

RECEIVED
1857
NOV 09 2005

MEMORANDUM

OFFICE OF THE CHAIRMAN
THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

TO: Montgomery County Planning Board
c/o Chairman Derick P. Berlage (via fax & e-mail)

CC: Rose Krasnow, Chief, Development Review Division (via fax & e-mail)
Michele Rosenfeld, Associate General Counsel (via fax & e-mail)

FROM: Kevin P. Kennedy and Timothy Dugan, Co-Counsel to Craftstar Homes, Inc. and
its LLC affiliates and NVR, Inc. t/a NV Homes

DATE: November 8, 2005

At the 11/3/05 hearing, a question came up as to whether I was correct when I said that at the 4/14/05 hearing none of the Board asked Ms. Withans the pivotal question of *when* the (now supposedly infamous) "change" in the site plan document record occurred - - whether (i) in real time, contemporaneous with the minor amendment (from maximum feet to maximum stories) that both she and Ms. Krasnow agreed had occurred very early in the project history *or* (ii) more recently, since the CTCAC raised issues regarding height compliance, *circa* 2005. I re-read the 4/14/05 transcript, just to be sure. If you do the same, you will confirm, as I stated; *viz*, Ms. Withans was never asked and never volunteered that information in her own testimony on 4/14/05.

That said, if asked now, I am quite certain she would corroborate what we and the developers' counsel have been arguing; *to wit*, (i) that the change was *not* important to any aspect of the staff's 4/05 recommendation against finding any height violation - - *i.e.*, *the alleged "change" in the record played no role in fact*, and (ii) was only made by Wynn as "confirmatory" - - demonstrative evidence, if you like - - of what she had already agreed to as a "minor" site plan amendment *in real time*, pursuant to her authority, delegated by the Board to her pursuant to Condition 38, *etc.* See attached flow chart re: same. For corroboration, the Board need only look at all of the as-permitted, built and lawfully occupied homes, all of which conform to the P&P c/o Wynn's minor amendments and real time interpretive instructions regarding same. Again, the permittees alone must receive the benefit of the doubt in that regard, presumption of innocence/compliance inclusive.

Thank you again for keeping an open mind on all of this. Properly reconciled, and for all of the reasons that we and other respondents have already put forward, the only proper outcome to all of the pending allegations of site plan violation is a resounding "not proved," and dismissal in favor of our client respondents.

Attachment

cc: Curt Adkins, V.P. (via fax)
David Deal, V.P. (via fax)
Stephen Kaufman, Esq. (via fax)
Robert Brewer, Esq. (via fax)
Barbara Sears, Esq. (via fax)

Enabling Authority for Site Plan Approval

The Maryland Code, Article 28

The Regional District Act

Granted powers in regard to Planning, Subdivision Control, Platting, § 7-111(b)

Granted administrative control and jurisdiction to the Planning Board (including power to delegate with guidance authority to review and approve plans to professional staff performing the duties and functions assigned) § 7-111(c)(1)

The Montgomery County Code

The Montgomery County Code

Delegation to Planning Board by the County Council to approve:

Project Plans, Sec 59-D-2

Site Plans, Sec. 59-D-3

The Planning Board

Approves Site Plans by a determination, and issuance of written opinion with finding of fact, that a plan meets all the fundamental requirements

MD Code Grants Authority to the Planning Board to Enter Into Agreements and Set Conditions

Regulatory Plan Enforcement, § 7-116(c) – “the agreement may establish terms and conditions required to implement the action and provide for enforcement and appropriate remedies.”

Development Rights and Responsibly Agreements, § 7-121 – the agreement is “for the purpose of establishing conditions under which the development of the property may proceed for a specified time.”

MC Code Grants Authority for Minor Amendments
Sec. 59-D-2.6, 3.7

“A minor amendment is an amendment or revision to a plan or any findings, conclusions, or conditions associated with the plan that does not entail matters that are fundamental determinations assigned to the Planning Board. A minor amendment is an amendment that does not alter the intent, objectives, or requirements expressed or imposed by the Planning Board in its review of the plan.”

Planning Board Lawfully Delegated the Approval of Minor Amendments and Clarified the Definition of a Minor Amendment in this Instance Through Condition 38 of the Site Plan Opinion and Repeated Same Definition As Condition in the SPA.

“The Applicant may propose compatible changes to the units proposed, as market conditions may change, provided the fundamental findings of the Planning Board remain intact and in order to meet the Project Plan and Site Plan findings. Consideration shall be given to building type and location, open space, recreation and pedestrian and vehicular circulation, adequacy of parking etc. for staff review and approval.”