another if
14 you really have to make a decision today, just do some
15 ballpark figuring. I don't know, 600 units, \$400 million
16 dol, uh, \$400,000 each, \$240 million. What do they make?
17 Take a guess, 20%, 10%; we're talking 24 million that they
18 normally make. If they're exceeding heights by 10% that's a
19 10% gain, divide that by 10. You're talking 2.4 million and
20 not 1 million.

21 So, in other words it does take time. Of course you
22 can't, maybe you're good and you can do these ballpark
23 figures and come up with a just amount, I suggest you take
24 the time.

25 Then there's that point where they have developed
26 quickly. You know, they were told about this problem in

1 August, did they check it? Did they see what's going on and
2 bring it to your attention? No, they went ahead and built
3 faster. That should be part of your consideration. Another
4 part is also the fact that you want to amend some plans
5 based on the fact that you've already got some there. I'm
6 not sure if I understood what you're saying, if you are only
7 amending for the existing ones built, okay that's fine. In
8 summary, delay until another day and consider per day
9 maximum possibly as high as \$60 million. Thank you.

10 CHAIRMAN BERLAGE: Mr. Williamson.

11 MR. MAJEWSKI: (To Mr. Williamson) I'll give you two
12 minutes.

13 CHAIRMAN BERLAGE: Mr. Williamson.

14 MR. WILLIAMSON: By signing contracts with the builders
15 of Clarksburg Town Center and accepting the terms of the
16 developer under their homeowner association agreement, every
17 home buyer unconditionally forfeited many of the basic
18 rights afforded most consumer groups. And building our
19 individual homes, and the community amenities, the builders
20 and the Newland Communities have complete control in
21 exercising their many forms of contractual coercion with a
22 smile. Whenever they are threatened with a financially
23 unfavorable situation, as home buyers in today's new
24 construction market our ability to seek adequate remedies is
25 sadly non-existent. While the concept of Clarksburg Town
26 Center established by the master plan may not have focused

1 on the particulars of building height and setback it's clear
2 that those, that have investigated this, those imperatives
3 were embodied in the site plan Signature Set and the site
4 plan enforcement agreement. This represents the communities
5 contract with the builders and Newland Communities,
6 regardless of the less stringent underlying terms approved
7 by the Board or viewed as less stringent by the Board. This
8 contract represents the binding commitment made to the

9 community by the builders and Newland Communities.

10 A contract and commitment, the planning Board must
11 uphold and enforce on behalf of the community. It is
12 interesting to note that as part of Maryland law, builders
13 are required to have prospective buyers reference your
14 planning decisions, planning actions as part of their
15 purchase decision. The builders and community, the Newland
16 Communities forever distorted and altered the vision of the
17 Clarksburg Town Center. Not only have they distorted the
18 vision and form as evidenced by much of the testimony that
19 you have heard on both sides by all residents of the town
20 center, they've also broken and divided the spirit of the
21 Clarksburg Town Center community.

22 One builder, Craftstar, as Mr. Kennedy is aware of,
23 markets itself on a theme that the builder would never move
24 into a home or have their families move into a home that
25 they would not feel comfortable moving their families into.
26 It is interesting to note that since these issues have

1 arisen, both Craftstar and NV have unloaded their town homes
2 which are clearly above the 35 foot limit onto private
3 citizens. Interesting enough as well, while Craftstar's
4 town home, model town home was on market, a family member of
5 Kenneth Malm, the President of Craftstar, Craftmark, the
6 associate company under Craftmark, was also in the market
7 for a home and also purchased a Craftmark/Craftstar model,
8 but not in Clarksburg Town Center, in neighboring Clarksburg
9 Village. Was there something there that they didn't feel
10 comfortable with? I'm sure maybe that the innocent third
11 parties who are now affected, might also feel more
12 comfortable in an NV or Craftstar home in Clarksburg village
13 also.

14 Who is building a community that they would feel
15 comfortable moving their families into? How should those
16 parties be held accountable? What will it take to hold the
17 builders and communities responsible for restoring the
18 communities' vision of Clarksburg Town Center? We strongly
19 encourage the Board through their authority for upholding
20 the communities contract with Newland Communities and the
21 builders, to exercise the maximum financial penalties and
22 punitive actions possible under the law. Newland and the
23 builders must be held accountable for restoring the vision
24 of Clarksburg Town Center. We were once told by a builder's
25 agent that if the builder had made such a major mistake that
26 they would tear down a home and rebuild it if necessary.

1 Again, from a Craftstar agent. If that is what it takes to
2 restore the communities' vision of Clarksburg Town Center,
3 then so be it. The Board must have the courage of
4 conviction to take such actions in this plan of compliance.

5 Further we request, on behalf of the entire community,
6 while you're talking about the Maryland State Attorney
7 General regarding the criminal investigation of altering of
8 documents, that you also speak to them as well as the
9 federal authorities for investigation and action under the
10 state and federal consumer protection acts. The deception,
11 fraud, misrepresentation, suppression and omission of
12 material facts in the context of consumers investing in the
13 Clarksburg Town Center is unfair and deceptive trade on the
14 grandest scale. All responsible parties must be held
15 accountable and be made to answer for the deception of over
16 400 million in consumer investment in the Clarksburg Town
17 Center. I am a member. I am a resident of the Clarksburg
18 Town Center. I live in 17 EE, which is adjacent to the
19 United Methodist Church cemetery. I thank you for your
20 time.

21 CHAIRMAN BERLAGE: Thank you very much. Mr. Knopf, any
22 rebuttal?

23 MS. PRESLEY: Yes, thank you again. Just like to go
24 back again to a couple of comments made by counsel for the
25 different builders, specifically Mr. Kennedy. We have to
26 suspend our beliefs that any of the counsel here present

1 today is aware of the requirements for an RMX-2 optional
2 method in terms of who does the enforcement. Mr. Kennedy
3 apparently stating for the record even as a land use
4 attorney, that he's unaware of the enforcement under this
5 RMX-2 optional method. And tries to place the blame on DPS,
6 which I find appalling. And I apologize to DPS for, just to
7 let this Board know, we have spent not quite equal time in
8 digging through DPS and their records, but sufficient time
9 to be able to state very plainly that the records that we
10 have encountered there are very clear. The records are
11 consistent; the records are available to us immediately as
12 citizens as we would expect equivalent records to be
13 available here. So, I'd just like to state for the record
14 that everything we've seen, Mr. Hubbard, has been
15 commendable.

16 Moving on then again to the issues about the
17 violations. I just want to reinforce that things such as the
18 pedestrian mews. These are not aberrations either. We had
19 Mr. Kaufman mentioning how he respected Ms. Witthans. And
20 we have the counsel referring to the staff opinions as it
21 benefits them. Let's talk about her staff opinion for the
22 site plan review.8-98001 and let me read from her opinion
23 regarding the mews. Page 10. Close to the edge of the
24 Clarksburg historic district is a diagonal pedestrian mews.
25 The mews contains sitting areas and 2 large lawn panels and
26 connecting walks linking the church with the town square.

1 The sitting area closest to the town square includes a
2 trellis and a memorial to John Clark with the use of found
3 headstones from the family gravesite. The mews develops a
4 visual and walkable access between the church and the town
5 square highlighting these significant features of the
6 existing and proposed development. I'll spare you and I
7 won't read what you can see for yourselves in your
8 submissions under page 11 on the same report where she
9 addresses O street. These things are carried forward in a
10 physical site plan just as the setbacks and the heights are
11 carried forward. Not just in the certified site plan that
12 Linowes and Blocher prepares for the client and then they
13 all sign, but also for the landscape plan, certified
14 landscape plan. And now these things are gone. By nature
15 of the fact that they were included, in fact, O Street
16 references included even in the Board opinion, under the
17 fundamental findings. How can staff under some clause 38,
18 make an amendment to something, not that there's any
19 amendment on record, because there isn't. There's no
20 amendment on record to that. But apparently Mr. Kaufman's
21 position is that that could've been done as well. The
22 staff, I suppose it was another verbal, something passing in
23 the hall to the developer saying, yep go ahead, take it out
24 if you want. That doesn't hold any water. Because there
25 are things here that you can, you can go into your chambers,
26 look at them. They're evidences they're signed, they're

1 legal documents. Do not issue sanctions without taking
2 these things into consideration.

3 And the last thing I want to point out is with
4 reference to site plan phase 2. There are serious issues
5 regarding that. I'll backtrack for a moment and say that
6 the document that Ms. Witthans changed after the fact, there
7 were several others in that series which we'll leave behind
8 for you today, but although there has been no admission, we
9 have before and after things that have come up, so we'll
10 leave them for you. But when you take a look at site plan
11 phase 2. What you have on record as the alleged certified
12 site plan for phase 2, please remember that it's stamped by
13 Richard Hawthorne, October 14th, 2004. The hearing was in
14 2002. Signatures for developer, I have it contained for you
15 2002 or 3. And the final signature by the Board allegedly
16 two years later. Not just two, a little over two years later
17 but after buildings are already permitted, built and
18 occupied, roughly 1/3rd of those. We've attached in our
19 presentation to you, your handouts in some of the exhibits,
20 copies of the staff report for phase 2. The staff report
21 contains not just language, textual, but also attachments.
22 And any attachment is a physical reduction sheet of the site
23 plan with that same data table that was present in site plan
24 phase 1, in the certified site plan, in the enforcement
25 agreement. It was present in the preliminary plan, the
26 project plan. It's there again in her staff opinion.

1 Regardless of the fact that in the text she doesn't call out
2 the specific as to the 4 storey. It's attached with a memo
3 and signatures. And if you check her DRC files for that
4 same site plan, there is a copy that exists that's signed by
5 the developer, by Les Powell, by the land surveyor. So,
6 it's to you to find out what happens between that and two
7 and a half years later to determine, but either way I see
8 that the developer has violated again because either they
9 have to admit that they built units without a permit or,
10 excuse me, without a site plan, official site plan or they
11 have to admit that the October 14th, 2004 site plan is not
12 valid. So, whichever of the two it is, and according to the
13 code anyway the site plan that is sitting over there, the
14 alleged site plan, doesn't have a height on it. So,
15 according to zoning codes, 59D, it's probably 323, 326. 3
16 point 3, I believe. It's not even a valid site plan without
17 a height. So, no matter how you slice it, it's incorrect.
18 Get to the bottom of it before you determine how gross or
19 deliberate the negligence has been on their part and the
20 violations have been. That's all I have to say.

21 MR. KNOPF: Just to very briefly follow up on that.
22 Mr. Kaufman or one of the attorneys made the remark that
23 phase 2 did not have specific 35 foot, 45 foot provision in
24 it, that's what she was addressing. We understand the staff
25 report to say well by error everyone assumed it was the
26 phase 1, the phase 1 site plan requirements that applied.

1 If that's the case in phase 1, we did have the site plan
2 documents with 35 feet and 45 feet. So, there's a violation
3 there. If there is no document that was a Signature Set
4 site plan, as she pointed out, that's a separate violation.
5 You can find a violation and they went ahead and built one-
6 third of things there wasn't even a site plan on record of
7 the Signature Set. That's also a violation. Either way
8 they have a problem. And so, we think that you can make a
9 finding of a violation in either case.

10 MS. PRESLEY: I want to clarify one thing. Norm's
11 brought this to my attention. Recollection. Please note too
12 that the October 14th, 2004 date is in sync with the date
13 that Ms. Witthans has admitted in the Fall of 2004 changing
14 the other documents. And a specific note is that the site
15 plan that miraculously appears is absent the height or the
16 setback. Those are two things that are rather conspicuous
17 at that timing. Sorry, Norm.

18 MR. KNOPF: And a site plan without the height and
19 setback requirements is not a valid site plan because it's
20 required to have that information before, you know, as part
21 of the valid site plan. In addition to point out that as
22 she said, and I think it's very important, you were
23 presented with a staff report which had those documents
24 attached showing the heights 35, 45 and the 10 feet. And
25 your opinion adopts, you know confirms the staff report.
26 So, we think that there is a standard, there was a violation

1 and if you want to take another position there is no
2 standard then there's a different type of violation. But
3 either way there is a violation.

4 The final thing I'd like to say, just clarification. Am
5 I correct that the, this morning's or afternoon's hearings
6 on the violation and this hearing on the sanctions, though
7 they're separate hearings, the records merged and it's all
8 one record?

9 CHAIRMAN BERLAGE: Ms. Rosenfeld.

10 MS. ROSENFELD: Yes, the two records are merged because
11 we were accepting testimony this morning on both matters.

12 MR. KNOPF: Thank you.

13 CHAIRMAN BERLAGE: Thank you. Mr. Kaufman, any
14 rebuttal?

15 MR. KAUFMAN: Yes.

16 CHAIRMAN BERLAGE: Come on up.

17 MR. KAUFMAN: I'll just take a minute or so 'cause we
18 only have 10 minutes. The testimony you just heard I
19 believe justifies what I said before, which is you need to
20 take the time to get all the facts.

21 There have been an awful lot of allegations that do not
22 deal with what was before you today, before you hold another
23 hearing or whether it's a violation hearing or one of the
24 amendments. I mean just to respond to a couple of things.
25 The signing of the site plan on October 14th, that maybe

1 when it was signed, but it was submitted signed by
2 Terrabrook on June 27th, 2003, 16 months earlier.

3 I have a site plan here signed by Wynn on 12/17/01.
4 That site plan shows that the mews is gone and that the road
5 that everybody argues about has been replaced. The vista is
6 maintained to the church. All I'm saying to you is, there's
7 a lot of confusing facts here. Let's make sure we have all
8 the fact before we accuse people of bad faith and
9 complicity, et cetera.

10 We're certainly willing to work with you to make sure
11 that all the facts are with your staff and that you have
12 this before you at some future time. Not one week from
13 today.

14 MS. SEARS: The only point I wanted to address is the
15 implication or the suggestion that perhaps 45 feet was a
16 standard that was set in the master plan and therefore it
17 was a higher level of concern. And the master plan itself
18 specifically states and I'm going to quote it that all
19 apartment buildings in the future town center will be 4
20 stories or less except within walking distance of the
21 transit stop where a building height of 6 to 8 stories may
22 be allowed if the master plan recommendations concerning
23 compatibility with the historic district can be achieved.
24 It then has a figure 21 on page 48, where it deals with
25 specific buffer areas, where it sets out linear feet where
26 stories should be less. These buildings are not located in

1 | those areas. So, they are covered by the 4 stories. There
2 | is no specific height in the master plan. And that is what
3 | your staff found and that is what Mr. Kaufman read earlier
4 | from the April 7th report. Your planning staff, your Chief
5 | of Planning found that 4 stories was what the master plan
6 | required, not 45 feet.

7 | So, I just wanted to make that clear because anybody
8 | looking at that master plan would not be on notice of any
9 | prior discussions or any feelings of others that may have
10 | come up during the master plan process. Thank you.

11 | MR. KENNEDY: Thank you. Just a minute more if you
12 | will. First we're not blaming DPS for whatever we're being
13 | held in violation for. We're simply saying that we acted in
14 | good faith. That we found in retrospect looking at it now,
15 | and in real time, the approvals ambiguous. We sought from
16 | the authoritative agencies, in good faith, clarification and
17 | direction and for authority as to why DPS is the, is the
18 | agency we can go to for that. I simply refer to section
19 | 8.25 of the Montgomery county code, it says action on
20 | application, the director must examine or cause to be
21 | examined each application for a building permit or an
22 | amendment to a permit within a reasonable time after the
23 | application is filed. If the application or the plans do
24 | not conform to all the requirements of this chapter, the
25 | director must reject the application in writing and specify
26 | the reasons for rejecting it.

1 Now if we were submitting that in bad faith knowing in
2 advance that it was in violation, that would be a different
3 issue. But, there was no evidence before the Board that
4 that ever happened. All of our submissions were in good
5 faith and when it says further in that same section at sub-
6 part G, compliance with zoning regulations, the building or
7 structure must comply with all applicable zoning
8 regulations, et cetera. That's what we were asking for.
9 Can we build this building here? And the answer we got back
10 in the form of approved permits was always yes. So, for
11 that reason we think that is a mitigating circumstance that
12 needs to be taken into consideration.

13 As far as the grandfathering, I think the merits of
14 that speak for themselves. We do support the staff's
15 recommendation in that regard and graciously ask that you
16 include that in your determination.

17 Is there anything below 45 feet? I agree with
18 Commissioner Robinson that that would be at most a technical
19 violation for which no sanction or punishment is justified
20 for the reasons stated that it was an ambiguity in the
21 record, certainly several, that we acted in good faith, and
22 we relied upon that in real time to do what we felt was
23 lawful.

24 With respect to the setbacks, I agree with my colleague
25 speaking for Miller & Smith. All of our houses are built
26 within that building envelope on the Signature Set site

1 plans. Many of which when we submitted with our permit
2 applications did not have a height stipulation on them. I
3 think as Mr. Kaufman has correctly stated that some of the
4 sheets do, some don't. And again more ambiguity, which is
5 which? We obviously, the determination of the Board as we
6 guessed or were directed incorrectly in that regard. But a
7 technical violation without a bad intent. I hope that is
8 relevant in determining how you guys come out on that.

9 With respect to anything over 45 feet, nothing for NV
10 homes is over 45 feet out there. There are a couple of
11 Craftstar 2-over-2 condominium products, a very popular
12 product out at Clarksburg, which are exceeding that at most
13 by a couple of feet. And so therefore we hope that the
14 magnitude of the violation also is taken into consideration
15 'cause we do believe it's di minimis and we agree with
16 staff's conclusion that ultimately no damage was suffered,
17 either from the standpoint of the community as a whole or
18 any individuals. And I thank you for your time.

19 MR. KAUFMAN: I have just a few other concluding
20 comments. I also thank you for your time and your patience
21 today; I know it's been very trying for the Board. I would
22 just reiterate one thing. In answer to a question from
23 Commissioner Purdue, Mr. Ma indicated that you can show your
24 development standards in both written form in the opinion
25 and also on the Signature Set. Either one would be, would
26 be equally enforceable. And I would suggest to you as to

1 with regard to the setbacks for example as was just said to
2 you, it was shown on every Signature Set where, where that
3 units would be. And the setbacks were less than 10 feet.
4 Now if there was a dispute as to the interpretation between
5 DPS and your staff, they had I believe an affirmative
6 obligation to bring that to our attention, so that we could
7 bring before you a clarifying amendment. Just as I've said
8 to you before on all these other issues, I honestly say to
9 you and I suggest very strongly and I -- and it goes to your
10 staff's confusion. Do you believe for one minute if we had
11 been told that we need clarifying amendments that we
12 wouldn't be in here asking for those? We certainly would
13 have been. You have to look at the course of dealing over
14 all this period of time.

15 One last thing. You've heard a lot about well there
16 should be this amount of damage and all these speculative
17 forms of damage. I would respectfully suggest to you that
18 if there are going to be sanctions they should be in
19 relation to the damage that has been found. Your staff has
20 stated to you that they don't see really much more than a
21 technical violation. It has no, these damages or sanctions
22 should have no relationship to profit or to appreciation of
23 houses. The market deals with that. We are very proud.
24 That is the master builder and the builders before you of
25 the community that is being built up there. We've shown you

1 pictures of it. It's won awards. If there have been
2 mistakes, we want them corrected.

3 We certainly want all owners, all prospective owners to
4 have validity and we would strongly recommend that you do
5 follow your staff's recommendations with regard to the plan
6 of compliance. And if there are sanctions that you deal
7 with these two issues today, there'll be more than enough
8 time and certainly much, much debate in this county over the
9 other issues that've been raised. But, take the time to
10 find out what the facts are and what happened and we'll be
11 glad to spend another day or evening with you. Thank you
12 very much for your time and consideration.

13 CHAIRMAN BERLAGE: You're excused. And the Board may
14 now discuss the proposed plan of compliance.

15 COMMISSIONER BRYAN: Let a non-lawyer start this time.

16 CHAIRMAN BERLAGE: Go ahead, Mr. Bryant.

17 COMMISSIONER BRYANT: I'm looking at some of the
18 comments that I wrote down that people said that struck a
19 chord, there are a lot of things that were said but a couple
20 that struck a chord. For example, Delegate Cryor said we
21 have a mess on our hands. And she is absolutely correct.
22 But also Wayne Goldstein said that we needed to be, to use
23 the J&J model. Candid, contrite and committed. So, as
24 regards the mess on our hands, I think that we have been
25 candid. We certainly have been contrite and you could tell

1 by the fact that we're still here and somewhat upright that
2 we're committed.

3 COMMISSIONER ROBINSON: Speak for yourself. (laughter)

4 COMMISSIONER BRYANT: All right. But I'm also
5 conscious of the fact that Mr. KAUFMAN reiterated time and
6 time again that you can't have it both ways, which leads me
7 to I think the most significant thing that remains as a
8 stand out for me by Mr. Spanos, and that is that we have to
9 assume a certain degree of certainty and that there's no
10 evidence in the record that people have not been acting in
11 good faith. And that, that applies to everybody as far as
12 I'm concerned. And I'm only speaking for myself. So, there
13 are a couple of things that all of those comments made me
14 write down in terms of where my head is. And there were
15 sort of three Rs. I said well, there were recriminations,
16 and we've sort of, we got out the recriminations. I think
17 that we did a very, very good job of looking at the
18 recriminations.

19 And we also tried to come up with a way of resolving
20 recriminations and I think that we have really done an
21 effective job at looking at that, because this is not an
22 easy case as everybody can attest. This is not easy at all
23 and I definitely agree with the gentleman from NVR that
24 everybody's going to be acting differently from this point
25 on. Everybody is going to be acting differently.

1 But the third R was retribution. And I was listening
2 to some of what was being asked of us, and this is not
3 casting any aspersions, it's just a question that I raised.
4 And I said, didn't they just win? Because what I heard was
5 yeah we won, but now we want retribution. Again, I'm
6 speaking for myself.

7 I believe that we have the responsibility of not just
8 looking at retribution when it comes to what a particular
9 interest might desire, but we need to look at the broader
10 picture in terms of not only the message that we want to
11 send, but also we have to look at what the impact will be of
12 the kind of decisions that we make. And with that idea in
13 mind all of the other things that came out that were not a
14 part of this particular hearing, those things are going to
15 be looked at. And I believe that when they get looked at
16 that and I'm sure that we'll take steps as part of whatever
17 we do to try to see to it that they get looked at soon as
18 possible, that we're going to look at those things in the
19 context of how they get presented at that point. But also
20 we're going to be mindful of how we got to that point in the
21 first place, with that idea in mind and I want my legal
22 counsel to correct me if I'm wrong, I believe that we can in
23 fact impose a compliance plan today that speaks to those
24 things that were before us today and they will have no
25 impact on what might get introduced later on. So, I don't
26 believe that it's necessary that we have to wait until every

1 single violation that is believed to exist, that we have to
2 have that before us in order to make a decision about what
3 we need to do right now. Because I'm under the impression
4 that we can make a decision about what, what we have before
5 us right now and later when we get the rest of those things,
6 we can make a decision about them later. And if there is a
7 necessity to adjust recommendations, well then we can adjust
8 recommendations, we're good at that. In fact that's what
9 some of you talked about. You presented as part of your
10 evidence. So, legal counsel, am I correct in that those are
11 two separate and distinct entities at this point?

12 MS. ROSENFELD: Taking action on the height or the
13 setbacks will not preclude your ability to make future
14 decisions and take future curative actions is necessary on
15 other alleged violations.

16 COMMISSIONER BRYANT: Thank you. I am prepared, Mr.
17 Chair, after discussion, because I know there are other
18 people who want to say some things. But at that point I
19 would like to go point by point in terms of the
20 recommendations and as quickly as possible, support the
21 staff in terms of their recommendations, but maybe tweak a
22 recommendation or two just a little to be conscious of some
23 of the additional items that were identified that maybe the
24 recommendation as laid out, may not capture, at least from
25 my perspective. But I don't want to be in a position where
26 in fact, exacting retribution.

1 CHAIRMAN BERLAGE: Well let's hear from some other
2 Board members and see whether we can go through staff
3 recommendations with tweaking or whether it's going to be
4 more complicated.

5 COMMISSIONER ROBINSON: I will wait to speak later Mr.
6 Chairman.

7 CHAIRMAN BERLAGE: Commissioner Wellington, do you want
8 to go ahead?

9 COMMISSIONER WELLINGTON: Yes.

10 COMMISSIONER ROBINSON: You can move from right to
11 left.

12 COMMISSIONER WELLINGTON: All right. Well, yes, this
13 is a mess and it's our responsibility to fix this mess,
14 that's what we are here for. So we are assuming our
15 authority, and the question is -- I'm going to start from
16 the general and go to specifics, because the remedy is what
17 it's all about, not -- not just the principles but, our
18 credibility and our integrity has been questioned, in the
19 process, and the largest plan that I've ever participated
20 in, and perhaps the largest plan in Montgomery County, is
21 what's at issue here. So it isn't just one or two houses,
22 the actual physical plan is huge and very important. So the
23 substance is very significant. But it also has broader
24 implications, as we heard from other speakers earlier, for
25 the future of the county in terms of deterrence and the
26 willingness of people to abide by our recommendations

1 voluntarily, because they know that they are concrete,
2 clear, and if they are not followed, there will be
3 enforcement. So, I think what we did today is more
4 important than some of the things we do on other days, and
5 what do I think specifically -- well one, turning to the
6 specifics on the fines of the citations, for myself, I would
7 defer consideration of those until I have the whole picture
8 of what's happening in Clarksburg. I don't know if I even
9 need to pass on the formulae used by staff for the fines.
10 We're not really about fines, that's the last ditch thing,
11 when the -- the horse is already out of the barn. We're
12 about land use. We're about enforcing the land use policies
13 of this county and making sure that things are built in
14 accordance with those plans. So for me, the most important
15 issue of compliance is what happens from this day forward.
16 Where am I on that? Well, the hardest issue in terms of the
17 equity is the current owners. For the ones that we know
18 already own the buildings, I -- I would try to clear the
19 title on them, but the staff's recommendation, to acquiesce
20 conforming all housing in the future, to basically, for the
21 developer, amend the plan for them, to bring in -- them into
22 compliance, I find totally unacceptable. And as to the
23 specifics of which ones I could clear title, I'm a little at
24 sea about having enough information to decide which ones to
25 grandfather because of my concerns which I will discuss as I
26 go through it, but not proceeding in a piecemeal manner.

1 Now why do I say that? Well what is our job as a
2 Commission? It's to take control of the process. This has
3 been like a runaway train without any blame placed on
4 anybody and that's not the way it's supposed to work. We
5 are the decision makers. So I think that -- I want to say
6 this is very important too -- because I'm proud to be a
7 Commissioner here, and the reason I'm proud is because of
8 the years of decisions that I've sat here and made. And I -
9 - I think of our staff as one of the finest and most
10 professional staffs that I've ever worked with, in the
11 various jobs I've held and I know that this has proven to
12 have serious harm to their morale. And I also want to say
13 that when I read the staff report, not the first one -- the
14 first report of violations, I said to myself, with a huge
15 sigh of relief, this is honest. This is telling people,
16 historically about what happened, even though, a lot of it
17 wasn't a very pretty picture and it didn't even always
18 reflect well on the Commission. And I was proud of that.
19 So, I want staff to know that in criticizing perhaps the
20 specifics of what we're talking about now, is not in any way
21 a general statement. It is just addressing what we are
22 trying to do right now.

23 That said, do I think we took too long to get to this
24 day? Yes I do. I am concerned about that. Of course I had
25 on the 14th, I would have found a violation on that day, but
26 it isn't just that, how long the investigation took, the

1 lengths that the citizens had to go through to finally come
2 to this moment, things did not work the way they should, and
3 I know that we are already internally looking at that. And
4 as we know, people are looking at it externally, so there
5 will be changes there. But it does make today more
6 difficult, because people are aggravated, and it's affected
7 for this case at least--trust. So if we're going to take
8 control of the process, if we're going to get back in
9 charge, the way we were and the way we are when we first
10 took the project plan and the site plans we should not
11 trivialize our own process by compartmentalizing each item
12 and proceeding piecemeal. We didn't do it when we did the
13 project plan. If you drive out to Clarksburg, you can't
14 just look at one house and say I'm not going to look at what
15 is next door, or I'm not going to look at the church, you
16 have to look at the thing as a whole. There are things that
17 are not before us today. But unfortunately there are
18 allegations, but there are allegations of a long list of
19 things, that at least for this Commissioner are of grave
20 concern to me. The timing of the issuance of building
21 permits for phase two, and the concomitant issue for the
22 validity of the October 14, 2004 Signature Set, what
23 happened there? Of which there have been many good
24 statements on both sides. I make no -- I don't -- my quest
25 -- I don't know. The elimination of O Street and the
26 pedestrian mews, once again, much said on both sides, cannot

1 | answer that today. The amenity phasing -- the, well, the
2 | extension of the preliminary plan we have that set for a
3 | date. The distribution of the MPDUs, the -- I don't know if
4 | it's the way it should be, but that's one of the most
5 | important things we do when we look at a site plan, it is of
6 | critical importance to us. So I can't say to you that
7 | without looking at those items, that I can really evaluate
8 | today the import of the height and setback violations that
9 | we just found. In the context of the whole plan, it may be
10 | fairly unimportant, the master plan may be quite alive if
11 | all these pieces are coming together, or it may not be. I
12 | don't know. So, for me, I would defer our sanctions, until
13 | we can consider all the other alleged violations, and in
14 | particular to the violations that we have found today, I
15 | would try to move with the greatest expediency possible, and
16 | I volunteer to put myself through this again on another
17 | days, maybe not necessarily on a Thursday to move
18 | expeditiously, to take what, right now is a boil on
19 | Montgomery County, and get it done and taken care of. Then
20 | I just have one little point that I'd like to say, which is,
21 | I cannot accept the idea that you could alter heights,
22 | through minor staff amendments, I've never heard of that,
23 | I've never known of that being done before, and I mention it
24 | now because it does go to the seriousness of the violation,
25 | but for me, I would defer ...

1 CHAIRMAN BERLAGE: All right, Commissioner Robinson,
2 did you want to go next?

3 COMMISSIONER BRYANT: Sure I'll go next. It's late in
4 the day I'm obviously tired, so I'm going to be a bad boy
5 and revert a little bit to my occasionally bawdy self. When
6 this situation comes up in my other ...

7 CHAIRMAN BERLAGE: Now we're all awake.

8 COMMISSIONER BRYANT: ... I looked at my colleagues and I
9 said when you get into this type of mess, there are two
10 types of ways in which you pay for it, the coin of the
11 realm, or the coin of the ream. I know which I'm paying in.
12 It's not the coin of the realm, so there's going to be
13 sanctions here, because it's just not enough for the
14 developers' interest to be scared, and make sure they
15 increase their level of diligence in the future. The pain
16 has got to be shared, it's got to go around, There has to be
17 some type of economic sanction to show that we really mean
18 what we say, and that these, as Commissioner -- all of my
19 colleagues have said that these site plans are very
20 important, and that the site plan document is very -- the
21 final plan that is recorded here and the chairman's signs
22 are very important. Now on specific remedies, I'll go with
23 my colleagues either way, if they want to defer the monetary
24 sanction until later, I can wait on that, if they want to do
25 it now, I can do it now. It's like they say, 'pay me now, or
26 pay me later. But as the Capital One card says, what do you

1 have in your wallet? You better go look at it, because
2 there's going to be sanctions, because good faith has
3 nothing to do with this. This is a matter of how we do
4 business. Good faith is not an excuse for being sloppy.
5 It's not an excuse for some level of professional or
6 corporate negligence or negligence on the part of our staff.
7 This should not have happened because all that was required,
8 contentious as it may have been, would be to come in for a
9 plan amendment, and to protect yourself, and we can't let
10 that go by, so the extent that there's a plea here that
11 everybody is dealing in good faith and they thought that
12 they'd got advice from the staff and that they could rely on
13 it et cetera, et cetera, that just not going to cut it as
14 far as I'm concerned. There may be an issue about the
15 amount that is sanctioned and whether it's proportional, and
16 you know, whether it will be sustained and how much we
17 should ask for. But the basic issue is not open to
18 question. Now moving on to the other aspects of the remedy.
19 There's two problems, there's the people that are in the
20 houses now, have their contracts, they can't move in. As
21 far as I'm concerned, and here I know this will upset the
22 people from Clarksburg that, you know, the project plan very
23 clearly says that residential buildings can be built up to
24 45 feet so if a building is under 45 feet then that is your
25 outer limit, in terms of an expectation under that project
26 plan. It may have been bargained down by the staff, the

1 developer may have made commitments, but there's a
2 distinction between the expectations that the developers may
3 have unwisely engendered and carried forward, and whether
4 they are in violation of the basic sector plan concepts and
5 the project plan. I made it clear I don't think that they
6 are so, necessarily. So I would go with the staff
7 recommendation to the extent that there are clearly in
8 extended contract, or someone's living in the house, I would
9 grandfather them in. And I am not worried about the problem
10 with a lane or a highway, because -- or a green space. Not
11 because I'm not concerned about it, I'm very concerned about
12 it, and those may be more serious violations than the ones
13 that we're dealing with here, because there's no ambiguity
14 about what's expected, at least there's some ambiguity about
15 the 45-foot height. So we can wait to impose the penalties,
16 we can grandfather in the people that have a problem with
17 their building heights, and if they are located in the green
18 spaces and should not have been there, they still have a
19 cloud on their titles because the complaints are going to
20 come in, you know, it's the obligation of the developer at
21 this point, and I would make a condition of our action here
22 that the developer advise people that are in those houses
23 that a complaint is likely to come in, or that they advise
24 them of the fact of the complaint as soon as it's filed.
25 That's a little harsh, but that's the reality of what's
26 going to happen. They may pass, they may get by on the

1 heights they are still going to have a problem but at least
2 we have narrowed the scope of injury in terms of the impact.

3 Now going forward there's a problem whether we should
4 allow all the town houses to be up to 45 feet -- not
5 necessarily. We still have jurisdiction to determine that
6 maybe those town houses should be 40 feet. Because our
7 regulatory procedures can hold them in the future to 35
8 feet, we can hold them to 40 feet depending on what we think
9 the impact is going to be on the historical district, so I
10 would reserve the issue on the buildings to be built in the
11 future to see whether they should be 35 feet, 40 feet or 45
12 feet or somewhere in between, so that we can have a record
13 of what the impact is going to be on the community
14 perspectively. I'm not prepared to simply let those
15 projects, those houses go forward without some concern, if
16 not in terms of the overall guidelines that are in, you
17 know, the project plan, but in terms of some concern that we
18 may have -- that in the future, that an unfortunate or
19 cavalier attitude depending on how we view these things,
20 regarding the site plan drawings not be automatically
21 rewarded perspectively, I think that we need to look at the
22 merits in terms of what will be done with those units. So
23 to sum up, in terms of the monetary sanctions, they can come
24 when they come, I think the current ones are reasonable, I'm
25 willing to wait, or I'm willing to impose them now, whenever
26 my colleagues think is most appropriate, I'm easy either

1 way. I will grandfather in the units that are clearly under
2 contract, and in terms of future development, amend your
3 project plan -- excuse me, amend your site plan, come in
4 with a proposal, and we'll see. Maybe we'll be interested
5 in arguing a little more, maybe the fines are a so-called
6 slap on the wrist and there's some question how enforceable
7 they are but when the new site plan comes in, or a new
8 project plan comes in. I know who has the leverage there.

9 CHAIRMAN BERLAGE: VICE CHAIR PERDUE, do you want to
10 weigh in?

11 VICE CHAIR PERDUE: A few comments. The -- the piece
12 of this that I feel that it's essential that we actually
13 decide today is for the houses that are built and occupied
14 or the houses that are un-built and under contract. I just
15 -- there's no easy answer on this, we could wait until all
16 information is in, but I just think that we have to address
17 those, and I would -- as to those, I would take the steps
18 necessary to confirm that they are in compliance with the
19 respect to the -- to the height and the setback. I would
20 not take steps to confirm that they are in compliance with
21 respect to anything else, because I never looked at anything
22 else. And -- and I don't view that confirmation as saying,
23 well since they are on the ground, no matter how far out of
24 compliance they are with some other conditions, it's going
25 to be okay but as to these -- as to height and setback I
26 would confirm for the ones that are built and the ones that

1 are un-built under contract. As to things un-built and no
2 contract, my inclination would be, both as to height and to
3 setback, I would say that the operative limit at the moment
4 is 35 feet and 10 feet setback, and if the developer wants
5 to do them differently, come in and we'll talk about it,
6 because I want to know where they are. And I've heard the
7 arguments that on setbacks, for example, that neo-
8 traditional communities they don't have setbacks, and
9 depending on where they are located, the setback might be
10 silly and a bad idea, that may be true but I can't decide
11 that in the abstract without actually seeing where they are.
12 So the ones that are un-built and not under contract, I see
13 no reason to say, it's fine. As to those I would treat them
14 -- the 35 feet, 10-foot setbacks, as the operative limit,
15 unless and until the developer comes back and seeks a change
16 on those. So that's -- those are the ones -- that's the
17 part I feel very strongly about deciding today. Fines --
18 here's what I'm struggling with on it, I'm not quite sure
19 I'm at the bottom line yet. On the one hand we have a
20 particular set of violations before us and we can adjudicate
21 them and my inclination at this point is that -- that --
22 that the violations with respect to the things that are
23 between 35 and 45 feet are as, or characterized by our own
24 counsel, technical violations, and that suggests a fine but
25 I'm not sure why, for example we would do a double fine on
26 each house as a technical -- the suggestion in the staff

1 recommendation was \$500 for the two different stages, I --
2 my -- not sure that makes sense as a technical violation.
3 Again I'm talking about only the 35 to 45 feet, the ones
4 over 45 is a different matter. So I have that on the one
5 hand, on the other had its -- it's a little awkward to not
6 actually have the details about which -- where these, -- how
7 much taller are they and we have general information, and we
8 have general information about how many there are, and so I
9 would -- in an ideal world -- would prefer to have more
10 detail about that. Although, again because it's -- I view
11 this one, the 35 to 45 as a technical violation, I'm -- in
12 the end I'm not sure how much that detail would change my
13 view on the fines. So I'm torn on the fine piece, the ones
14 over 45 feet I -- I really -- I want to know how tall they
15 are, I want staff, I want measurement. I mean I heard from
16 one of the developers saying no, it's not this one, it's not
17 too tall. It matters a lot to me. And maybe it turns out
18 everybody is going to reach agreement on what they are but -
19 - but it seems -- because I view that as a much more serious
20 violation, the details of those matter a lot more to me
21 about precisely what our staff says what the heights are.

22 Now the other -- what about all the other potential
23 violations? There have been serious allegations I take them
24 very seriously. They clearly have to be investigated. One
25 could hold off fines until we knew about -- we know all of
26 those have been judicated, and then fines are done all at

1 once. I think -- in the end -- not sure it makes sense,
2 when we get to those, what -- having found what -- having
3 found violations here, at the next one, if we are to find
4 violation, at that point, one can say, there's a pattern of
5 violations. And the fact that there is a pattern of
6 violations might mean that the sanctions for number two, are
7 much more significant and indeed the sanctions for number
8 three, if there were a number three or number four, would be
9 very significant, if we were to find violations, because
10 increasingly one would say there's a -- there's a pattern of
11 violations. But I don't think we have to wait until we have
12 done all those to impose the fines on the first ones. So, I
13 don't feel as strongly about the fines as I do about the
14 houses that are built, although my inclination would be to
15 go ahead and assess the fines on the 35 to 45 feet although
16 I -- I would not do it for the two events, I would do it at
17 \$500 a unit, as a technical violation ...

18 COMMISSIONER WELLINGTON: Although by waiting, we could
19 then get the details as you're saying, on the buildings over
20 45 and ...

21 VICE CHAIR PERDUE: Yeah, I would wait on the buildings
22 over 45 ...

23 COMMISSIONER WELLINGTON: And for me I would be getting
24 the information about the 35 feet and where they are in the
25 layout in terms of do they block the church spire, do they -
26 - do some of them, cause more problem for the master plan

1 and how great are they? What is the height variation from
2 35? That's why I was suggesting deferring on that.

3 CHAIRMAN BERLAGE: My own views are very similar to
4 those of Vice-Chair Perdue. First of all, I absolutely
5 agree that we need to legalize the properties that have been
6 sold and occupied, and the properties that are under
7 contract. To fail to do that would be a cure far worse than
8 the disease. These are innocent third party purchasers,
9 these are families living in the Montgomery County, and even
10 for those who are merely in the process of trying to close
11 on a contract, anyone who has been through the process of
12 buying a home in this market, and I suspect many of them
13 have been through that process, knows that it is enough of a
14 roller coaster without our visiting upon these innocent
15 individuals and families, the ramifications of what has gone
16 awry in the development process, and so I completely agree
17 with that sentiment.

18 As to imposing sanctions today, at this time I think
19 the staff recommendation is probably in the right place. It
20 is a recommendation that is very significant in terms of the
21 amount, it is -- I recognize there will be some who won't
22 consider any amount high enough. If the staff
23 recommendation is adopted however, it will be the largest
24 fine ever imposed in our history. We are dealing with a
25 violation which, for all appearance was not intentional,
26 that does not excuse it, that does not justify it, and that

1 will not relieve the developers or the builders of paying
2 the price of the failure to adhere to the Signature Sets
3 that they submitted and they signed. It is a very, very
4 serious matter, but the intentionality of the violation
5 obviously does get into the question of what is the penalty?
6 And the penalties that have been suggested by staff, while
7 significant, I think do reflect the record before us. If
8 there were evidence of an intentional violation, I think the
9 fines would be much, much higher than what is recommended
10 here today.

11 I also am a bit perplexed frankly, and I listened
12 carefully to the argument as to why one should wait. I
13 don't understand the argument that by waiting, the issuance
14 of sanctions for these violations, that somehow we would --
15 that failing to wait would somehow deprive us of an
16 opportunity to act decisively on any future violations that
17 are uncovered. The other allegations will be fully reviewed
18 and fully evaluated, and we will work with the community in
19 an effort to get to the bottom of those alleged violations.
20 But those who are aware of the powers that we have to impose
21 sanctions, including monetary fines, which are typically
22 tied to every day that the violation exists, you can impose
23 the fine again, those who are aware of the scope of our
24 enforcement powers know that the complainants are very aware
25 of the scope of those powers, will understand that if we do
26 find additional violations, and if they do establish a

1 pattern or practice of ignoring the law, that we will at
2 that point, have the same opportunity that we might have
3 today, might not exercise today, to impose fines far in
4 excess of what the staff has recommended. So I don't see
5 that we are losing the opportunity to -- to continue to make
6 sure that any violations of our approvals are dealt with
7 forcefully. I guess that when you are ...

8 COMMISSIONER WELLINGTON: Where are you on the future
9 homes? Because I think there were three of us who said that
10 we would not grandfather any of the un-built homes that had
11 no contract.

12 CHAIRMAN BERLAGE: I -- I am in agreement. That is --
13 that essentially provides us with an opportunity to do what
14 should have been done in the first place, for the units that
15 are already constructed, namely, the developer, the
16 builders, if they are interested in making an argument that
17 the heights or the setbacks of those buildings, those fit to
18 be constructed units, should be different from what the
19 approvals have currently provided for, they can come in and
20 ask. And the community can react to that, and we'll have a
21 hearing and we'll have a discussion and we'll weigh that on
22 the merits. So certainly that is not something that needs
23 to be dealt with today but should be dealt with in the
24 normal course, in the future.

25 COMMISSIONER WELLINGTON: Well, if we could I would
26 like to vote on that separately because I agree with my

1 | colleague on that. I do not agree with the other findings.
2 | Like I don't think we have -- we can't make a finding on
3 | whether it was an intentional or inadvertent, because we
4 | don't -- we don't know. So, in terms of how much the fine
5 | would be, I can't make a finding on that, and we don't even
6 | have the information of evaluating a fine based on the
7 | profitability, or how much extra was made because of the
8 | violations which I think would be relevant, and that's why I
9 | wanted to defer the citation and fine process until we could
10 | get all of the information.

11 | VICE CHAIR PERDUE: Well could I -- I was going to make
12 | a suggestion. I was going to try (over speaking) ...

13 | CHAIRMAN BERLAGE: Please go ahead.

14 | VICE CHAIR PERDUE: ... breaking things apart and let's
15 | see if it would work. So that at least the first part is
16 | that as part of a plan of compliance, all units that are
17 | built, or that are un-built and under contract, would be --
18 | appropriate adjustments would be made to ...

19 | CHAIRMAN BERLAGE: Remove any cloud of title.

20 | VICE CHAIR PERDUE: (Over speaking) remove any cloud of
21 | title, they are in compliance with respect to height and
22 | setback.

23 | MS. ROSENFELD: Right, revise the project plan and site
24 | plan project data tables for those buildings...

1 VICE CHAIR PERDUE: For those buildings -- with respect
2 to the height and setback. So just that, that's my --
3 that's the first piece (over speaking).

4 CHAIRMAN BERLAGE: That is a separate motion.

5 VICE CHAIR PERDUE: That's just one - that's right.

6 CHAIRMAN BERLAGE: All right.

7 COMMISSIONER BRYANT: Well then, based on this
8 recommendation, that would be two, there are two specific
9 recommendations.

10 VICE CHAIR PERDUE: I don't know which number it is ...

11 CHAIRMAN BERLAGE: Looking at page two of -- yeah well
12 it's -- number one seems to be what we decided in the prior
13 proceeding, am I right?

14 VICE CHAIR PERDUE: I -- it's not all of number two,
15 because this is just -- I haven't talked about fines, and I
16 haven't talked about the un-built units.

17 COMMISSIONER BRYANT: Well, I'm saying then number one
18 should stay in.

19 VICE CHAIR PERDUE: Direct staff to issue citations.

20 CHAIRMAN BERLAGE: Looks like it's ...

21 COMMISSIONER BRYANT: Yes, the citation is just the
22 fact that confirmation of the violation has occurred, and
23 there is no disputing with that.

24 DIRECTOR CHARLES LOEHR: That -- that includes the
25 dollar.

26 COMMISSIONER WELLINGTON: Right, I think you're not ...

1 CHAIRMAN BERLAGE: As inviting as it would be to go
2 through the staff recommendation, I'm not sure that really
3 is the best way to proceed. I think we can go through the
4 issues that Board members have raised, and then if we are
5 missing anything in the end, we can come back..

6 VICE CHAIR PERDUE: That would be my advice,
7 suggestion. I was just trying to find out whether, what the
8 rest of the Board's thinking was on this one question, of
9 whether we would bring the built and un-built under contract
10 units into conformance. So my motion is that they be
11 brought into -- into conformance.

12 CHAIRMAN BERLAGE: Right, that's a motion and a second,
13 any discussion?

14 COMMISSIONER WELLINGTON: As refers to height and
15 setback.

16 VICE CHAIR PERDUE: As to height and setback.

17 COMMISSIONER WELLINGTON: All right and you had another
18 language in the beginning in that it would not be passing
19 any judgment on any issues that came before, give assurance
20 of a cloud -- there wouldn't be a clouded title under other
21 circumstances.

22 VICE CHAIR PERDUE: Right, its not -- the only
23 adjustment would be concerning height and setback. If it
24 got other problems I wouldn't purport to be ruling on those
25 because that's really not the way forward.

1 CHAIRMAN BERLAGE: All right, that's the motion. All
2 in favor say aye.

3 GROUP: Aye.

4 CHAIRMAN BERLAGE: Any opposition? That appears to be
5 unanimous, okay.

6 VICE CHAIR PERDUE: Now let me try that one -- next
7 piece.

8 CHAIRMAN BERLAGE: Please.

9 VICE CHAIR PERDUE: As to the un-built -- the un-built
10 units, that those are bound by the height limit of 35 feet
11 and the 10-foot setback, that's what's applicable to those,
12 and so any -- I can proceed -- consistent with that if the
13 developers want to build, want to change those, they have to
14 come in to us. I mean in a sense, it's not exactly a plan
15 of conformance, it's just clarifying that we're not changing
16 anything as to those, and as to those, we're treating 35
17 feet and 10-foot setbacks as the operative limits.

18 COMMISSIONER BRYANT: May I get a clarification on that?

19 COMMISSIONER WELLINGTON: You're not authorizing staff
20 to modify ...

21 VICE CHAIR PERDUE: We're not authorizing staff to
22 modify anything.

23 MS. ROSENFELD: There is one point of clarification I
24 would like to make, there is a 45-foot height limit for
25 multi-family buildings, 35 for single-family and town homes,
26 and 45 in the project data tables ...

1 VICE CHAIR PERDUE: Yes.

2 MS. ROSENFELD: ... I assume that stands ...

3 VICE CHAIR PERDUE: Right, that's -- yes.

4 COMMISSIONER BRYANT: Let me get a clarification,
5 because you said, on the un-built, un-built does not mean
6 un-contracted, and therefore what will happen, or what
7 possibly could happen is that we have obviated an existing
8 contract for those people.

9 VICE CHAIR PERDUE: I'm sorry my prior motion was built
10 and un-built and under contract.

11 COMMISSIONER BRYANT: Oh and under contract?

12 CHAIRMAN BERLAGE: We have already grandfathered anyone
13 that is under contract, whether built or not, whether
14 started or not.

15 COMMISSIONER BRYANT: Okay, if I understood correctly
16 then that means everybody that I had a concern about is
17 taken care of. Right now we're talking about people who ...

18 VICE CHAIR PERDUE: Under contract, as of now.

19 COMMISSIONER BRYANT: As of now, today.

20 VICE CHAIR PERDUE: Not allowed to ...

21 COMMISSIONER BRYANT: So that's three categories that I
22 ...

23 VICE CHAIR PERDUE: You know, when we finish and go
24 sign up people, it's as of now.

25 COMMISSIONER BRYANT: Okay. Okay.

26 VICE CHAIR PERDUE: Yeah.

1 COMMISSIONER BRYANT: Okay.

2 VICE CHAIR PERDUE: So what ...

3 CHAIRMAN BERLAGE: I'm quite certain nobody's signing
4 contracts today on these units.

5 VICE CHAIR PERDUE: Okay. So as to un-built units --
6 as to un-built units we have not authorized staff to change
7 anything. And ...

8 CHAIRMAN BERLAGE: Right. So not built and they are
9 not contracted for, they are subject to the existing
10 approval.

11 VICE CHAIR PERDUE: Highlighting -- highlighting to
12 everybody concerned that the rules are 35/45 feet, 10 foot
13 setback, you guys want to change it, you file, we'll look at
14 it.

15 CHAIRMAN BERLAGE: Yeah I mean that -- we're not
16 suggesting they might want to change it just, you know,
17 because we're trying to be nice. They may come in and seek
18 to change the rules for the yet to be built units, because
19 given what has taken place today, holding the future units
20 to the existing signature sets may in fact be damaging to
21 the look and esthetic appearance of the Clarksburg
22 community.

23 COMMISSIONER WELLINGTON: (Inaudible) particularly with
24 respect to things like setbacks (over speaking).

25 CHAIRMAN BERLAGE: Setbacks, and we can give good
26 examples of that.

1 VICE CHAIR PERDUE: And the neo traditional community,
2 that may not be a sensible thing to do. But I - I don't
3 know ...

4 CHAIRMAN BERLAGE: Well we made no assumption that that
5 would be granted.

6 VICE CHAIR PERDUE: They have to make the case, that's
7 all.

8 CHAIRMAN BERLAGE: We will talk about it. We'll
9 discuss it.

10 VICE CHAIR PERDUE: No pre-decision on any of that.

11 COMMISSIONER BRYANT: So is that a formal motion?

12 VICE CHAIR PERDUE: That was the next piece of the
13 motion.

14 COMMISSIONER ROBINSON: I second.

15 COMMISSIONER WELLINGTON: Well, I am sorry, what was the
16 motion?

17 VICE CHAIR PERDUE: As to un-built units that are not
18 under contract, we are not authorizing staff to make any
19 corrective action and we are confirming that the limits are
20 35/45 feet and 10-foot setbacks.

21 COMMISSIONER BRYANT: And it's been seconded.

22 VICE CHAIR PERDUE: Okay.

23 CHAIRMAN BERLAGE: Any further discussion? All in
24 favor say aye.

25 GROUP: Aye.

26 CHAIRMAN BERLAGE: That's unanimous.

1 VICE CHAIR PERDUE: I think the third part is the
2 fines. Is there anything else other than fines?

3 CHAIRMAN BERLAGE: Tell us what's left.

4 MS. ROSENFELD: The fines.

5 VICE CHAIR PERDUE: Okay now the fines got, I'm not ...

6 CHAIRMAN BERLAGE: Did we resolve the phase one, phase
7 two dichotomy?

8 MS. ROSENFELD: We did not distinguish between phase
9 one and phase two ...

10 CHAIRMAN BERLAGE: Your position is they're all subject
11 to fines.

12 MS. ROSENFELD: Our position is that they are all at
13 this point subject to the same 35/45 foot height limit (over
14 speaking).

15 CHAIRMAN BERLAGE: So you agree with Mr. Knopf's
16 analysis of -- okay.

17 COMMISSIONER BRYANT: Now let me ask you this question
18 with regards to fines, and this might get at some of what I
19 think I'm hearing from some of the other colleagues, that is
20 that you actually stated earlier, and that is that when it
21 comes to fines, we can just, essentially authorize staff to
22 levy appropriate fines, and we'll lay out the parameters.
23 Is that not true?

24 CHAIRMAN BERLAGE: I believe that's correct. Is that
25 correct, Michelle?

1 MS. ROSENFELD: You can establish the amount of the
2 fine, and the event or events, which you think merits
3 sanction and then we would issue the fines ...

4 COMMISSIONER BRYANT: Okay, well ...

5 MS. ROSENFELD: ... issue the citations.

6 COMMISSIONER BRYANT: Well since we in fact have taken
7 care of what I consider to be at least, the most crucial
8 aspects of trying to make whole those people who are out
9 there, waiting for us to make some sort of decision, the
10 fines in fact could be delayed, to give staff an opportunity
11 to come back with a, a proposal that considers the kinds of
12 things that have been said, and that they've heard, and
13 bring that back for us to react to...

14 COMMISSIONER WELLINGTON: We can allow the parties then
15 to submit their ideas about how they think the fines should
16 be assessed.

17 COMMISSIONER BRYANT: And I -- I personally do not have
18 a problem with that.

19 VICE CHAIR PERDUE: The part I guess I want to get some
20 clarity on -- one -- with respect to the buildings over 45
21 feet, not, where I am is I would like to -- I don't want to
22 assess a fine on those, until I know exactly how tall they
23 are and I have agreement -- I mean, I hear from staff.

24 COMMISSIONER WELLINGTON: That's where I am on the 35
25 feet too, I agree with you.

1 VICE CHAIR PERDUE: So as to those, because it matters
2 to

3 COMMISSIONER BRYANT: Incorporate that into the motion.

4 VICE CHAIR PERDUE: So I would like staff -- but that's
5 a very -- I don't want to know about -- it's not come back
6 and tell us about the -- every -- everything else that's
7 going on. It's just that specific ...

8 CHAIRMAN BERLAGE: I think we either impose the fine
9 today or we impose the fine another day, a fine to be
10 flushed out just doesn't -- that doesn't work for me.

11 VICE CHAIR PERDUE: Well I guess, as to -- I think here
12 -- as to the buildings that are under 45 feet, the 35 to 45
13 those -- I went back and forth on it -- I think where I am
14 at this point is I would be comfortable assessing -- saying
15 what the fine is on those, because, I can see ...

16 CHAIRMAN BERLAGE: That would be a \$1000 -- two \$500
17 fines.

18 VICE CHAIR PERDUE: Yeah, we'd have to talk about the
19 amount, because I actually think, I'm not sure, I don't
20 understand the rationale for two.

21 CHAIRMAN BERLAGE: Right.

22 VICE CHAIR PERDUE: But I consider that a technical
23 violation, not a fundamental violation where it matters
24 whether it's, you know, exactly what they are. So I'd be
25 inclined to -- to go ahead and assess that one. The ones --
26 the difficulty I'm having-- the ones over 45 feet I just

1 consider a more serious -- it's not a -- I consider that not
2 a mere technicality. So ...

3 CHAIRMAN BERLAGE: So you're suggesting that ...

4 VICE CHAIR PERDUE: I feel ...

5 CHAIRMAN BERLAGE: ... the staff recommendation is not
6 enough for those possibly, is that what you're saying?

7 VICE CHAIR PERDUE: Yeah, I don't know, I don't know, I
8 don't know how that -- I don't have enough information about
9 how big -- how -- I don't know their heights because we
10 didn't -- we didn't have a (over speaking).

11 CHAIRMAN BERLAGE: Well since you asked the question
12 well why don't we get -- Rose could you briefly review the
13 basis for the fines that you recommended.

14 MS. KRASNOW: Well, we've heard people state here today
15 that we should be charging \$500 a day going back to the time
16 the first person moved into the house. Staff takes issue
17 with that. We had not ever put builders on notice and so we
18 -- we think that realm of things is not really in front of
19 us. We had chosen two specific dates. The date the
20 building permit was issued and the date construction was
21 begun, simply as a basis to go from. I tend to think in
22 light of the fact that we don't have the measurements -- and
23 I -- I regret that we don't have the measurements that we
24 should perhaps postpone setting a fine. I think it would be
25 significant to all of us to find out what the actual heights
26 are. I hope we'll be able to get that information for you.

1 It has proven more difficult than we had suspected. And
2 again, we do not have the equipment here to measure height
3 ourselves. But I -- given the lateness of the hour,
4 personally, I think we would do better perhaps to postpone
5 this decision.

6 CHAIRMAN BERLAGE: Until when?

7 MS. KRASNOW: Well we do have another ...

8 CHAIRMAN BERLAGE: Because I don't want...

9 COMMISSIONER BRYANT: She doesn't know because ...

10 MS. KRASNOW: We do have another hour set aside next
11 week, but we're not going to be able to have everything
12 measured by next week. So I don't know.

13 COMMISSIONER WELLINGTON: Well, don't the applicants
14 know the heights of the buildings they built?

15 MS. KRASNOW: I would assume the applicants do.

16 COMMISSIONER WELLINGTON: Can't...

17 MS. KRASNOW: If the applicants are willing to submit
18 that information to us.

19 COMMISSIONER WELLINGTON: I think it should already
20 have been requested, and then they need to certify that it
21 is correct, and you can verify it by going out with their
22 engineers yourself.

23 MS. KRASNOW: I'm -- I'm happy to accept the
24 information from the applicant. I was worried that that
25 would be viewed as suspect to be very honest.

1 COMMISSIONER WELLINGTON: Well you have to find a way
2 to (over speak).

3 CHAIRMAN BERLAGE: Ladies and gentlemen, please, we
4 listened carefully to everyone. This is our opportunity to
5 speak. Anything that is submitted will be made available to
6 the public, and the public will have a complete opportunity
7 to -- to review it and take issue with it. That -- that's
8 not a question. Go ahead, Rose.

9 MS. KRASNOW: So what I would like to do is to get that
10 data and to actually verify each violation. I think it will
11 help us in establishing whether it was technical or whether
12 it was more on purpose...

13 COMMISSIONER BRYANT: Yes, yes, yes, that's good,
14 that's completely appropriate.

15 COMMISSIONER WELLINGTON: I would like information for
16 the 35 foot too.

17 CHAIRMAN BERLAGE: Well ...

18 COMMISSIONER WELLINGTON: I don't agree that that was
19 just technical, and that is 433 town houses.

20 MS. KRASNOW: They should have all that data.

21 COMMISSIONER WELLINGTON: They should have all that
22 data.

23 VICE CHAIR PERDUE: I'm sorry, were you suggesting
24 deferring on all of them or just on that?

25 CHAIRMAN BERLAGE: All of it.

1 MS. KRASNOW: I was suggesting deferring on all of
2 them, yes.

3 VICE CHAIR PERDUE: Okay.

4 CHAIRMAN BERLAGE: Well I think I can -- I can see
5 where the Board is going on this. I simply want to state --
6 I keep hearing the term technical violation -- Mr. Kaufman
7 we're not seeking anything from you at this point.

8 MR. KAUFMAN: I can give you some of that information.

9 CHAIRMAN BERLAGE: Not right now. Not right now, thank
10 you.

11 COMMISSIONER WELLINGTON: You could have given it to us
12 sooner.

13 CHAIRMAN BERLAGE: Mr. Kaufman you may return to your
14 seat.

15 MR. KAUFMAN: Okay.

16 CHAIRMAN BERLAGE: We did not call you up here to
17 speak.

18 MR. KAUFMAN: Okay. Sorry. (Inaudible).

19 CHAIRMAN BERLAGE: The term technical violation keeps
20 getting thrown around and I really don't know what that is.
21 And I really don't like that term at all because it suggests
22 some kind of minimization of the violations. I know what an
23 intentional violation of law is. And if there was evidence
24 of that, I would throw the book at anyone who intentionally
25 violated the law. I know what an unintentional violation,
26 which is what we appear to have here today, and

1 | unintentional is a statement of circumstances under which
2 | the violation occurred. But if the violation is a violation
3 | is a violation. Technical I really don't understand what
4 | that means.

5 | MS. KRASNOW: That was not my word. (LAUGHTER)

6 | CHAIRMAN BERLAGE: That was not really directed at you
7 | but it's directed at everyone.

8 | COMMISSIONER BRYANT: With that idea in mind, Mr.
9 | Chairman, there is no need to really take a motion. We
10 | could just by consensus agree that we (over speaking).

11 | CHAIRMAN BERLAGE: That the matter remains open.

12 | COMMISSIONER BRYANT: Yeah. That it remains open until
13 | she can give us a better idea in terms of a time that in
14 | fact you can come back with all of the information,
15 | regardless of the approach that you use but understanding
16 | the necessity to act as soon as possible, and that we'll
17 | just have to re-notice from that standpoint.

18 | CHAIRMAN BERLAGE: Well we don't need to re-notice
19 | because the notices are already out there. It will be a
20 | continuation of what we're doing today. And we will act
21 | with speed. I think that there's been a lot of time gone by
22 | that has brought us to this point. We have made a strong
23 | statement in so far as we have -- now that we finally have
24 | full information before us, we have determined that there
25 | are -- and have determined unanimously that there are
26 | violations and what those violations are. But obviously the

1 next question on everyone's mind is what's the remedy? And
2 a long delay on assessing that remedy I do not think is good
3 for the community and is not good for our credibility, and I
4 think that we need to clear the decks and get this back
5 before the Board as quickly as possible, and definitely
6 before the August recess.

7 MS. KRASNOW: Yes, sir.

8 VICE CHAIR PERDUE: But I just want to clarify -- what
9 I want -- given this conversation, what we're seeking is
10 information about the heights and locations of these
11 buildings. This is not saying before we assess the fines,
12 we need to investigate the question of the mews, we need to
13 -- we need to know the -- about the Road O. What I
14 understand us to have asked for is information about the
15 heights and locations of the buildings, and not everything
16 else, not because everything else isn't important but that's

17 COMMISSIONER BRYANT: That's not part of this case.

18 VICE CHAIR PERDUE: ... that's not part of this case.

19 COMMISSIONER WELLINGTON: That's proceeding
20 independently...

21 VICE CHAIR PERDUE: It is proceeding -- it will proceed
22 independently, yes.

23 MS. ROSENFELD: One more point. If we defer this or
24 recess this to a date certain, we do not need to re-notice.
25 If we leave the date uncertain, we will need to send
26 subsequent notice.

1 CHAIRMAN BERLAGE: Then let's get a date.

2 MS. ROSENFELD: To - to Director Charlie Loehr here and
3 we would like to recess this until July 28th when all five
4 Board members will be here and we will have an opportunity ...

5 CHAIRMAN BERLAGE: And that's a Thursday?

6 MS. ROSENFELD: Which is a Thursday, and we can collect
7 the information in (inaudible) time.

8 CHAIRMAN BERLAGE: By unanimous consent, that will be
9 the action of the Board. Yes. So the matter remains open
10 and we will reconvene on -- on July 28th.

11 I do -- there was a lot said today, most of it directed
12 at these particular violations but some of it directed at
13 larger issues, and while we were discussing the violations I
14 really did not want to cloud the record by responding to
15 some of the other points that were made. But I want to be
16 very clear on behalf of myself, and on behalf of the Board,
17 and on behalf of the entire staff that while the imperfect
18 enforcement process does not excuse the violations that this
19 Board has found, and the Board will impose the sanctions
20 that are appropriate. It is quite obvious that there have
21 been serious problems with the enforcement process, and that
22 set of problems must be fully investigated, fully reviewed
23 and must be fixed. This is something we have already
24 announced that we will be seeking to obtain a review by an
25 outside independent entity. I think it is critical that we
26 go outside the Park and Planning Commission and find a

1 competent, credible responsible reviewing authority that
2 everyone can agree is a good independent entity that can
3 review our processes from top to bottom so that we can find
4 out where things went awry and make sure that the problems
5 are fixed and that situations such as this does not recur.
6 We have spoken and been in contact with other agencies of
7 county government who also play a role in the development
8 process, and they have pledged their full co-operation and
9 participation in that top to bottom review. Clearly that is
10 critical. I know that out there in the community -- in some
11 -- not in the community generally, but in some places there
12 has been an obvious tendency to try to point fingers or
13 assign blame. The citizens of Montgomery County don't
14 really care about the difference between Park and Planning
15 and DPS. They don't care about the difference between site
16 plans, preliminary plans and zoning codes. What they care
17 is that their elected and appointed officials are minding
18 the store, and are ensuring that laws are adhered to and
19 laws are enforced, and that is especially true in the land
20 use context. And all of us in county government in the
21 largest sense, including Park and Planning and county
22 government have an obligation to make sure that we restore
23 credibility in the process. And we will do so. This agency
24 doesn't control everything. But what we do control, we will
25 get on top of. If we need to recommend changes in law, we
26 will do that. If we need to change our own procedures, we

1 will do that. If we need to move staff from one place to
2 another or seek new budgetary authority to ensure that the
3 approvals that this Board issues, and that are the product
4 of, generally speaking, a very intense interaction and
5 negotiation and consultation between developers, community
6 members and staff. A lot of work goes into those approvals,
7 they are very important, and that work should not be
8 squandered by a process that truly does not under present
9 circumstances make sure that those approvals are implemented
10 the way they're supposed to be in all cases. They need to
11 be, they will be, and we will take however much time and
12 effort is required to fix this.

13 With that, I think it would probably make the most
14 sense, and I apologize to the other applicants on our agenda
15 for what was the afternoon session, we're going to take a
16 one-hour recess for lunch. I'm sorry, for lunch -- for
17 dinner. I've still got my -- my -- my times confused, and
18 at 8:15 -- is that where we are? 7:15?

19 VICE CHAIR PERDUE: Yes.

20 COMMISSIONER BRYANT: Yeah. 7:15.

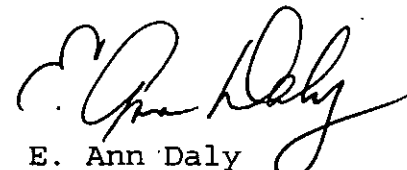
21 CHAIRMAN BERLAGE: Yeah, at 8:15, we will reconvene and
22 we will do Items 4, 5, 6 and 8, which I believe can be
23 handled relatively quickly. We will then move immediately
24 to the scheduled evening agenda. Which is 11, 12 as well,
25 and then the evening agenda 13 and 14, and apologies to
26 those whose schedules may have been disrupted.

1 VICE CHAIR PERDUE: Yeah, the one thing I just would
2 add is as frustrating as it is for people, we -- we do -- we
3 need to make -- it's in everybody's interest for us to be at
4 least vaguely coherent. And so after the last 12 hours,
5 however long it's been, 10 hours, the decision-making will -
6 - will not improve by not taking a break.

11 CERTIFICATION

15 This is to certify that the attached proceedings before
16 The Maryland-National Capital Park and Planning Commission,
17 Montgomery County Planning Board, in the matter of
18 Clarksburg Town Center Site Plan Review No. 8-98001 (Phase
19 I) and amendments, Site Plan No. 8-02014 (Phase II) and
20 amendments, Items 1, 2, and 3 on the agenda, respectively:
21 Reconsideration of failure to comply (building height);
22 Threshold hearing, failure to comply (building setback), and
23 Enforcement and Plan of Compliance hearing. This hearing was
24 held as herein appears in the auditorium at 8787 Georgia
25 Avenue, Silver Spring, Maryland, on Thursday, July 7, 2005,
26 and that this is a transcript from the audiotape.

28
29
30
31
32



E. Ann Daly
Technical Writer