

**CITY OF NEWARK
DELAWARE**

**PLANNING COMMISSION
MEETING**

November 6, 2007

7:30 p.m.

Present at the 7:30 p.m. meeting were:

Chairman: James Bowman

Commissioners: Ralph Begleiter
Angela Dressel
Mary Lou McDowell
Rob Osborne
Joe Russell

Absent: Chris Hamilton

Staff Present: Roy H. Lopata, Planning Director

Chairman James Bowman called the Planning Commission meeting to order at 7:30 p.m.

1. MINUTES OF THE OCTOBER 2, 2007 PLANNING COMMISSION MEETING.

The minutes of the October 2, 2007 Planning Commission meeting were accepted as received.

2. REVIEW AND CONSIDERATION OF THE MAJOR SUBDIVISION OF THE 120.391 ACRE NEWARK COUNTRY CLUB PROPERTY ON NOTTINGHAM ROAD FOR A 271 UNIT SINGLE FAMILY DEVELOPMENT TO BE KNOWN AS COUNTRY CLUB ESTATES [TABLED OCTOBER 2, 2007].

Mr. James Bowman: The Chair will entertain a motion to remove this item from the table.

MOTION BY BEGLEITER, SECONDED BY RUSSELL TO REMOVE THE ITEM FROM THE TABLE AND RESTORE IT FOR DISCUSSION.

VOTE: 6-1
AYE: BEGLEITER, BOWMAN, DRESSEL, McDOWELL, OSBORNE, RUSSELL
NAY: NONE
ABSENT: HAMILTON

MOTION PASSED UNANIMOUSLY

Mr. Bowman: Two ground rules for this evening; first, I am going to ask Mr. Lopata to summarize this item. We have already had an extensive public hearing on this item, and when we open it to public comment we are going to ask that, first, people who have not had an opportunity to speak before will be given five minutes if you are addressing something new and different. We have already extensively covered design, traffic issues, conservation issues, stormwater runoff and other items. So, the Chair will exercise the position to stop you if it looks like it is going to turn into another two hour "Donny brook" here tonight. The applicants will be given an opportunity first to explain or offer

any comments about why they have chosen to stick with the same plan that they offered the last time.

Mr. Lopata then summarized his report to the Planning Commission which reads as follows:

“At its October 2, 2007 meeting, after a lengthy public hearing, the Planning Commission tabled consideration of the 120.391 acre 271 single family dwelling unit Country Club Estates major subdivision proposed for the site of the Newark Country Club. By way of summary, the Commission indicated in its tabling motion that the applicant should consider submitting a revised and improved site plan for the property.

Following the meeting and subsequent discussions with the Planning Department, the applicant has requested that the Commission reconsider the plan currently “on the table,” and make a recommendation to City Council (see the attached letter from the applicant’s attorney, dated October 29, 2007).

The Planning Department’s suggested course of action for the Planning Commission is provided below.

Planning Commission Alternatives

In light of the response of the applicant to the Commission’s tabling motion, the Planning Department suggests that the Commission consider one or a combination of the following alternatives. Please note that the Department believes one alternative -- a further tabling -- is not realistic nor appropriate because the applicant does not wish to consider a plan revision for the site. As a result, after the item is “lifted from the table,” we suggest the Commission consider the following:

Alternative One

The Planning Commission recommends that City Council not approve the Country Club Estates plan based primarily on Subdivision and Development Regulations sections 27-3(f) *Site Design*, (1) *General* and (2) *Conservation and Natural Resources*.

Alternative Two

The Commission recommends that City Council approve the Country Club Estates plan, subject to the conditions in the Planning Department’s September 24, 2007 report [see attached].

Alternative Three

The Commission recommends City Council approve the Country Club Estates plan, subject to the conditions in the Planning Department’s September 24, 2007 report (see attached), with the additional condition that the City/applicant subdivision agreement includes the provisions described below. This agreement is typically negotiated and agreed to by the City Staff and applicant prior to its final acceptance and approval by City Council.

- If approved by City Council, a major subdivision with a minimum of 265 single family parcels shall be recorded by the City.
- As a condition of approval, the subsequent construction improvement plan [the technical and final site design plan that follows subdivision approval] shall be accompanied by a site plan approval plan, under the requirements of Zoning Code Article XXVII. In addition, this site plan approval plan, as stipulated in Zoning Code, section 32-97(a), shall be, “based upon distinctiveness and excellence of site arrangement.” This site plan approval plan shall use the existing RS zoning or an alternative zone (or zones) agreed to by the Planning Department and applicant. Site density

shall be limited to the maximums permitted within these districts, as modified in Zoning Code Article XXVII. This site plan approval plan shall be reviewed by the Planning Commission and City Council and final approval shall be completed as expeditiously as possible under current Subdivision and Development Regulations legal notice requirements; this site plan approval plan shall be reviewed under all current [that is, at the original date of Country Club Estates major subdivision application] Subdivision and Development Regulations; and, in no case, shall approval of this site plan approval plan be unreasonably withheld.

Procedural Matters

No matter which alternative is eventually selected by the Planning Commission, the following procedural steps will occur. We are including this information in light of the size and scope of the project for the information of the Planning Commission, the community and applicant.

After the Planning Commission makes its recommendation to City Council, the following occurs:

- A series of technical and related changes need to be made in the subdivision plan before revised copies are forwarded to the City Secretary, through the City Manager, for scheduling of a Council public hearing.
- An applicant, DelDOT, and Planning Department meeting should be convened by the applicant to clarify issues raised in DelDOT's review of the traffic impact study for the project [this is not atypical for large developments].
- A subdivision agreement is drafted by the City Secretary, reviewed and agreed to by the City Staff and the applicant, and then included with the major subdivision revised plans for Council's public hearing "packet."

Recommendation

The Planning Department suggests that the Planning Commission review the Planning Department reports on the Country Club Estates plan, re-review the applicant's subdivision plan and make a recommendation to City Council, based on the alternatives described above. While the Commission may also choose to hear once again from the public, because the Planning Commission public hearing was completed and the plan has not been changed, such a hearing is not required."

Mr. Lopata: One other final point that I want to make, which I think is crucial. The applicants have described the Country Club Estates plan as Code compliant and, therefore, they believe the Planning Commission should recommend approval. I think it is important to clarify this issue so the Planning Commission and the community understand the Planning Department and City Subdivision Advisory Committee positions on this matter. The plan is not Code compliant. It is "Code compliant." By this we mean that this subdivision plan, like many before the Commission, by-and-large conforms to the underlying zoning and with certain modifications, and in this case more information, can be fully Code compliant. One key example is water and sanitary sewer service. The Water and Waste Water Director and the Planning Department believe that it is crucial for you and the applicants to recognize that there is much more work to be done at the construction improvement plan stage to determine the required water and sewer system improvements so that 271 single family homes can be adequately and cost effectively served with sanitary sewer and water service. It is very important to understand, and we will underscore this in the subdivision agreement that will be drafted after this meeting, that the City is not guaranteeing that a specified number of units for the plan as shown can be adequately provided sanitary sewer capacity and water service. In other words, in terms of sanitary sewer and water service and related items, for that matter, it remains to be seen whether the plan is fully Code compliant. In the meantime, the plan remains "Code compliant."

Mr. Rob Osborne: Roy, can you help me understand, again, what the difference between Code compliant and compliant is.

Mr. Lopata: What we are saying is, if you go back and look at my original report, the September report, there is a lengthy list of items that need to be fleshed out.

Mr. Osborne: To make it Code compliant?

Mr. Lopata: When we approve a subdivision plan for 270 units or 10 units or whatever it is, an applicant understands that they can build those ten units (or presumes they can); they can sell 10 units, 5 units, 270 or 500 units. They are getting assurance from the City that that is an approved buildable facility.

The Water Director and I want to make it clear to everybody – the applicant understands this, but I want to make sure the rest of you do – that there is more work that needs to be done to be sure that these homes can be served in an adequate and cost effective matter. What I am trying to say in that case is more money may need to be spent to, let's say, to provide sanitary sewer service. A considerable amount of money might need to be spent. Some future builder might decide that they do not want to spend that kind of money to build 271 homes, so it is important to understand, in that case, that we are not warranting or guaranteeing that number of homes can be built on that site. In fact – just as an aside – the site plan approval process we are suggesting, may mean more homes can be built, depending upon the cost.

This is not an unusual thing, as I said. If you go back and look at my reports, I invariably say – very few people notice it except Mrs. White – that the plan “meets or can meet the Code.” I use those words deliberately because, for example this plan has 36 categories of changes that need to be made to be sure that when it is finally approved that it is buildable.

Don't misunderstand. I am not saying that this plan is drastically out of sync with the Zoning Code or Subdivision Regulations. It is not. It is Code compliant. With several additional steps, buildings can be constructed on this site pretty much as shown on the plan

Mr. Ralph Begleiter: Roy, in this plan, in this proposal that is under consideration tonight, is there any zoning ordinance change proposed or required?

Mr. Lopata: No.

Mr. Begleiter: Is there any zoning variance proposed or required?

Mr. Lopata: No, not at this point.

Mr. Begleiter: Is the City attorney here tonight?

Mr. Lopata: No.

Mr. Begleiter: In his absence, can you answer the question of whether the Planning Commission has the legal authority to table any of the activities that it is called upon to vote.

Mr. Lopata: From correspondence you received from the Solicitor, you always have the right to table. If the Commission is not happy with a plan before you, you have the right to table. But, you need to table for good and sufficient reasons based on something in the Code. That is really what it amounts to. And, of course, repeated tabling, when a plan before you is clearly not going to be revised, makes no sense and becomes just obstructionist. The Planning Commission is advisory. Your role is to give it your best shot, and believe me; I do not think there was anything wrong with tabling the plan before. You have tabled plans of much less moment many more times than the one time this item has been tabled. On the other hand, when you have tabled plans, it is usually pretty obvious that the applicant standing before you has indicated a willingness to make

revisions. You may remember the Casho Crossing plan. The attorney for that applicant actually asked you to table the plan. After hearing from the community they felt that the plan would be a better plan if it went forward following tabling.

Mr. Begleiter: So, if I said to you that the Planning Commission has no authority in law to table one of the proposals, would you say that that is an accurate statement or an inaccurate statement?

Mr. Lopata: I am not an attorney so I am not going to try to answer that question directly but, yes, I think you can table this item again. I am strongly urging you not to do that.

Mr. Begleiter: I wasn't asking about tabling it again. I am just asking about the authority to table it.

Mr. Lopata: You absolutely have the authority to table it. Robert's Rules gives you the authority to table. That is standard. There is nothing in the law that says you cannot table something. You need to do it for good and sufficient reasons.

Mr. Begleiter: Does this Commission follow Robert's Rules of Order.

Mr. Lopata: Yes

Mr. Begleiter: Have we adopted Robert's Rules of Order?

Mr. Lopata: Not officially. I have been Planning Director since 1977, and several of the former chairmen are in the room. I do not ever remember actually adopting them, but the City Council has adopted them and you as a body that reports to City Council, in a sense, go along with that. We have never operated under anything other than Robert's Rules on a somewhat informal basis, as I just indicated.

Mr. Begleiter: If we follow your advice and the City Attorney's advice, which is strongly urging us not to table the proposal again, and then we have various options at our disposal, is one of the options to outright reject the proposal?

Mr. Lopata: As I indicated in my first alternative, I think you can, as an advisory body, recommend against the plan. I make reference to the Subdivision Regulations sections having to do with quality, planning and good design; I will tell you as a matter of State law in Delaware that that is a relatively slender reed. It is a reed; it is not a redwood. It has not ever been tested. The law in this state is, by and large, if you meet the Zoning Code and you meet the Code and the plan is fully Code compliant, you must approve the plan. Now, I just went through that little song and dance about Code compliant. I did it for a reason. This plan is definitely Code compliant. The one before you is not in our view Code compliant. It is close enough to where you would be hard pressed to defend voting against it, but that is an alternative. I cannot tell you as Planning Director that you must vote yes. What is the point of having a vote? That is like a "Soviet" election.

Mr. Begleiter: That actually is the point of my question. If it is a slender reed, aside from that slender reed, in effect, we are required to approve this proposal.

Mr. Lopata: Approve it or approve it with conditions. Required is a bit of a strong word. Well advised. How is that? That is unfortunate. I have often made this comment in other contexts that the whole subdivision process is a little bizarre in Delaware because we have these hearings and votes, and people come to the meetings, and unless you have an applicant that is demonstrably willing to work with the community and willing to make compromises and is agreeable to tabling and revising plans, you are pretty much are forced to live with that plan.

Now there is a lot more to go. There are traffic issues. As I said, there are water and sewer issues. We are long way from the finish line, so this plan will be changed. The applicant, hopefully, recognizes that. But, in terms of the Planning Commission role, you are by and large kind of hemmed in. You can recommend, "for with conditions," and there are a whole series of important conditions. The third alternative, which, of

course, I think is the best. The intent of that is to let the applicant know we are put on the record as a Commission if you agree with it and if Council ultimately agrees with it that we really would like a better plan, and we are going to try to get you to that point. We will go way beyond what we would normally do; it is an open invitation to do better.

Mr. Begleiter: If I may, just one more set of questions related to the previous action that we took. Just for the record, at the last session we engaged in this matter, am I correct in saying that we tabled the matter and that we did not approve it the last time. Is that accurate?

Mr. Lopata: Yes.

Mr. Begleiter: What was your recommendation last time? Your recommendation, as I recall it, was to approve the proposal.

Mr. Lopata: My recommendation was Alternative Two, as you have before you tonight, to approve it with conditions based on the premises we have been talking about.

Mr. Begleiter: So, if I were to suggest to you that the Planning Commission members who voted unanimously to table this matter last time, and the Planning Director, were engaged in some kind of conspiracy, would you be able to reconcile those two things. You recommend that we do one thing, we unanimously voted to do something else, would you characterize that as a conspiracy? Would it be possible to characterize it that way?

Mr. Lopata: No, what I would say is that, once again, you did not listen to me.

Mr. Begleiter: But, it would not be a conspiracy, would it?

Mr. Lopata: No Sir.

Mr. Bowman: The applicant at this time has the opportunity to address the Commission. I would suggest that you keep your remarks brief and to the point, please.

Mr. Lopata: Before we go on, Mr. Chairman, I wanted to mention the petitions that you received from Fairfield residents about access to Country Club Drive; we will add these to the record. We also received a letter to Mr. Begleiter, thanking him for his efforts. We will enter that into the record.

Mr. Shawn Tucker: I represent Aston Development. Here with me tonight are the folks that were here last month. In case there are any additional questions from the Planning Commission members, Sue Best is here, our traffic engineering consultant; Jim McCalley is our environmental consultant; Parley Hess and Gregg Swift from McBride and Ziegler, regarding the site plan as well as the drainage.

If I could, I would like to briefly go over some history because I think it is important not only for the Commission to understand but for members of the public to understand some of the history associated with this project. The reason I think that is important is that it helps explain why at this point of the process my client has very little flexibility in terms of jumping from one chapter of the Code into an entirely different chapter of the Code, which will require a significant and very expensive and very time consuming redesign from the ground up.

About two years ago, as some of you may recall when information about this project started to come to light, that there was an ordinance that was proposed by the town, an adequate facilities ordinance. At that time, my client had actually paid his engineer a significant amount of money to come up with a concept plan. Not at the level that this plan is at, but a concept plan that would have followed the site plan requirements found in Chapter 32 of your Code, which is the section of the chapter, if you will, that folks are trying to encourage my client to pursue a year later after he has invested hundreds of thousands of dollars. My client was proceeding down that path like most applicants would naturally do because, quite frankly, you can get more density if that

option is approved by the town. In addition, yes, you can have more open space and you can have better design. So, it is a win, win type provision that is in your Code. I don't think anyone would deny that if it is done properly. The problem with that chapter or section of the Code is not what lawyers or land use attorneys consider a "by right" chapter. That is, there is a tremendous amount of discretion for the town to say no. It is much like a rezoning, although it is not called a rezoning, it is very much like a rezoning. It is subjective. The problem with pursuing that type of plan is that if there is a lot of public opposition and there is a lot of political opposition that is a wasted investment and a wasted venture for an applicant. In fact, New Castle County government recognizing that very thing, eliminated that option as a, sort of, discretionary option under their code in the past year. They call that a special hearing called 3.319. I won't bore you with the details, but it is not unlike your site plan provision. They have now made that a "by right" so that if you pursue that at the end of the day you do get approval. Newark has not made that change yet. Maybe Newark won't, but other governments have addressed this very concern by giving more predictability under those types of design options.

When the adequate facilities ordinance was introduced, that, quite frankly, caused my client great concern. And, as his counsel, it caused me great concern. In fact, that ordinance was passed. I have a copy of it here this evening. That ordinance does not apply to my client's application because through much effort and expense, he was able to get a by right application in before that ordinance was adopted and I can tell you as I stand here that if this ordinance did apply to my client's application, that is, the new ordinance that he is grandfathered from, he would not pass the traffic analysis, and the improvements that would be required would be astronomical and would not be feasible because the level of service that is in your new Code that applies to all future applicants is level of service, essentially, C. Sometimes you can be D, but there is a lot of discretion. Right now – I don't know that a lot of people understand this – the City of Newark has the most strict traffic standards in the State, in my experience. It used to be New Castle County. It is now the City of Newark. So, everybody understands if the law that my clients rushed in to get an application in on had been adopted and had applied to this project it would probably be dead today.

After my client went through that experience and rushed to change to change from a site plan that he had his engineer preparing to a "by right: plan, my client, quite frankly, became fearful of every pursuing the site plan, again, because of the discretion, because of the new law that was in place. That wasn't his original intent. I can stand before you and say that. The engineer is here who can tell you who has seen the plan. Mr. Lopata may have even seen that plan. I am not positive, but a year plus ago there was an effort by my client to go in that direction. A year later, after going the "by right" option, which is Chapter 27, which is what we are under here tonight, there has been over \$100,000 invested in this site design and this plan. There has been about a year spent in the review process. Your Code actually mentions a 40-day process after you get the Advisory Committee comments. We have actually been in this process for about year and we have been working with Mr. Lopata and other members of the department. We have made some changes, some significant changes in terms of the location of open space. I really want and I think it is important for folks to understand that my client would have preferred the site plan option, was heading in that direction, but for the adequate facilities ordinance, would have pursued that and now is in a position that he cannot.

Having said that, there is flexibility in Chapter 27 regarding the site design provisions that Mr. Lopata cited. In fact, our client made some changes that Mr. Lopata sought in terms of location of open space, in terms of homes that were originally fronted on Main Street that were flipped back the front internally because of some concerns . . .

Mr. Lopata: Mr. Tucker, you are not talking about changes since the last meeting.

Mr. Tucker: That is correct. These are changes that were made before we got here a month ago. The reason I am pointing that out is, there has been revision that predated the hearing a month ago that you are not aware of. But, you should be aware that my client has been working with the town prior to coming here on changes. Many of the changes, in fact probably all of them, were done under the provision that Mr. Lopata has cited to

you where there is some flexibility under Chapter 27. In fact, Mr. Lopata, as some of you may recall from reading his original recommendation vs. his recommendation that was presented at last month's meeting, originally going to be negative on the recommendation until . . .

Mr. Lopata: That is not correct, Shawn. My recommendation was to table the matter. Let's try to be accurate.

Mr. Tucker: I am trying my best to be accurate.

Mr. Lopata: No, you are failing. My recommendation . . .

Mr. Tucker: Can I speak?

Mr. Lopata: Shawn, if you are going to say something that is not correct, I am going to correct you. It is not a court of law, it is a Planning Commission meeting and we are informal here. I recommended that it be tabled. That is all I did.

Mr. Tucker: If I could complete my thought on that, Mr. Lopata, I was being accurate. It was negative in the sense that the project could not move forward. The project could not move forward, the project would be tabled. It should not go forward, it was not adequate. So, what I said was accurate and that that is exactly the procedure. . .

Mr. Lopata: If it had been tabled, you probably would have saved one of the months that you claimed you lost because we would have been having the discussion we are having tonight back in October, but that is another matter.

Mr. Tucker: If it was tabled, we would be exactly where we are.

Mr. Lopata: No, I don't think so, Shawn.

Mr. Tucker: Having said that, that was the mode that we were in. Then after the changes were made under Chapter 27, Mr. Lopata changed his recommendation, and I think rightfully so because we addressed those design concerns and those conservation design concerns, and it is a matter of public record – you can look at the recommendations and decide for yourselves – that recommendation recommending a table. To us that is a negative recommendation because the plan would not have moved forward changed to a positive recommendation, if the recommendation was that it move forward to the town Council. That is where we were after the last meeting after efforts by my client and additional expense, by the way, to redesign the plan, to address the conservation and design principles in Chapter 27. Certainly, reasonable minds can probably differ on what is adequate under that provision. We tried to address Mr. Lopata's concerns. We will certainly listen tonight if members of this Commission have ideas different than Mr. Lopata's regarding Chapter 27. However, we are not in a position to start over and redesign this plan and submit a site plan, which is really where we were last month, which is why my client is back in front of you this evening. If it was a year ago or a year and a half ago and we had not lived through that cycle and that adequate facilities ordinance and that experience, we would probably not be here either. We would probably have a site plan and maybe we would be approved right now. That is just not what happened. That was beyond our control. It was not something that we initiated. That was a reaction by my client to an adequate facilities ordinance that he was very fearful of, and I think for good reason.

In terms of the alternatives that are in front of you this evening, there is a fourth alternative. The fourth alternative is what we had asked for last month. The fourth alternative was, essentially, Mr. Lopata's second alternative that is before you tonight with some changes. If I could, briefly, I will just walk through what those are because I want folks to understand what the modification are that we are respectfully asking for.

Mr. Bowman: I am going to give you seven or eight more minutes, Mr. Tucker.

Mr. Tucker: Thank you Mr. Chairman. If you turn to page eight of the Planning Director's report from last month, you will see a list of from one to six. Those listed items deal with the traffic impact study. Under the Code that we are operating under, the City has historically deferred to DelDOT on traffic impact study analysis and recommendations. Maybe not 100% but have done that. In fact, there is a letter in the fill that was sent where it was acknowledged that there would be deference to DelDOT on the standards in particular.

It is dated May 4th to Mr. Brockenbrough regarding this project where the City writes, "Newark Country Club property, please be advised that as per the specifications in our Subdivision and Development Regulations, we will defer to your office regarding a required study and scope of work and conformity with DelDOT procedures." What we received from DelDOT was their standard comments – some not standard, but some standard – and their third party review. Mr. Lopata, I think, does a good job of summarizing those on page 8, but Mr. Lopata has added some things that DelDOT did not require in our opinion. I would like to illustrate what they are. We did that last month but I would like to go through that quickly because it has been about a month and I am sure memories are not fresh on those points.

Item #1, on page 8 where Mr. Lopata concurs with DelDOT and asks that we include items #1, #2, #4 and #5 that were requested by DelDOT which appear first on page 7, we are agreeing with that. We agree with Mr. Lopata and we agree with DelDOT. We think those are reasonable and standard types of requirements, and our client is prepared to make those changes as a condition of any approval.

Item #2. Number 2 has to do with the Elkton Road reconstruction. This is important. DelDOT has asked our client to make a fair share contribution to that improvement. Our client has agreed to do that. Mr. Lopata has gone one step further and asked that those improvements be tied to building permits. We are not in a position to agree to that and we don't think that that is fair for us to be put in that position. The level of service analysis done by DelDOT does not study what is called roadway segments in Newark. We don't have a failing roadway segment. Our TIS does not fail it was not found unacceptable by DelDOT because of the Elkton Road reconstruction that is being proposed. In fact, our client could have taken a position with DelDOT and with the City that we are not going to make a fair share contribution because our TIS does not show a failure on Elkton Road that warrants our fair share contribution. However, our client has agreed to make that contribution. So, in terms of #2, we are in partial agreement. We agree with DelDOT that our client will make a fair share contribution of that highway improvement even though results of our TIS do not mandate that, but we are not willing, in all due respect to the Planning Department, to condition building permits. I gave some other reasons about why you probably don't want to have subdivisions that may half built because DelDOT hasn't finished the road. That is not desirable for the City or for the people who live in the community. That does happen sometimes. I have seen that happen and that is not pleasant when have of the community is built out and the other half tends to grow over.

Item #3. We are pleased that the Planning Department does not recommend the corridor reservation of right-of-way and identifies that as a pipe dream and we agree with Mr. Lopata in that regard. We are on the same page there. That is something that DelDOT was looking for but the City does not embrace. We agree with the City in that regard.

Item #4. The subdivision plan as noted by DelDOT needs to be revised based on suggestions from the Delaware Transit Corporation. Actually, that is included in #1 to some extent and we agree with that. We agree with Mr. Lopata's comments and we are doing that.

Item #5. Number 5 is one where there is some partial agreement and some disagreement. Traffic signals at the two roads that intersect with Main Street coming out of our subdivision. I want to say it again, if DelDOT does require those lights, our client will still provide them. There are warrants – I won't go through that again with Ms. Best, - but there are certain warrants that DelDOT typically requires be satisfied before they

allow a light to be put in. Mr. Lopata has indicated to us in the past that DelDOT has gone beyond those warrants and agreed to lights. If DelDOT says that they want lights at these two intersections, we will install them. We know that the warrants aren't there. DelDOT does not believe that the warrants are there, but if DelDOT changes its mind and wants those lights, we will put them in.

There is also a reference to crosswalks. We think a crosswalk at Radcliffe would make some sense. We are not adverse to that. I don't think DelDOT required that but we would certainly be willing to do that to encourage folks to come across from neighboring community into the open space if they wanted to use it. I think that is a good idea. We would not want the crosswalk at the other crossover because I don't know if you want to encourage people to cross Main Street at two points. So, we would suggest that one crosswalk at Radcliffe would be sufficient. It would probably be safer to do it a one main point, which is the main entrance proposed for the subdivision, rather than two.

Regarding #6, we agree with Mr. Lopata and DelDOT that the feasibility of the improvements suggested at New London Road and Cleveland Avenue/Hillside Road would not be viable because in order to accomplish them, you would have to have DelDOT, essentially, take ground that a church sits on. We do not think that is desirable. We do not think that is realistic that that would ever happen. Also in that regard, I want to point out that when you look at the level of service for the signalized intersections that were studied as part of this traffic analysis, our client's development does not transform any of those intersections into failing levels of service because our client builds his project. In the build out year the level of service would be the same at these intersections with, or without us in terms of failure.

Mr. Bowman: Mr. Tucker, I am going to ask you to finish because in the interest to the fact that we have another item on the agenda and we are now plowing old ground, I am going to bring it back to the table. Roy, I think you want to clarify a couple of things and then I will ask members of the Commission if they have any brief questions for the applicant and then we will open it briefly to the floor and I will restate the conditions for that before we do so.

Mr. Lopata: Thank you, Mr. Chairman. I want to clarify, though, for the record. Shawn, you can correct me if I am wrong. The rest of the conditions are acceptable – the ones in my September report?

Mr. Tucker: The conditions related to the traffic that we have gone through.

Mr. Lopata: I am not talking about the traffic, all of the other items.

Mr. Tucker: If you want to talk about the position, for example, on rentals, we have no desire to engage in rentals.

Mr. Lopata: Do you have any objection to. . .

Mr. Tucker: There are several.

Mr. Lopata: I do not want to go through them all. I thought, from what you said, you were done, but you do have other things you want to talk about, perhaps. We will have to discuss that a little later. Let me make a couple of comments, then.

First of all, this is a Staff report. It is not "Mr. Lopata" saying these things; this is a City staff recommendation. Secondly, perhaps more importantly, you have indicated that the applicant has spent a year and a half or gave some sense of working on these changes and the most recent change was after my so-called negative comments this past summer. We sent a letter to your client on May 18, 2006 – that is well over a year ago – with a whole series of comments many of which still are pretty much identical to those that appear in my report today, including the open space suggestions. So, your client had ample opportunity to make those changes. Finally, and most important in the traffic realm. First of all, the letter you read did not say anything about deferring to DelDOT. It had to do with the scope of the traffic study in terms of their recommendations. When

the City approves a subdivision it has, historically, required applicants to make off-site improvements typically with the consultation of DelDOT. Sometimes the improvement has been item that have not been suggested by DelDOT. Let me give one quick example. Just about every road surrounding the College Square Shopping Center, which was approved in 1980, was widened and paid for by the developer of that shopping center – Marrows Road, Ogletown Road, and then it was called Delaware Avenue – through the subdivision process. We are not proposing anything here that is different other than the traffic signals. That is why I am suggesting that we need to get together with DelDOT to try to clarify the points that they are making in their report.

I just cannot resist saying that in your opening remarks; you are in effect, blaming the City for your applicant's plan, which I do not think is accurate, appropriate or fair. Your applicant has been urged by me repeatedly to submit a revised plan. I have tried to come up with every level of assurance that I can – at least from the staff point of view – that we can try to get a better plan through the process. In fact, the first ordinance that caused your client to rush in a plan was not approved by the City. It was turned down by Council and your client has been operating under the original rules ever since. The second ordinance that your referred to that you feel was onerous, as I indicated repeatedly to your client, I thought there was some way we could come up with a mechanism to have a better plan and still come under the current regulations. What I would like to do this evening is not fence back and forth between you and me but rather move forward and have the Planning Commission make a recommendation, hopefully, between now and when we get to City Council, as I have said, review these items with DelDOT and get the clarification we need in their letter because it is not clear to me what they are suggesting. And secondly, try to continue to put out that offer of, let's get a better plan before us. I do not know how many times I keep saying it. Now I am trying to say it in a way that I think meets all of your clients concerns. I am still urging you, urging Bill, to please consider this for the good of the community between now and when this gets to City Council. There is still time to do something better.

Mr. Tucker: May I respond?

Mr. Bowman: You have two minutes.

Mr. Tucker: Mr. Lopata, I think my characterization of why we ended up here is exactly correct. I won't go into all the history because we only have a few minutes, but I stand by it. I was there. I lived through it. I know why we are here today, and those ordinances were driving this to change from a site plan to a by right plan. I do think that is unfortunate for everybody. I am just going to call it the way I saw it. I think there might be some other people in the audience that lived through that, too, that might have some comments.

I also want to point out that my client has spent a couple of hundreds of thousands of dollars; by the way, studying the sewer and water situation, and our client's engineer does believe there is adequate capacity. By the way, nobody else has had to do that at that level and at that expense. So, there has been significant money spent studying things that normally applicants don't have to study, but my client spent that money in good faith trying to move this process along and get to this stage. So, when we say that we believe we are Code compliant, we believe there is adequate water and sewer because my client, in particular, has spent several hundreds of thousands of dollars studying that very issue over the past year.

There are some other conditions, as Mr. Lopata correctly pointed out in his report and his staff's report. I would like to just state on the record and sum up because I am probably right at two minutes, that in terms of the conditional rentals, my client has no desire to turn this into a rental community. I think everybody knows, given the project that is proposed, that that is not realistic. However, I think it is unfair to ask for conditions that don't apply to other neighboring communities. That is not a condition on either of the neighboring communities.

Mr. Lopata: Shawn, I have to interrupt. That applies to almost 90% of the City.

Mr. Tucker: The neighborhoods on either side of us do not have that condition.

Mr. Lopata: Yes, they do. You are just not familiar with the Student Home Ordinance that we adopted in 1999.

Mr. Tucker: They were not asked to deed restrict their property.

Mr. Lopata: I understand that.

Mr. Tucker: That is a difference.

Mr. Lopata: You have got this upside down. The people who live in Fairfield and Nottingham Green and Oaklands, where I live, we cannot rent to more than two individuals under the student home ordinance even though our subdivision was approved in 1959 before this ordinance was adopted. The central part of Country Club Estates would be exempt from that ordinance because the golf course is so large. I am trying to have an equal playing field. I am amazed that you are objecting to that condition. We have to talk about it some more so you will understand it better.

Mr. Tucker: I think I understand it and I think I have accurately stated it.

Mr. Bowman: Thank you Mr. Tucker. I am going to bring it back to the table for any brief questions or comments from the members of the Commission. Let's try to keep them short.

Ms. Dressel: I have a question about the adequate facilities ordinance. I am not sure I understand how this is impacting.

Mr. Lopata: What Shawn is talking about is a plan that he has not submitting.

Ms. Dressel: It is really a moot point.

Ms. Dressel: Can you clarify a couple of dates for me? I believe that a plan for Country Club Estates was before us for August.

Mr. Lopata: Right.

Ms. Dressel: Then it came again before us for the November meeting.

Mr. Lopata: October.

Ms. Dressel: As I recall, there were no changes except that 3.something acres was added.

Mr. Lopata: That was what I was discussing with Shawn, which is why I mentioned the May, 2006, letter. The open space suggestions we made go back a long way before August, 2007. At that point there were some changes made in the plan, and the applicant asked that it be postponed. We concurred with it, although, as I was saying to Shawn, I was proposing that be tabled, have some of this public discussion, and then perhaps come back with a revised plan and maybe save a month.

Ms. Dressel: But, between August and October the Country Club Estates said they wanted to pull it and so we guessed as a result that they were going to make changes.

Mr. Lopata: They did. They made the open space changes and some other changes.

Ms. Dressel: But not dramatic.

Mr. Lopata: Well, it is all in the eye of the beholder.

Mr. Begleiter: Do you or your client believe that there is any constitutional violation in the action taken by the City Planning Commission last month?

Mr. Tucker: Yes, I do.

Mr. Begleiter: Would you care to explain what the violation of the Constitution was?

Mr. Tucker: I would. I have been doing this for a long time. I am a former Planning Director. I am very familiar with the law in this area. When New Castle County adopted the UDC, I had to pretty much research every case in Delaware at one point when it comes to takings due process violations. What was troubling me – I will be very candid because it is troubling me. I have been doing this for a long time and have a lot of respect for the process. I advise clients to follow the process because I believe in it. What troubled me about last month, very candidly, is I don't believe there is any authority for the Board – and I don't necessarily blame the Board for this, I think it is a misunderstanding. I had to put it on the record in the letters because I have to protect my client's rights. But, there is no authority, in my opinion, in the Code for the Department or the Commission to table a project because the Department or the Board would prefer my client pursues a different development option in the Code. That is not a legal basis to table, in my opinion, based on the law. Notwithstanding Robert's Rules. There is a book about this thick on Robert's Rules and it does talk about when you can table and when you can't. It is all based on the premise that the law is being followed. Had there been Chapter 27 comments about adjusting this or adjusting that, quite frankly, they could have been put on as conditions of any recommendation you gave, then I would not have sent that letter and I wouldn't have reached out to the Counsel. I wanted him to be here tonight. I thought it was appropriate for him to be here. I know he has a conflict. I think there is a Board of Adjustment hearing tonight. I thought it would be good for the Board. I used to advise a Board myself in government. I thought it would be good for you to have that direction. I think last month was really the opportunity to comment on the Chapter 28 changes. Instead, we ended up on Chapter 32 complete redesign, which I understand why folks want, but I hope I have explained why we can't get there unfortunately.

In that regard, for the last month as I have already articulated in my letter to the town Solicitor and sent off to members of the Commission, I think you had a temporary taking for 30 days because we were tabled and paused in the process without what, I think, was a justification in the Code. I am very candid in that regard. And, that has cost my client tens of thousands of dollars in the past month. It is a significant amount of money.

Mr. Begleiter: Do you believe there was a conspiracy by any private individuals on this Commission with officials of the government of the City of Newark?

Mr. Tucker: I have no idea where that comes from. I have never suggested that in any of my correspondence. I have not alleged a conspiracy. I am not a believer in conspiracy theories. No I don't.

Mr. Begleiter: Is there any zoning ordinance change proposed in your application?

Mr. Tucker: No.

Mr. Begleiter: Is there any zoning variance proposed in your application?

Mr. Tucker: No, there is not.

Mr. Begleiter: You keep referring to the delay costing tens of thousands of dollars per month. You first made the proposal to the City Planning Commission in August. Then I remember getting a courier coming to my door to hand deliver a notice that the notice was being withdrawn from the August Planning Commission meeting. Was that because the City Planning Commission or the City government caused that to be withdrawn?

Mr. Tucker: No.

Mr. Begleiter: So, the delay from August to October did not cost you tens of thousands of dollars?

Mr. Tucker: Oh, it certainly did, but that is not what I just stated.

Mr. Begleiter: Okay, but the tens of thousands of dollars per month apply to a single month.

Mr. Tucker: Every month in interest and other costs.

Mr. Begleiter: But only one month.

Mr. Tucker: No, every month, Sir.

Mr. Begleiter: What I am asking about is that you imply that the cost of the tens of thousands of dollars per month is somehow being imposed or foisted or whatever upon the client. The delay from August to October you just said was not a result of pressure from the City or a requirement of the City. Is that correct?

Mr. Tucker: What I have said, let me say it again so I am clear, each month of delay costs my client tens of thousands of dollars.

Mr. Begleiter: Whether that delay is caused by the City or your client himself.

Mr. Tucker: That is correct. My client withdrew the application in August because of the recommendation from Mr. Lopata's office which was to recommend tabling because we wanted to work with Mr. Lopata and the community and the City so that we could get to a point where we were not faced with a recommendation that was negative.

Mr. Begleiter: The reference, by the way, to conspiracy comes from your letter dated October 15th on page #1 about two-thirds of the way down the page about private individuals who may conspire with government officials.

Mr. Tucker: That is not an allegation I made Sir. I was citing the case law that talks about how that can create liability. So, I did not make that allegation.

Mr. Begleiter: I did not say anything about an allegation, I just said, I am asking you whether there was a conspiracy here and you said . . .

Mr. Tucker: I am not aware of any conspiracy and I have not alleged it.

Mr. Begleiter: Good. That is fine. So that citation in your letter is not to apply to this case?

Mr. Tucker: That citation is a statement of the law in takings and other liability that I have cited because it is an accurate statement in the law in Delaware.

Mr. Begleiter: And you cited it in connection with this case.

Mr. Tucker: I cited it in connection with this case.

Mr. Lopata: Hopefully, it is not a "case;" it is just a hearing on a subdivision plan.

Mr. Begleiter: You could have, though, just listed all the laws in the State of Delaware if you wanted to and said -- we are just listing the laws in the State of Delaware. You wouldn't have put it in a letter to the Commission.

Mr. Bowman: Gentlemen, can I interrupt? I am not sure this is leading anywhere to stay with the subdivision issue. I think I know what Ralph's feelings are. They are very similar to the rest of this Commission in that we don't do business here in Newark by intimidation. Maybe New Castle County in your former job, that is what you did, but it doesn't work here. So, let's get on with it. If there are any other questions here from any members on the dais.

Mr. Begleiter: A few moments ago in your presentation to us tonight when you were talking about the history of the case, you said you had little flexibility to jump from Code chapter to Code chapter. I think you used the phrase jumping from Code chapter to Code chapter. You also said, however, that your client developed an alternative plan which we never saw because it was never submitted with this process for the reasons you explained, but presumably it still exists. Presumably, it is in a file drawer someplace or maybe it was burned or shredded or something like that but probably it wasn't. Is there anything preventing you from presenting to the Commission that plan on which you have spent hundreds of thousands or tens of thousands of dollars on that plan already which you indicated that you thought was a better plan. Is there anything preventing you from submitting it under Chapter 27?

Mr. Tucker: That plan is not in a state of review in engineering that it could be submitted to Newark. That plan was abandoned and the "by right" plan was pursued because of what transpired regarding the adequate facilities (inaudible).

Mr. Begleiter: That doesn't have anything to do with flexibility. You have the flexibility to do that if you had wanted to.

Mr. Tucker: If we had a \$100,000 and six months and if somebody would like to volunteer that, we will listen. But, that is what it would cost, just so people will understand that.

Mr. Begleiter: When did you abandon that plan?

Mr. Tucker: We abandoned that plan when the adequate facilities ordinance was first talked about and then first introduced because it became clear to my client and me . . .

Mr. Begleiter: Which was about a year ago?

Mr. Tucker: Over a year ago because it was clear that there was major opposition to this project and we weren't going to go down a path where there was discretion to say no.

Mr. Begleiter: So, if it was, let's say, a year ago at tens of thousands of dollars a month, would that have been enough money to submit that plan under Chapter 27 over a year ago?

Mr. Tucker: We would still be here close to this today and that was non-compliant.

Mr. Begleiter: That was a non-compliant plan.

Mr. Tucker: That is right. It was just a concept plan. It has to comply with the Code. That was a concept only. This is important to me. I rarely send letters like the ones I sent to this Commission. I really want to explain this.

Mr. Begleiter: You are referring to the letters threatening the law suit, right?

Mr. Tucker: I am referring to those letters. I came to this first meeting and made what I think was a first class professional presentation to this town. That is the way I practice as a land use attorney. That is the way I practice in New Castle County. That is the way I practice in Kent and Sussex Counties and the towns I appear in front of. When I walk away from a hearing, however, and I think my client's rights have been violated, I have a duty as an attorney to point out what the status of the law is in Delaware and ask for help. What I did was, I reached out to your City Solicitor and I asked for his help. That is my job as an attorney to protect my client's rights. That is what I did. I am sorry, sincerely, if I offended anybody by doing that, but I didn't come to the first meeting taking that approach, I assumed that the rules would be followed in that regard. When, in my opinion they weren't, I had to protect my client's rights and point out what the state of the law was.

Mr. Bowman: I am going to stop you there, Mr. Tucker. I think the operative words here are I, think, and in your opinion. So, thank you very much. I am now going to open it to

the floor with the following stipulations. Please, if you have spoken before on this issue, I am going to ask you not to come to the dais initially. I have a couple of people, I believe, who have not spoken before

Ms. Jessica Casey: 108 Country Club Drive in the Fairfield community. I am speaking on behalf of the Fairfield Civic Association. First and foremost, we feel like most Newark citizens at this point, that we are pretty much grabbing at straws trying to find alternative options. I apologize in advance if any of the ideas that we present tonight offends any of our fellow citizens.

Ms. Casey then read the letter submitted to the Planning Commission from the Fairfield Civic Association (Secretary's note: see attached).

Mr. Bowman: Ms. Stapleford, if you have new information for us tonight, I am going to ask you to be very brief. We will enter that information into the record.

Ms. Linda Stapleford: 802 Dallam Road. I am speaking on behalf of the White Clay Creek Watershed Management Committee.

Last month I offered general comments, but we wanted to obtain a professional review of the site's natural resources. We have done this in the intervening months. I have a tissue paper concept that I could show to everybody if I have time at the end. What he did was did an overlay of natural resource features that should be protected in line with our management plan and then produced a quick concept plan on how units could be arranged around those resources/features. I will note that in the process he did discover that using the site topo map supplied by the developer, there appeared to be two area that equal or exceed 25% slope, and City regulations do not allow building on 25% slope, so that is something that needs to be looked at. The developer knows and I am sure they have looked at that. The concept plan was presented with the following caveats. This design shows one way the resource features could be protected. It is not to be construed as a development plan. The resources that were overlaid include drainage ways, waters of the United States and associated wetlands, 100 foot riparian buffers, 25% steep slopes and woodlands and specimen trees. The total area protected that would remain open space equals 50% of the site. To minimize changes in the original submitted design and to protect the important natural resources, this concept plan that we are submitting would require granted variances to one or more of Newark's other ordinances. Conservation design sometimes allows the developer to use a multiplier number for the number of units allowed, other times it does not. This plan decreases lot size and allows for twelve more units. Finally, the utility of what we are showing tonight is an illustration of the value of adding additional natural resource protection ordinances.

The Planning Commission, the Planning Department, the Council and public have expressed frustration in this and in other cases in the past that are apt to be approved but are not desirable. We feel that if these ordinances were in place that the Council, the Commission and the City would not be put in this position in the future.

Mr. Bowman: Jean White. If you have something new and different, please come up and you are limited to five minutes.

Mrs. Jean White: 103 Radcliffe Drive. I have a question about option #3 which is on your new Planning Department report. Those of us at the previous meeting got the idea, possibly, erroneously, that this developer did not intend to be the developer of all the houses – he has no elevations of what they look like – and that it was quite likely that he would flip the property or sell it off to individual builders. For option #3 to work at all, the whole 120 acres has to be preserved without divvying it up to individual builders. It has to be looked at as a total parcel. If anybody understands my question, you can comment on it later.

The developer accuses the Planning Commission of a taking by tabling at the last meeting. As somebody who has attended Planning Commissions for many, many years, I have seen many tablings and it does not seem to me that it was not out of line what the Planning Commission did. In fact, even if not to go to a site plan approval, there were

many things that this developer could have done, even small things like several people talked about, there was no way to walk from where you lived over to the shopping center or to the trail. Even something as tiny as my suggestion as not to call it East Radcliffe Drive, which would confuse people. There were things you could have done, however small, cut down the houses from 271 to 260 or something like that. I live in Nottingham Green, so I don't live over there, but I consider what you are doing – tearing down a house there – as you having a taking, in essence, to what has happened to those houses. You ought to reimburse them, I am speaking to the developer for something, not because you are legally required to because that would be the only the right decent thing to do. If all of us in the world only did what was legally required, it would be a very sad place to live in.

My third and final comment is a specific question that I did ask at the last meeting but the developer did not come forth. I asked, has the Newark Country Club or has the developer done an environmental study testing the soils of the golf course for herbicides, pesticides, and metal contaminants like arsenic which often show up sometimes in golf courses? I would like that study, which presumably you did, to be given to the City Planning Department or whoever and made public for all of us to see including those people who will eventually live there. It should include who did it, who did the work, when the work was done, a map of the sites, how deep the soil was, what were the pesticides and herbicides that were tested for and what were the results. So, I am asking you to answer that question here, which you did not answer.

Mr. Lopata: Mrs. White, my understanding is that they have done such a study, but regardless, we are requiring it anyway as part of one of my recommendations. They will have to submit through our review process.

Mrs. White: I haven't seen this in your Planning Department report.

Mr. Lopata: It is in there. That was the discussion about environmental requirements. I mentioned DNREC and Federal regulations. That is what I was talking about.

Mrs. White: This was to come in August. I got those plans. They changed for October. It was tabled. Now we are at November. Where is the study? Why are we sitting and waiting?

Mr. Lopata: I meant that those things need to be submitted before it is reviewed by City Council. That is what I was saying.

Mrs. White: I think it should have been submitted so we could see this now. Why do we have to wait until it comes to City Council? This is unfair to this community. I will end by saying it is a mystery to me, an absolute mystery, that somebody who has grown up in Newark and all the people who were part of the Newark Country Club – I realize it is now to the developer – could be so not considering the community that you have been part of, to not reach out to the community at all the steps along the way. I am not aware of any situation where there have been meetings with different communities around here and for that kind of thing. To me, it has been a real affront to all of us who have lived here.

Ms. Pam Lewis: 223 Cheltenham Road, Oaklands. My main concern is financial and it is current. I was reading the paper today, all the sheriff's sales, all the properties that are being sold. In the last few months we have been reading of 25% of foreclosures in this New Castle County area. 40 out of 49 banks were in the News Journal today of changing their lending practices. CitiGroup, I believe, has \$11 billion of debt now. I am concerned about the developers. Can they afford this? We are looking at \$150 to \$200 million project. It is a hefty chunk of change with our economy as it is. This does affect the City. I don't want to see the City sued again. That is my big concern. And, I am still concerned about the schools. This is going to increase enrollment. We will possibly have to expand schools. I don't think this has been addressed so my concern is finances all the way around.

Mr. John Wharton: Cheltenham Road in Oaklands. I wish to speak about the capacity of the reservoir and our water supply in the City. We have just gone through a drought. Fortunately it has rained. I understand that the reservoir was drawn down to rather low levels. My question is, has anyone studies and should we know whether the proposed addition of these homes is going to impact the reserve capacity of this reservoir?

Mr. Gerald Kauffman: 708 N. Country Club Drive in Fairfield. I am here as a member of the Fairfield Watershed Association a dormant entity that has been resurrected by this proposal. I am a Newark taxpayer and a resident of the same watershed that includes the Country Club. I have been following the applicant's proposal for 271 homes on 120 acres. I am also a registered professional engineer here in Delaware and in three other states here and in the mid-west.

The Newark Country Club property is unique in Newark because it is the only open interior open space within the City proper that straddles two major watersheds – the Christina and the White Clay Creek. There are three streams on the parcel, one that flows west to the upper Christina and two that flow east through the valley before joining and continuing through the University of Delaware property before entering White Clay Creek. The stream along the easterly property line – Blue Hen Creek – was designated by the President and Congress as part of the White Clay Creek National Wild and Scenic River Watershed.

I do believe the plan can be substantially designed with a more balanced approach by using a conservation design approach that delineates the three finger-like streams, delineates their buffers, the steep slopes, the wooded areas and the flowerbeds and the mature trees and then employing a City park and then putting a new layout that basically protects those areas and then the new neighborhood will on top of the hill overlooks a stream valley. That will be a sensational neighborhood, one that would be a fantastic neighborhood that balances economic yield without sacrificing all the environmental recourses. I believe the current plan is a 1960s approach that tries to maximize lot yield at the expense of the environment and I am asking for more balance as a good neighbor.

I believe the plan could be a good one for Newark. Let's face what the assets might be. Property values will increase in the adjoining neighborhoods. New families will replenish the swim clubs, the little leagues and soccer teams. The new trail would connect the surrounding neighborhoods. The new neighborhood park would be added to the new system. The City would accrue more water, sewer and electric revenues. So, there would be a lot to like if the neighborhood plan was revised to follow a more green conservation design approach.

I am an engineer. I could come up with a concept plan in less than 40 hours if I had the applicant's computer and drafting files. It is not an onerous thing for you to ask for a modified plan, in my opinion.

For decades the members of the Country Club have been good neighbors and careful and considerate custodians of a privately owned open space. As property owners they do reserve the right to receive fair market value on the value of their land. I am hoping that they will consider alternatives to land development that would honor their history as stewards of land and continue the Country Club's open space legacy for posterity. What I am asking for is that the members of the public, Commission and Council consider alternatives to preserve this land. I am pursuing options from a private land trust to obtain the millions of dollars that would be necessary to acquire this land. In comparison to the reservoir site acquired for \$8 million that was a little over 100 acres; that plan was fully approved by New Castle County for 200 homes. I am looking for that type of money. I don't know if it will work, but I think it is worth it. This could be Newark Central Park. New York City had the same type of rare opportunity back in 1858. Nottingham Road is not Fifth Avenue, but it could be a fantastic central park forever.

Ms. Marilyn Gleber: 900 Baylor Drive. I have not kept up with this. I have been away. Who is going to pay for the roads and the sewers and whatever it takes to get a development going? Is it I?

Mr. Lopata: The developer pays for everything.

Ms. Gleber: And the maintenance and all that. Is it not a private community?

Mr. Lopata: When the streets are done they are turned over to the City and then we will pay for them.

Mr. Sean Casey: 108 Country Club Drive: What is going to be the impact on police, fire protection and emergency services? I am not sure whether Mr. Lopata or the developer would be able to answer those questions.

Mr. Lopata: The original plan and the sets of plans are reviewed by all of our City Operating Departments, and in my report we make reference to their commentary regarding items like refuse collection, of course, the City utilities, police services, and so on. We also do a fiscal impact analysis so we can get a sense of what the cost impact would be for the City. Primarily because we sell electricity, we will make money from this development and it will pay for the additional services that we need. Obviously that is not a motivating factor here, but the way this project is designed it will be a net gain in terms of City finances.

Mr. Osborne: I have a comment, Mr. Chairman. I don't feel good about this. I don't know how the other Commissioners feel, but I am feeling a lot of contentiousness between the developer, his counsel and the City. To me, that does not feel like a good place to start moving forward. There are a lot of things in your report, Roy, that like, this should be considered at the next step before it gets to City Council. There are a lot of those. That is a lengthy report. I guess I would feel more comfortable if a lot of those things were addressed before we turn that over to City Council and have our legislators debate a development. I am not making a motion; I am throwing an observation out at this point.

Mr. Lopata: I will say very briefly that you are right, there are at least 36 changes that need to be made in the plan. Many of them are minor. That is not atypical. Very often the Planning Commission will make recommendations either for or against the plan with the understanding that these conditions will be handled. Could some of these have been done earlier? Yes, and I think I said that by making reference to my letter from sometime ago. Why they were not done is neither here nor there at this point because we are where we are. Since the tabling issue continues to come up, our attorney, of course, has advised you that tabling was appropriate at the last meeting. But, as I said before, I think we need to move forward now. The major condition out there that the applicant has discussed, we have all discussed, every member of the Commission has essentially touched on it, is could we do a better plan or a different plan? The applicant is not really interested in a revised plan, a plan that, perhaps, exposes him to what he views as some risk, so you really have no choice but to make some kind of recommendation to go forward.

Mr. Begleiter: I would like to make a statement before making a motion. I was unaware of the lack of flexibility in our responsibility to approve this approval, and I wish we had been so informed by the City Attorney or the staff before last month's meeting. To me the word approve means acceptance or affirmative support. I do not approve of the proposed plan. However, in light of the formal advice however late from the City Attorney and the Planning Director strongly advising that rejection of this proposal is not within our current authority. And in light of the apparent unwillingness of the developer to attempt to submit a more civically appealing plan or to offer even a glimmer of sensitivity to the developer's personal and professional neighbors, in light of the fact that the Commission last month and the City Planning Director have asked repeatedly for a revised and improved plan and have been systematically and methodically ignored or flouted, I come to the conclusion that we are an advisory body with no legal authority to do anything but make recommendations to the City Council. With that statement, I move the following:

MOTION BY BEGLEITER, SECONDED BY DRESSEL THAT THE COMMISSION FORWARD TO THE CITY COUNCIL THE COUNTRY CLUB ESTATES

SUBDIVISION PLAN RECOMMENDING THAT IF THE CITY COUNCIL APPROVES THE PLAN, IT DOES SO SUBJECT TO THE CONDITIONS IN THE PLANNING DEPARTMENT’S SEPTEMBER 24, 2007 REPORT EXCEPT THAT THE TRAFFIC SIGNAL ITEM (#5) IN THE PLANNING DEPARTMENT REPORT BE MODIFIED TO READ:

“TRAFFIC SIGNALS AND CROSSWALKS AT THE TWO ACCESS WAYS TO NOTTINGHAM ROAD SHOULD BE SUBJECT TO DELDOT REVIEW, IN CONSULTATION WITH THE CITY OF NEWARK;”

AND WITH THE ADDITIONAL CONDITION THAT THE CITY/APPLICANT SUBDIVISION AGREEMENT INCLUDES THE FOLLOWING PROVISIONS:

- IF APPROVED BY CITY COUNCIL, A MAJOR SUBDIVISION WITH A MINIMUM OF 265 SINGLE FAMILY PARCELS SHALL BE RECORDED BY THE CITY.
- AS A CONDITION OF COUNCIL APPROVAL, THE PLANNING COMMISSION RECOMMENDS THAT THE SUBSEQUENT CONSTRUCTION IMPROVEMENT PLAN SHALL BE ACCOMPANIED BY A SITE PLAN APPROVAL PLAN, UNDER THE REQUIREMENTS OF ZONING CODE ARTICLE XXVII. THIS SITE PLAN APPROVAL PLAN, AS STIPULATED IN ZONING CODE, SECTION 32-97(A), SHALL BE, “BASED UPON DISTINCTIVENESS AND EXCELLENCE OF SITE ARRANGEMENT.” THIS SITE PLAN APPROVAL PLAN SHALL USE THE EXISTING RS ZONING OR AN ALTERNATIVE ZONE (OR ZONES) AGREED TO BY THE PLANNING DEPARTMENT AND APPLICANT. SITE DENSITY SHALL BE LIMITED TO THE MAXIMUMS PERMITTED WITHIN THESE DISTRICTS, AS MODIFIED IN ZONING CODE ARTICLE XXVII. THIS SITE PLAN APPROVAL PLAN SHALL BE REVIEWED BY THE PLANNING COMMISSION AND CITY COUNCIL AND FINAL APPROVAL SHALL BE COMPLETED AS EXPEDITIOUSLY AS POSSIBLE UNDER CURRENT SUBDIVISION AND DEVELOPMENT REGULATIONS LEGAL NOTICE REQUIREMENTS; THIS SITE PLAN APPROVAL PLAN SHALL BE REVIEWED UNDER ALL CURRENT [AT THE ORIGINAL DATE OF COUNTRY CLUB ESTATES MAJOR SUBDIVISION APPLICATION] SUBDIVISION AND DEVELOPMENT REGULATIONS; AND, IN NO CASE, SHALL APPROVAL OF THIS SITE PLAN APPROVAL PLAN BE UNREASONABLY WITHHELD.

Mr. Bowman: Is there any further discussion from the table?

Ms. Dressel: I just want to say that I am really disappointed with the plan and with the presentation that was made last month and this month. I believe that the owner of the property heard the comments of the community prior to the August meeting and was planning to make changes. I do not believe that a sufficient number of changes were made. I don’t see that there has been any effort to work with the community and work with the City, and I feel very coerced by the letters that were sent from the lawyer to the Commission. I think that the whole presentation was antagonistic from the very beginning and I am very disappointed.

VOTE: 5-1

AYE: BEGLEITER, BOWMAN, DRESSEL, McDOWELL, RUSSELL

NAY: OSBORNE

ABSENT: HAMILTON

MOTION PASSED

3. REVIEW AND CONSIDERATION OF THE MAJOR SUBDIVISION, PARKING WAIVER, AND SPECIAL USE PERMIT OF THE .48 ACRE

PROPERTY AT 102 E. MAIN STREET FOR A 100 SEAT RESTAURANT AND NINE APARTMENT UNITS.

Mr. Lopata summarized his report to the Planning Commission which reads as follows:

“On September 6, 2007, the Planning Department received applications from 102 E. Main Street Associates, L.L.C. (the Lang Development Group) for the major subdivision, special use permit, and a parking waiver for the property at 102 E. Main Street. The applicants are requesting development approval to renovate the building and remove and then enlarge its rear portion so that it can accommodate a 100 seat first floor and portion of the second floor restaurant and eight two-story and one one-story apartment occupying the balance of the second floor and the entire third floor. The applicants have applied for a required 16-space parking waiver, as well as a special use permit for apartments in the BB District. Please see the attached Landmark Engineering major subdivision, parking waiver and special use permit plan; color building elevation drawings, and applicants’ supporting letter.

The Planning Department’s report on the 102 E. Main Street project follows:

Property Description and Related Data:

1. Location:

North side of E. Main Street, immediately east of the E. Main Street/Academy Street intersection.

2. Size:

.48 acres

3. Existing Land Use:

Three-story commercial/office building known as the Bank of Newark building, on an approximately 4,185 square foot footprint. The rear portion of the site is currently leased to the City as part of Parking Lot #3.

4. Physical Condition of the Site:

The 102 E. Main Street property is a developed site containing an existing three-story building and surface parking lot. The front portion of the building is included on the City’s list of Historic Properties and the U.S. Department of Interior’s National Register of Historic Places. Rear wings of the building were added in 1963 and 1982. The historic portion of the building is the front segment facing Main Street.

In terms of topography, the site slopes gradually from its highest points at the north down to Main Street.

Regarding soils, according to the United States Department of Agriculture’s Natural Resources Conservation Service, the 102 E. Main Street site consists of Matapeake Sassafras Urban Land Complex soil. The Natural Resources Conservation Service indicates that this is a disturbed soil that has been used for development purposes; no development limitations for the use proposed are indicated.

5. Planning and Zoning:

102 E. Main Street is zoned BB. BB is a central business district zoning that permits the following:

A. Retail and specialty stores

- B. Retail food stores up to 5,000 square feet in maximum floor area, with special conditions
- C. Restaurants, bakery and delicatessens
- D. Banks and finance institutions
- E. Offices for professional services and administrative activities
- F. Personal service establishments
- G. Studios for artists, designers, photographers, musicians, and sculptors
- H. Repair and servicing, indoor and off-site of any article for sale, which is permitted in this district
- I. Related indoor storage facilities as accessory uses with special requirements
- J. Accessory uses and accessory buildings
- K. Public parking garage and parking lot
- L. Public transit facilities
- M. Social club, fraternal, social service, union and civic organizations, except on ground floor locations
- N. Photo developing and finishing

BB also permits, with a Council granted Special Use Permit, the following:

- A. Retail food stores with more than 5,000 square feet in area
- B. Drive-in and curb service for other than eating establishments
- C. Fast-food restaurants with special requirements
- D. Motels and hotels
- E. Commercial in-door recreation and in-door theaters
- F. Instructional, business or trade schools
- G. Electric gas and telephone central offices and telephone central offices and substations with special requirements
- H. Tower, broadcasting or telecommunications on existing buildings or structures with special requirements
- I. Police and fire stations
- J. Library, museum and art gallery
- K. Church or other place of worship
- L. Restaurant, cafeteria style
- M. Apartments, except on ground floor locations, with special requirements
- N. Restaurants with alcoholic beverages, with special requirements

Regarding BB zoning area requirements, other than off-street parking for the changes in use at the site, the 102 E. Main Street subdivision plan meets all applicable Zoning Code requirements. Based on the applicant's submittal, the 102 E. Main Street plan would normally require 16 additional off-street spaces. Because the existing parking on the site is leased to the City for public use in Parking Lot #3, a parking waiver is necessary for this project.

In addition, regarding area requirements, if a restaurant with alcoholic beverages is located on the 102 E. Main Street site, a Council granted special use permit is required and the following regulations will apply:

"Facilities selling alcoholic beverages for public consumption on the premises that are less than 300 feet measured along a straight line from the facility selling alcoholic beverages to the nearest property line of a church, library, school, nursing home, hospital, dormitory or lot zoned residential (RH, RT, RS, RD, RM, RA, RR, AC) shall be permitted, except as otherwise provided therein, subject to the following special requirements [this property is less than 300 feet from RS zoned parcels on Center Street]:

(1) Live night club or floor show type entertainment defined as electronically amplified musical dance, cabaret, or comedy performances that may be accompanied by dancing by patrons shall not be permitted, except that one person electronically amplified performances intended as accessory or background music or non-electronically amplified performances shall be permitted. Permitted live entertainment shall not include adult entertainment

as defined in this chapter. Full restaurant service as defined in this section, shall be provided with all permitted live entertainment.

(2) There shall be no carry-out liquor service.

(3) No bar facilities, defined as any counter in which alcoholic beverages may be stored, displayed, prepared, and served, and at which patrons sit and/or stand and consume alcoholic beverages, shall be permitted.

(4) There shall be no less than 50 seats in the facility.

(5) There shall be no alcoholic beverage promotional activities that encourage excessive consumption on the premises. Happy hours, reduced price alcoholic beverage specials, or similar alcoholic beverage promotional activities shall only be permitted where the service of such specials is restricted solely to seated patrons who shall also be required to order food as further defined as full restaurant service in this section. Such alcoholic beverage specials, in addition, shall be restricted to hours of 4:00 p.m. to 9:00 p.m.

(6) New and existing restaurants located as specified herein shall be limited to no sale of alcoholic beverages on the premises after 12:00 midnight, unless such restaurants receive a special use permit permitting sales after 12:00 midnight, subject to the procedural requirements in Zoning Code section 32-56.4 (b) and (f)."

Regarding nearby properties, the 102 E. Main Street site is adjacent on the east to the BB zoned old "CVS" building. This site was previously reviewed by the Planning Commission and City Council for a two-story 15-unit apartment addition. While the City staff, Planning Commission and Council preferred a project with ten units at this location, the applicant persisted with the 15-unit request that was eventually not approved by City Council. This "denial" was later the subject of litigation by the applicant that was ultimately won by the City.

A BB zoned office building is located west of the site on E. Main Street. The UN zoned University of Delaware tennis courts are north of the portion of the property leased to the City for Parking Lot #3. The UN zoned Academy Building lawn and University of Delaware offices in the Academy Building are located south of the site across E. Main Street.

Regarding comprehensive planning, the Newark Comprehensive Plan calls for "commercial (pedestrian oriented)" uses at the 102 E. Main Street location. In addition, the Plan's Downtown Economic Enhancement Strategy suggests, "downtown core districts" land uses for this site. The Strategy describes this district as:

"... [The] center of Newark's central business district that is intended as an area to be redeveloped with first floor specialty and traditional retail shops, with a balanced concentration of food and entertainment. Apartments and offices are proposed for upper floors. Any additional apartments, however, must be carefully and closely evaluated in terms of their impact on downtown traffic and parking; their compatibility with existing downtown buildings in terms of design, scale and intensity of development; the contribution of the overall project, including proposed apartments, to the quality of the downtown economic environment; and potential significant negative impacts on nearby established businesses and residential neighborhoods."

Regarding gross residential site density, please note that the 102 E. Main Street major subdivision and special use permit plan calls for 18.75 dwelling units per acre.

BB District Off-street Parking and Option Procedure

The BB district off-street parking waiver program, adopted by the City to encourage quality pedestrian oriented development downtown stipulates that the Planning Commission can reduce or waive the off-street parking standards in Zoning Code Section 32-45(a) after considering the following:

- “A. Whether the applicant has demonstrated the proposed use does not conflict with the purposes of the Comprehensive Development Plan of the City;
- B. Whether the applicant has demonstrated that the proposed use conforms to and is in harmony with the character of the development pattern of the central business district;
- C. Whether the applicant has demonstrated that the proposed use is not highway oriented in character or significantly dependent on automobile or truck traffic as a primary means of conducting business;
- D. That the proposed use will not adversely affect the health or safety of persons residing or working in the vicinity, will be detrimental to the public welfare, or injurious to property improvements in the vicinity;
- E. The Planning Commission may also consider the availability of off-street parking facilities, the availability of nearby adjacent public parking facilities (within 500 feet) that may be shared by the applicant and an existing or proposed use. In considering this subsection the Planning Commission may require that the applicant submit an appropriate deed restriction, satisfactory to the City, that ensures either the continued validation of and/or the continued use of shared parking spaces in connection with the uses and structures they serve;
- F. The Planning Commission shall consider the advice and recommendation of the Planning Director.

Please note also that the BB zoning parking waiver procedure permits City Council to review, modify, or deny Planning Commission approval, disapproval, or approval with conditions upon the recommendation of the Planning Director and/or the City Manager.”

Also regarding the requested parking waiver, our procedure specifies that applicants receiving such approvals must make a “payment in lieu of spaces” to the City used to improve parking downtown. The required payment, based on an estimate of the cost of construction of surface level parking spaces provided by the Public Works Department (\$2,678) is as follows:

<u>Number of Spaces</u>	<u>Payment Required</u>
Five (5)	\$ 669.50 (5% of cost)
Six to twenty-five (11)	<u>\$14,729.00</u> (50% of cost)
TOTAL:	\$15,398.50

Comments regarding this “payment in lieu of spaces” and related comments regarding this issue appear below under Subdivision Advisory Committee. The applicant’s supporting letter with comments regarding the parking waiver is attached.

Status of the Site Design

Please note that at this stage in the Newark subdivision and review process for projects fronting on Main Street, applicants are required to show the general site design and architectural character of the project. For the site design, specific details taking into account topographical and other project features, must be included in the construction

improvement plan. For architectural character, the applicants must submit at the subdivision plan stage of the process color scale elevations of all proposed buildings, showing the kind, color and texture of materials to be used, proposed signs, lighting and related exterior features; and, in addition, contextual color scale elevations showing the front Main Street facades of all buildings immediately adjacent to the property. If the construction improvement plan, which is reviewed and approved by the operating departments, does not conform substantially to the approved subdivision site and architectural plan, the construction improvement plan must be referred back to City Council for further review and approval. That is, initial Council subdivision plan approval means that the general site concept and the more specific architectural design has received City endorsement, with the developer left with some limited flexibility in working out the details of the plan -- within Code determined and approved subdivision parameters, to respond in a limited way to changing needs and circumstances. This does not mean, however, that the Planning Commission cannot make site design or related recommendations that City Council could include in the subdivision plan and agreement for the project.

Be that as it may, as you can see from the 102 E. Main Street subdivision plan, supporting letter, and applicant's color building elevation drawing, the proposal calls for renovating and restoring the front historic façade and sides of the original portion of the Bank of Newark building, removing the back portion of the existing facility and reconstructing it in an architectural style, "more closely matching the front portion of the building," and extending the rear portion of the building with a resulting total square footage footprint of approximately 6,400 square feet. The existing square foot footprint of the Bank of Newark building including previous additions is 4,185 square feet. Presumably, the new extension of the building will also "closely match" the existing historic facades of the building. A front restaurant patio is also shown on the slightly elevated portion of the property's front yard.

To evaluate the proposed architectural design, the Planning Commission may wish to consult the design review criteria in Municipal Code Chapter 27, Subdivision and Development Regulations, Appendix XIII (d).

Please note, in this regard, that on a voluntary basis, the applicant reviewed the proposed building elevation drawings with the Downtown Newark Partnership's Design Review Committee and the Committee indicated that the plan meets and, in some instances, exceeds the recently updated Design Guidelines for Downtown Newark. The Committee had several minor technical comments and suggestions that it reviewed with the applicant. Because Joseph Charma of Landmark Engineering is the engineer for this project, he recused himself from consideration of the design of the facility as part of his role as Chairman of the Partnership Design Committee.

Subdivision Advisory Committee

The City's Subdivision Advisory Committee – consisting of the Management, Planning and Operating Departments – has reviewed the 102 E. Main Street major subdivision plan and has the comments provided below. Where appropriate, the subdivision plan should be revised prior to its review by City Council. The Subdivision Advisory Committee comments are as follows:

1. Because of previous questions raised by the City staff, the Planning Commission and City Council regarding the proliferation of rental units downtown and the related impact on off-street parking along Main Street, as well as the related impacts of the increase of rental units on the City's apartment housing stock, concerns may be raised about the increase in size of the 102 E. Main Street building, calling for 18.75 dwelling units per acre. In this regard, the Department notes that we had previously recommended that the adjoining "CVS" major subdivision be reduced to ten units with a gross site density of 17.47 units per acre. Similarly, we had recommended that the Washington House (old Stone Balloon site) development be reduced to 27 units or 18.0 units per acre. As a result, while we recognize that concerns about apartments downtown may be an issue, we believe the 102 E. Main Street proposal is consistent with Planning

Department recommendations in the recent past for adjacent and nearby projects calling for similar land uses.

2. As a condition of approval, the Planning Department suggests, to limit the impact of the proposed apartments on downtown parking, each dwelling unit should be restricted to a maximum of four tenants and that tenants shall be informed in writing that no off-street parking monthly permits will be available at the 102 E. Main Street site for their use.
3. The Planning Department notes that the plan needs to be revised to indicate that a parking waiver is being requested along with major subdivision and special use permit approval. In this regard, the “Data Column” legend should be revised to delete the reference to “excess parking available in Lot #3.”
4. The Planning Department suggests in light of the applicant’s proposal to dedicate to the City the portion of the site currently leased as part of City Parking Lot #3, that the normally required parking waiver fee be waived.
5. As noted above, the Planning Department indicates that an additional special use permit will be necessary if a restaurant with alcoholic beverages is proposed for the building.
6. The Planning Department suggests that the Planning Commission recommend as subdivision site design conditions:
 - A. The historic architectural design of the existing facades of the building shall be carried out on all new and renovated building elevations visible from public ways.
 - B. Storage areas, mechanical and all utility hardware shall be screened from view from all public ways and nearby properties in a manner consistent with the proposed and existing architectural design.
7. The Public Works Department indicates the following:
 - The trench drain starting east of the site appears to be a 15 inch concrete pipe draining under the corner of the existing building into the drain on the west side of the building. As a result, this drainage system from the east side of the site will need to be rerouted.
 - The sidewalk on the west side of the building at its northern end terminates at a handicap space; handicapped accessibility at this location should be shown on the plan.
 - The parking area to the rear of the proposed expanded building may need to be revised to show adequate turn around area. The applicant should review this item with the Department.
 - The three proposed relocated parking spaces appear to conflict with the queuing line from the Planning Department’s Parking Division booth.
 - The exit from the parking on Main Street will need to be redesigned to include improvements scheduled as part of DelDOT’s comprehensive Main Street streetscape plan.
 - The plan may need to be redesigned to provide an area for two trash dumpsters – one for the restaurant and one for the apartments. The applicant should review this item with the Department.
8. The Electric Department indicates the following:
 - In order to correct for low voltage problems in the past at this site and because the current access from a 4,160 volt aerial line is fully loaded, an additional

line would be required from a new 12,470 volt circuit extended from the pole at the corner of Main Street and Academy Street to a relocated pole by the City's parking booth. A pad mounted transformer will be necessary in the grass island to feed the building. The developer will be responsible for the cost of the aerial extension, the pole relocation by the parking lot booth, the cost of the onsite transformer, and for the high voltage cables; the department estimates this cost at \$42,000.

- The developer will be required to install two to four inch conduits from the back aerial line in the parking lot to the pad mount transformer.
- No trees over 18 feet high at maturity shall be planted under any existing and proposed aerial lines.

9. The Building Department indicates the following:

- The building must be renovated and expanded in accordance with the International Building Code.
- All new construction at this site will be required to be sprinkled.
- Based on fire separation distance requirements in the International Building Code, the east wall in the new addition may be limited to window openings of 15% to 25% of the size of that wall.

10. The Parks Department indicates that a landscape plan for the front of the project will be submitted through the construction improvement plan process.

11. The Water and Waste Water Department indicates that there have been problems with the existing four inch sewer lateral in the basement of this facility. A capacity analysis will be required to ensure the size is adequate for the proposed restaurant and new apartments.

12. The Water and Waste Water Department also indicates that two water meters will be permitted for the site – one for the residential uses and one for the restaurant -- with the size and location determined by the Water Department.

Recommendation

Because the proposed 102 E. Main Street project, with all the Subdivision Advisory Committee recommended conditions, will not have a negative impact on nearby and adjacent properties, because the proposed use conforms to the development pattern in the nearby area, because the proposed renovation, including the restoration of the rear portion of the existing building to match the historic facades of its front section, will preserve and adaptively reuse an existing historic downtown property, and because the proposed land dedication of the section of the site leased to the City will help to improve our downtown parking, the Planning Department suggests **that the Planning Commission approve the 102 E. Main Street parking waiver, with the condition that parcel #2 shown on the Landmark Engineering plan, dated August 21, 2007, be dedicated to the City upon issuance of the first certificate of occupancy at the site, and that the Commission make the following recommendations to City Council:**

- A. That City Council, with the conditions in this report, approve the 102 E. Main Street major subdivision plan, as shown on the Landmark Engineering plan, dated August 21, 2007.**
- B. That City Council, with the conditions in this report, approve the 102 E. Main Street special use permit for apartments in the BB district, as shown on the Landmark Engineering plan, dated August 21, 2007."**

Mr. Bowman: Are there any questions for Roy?

[Secretary's note: The applicant and members of the public referred to visuals brought by the applicant for his presentation to the Planning Commission].

Mr. Jeff Lang: 13 Spring Water Way. I have Joe Charma from Landmark Engineering here this evening; Dan Hoffman, DCI; and Karen DeVenney and Chris Locke of Lang Development Group are present.

Let me give you some background concerning this project. We were approached by the property owner about a year ago, and they voiced some interest in possibly selling this piece of property. At that point in time we looked at the alternatives, had a conversation that I always do with Mr. Charma. We talked about some different reuse possibilities, but we couldn't reach a final agreement with the property owner. About six months later, a restaurant operator, that was interested in downtown, came to the site and thought about possibly doing something with the site. We looked at the redevelopment of the site then in conjunction with the restaurant use and that is how Mr. Lopata pointed out the complexity of our process and the variance process for potential restaurant use. Obviously, tonight we are just discussing the reuse of the property and the development plan that has been proposed.

As you know, it is an existing old building – the Newark Bank Building. It is approximately 4,400 square footprint, about a 13,000 square foot building. The majority of the back of the building is in major disrepair. Many tenants have left this building. Many tenants have come to me that were in that building looking for space to relocate due to the fact that the building was in disrepair. I have been in the building over the years. Gilpin Mortgage was in there. I think the University had some space there. I think it is a very nice old historic building that, really, should be reused. After speaking with Mr. Lopata and working with Joe and Dan, I think we have come up with a plan that could really work there. One of the questions Mr. Lopata asked us early on is, what is the theory behind the size of the building. Part of it is driven, obviously, by the users that are going to potentially take the space. A restaurant user or any retail user needs a certain size space to occupy on the street. Many of the spaces that are on the street that have been before you and before Council before are smaller spaces and they don't allow a certain type of tenant. We have a similar office tenant down the street at Abbey Court that is in about a 7,000 square foot space. Most of the restaurants on Main Street that are larger and more successful are somewhere between 7,000 square feet and 10,000 square feet. So, when we looked at the footprint of this building, we looked at the expansion of the footprint, and as you look at it in comparison to CVS, we propose to expand the building about 50 feet longer than what it was. Still, it is probably about 70 feet shorter than the CVS directly adjacent building. So, we thought that was a fair compromise. We were lucky enough to be able to extend the building through, basically, a driveway, and we have been able to take off parking that was in this area and replace it here and not really lose any spaces in the entire back lot. When we did that, obviously, we end up with about a 6,600 square foot building and we end up with a second and third floor. When we started looking at the second and third floor, we talked about office use, we talked about apartment use. Obviously, we are involved in a number of other projects that have apartments and we thought that it was an appropriate reuse for this area. It is a small project – nine units – so it is easy to manage.

So, our proposal, obviously, is to come to you, renovate the existing three-story portion of the building, tear off the old piece, add the new piece, tie it together with a brick band around its architectural details on the side and add nine apartments. We did meet with the Design Review Committee, which Joe is a part of. He abstained from comment, but the Committee thought that the details that we presented and the design were appropriate.

Mr. Bowman: Do you have any questions for Mr. Lang?

Mr. Begleiter: I have one comment I would like to make. I want to thank the developer in this case for two things; First, revising your elevations to include the utility pole. I guess as a matter of record, I suppose I should ask, don't you think this would be a thousand times better if that utility pole weren't there? And if it weren't there, since you are going to rebuild the sewer line underneath anyway, wouldn't it be much easier to dig

that trench twice as large as it needs to be and put the wires underground in front of your building?

Mr. Joe Charma: We would be willing to do that. I am not certain, as Dan mentioned, I think some of the traffic guy wires are tied to that light pole. It is a street light. However, we are getting pedestrian scale lighting on Main Street. There is still high-rise lighting needed for other security reasons. That is really something, I think, that this Commission ought to pursue with Council, and Council ought to pursue it with the Electric Department and some of the other operating departments.

Mr. Begleiter: Just out of curiosity, if you were to propose it, wouldn't that trigger a formal consideration of it? Wouldn't they have to actually come up with some good rationale why it couldn't be done?

Mr. Charma: Let me put it this way, we have a similar proposal on another project and it was met with opposition internally.

Mr. Begleiter: Internally to the City?

Mr. Charma: Yes.

Mr. Begleiter: The second thing I wanted to say was to just congratulate you on a really terrific proposal for a building that is a beautiful building but clearly in need of work. It is a wonderful example of how you can take an existing facility and falling apart and doesn't add much currently to the cityscape but turn it into something that would truly be a showcase spot on Main Street. I note, just to make it clear, it made an impact. That building currently has two very large and, I think, unruly, for the lack of a better phrase, trees in front of it, which actually obscure the beautiful façade of the building. It doesn't bother me a bit to see those two trees disappear, not because I don't like trees on Main Street, but in this case, I think the cityscape will actually be much better without them than it is with them.

Mr. Osborne: I just want to agree with Ralph. I am very impressed with the plan and appreciate the work that you have put into it.

Mr. Joe Russell: I assume the driveway will stay as a driveway coming out?

Mr. Charma: Yes, the driveway will stay. One thing I would like to point out, we are proposing a five foot promenade to connect from Main Street to the parking lot because as Jeff mentioned, I do chair the Design Committee, and one of the things that we are trying to focus on downtown is making connections from the Street to the parking areas that are safe connections, well lit and something that can be attractive rather than just walking up alleys.

Mr. Bowman: While you are there, Joe, under the Building Department comments, the second bullet of Roy's report says, "All new construction at this site will be required to be sprinkled." I would hope that the entire building would be sprinklered.

Mr. Charma: That is correct. It will be, particularly because it is a mixed use building. You have residential as well.

Mr. Bowman: It represents a change of occupancy and considerably higher occupancy than probably before.

Mr. Charma: A portion right now is sprinklered.

Mr. Bowman: I just wanted to clarify that.

Mr. Lang: To further talk about that issue, and I had a conversation with Mr. Lopata about this, obviously, we want to fully sprinkler and make it as safe as possible. The concern I have when we deal with old buildings, and we have dealt with some in town in other locations, is we need to review aspects of the present buildings so that we don't

have to tear stair towers down and all kinds of other things to conform to the new Building Code. So when it says it has to meet all the new Building Code, it should be all the new construction within the new area. Obviously, we want to put sprinklers in the old part.

Mr. Lopata: There is a historic building exception in the Building Code.

Mr. Lang: I just have to make sure the Building Department is aware of it.

Mr. Bowman: There might be that exception, but given the fact that you are going to have a restaurant in there with a high occupancy exposure, it makes good sense, and if you get a good sprinkler contractor, they can make those sprinklers disappear.

Ms. Dressel: On page nine. "The three proposed relocated parking spaces appear to conflict with the queuing line from the Planning Department's Parking Division booth." Was that addressed?

Mr. Charma: Yes, all those Public Works comments were addressed in a letter to Rich Lapointe that I sent on October 22nd. I addressed all those comments point-by-point.

Mr. Lopata: They are going to have to be resolved prior to City Council about some of these things. There will not be any net loss in parking. That is the most important thing.

Mr. Charma: If you look at it carefully, what I have done is I have struck a line from the parking booth back to the end of the island, and there is enough room to get all the spaces beyond that line.

Ms. Dressel: Can you show that?

Mr. Charma: Here is the parking booth here. Straight back, even though this (inaudible) area which is kind of just an access way, the line does cross through that but that is not a parking space. That line comes back to the end of the island, here, that is why they are staggered at an angle because they are all pushed in to get out of the queuing line.

Mr. Bowman: Are there any further questions or comments from members of the Commission? If not we will open it to the public.

Mrs. White: 103 Radcliffe Drive. Mr. Lang's letter of September 4th says they plan to "remove the back portion of the building and rebuild it with the architectural style more closely matching the front portion of the building." The Planning Director's report on page 7 says, "Presumably, the new extension of the building will also "closely match" the existing historic facades of the building." Both the Planning Department and the developer, as well as many town's people, know that the front half of this building is on the National Register of Historic Places. The Secretary of Interior has ten standards for treating historic buildings of which this one imminently has qualified because of its National Register status. In standard #9, I will read the whole thing but am focusing on one part of it, "New additions, exterior alterations or related new construction shall not destroy the historic material that characterizes the property," which it doesn't. The new work shall be differentiated from the old and should be compatible with the mass and size scale of architectural features and respect the historic integrity of the property (inaudible)." In addition, the Secretary of Interior has issued guidelines to augment and support the ten standards. I'll read one of those guidelines, "One should design a new addition so as to make clear what is historic and what is added on." Under that they have a series of things that are not recommended. Not recommended: "To duplicate the exact form, materials, style and details of the historic portion so that the new work appears to be part of the historic building." I don't know what you have in mind, but if you are going to have it all brick and it is going to be exactly matched the old (inaudible). I was wondering if the developer – Mr. Lang, and so on – would be amenable to consultation with the Historic Preservation Office which could comment on your plans and could possibly like them the way they are or even suggest some additional things. It would be something that would be available to you.

Mr. Lopata: Mrs. White, we would typically require that for a historic building.

Mrs. White: I did not see that.

Mr. Lopata: I did not put it in that report, which I should have, but that is typically what we have done.

Mrs. White: That would be nice if the Planning Commission would come forth. Already noted was what I have with me, which is Appendix XIII – Design Review for Downtown Commercial Properties which says, “color scale elevations of all proposed buildings showing the kind, color, textile and material used for all sides of the building.” You have them, but I know I for one would appreciate them to be in the packet. So, I presume that Council will be getting those.

My reactions to the restaurant occupying the first floor, I would have, actually, preferred the first floor be occupied by offices. But, getting to the plan before you, I actually like the current low stone wall that is out front and the general landscaping greenery minus the trees. I appreciate Mr. Begleiter’s comments. I actually think that more open trees like Dogwoods which are beautiful but are open. For those of you who got the guidelines, I was the one who took the picture of this building that is in those Design Guidelines. I worked very hard not to get wires or to get fewer wires and I, of course, was noticing the trees that you have spoken of. Nevertheless, the greenery in the front is nice, and I am bothered by the fact that it is going to be a flat brick wall with a flat whatever with umbrellas in front like every other place with umbrellas in front. So, I think the building is very nice as is with some greenery.

More troubling is the fact that the developer on behalf of this proposed restaurant tenant is appealing to the Newark Board of Adjustment on November 15th to be allowed to have a bar and to be allowed to have amplified live entertainment in the nightclub category. Although this is going to come up then, I will say that the outcome of the Mayor’s Alcohol Commission, 2002, was a series of ordinances and very importantly was that within 300 feet of protected uses – churches, school, and in particular, residential areas, that there not be bars and the live entertainment was in there. So, if you look up and down Main Street of restaurants that have gone in since then, you could name four offhand that do not have bars. Those of us who have been very interested in the problem of excessive alcohol use and the problems that it has caused, are very aware of studies that show that, not only the number of bars but the density of them in downtown areas is the problematic issue and I, actually, do not have a problem with a restaurant or a restaurant with an alcohol license, but I am very sorry to see that this is what is going to be happening. I would say that if the appeal were denied, this proposed restaurant would need less floor space. I, actually, would prefer that the Planning Commission table this until the outcome is known.

The current footprint is 4,185 square feet. The developer proposes demolishing the current addition and building a new addition, but a much (inaudible) addition so that the new footprint will be 6,400 square feet. This is an increase in the total footprint counting the old historic building of 2,225 square feet. In other words an addition and footprint of 53%. That is a very large addition. I personally feel that it is too large. I do understand that it is going backward into the parking lot, but that is how I feel. I do not in principle oppose putting apartments on the second and third floor because I do feel that it is probably hard to find office tenants on the second and third floors or, perhaps, for this building. I feel that by reducing the footprint of the building a little bit, but basically, doing the same type of thing would be better all together.

Ms. Pamela Bobs: 713 Christina Mill Drive. I have bought into the Washington House. So, what happens on Main Street is very important to me. I am very concerns about the parking issues all the way around, primarily, because one of the things that I don’t think anyone has thought about at all, what do people do that live there that are resident owners (not students) that have visitors, where are they going to park? You put another restaurant in there that is going to require people to drive in to attend the restaurant, even townspeople are coming in who are no walking are going to need parking spaces. I don’t know what that is going to do down there. It is not particularly convenient as it is right

now.

I am also concerned about student housing. If you are proposing that downtown Newark is going to become a more upscale type of a place and, quite frankly, the trash I see on the streets now is not conducive to that. So, when you are talking about non-owned units above that, I have some concern that you are going to be able to maintain the beauty of the building as you are proposing that it be because the residents won't really care. They don't own it and they won't care. They don't across the street in the current property you have control of.

Mr. Bill Pace: 13 E. Mill Station Drive, Mill Branch. I only had a couple of comments to begin with but now you have brought up cutting down the two Cherry Trees, and I have a partiality to Weeping Cherry Trees so I would hate to see that happen. The parking waiver, I do not understand that.

Mr. Lopata: We have a process that we adopted back in 1986 that when you have a change in use and the applicant can come and request from the Planning Commission permission not to provide the additional parking that would otherwise be required for a project. That Code change is probably the single most important regulation that the City ever adopted in terms of downtown improvements. Otherwise the uses would be locked in. An office would have to stay an office and so on.

Having said that, we also recognize that parking is an issue downtown, so the City has continued to acquire new land and expand downtown parking as best as we are able. In this case, one of the issues that we will have to deal with, and it is in my report, we are going to be requiring in the lease that tenants be made to understand that there will be no onsite parking available, although, they will be renting a unit in what appears to be land adjacent to a parking lot. We have used that clause in several other downtown projects and by-and-large it has worked effectively, that is, the tenants understand that they cannot park there. They are typically students and, hopefully, park on campus. But, I grant you, the downtown parking situation has become more difficult. The parking waiver has to be used judiciously. That is why I mentioned weighing benefits, in the clause I did not read that is in my report states that we have to look at these downtown projects that call for apartments more carefully. And, we have. We have recommended against projects. The Planning Department recommended against the Washington House. We felt that it was much too big because of its impact downtown including on parking albeit that had a parking garage. The CVS project, we suggested that be scaled down, and ultimately, we went to court and won on that. This is a project, as I said, that conforms to that pattern. But, I recognize that this is an issue that we are going to have to continue to look at and weigh each project on its merits because we cannot simply continue to house off-campus students downtown. That time is long since past.

Mr. Pace: You hit the very issue I was questioning when we continue to load up the traffic issues in Newark by new developments. The one we just talked about and debated here previously is going to add to that problem. No solutions do I see in sight. We keep loading up the streets. We keep the loading up the intersections. We can't get down through Main Street a good portion of the day without waiting for someone to get in a parking space or the traffic backed up. So, I don't know how we continue to load the problem up without coming up with some solutions first. I think that is a leadership issue. I think that is a City Council issue. I have heard the blame put on DelDOT, but I think it falls within this city.

Mr. Lopata: The issue of downtown parking is not DelDOT. That is us.

Mr. Pace: We accept that responsibility.

Mr. Lopata: Absolutely.

Mr. Pace: The second issue I have is the alcohol. We have an alcohol problem in the City of Newark. All you have to do is read the newspaper and look at the traffic stops. We keep putting the availability of alcohol out there, and I agree with the previous comment that it keeps encouraging the drinking and encouraging the problems. I would

prefer that that not go in that facility.

Ms. Sheila Anderson: 206 Sypherd Drive. I am the tree hugger of Newark. We all know that, but those Cherry Trees need to go. I would hope, though, that you will soften with some green the front of that. I see you have a plan for some landscaping, but keeping that wonderful brick with some Boxwoods or something that is compatible with the historical nature of the building would be very desirable.

I have a few questions. I think this is a good project. Are you keeping the cornice work here? (inaudible)

Mr. Lang: Obviously, we either need to replace it or repair it.

Mrs. Anderson: I am also interested in this door. Is this door going to be an entry and exit or is it just decorative to the building?

Mr. Lang: What we basically have is an interpretation of what we think this deck is going to look like. We, obviously, met with the Parks and Recreation Department. Charlie Emerson talked about adding some kind of plantings on the deck. Obviously, we have to determine how the deck is going to be done. Obviously, we need to meet the Building Code for the restaurant.

Mrs. Anderson: My last concern is the original windows. (inaudible)

Mr. Bowman: Mrs. Anderson, I think the builder understands that. They have got guidelines that they have to follow.

Dr. Thomas Cox: My wife and I own the building next door, the “green mansion” at 94-96 E. Main Street. We actually did put vinyl windows in our building when the wooden windows collapsed. No one would know by looking at it. It is all white wood trim. No one would know, unless you had to go up and feel them, that they are vinyl windows. They are double paned glass. They are insulated for the heat.

The concern that I have is that I lease a large portion of that parking lot to the City. The parking waivers, most of the time the parking is great and it is adequate. Sometimes it is tight with a lot of spaces filled up so I get concerned with what will happen with my clients as a dental business. Does the parking lot get more filled with more clients? The construction, while it is going on, how it impacts the parking sectioning off part of the parking lot to hold the equipment that they would need would make it a concern to me. I am really happy that something is going to be done with the building because it has been collapsing for so many years. The other concern would be the bar and how a bar and what aspect of the restaurant that the bar might impact being an adjacent building, raudiness or whatever. If it is a bar, part of a nice upscale restaurant, there will probably be no problem, but if it becomes a Grotto’s pizza bar or something like that, it then becomes . . .

Mr. Lopata: The bar would be limited to 15% of the seats of the total restaurant. It has to be a regular sit-down restaurant.

Mr. Lang: When you say bar, everyone gets all excited. When we started talking about this whole thing, when you go to all these nice restaurants, they all have what everyone calls a bar. It is really a waiting area or a bar area for before or after dinner drinks. That is the type of restaurant owner we are dealing with here. We are not dealing with a Grotto. Yes, everyone gets concerned about alcohol consumption in college towns. I was just up in West Chester and there are many, many great restaurants and they all have bar components and live music that has nothing to do with the college environment. He wants to have something like Iron Hill has. You have someone come in a play the guitar – not a band like you used to see at the Stone Balloon. The size of the space does not cater to that anyway. It is not like you have the second floor of Klondike Kate’s where you have 4,000 square feet. Even the second floor of this building that he proposes to use this for is kind of a small sitting area. It is 1,500 square feet. It is three small rooms. It is more of dining area. The building is not set up for huge open space anyway. We are

going to have 1,500 square feet of old building on the first floor. You are going to have about another 1,500 to 2,000 square feet of seating area, and then you are going to have a kitchen and a little space upstairs. I understand the concern, but when you really think about the restaurant use and the need for a bar is that restaurants need to survive. It is a competitive environment. That is what restaurants do now. They have small bars. They might have live entertainment on an off night. They might do that kind of stuff to survive the competitive environment. Iron Hill does it, Klondike Kate's does it, Dome does it, Tuscana does it. That is what all restaurants do.

Dr. Cox: Would you anticipate the construction for a certain period of time that would block off a section of the parking area?

Mr. Lang: What we propose to do, hopefully, is if we are successful in the approval process, we will try to build this building between March and August. The restaurant operator would love to be open in September. The building is not that big. What we need to do, obviously, work with the City on how we are going to access in and out of the parking area . . .

Mr. Lopata: Let me interrupt. To say we share your concern about the parking lot would be an understatement. That is revenue for us. We are going to limit the impact as much as possible.

Mr. Lang: I think a restaurant use actually is a little bit off peak from your use to some extent, so that is good. If I had an office user in there and he came in and had 40 employees, all of a sudden we have a huge problem with parking. So, when you have a restaurant user, most of his people come in at night. A lot of his people might walk. There are remote locations to park. That is really the ideal use.

Mr. Lopata: Also as part of our examination of this in light of this proposal, we have monthly permits in that lot, and we are going to begin to phase some of them out. It causes a problem when you have long-term parkers and you have dentist patients and restaurant folks wanting to come in and out of a parking lot. In the long run the potential of this lot is to be a downtown type parking lot, not a place for cars to sit for hours and hours.

Dr. Cox: I understand you try to steer some of the monthlies down toward . . .

Mr. Lopata: Lot 5 is where we are pushing them and that is very successful. That lot is sold out. We also have monthlies in Lots #3 and 4. Yours is #3. We have reduced them in #1 for the same reason.

Mrs. Donna Cox: 94 and 96 E. Main Street. The only question I have on the parking is, when you mention that you have tried to have some spaces that are short-term up front. The problem is you come in and we are finding cars from adjacent buildings that have tenants that are parked there 24 to 48 hours. We have to go to the attendant and say, "I believe these cars were here yesterday, why are they still here?" I would wonder if you would address if they would make sure the short-term parking is kept to short-term parking.

Mr. Lopata: That is why I mentioned it. We are certainly aware of the problem.

Mrs. Cox: I appreciate that.

Mr. Lang: One other comment that I wanted to bring up and I forgot to bring it up when I was addressing this conversation. I did have this conversation with Mr. Lopata. Due to the fact that we don't have a configuration of our apartment units, we are more than willing to agree to a maximum density of 4 per unit on average, but we have no real configuration of whether they will be one, two, three bedroom type units. I wanted to clarify that, and Mr. Lopata seemed to be comfortable with that when we talked about it earlier.

Mr. Lopata: It is really the same point. The total number of tenants is the same.

Mr. Begleiter: So, the restriction would not be on a per unit basis but you have the restriction on the total number.

Mr. Lopata: Multiply nine times four is the best way to do that.

Mr. Lang: It is more due to the configuration of how to lay the building out.

Mr. Bowman: Let's bring it back to the members of the Planning Commission for any questions or final comments.

Ms. Dressel: A comment. Thank you very much for the drawings. This really helps to understand what your plan is. It is nice to see the color and with the light pole in the front.

ON MOTION BY DRESSEL, SECONDED BY McDOWELL THAT THE PLANNING COMMISSION APPROVE THE 102 E. MAIN STREET PARKING WAIVER, WITH THE CONDITION THAT PARCEL #2 SHOWN ON THE LANDMARK ENGINEERING PLAN, DATED AUGUST 21, 2007, BE DEDICATED TO THE CITY UPON ISSUANCE OF THE FIRST CERTIFICATE OF OCCUPANCY AT THE SITE, AND THAT THE COMMISSION MAKE THE FOLLOWING RECOMMENDATIONS TO CITY COUNCIL:

C. THAT CITY COUNCIL, WITH THE CONDITIONS IN THIS REPORT, APPROVE THE 102 E. MAIN STREET MAJOR SUBDIVISION PLAN, AS SHOWN ON THE LANDMARK ENGINEERING PLAN, DATED AUGUST 21, 2007.

D. THAT CITY COUNCIL, WITH THE CONDITIONS IN THIS REPORT, APPROVE THE 102 E. MAIN STREET SPECIAL USE PERMIT FOR APARTMENTS IN THE BB DISTRICT, AS SHOWN ON THE LANDMARK ENGINEERING PLAN, DATED AUGUST 21, 2007."

VOTE: 6-0

AYE: BEGLEITER, BOWMAN, DRESSEL, McDOWELL, OSBORNE, RUSSELL

NAY: NONE

ABSENT: HAMILTON

MOTION PASSED UNANIMOUSLY

Mr. Lopata: Mr. Chairman, may I make a brief comment. I want to tell the Commission, and folks here can hear this, too. I was proud of you here tonight. You had a very contentious, difficult situation, and I think you all did a very good job. And I think you ought to be proud of yourselves because you are all volunteers and at times I think that is forgotten by applicants that you do the best you can under trying circumstances.

Mr. Bowman: Thank you, Roy.

Meeting adjourned at 10:00 p.m.

Respectfully Submitted,

Elizabeth Dowell
Secretary, Planning Commission