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To: Chair and Members, Itasca County Planning Commission

From: John H. Erickson

Date: April 4, 2014

Subject: Application of Living Word Bible Camp for Final Planned Unit Development ("FPUD") Approval

On behalf of Holly Newton, a permanent resident of Deer Lake living nearby to the proposed commercial land use for which Applicant Living Word ("commercial applicant") now seeks commercial Final Planned Unit Development ("FPUD") permission, I offer the following comments, supplementing those I asked you to consider earlier, in opposition to your approval of the FPUD application before you for decision on April 12, 2014.

I make this request in part because the commercial applicant's FPUD application was allowed to be altered by the Planning Commission through the commercial applicant's submission – and the Planning Commission's allowance of that submission – of a different open space covenant than the Planning Commission gave notice of as part of the FPUD application. Once notice was given, the Planning Commission should not have allowed more filings by the commercial land use applicant, especially ones made at the outset of the hearing, without notice to the public. In fairness to the public, the Planning Commission should attempt to correct this capriciousness, this legal irregularity, by allowing further comment from the public, such as what is offered here.

In the interests of regularity and fairness in treatment of those opposed to the commercial application before you for FPUD approval, and in your effort to arrive at a decision based on the exercise of judgment, not caprice and not will, please consider the following:

Introductory Comments

It is important to appreciate that the FPUD stage of an application is not the planning stage of a proposed commercial development, nor is it when an applicant introduces new material to the Planning Commission. Planning occurs at the commercial

preliminary planned unit development ("PPUD") stage of an application. PPUD regulations are found at **Sections 9.20 – 9.52** of the **1998 Zoning Ordinance**. *The Planning Commission has no FPUD subject matter jurisdiction to "plan" in any manner except in the very specific and limited way it is empowered to by the terms of the Ordinance* (discussed below). And where the **Ordinance** says that the Planning Commission must judge the FPUD application using the terms of the **Ordinance**, the Planning Commission must do so. Any other processing of the FPUD application by the Planning Commission would be irregular, arbitrary, capricious, unreasonable and contrary to law.

Ordinance Section 9.60 very, very plainly admonishes the Planning Commission "to include requirements set forth in **Sections 9.48 – 9.51**" as part of its FPUD decision making, and **Section 9.60** describes the "procedure," what the Planning Commission is to do in administration of a "final plan" application. **Sections 9.48 *and 9.49*** address open space requirements, **Section 9.50** "erosion control" and, separately, "stormwater management plans," and **Section 9.51** is concerned with centralization of facilities and design of facilities. These sections are not invitations to plan a PUD at the FPUD stage, but are clearly incorporated into the FPUD process as a "cross check" required to be gone through by the Planning Commission to assure that (1) the FPUD application is consistent with the PPUD approval given earlier by the Planning Commission, and that (2) PPUD permission is consistent with those important ordinance provisions, including the law's requirements found in **Ordinance Section 9.49**. The Planning Commission's FPUD subject matter jurisdiction is limited.

Section 9.61 requires the applicant to submit "the final (FPUD) plan" to the Zoning Officer." Those plans, *not* those plans as modified and adjusted later by the commercial applicant, including, as here, minutes before the public hearing, are then referred to the Planning Commission and the public is given notice of those plans, *not* those plans as modified and adjusted later by the commercial applicant, including moments before a meeting begins.

Section 9.63 then requires the Planning Commission to "review the final plan and verify that said plan" (that is, the filed with the Zoning Officer final plan) has in it all "changes" in the preliminary plan (proposed to the Planning Commission in connection with the applicant's preliminary plan application and PPUD approved by the Planning Commission) required by the Planning Commission. No changes can be made to a preliminary plan approved by the Planning Commission *if the Planning Commission did not require those changes.* There is no Planning Commission FPUD subject matter jurisdiction to do so.

In other words, the FPUD final plan submission "target" (even if founded upon an erroneously designed, adopted and created by PPUD approval) cannot be moved/changed/improved by the commercial applicant and by the Planning Commission. FPUD approval is a limited exercise in administrative decision making. The Planning Commission's FPUD subject matter jurisdiction is very restricted and a commercial applicant's attempts, here already allowed by the Planning Commission in an irregular to the Ordinance and contrary to law manner, to expand that jurisdiction must be resisted.

Section 9.64 tells the Planning Commission what it can do at its "first regular meeting following receipt of the final plan," limiting that power, that FPUD subject matter jurisdiction, to (a) approve as submitted, (b) deny and say why, (c) request further changes or amendments of the final plan (read in conjunction with other ordinance provisions, this is enabling power to require the commercial applicant to bring to the Planning Commission changes that were to have been made (ordered in the PPUD approval), but which were not made by the commercial applicant for FPUD approval), or (d) table for study and review.

1998 Ordinance Sections 9.34 and 9.40 describe what the applicant *must* (there is no discretion in this and, if the Planning Commission does not adhere to the law, then it acts contrary to the law, its behavior is irregular and its decision is arbitrary and capricious) present to the Planning Commission for PPUD consideration and approval; **Sections 9.34 and 9.40** are relevant to FPUD administration only to cause the Planning Commission to assure that *if the standards of those sections were not met and fulfilled "in" the PPUD, nor ordered to be placed "in" the PUD for final plan approval, then (1) those features cannot now be placed "in" the FPUD by the commercial applicant or by the Planning Commission and (2) the Planning Commission cannot grant FPUD approval. Denial must follow.*

Sections 9.34 and 9.40 require (1) a detailed site plan, including all relevant planning features such as open space, (2) locations of all proposed land alterations, (3) covenants, including for open space protection of vegetation and other natural features, (4) existing conditions, such as protected conservation areas, (5) erosion controls and stormwater management plans (two distinctly different plans treated distinctly differently in Section 9.50 (1) and (2) of the Ordinance). If these elements of planning are not "in" the PPUD and were not ordered by the Planning Commission to be "changes" the commercial applicant was to put into the FPUD application, then (1) error is present in the PPUD and that error (2) cannot be remedied by either the commercial applicant or the Planning Commission on application for FPUD approval. The Planning Commission's subject matter jurisdiction can only then be

exercised to deny FPUD approval on the basis that the FPUD application does not conform to the requirements of the County's own law. **Section 9.60** requires the FPUD application "to include requirements set forth in **Sections 9.48 – 9.51**."

In order not to make an arbitrary, capricious, unreasonable and contrary to law decision as part of an irregular proceeding in connection with approval, or not, of the FPUD application, the **1998 Zoning Ordinance, Section 9.60** requires the Planning Commission to confirm that the PPUD approval earlier given fulfilled the requirements of, e.g., **Sections 9.48 – 9. 51 of the Ordinance**. This requires the Planning Commission to review, point by point, all PPUD records, including all PPUD public comments. By reference, Newton incorporates all of her submissions, oral and written, made by her or on her behalf at the PPUD stage of proceedings, those submissions in substantial part arguing that the commercial applicant has not met the requirements of law in order to receive PUD approval.

Your attention is especially drawn to Newton's separate writing being filed with you at this time. There, Newton clearly articulates numerous departures of the PPUD from requirements of the **Ordinance**. In addition, I ask that you especially concern yourselves with (1) the legal inadequacies of the commercial applicant's treatment of the open space requirement of the **Ordinance**, (2) the commercial applicant's intended commercial uses of the Conservation Easement acreage, which clearly prohibits commercial uses, (3) the lack of conditioning of the PUD by (1) prohibiting use of Deer Lake east of that line drawn on a site plan, by (4) not creating conditions supportive of the PPUD based on multiple assurances and "understandings" of the commercial applicant, by (5) not requiring conditions anticipated by Itasca County, as the environmental review "Responsible Governmental Unit," to mitigate the effects of the proposed project, and by (6) completely ignoring the requirements of **Section 9.49**.

New Site Plan

In its PPUD approval (by its Findings, Orders and Resolutions dated January 30, 2014), the Planning Commission did not direct the commercial applicant to change the commercial applicant's site plan, which suffers from multiple ordinance failures as astutely catalogued by Newton in her separate memorandum of April 3, at Pages 1 and 2, writing deserving of close attention by the Planning Commission.

Moreover and as described above, the site plan submitted as the FPUD (fatally flawed as it is) cannot be altered by the commercial applicant or the Planning Commission in the FPUD process, since to do so creates unfairness to the public, is irregular and is arbitrary, capricious, unreasonable and contrary to the **Ordinance**. Yet

the commercial applicant has now, in this FPUD proceeding, submitted two new site plans (which continue to demonstrate a lack of understanding of **Ordinance** requirements for site plan content – again, see Newton's writing of April 3). The Planning Commission is without FPUD subject matter jurisdiction to approve a new site plan and for the reasons stated, FPUD approval of a new site plan would be contrary to law, arbitrary, capricious and irregular.

The Planning Commission should attempt partially to mitigate that error by allowing Newton, and others, fair opportunity to consider and to reply to the commercial applicant's submissions made after applying for FPUD approval and after public notice was given of the application for FPUD approval.

Without waiver of her position with respect to lack of FPUD subject matter jurisdiction with respect to this or any other issue she may argue alternatively on the merits, Newton notes that the new site plan attempts to re – situate the location of the conservation easement property within the boundaries of the commercial applicant's property. The new site plan, and the old site plan erroneously approved by the PPUD, incorrectly depict the conservation easement property (which is sensitively located on the development site, nearby to construction and land alteration, adjacent to major wetlands and adjacent to major fish and wildlife habitats). It is materially important that the illustrations of the site be accurate for possible future references.

However, because the commercial applicant has never provided a survey quality site plan, the Planning Commission is left to speculate, guess and surmise distances, sizes and relative relationships of structures, proposed uses and significant topographic features. Given the non – surveyor quality, blue print, of any site plan, the public and all future users, as well as the Planning Commission now, will not be able to determine whether there are commercial construction uses happening close to, next to, or overlapping open space/conservation easement space. The Planning Commission cannot speculate, guess and surmise. The late arriving "site plans," like the PPUD "site plans," require the Planning Commission to do what it cannot legally do and now, in considering the FPUD application, the Planning Commission should finally say "no" and deny.

The conservation easement area is shown on the new "first" site plan (dated 2/20/14 and labeled "Final Site Plan" and which was made available to the public before the March 12 FPUD hearing) to be further distant and easterly, roughly 80 to 100 feet more distant, from the commercial applicant's proposed construction areas than is in fact the case, misleadingly suggesting a lesser possibility of commercial construction and activity impacts on the conservation easement (and, of course, the conservation

easement expressly protects conservation assets in the easement from commercial uses, including those of this commercial PUD land use applicant). Only commercial land uses are even theoretically possible on this site, given the commercial land use application; no commercial uses are permitted by the conservation easement. It is logically, and legally, impossible for the Planning Commission – entrusted with the care of the people's environment – to purport to authorize (1) commercial land uses and (2) possible commercial storage, structures or facilities in a (3) conservation easement which (4) expressly prohibits them.

The second "new" "final site plan," also dated 2/20/14 and also labeled "Final Site Plan," was handed to the public during the March 12 FPUD meeting. This second "new" "final site plan" appears to be a modification (not permitted by FPUD rules and for which the Planning Commission has no subject matter jurisdiction) moving the Conservation Easement 80 to 100 feet west of the first "new" "final site plan" location of the Conservation Easement, but the second "new" "final site plan" still does not depict approximately 10 acres of open space area in the legal description of the open space area illustrated as open space (shaded). The 10 not shaded acres are distant from the concentrated building area.

As a result, the Planning Commission has before it two "final site plans," both of which are inaccurate and one of which the Planning Commission has no subject matter jurisdiction over.

The Planning Commission cannot, on this vague, inaccurate and consistently changing record, grant FPUD approval.

Grading Plan

Section 5.58A, as well as the County's negative EIS declaration, require a detailed grading plan – part of the construction process of these concentrated in one place commercial structures, but there is no "plan."

There are "concepts" of this and that, but there is no plan. The commercial applicant proposes to build numerous structures in shorelands, immediately adjacent to large, littoral wetlands, part of the supposed open space and nearby to the conservation easement. But there is no visible grading plan, yet, and by remarks made at the March meeting of the Planning Commission, significantly more grading is requested (none of which has ever been evaluated, discussed or even conceptualized) by the commercial applicant for ball fields and two roads to those ball fields (none of which has ever been so much as depicted on a site plan – the commercial applicant seems to feel that regardless

of ordinance processes, the door is always open to the commercial applicant to do what it wants, when it wants, picking the parts of the Ordinance it likes and ignoring the parts that it does not.

The Planning Commission, and the Environmental Services office, has a duty to protect the public and to act independently of the commercial applicant. This requires denying commercial applicant permissions, commercial applicant departures from process, commercial applicant ignoring of plain rules and surely not aiding and abetting the commercial applicant by willful approvals which lack reasoned decision making addressing legitimate, articulated public objections to the increasing panoply of commercial applicant requests.

Stormwater Management Plan

The commercial applicant offers words, ideas – and delays to a non – public hearing process (Minnesota Pollution Control Agency ["MPCA"], "later") – for its "plan." The PPUD Ordinance requires the "plan" to be prepared, noticed, heard and decided now, whether another agency has a requirement later or not, and the "plan" is to be reduced to a standard, typical, ordinary drawing depicting the design and construction of the plan. Not words, concepts, sketches, then more words. A "plan," especially as used in the context of the 1998 ordinance, is something that can be built from and is illustrated to support that building undertaking. It is not a "hydrological concept" (which, in this instance, also fails to match the site plan of the commercial applicant). And it is not something that is done for another agency months after these public hearings and processes are completed.

Newton has spoken eloquently in her April 4 memorandum to the Planning Commission, at Pages 2 and 3. The Planning Commission itself, at the table in PPUD deliberations, stated that there was no commercial applicant stormwater management plan at this time (January 2014), despite the commercial applicant's several invitations to the Planning Commission to rely on "hydrological" concepts and reports from the commercial applicant as the "stormwater management plan," and the commercial applicant's continued diversion of Planning Commission attention to the non – public hearing, essentially private MPCA requirements to be addressed *after* all County approvals and all County public hearings, completely nonsensical and blatantly contrary to the **Ordinance's** requirements.

This is not the law of Itasca County, the very law that both the commercial applicant and the County hold up – when convenient to their interests – to be "the" law which "must" be followed.

The commercial applicant relies on the "Hydrologic Summary Report" prepared for the commercial applicant some 5 years ago, Appendix F in the administrative record coming out of (and part of the record in the PPUD proceedings) the environmental review proceedings conducted by the County Board and resulting in a negative EIS declaration, as "the stormwater management plan." *It is immediately obvious, from the nature of the document as named by its author, that the "Hydrologic Summary Report" is not a plan, but instead is a "Summary Report."*

In the Planning Commission's own Findings of January 30, 2014, Finding 27, the Planning Commission itself does not recognize the Summary Report to be a stormwater management plan as required by the **Ordinance**. The Planning Commission, instead, only refers to other documents to be created in the future to meet other agency requirements.

In Condition 16 of the Planning Commission's Resolution and Order of January 30, 2014, the Planning Commission does not acknowledge that the **Ordinance** required stormwater management plan exists. It merely recites that the commercial applicant "shall implement" "stormwater management practices" that it then describes. No reference is even made to the Summary Report, much less determining that it is the required by ordinance stormwater management plan.

There is no stormwater management plan as required by **Ordinance** in order to support the commercial applicant's FPUD (or PPUD) requests for Planning Commission approvals.

The Planning Commission has one last opportunity to "do right." It can deny the application for FPUD approval and it can do so for many reasons, but among them that the Planning Commission would be derelict in its duty if it did not, now, subject to notice and public hearing, require the commercial applicant to present to the Planning Commission and to the people of Itasca County at least an ordinance driven stormwater management plan, an ordinance driven grading plan, an ordinance driven site plan, and an ordinance driven open space covenant.

If the Planning Commission chooses not to, then it will have again exercised its will, not its judgment. Newton asks the Planning Commission to exercise its judgment and to deny the FPUD application.

Parking, Floor Planning, Campers and Trailers

Illustrative of the unplanned nature of this commercial PUD application, the PPUD includes approvals for land uses that have nothing to do with a purported "youth camp," but are heavy on adult uses, such as weddings, marriage retreats, college activities and receptions. These are illegal uses for this real property, a point that has been repeatedly made, but for the moment, Newton asks the Planning Commission only to focus on where the cars and RVs are to go.

County parking regulations, including in the **Ordinance**, are applicable here because, as a commercial land use, the "public" is always involved in the land use, unlike a residential land use. "Public" does not mean "governmental."

Provision has been made for a mere 25 parking spaces.

The public was given no notice of these activities as part of the application for land use approval. Their very presence in this discussion is a result of the highly irregular decisions of some Planning Commission members to introduce those land uses into the process, such offerings then being seized upon by the commercial applicant and grafted into the PPUD permissions given by the Planning Commission.

The public is still, collectively, left gasping at both the audacity of the process and the Planning Commission's advocacy in it, clearly unfair to the public and highly irregular. But aside from that, the planning process is irrational in that there is no provision for vehicles to park for such activities and planning suggestions were made by the commercial applicant "on the fly," some remarkably and obviously impractical, with a great deal of speculating by both the commercial applicant and by the Planning Commission. Parking will inevitably, then, occur where it should not and where no County voice has permitted it to be, most likely creating more impervious surface by impaction in the wrong places (bear in mind that most activities are alleged to occur adjacent to a major wetland and a smaller set of wetlands).

Related to this planning happening when it should not, and the ultimate expression of "non-planning," is the absence of commercial applicant attention and Planning Commission insistence on floor planning for all levels of all buildings as required by the Ordinance. FPUD approval should not be given if there is non – conformity of the FPUD application to the law of the County, as such non – conformity is the most apt description of the FPUD application, as modified and modified again in the carousel of requests from the commercial applicant.

Resort Land Use

The Planning Commission, in considering approval of a FPUD application, cannot violate the law. Newton has argued, in several places, including again in her April 4 memorandum joined in by Michael Newton, that the land use the commercial applicant wishes to make of the property is that of a resort, not a youth camp. Newton tellingly takes the Planning Commission back to its own words in its discussions, words in which the Planning Commission compared the proposed project to "Camp Hiawatha," which is not a "youth camp" and which is, as must be the land uses here, regulated as a resort. Resorts are not lawful in this Seasonal Residential land use district.

The Planning Commission cannot violate the law in approving any land use application, including a commercial land use application in a long established seasonal residential land use district. The FPUD application should be denied.

Open Space Covenant

In its PPUD decision, the Planning Commission adopted Resolution and Order 27, which states that, before final approval, "the requirements set forth in **Section 9.48** of the **Zoning Ordinance** shall be developed to preserve and to maintain open spaces in perpetuity * * *." Although **Ordinance Section 9.60** expressly requires conformity to **Ordinance Section 9.49**, the Planning Commission failed to condition PPUD permission on creation of an open space covenant honoring the law of **Section 9.49.**

In its mandated FPUD review of PPUD conformity to **Sections 9.48 – 9.51**, the Planning Commission must determine that PPUD approval was irregular, contrary to law, arbitrary and capricious because of the PPUD's complete avoidance of **Section 9.49**, necessitating FPUD application denial.

In addition, **Section 9.48 A** plainly and simply requires that "provisions" for "open spaces" "must be developed for preservation and maintenance in perpetuity." The words are eminently understandable: "Preservation and maintenance in perpetuity." This is not "preservation, but only so long as it is convenient or until we decide we want to change it." It is "in perpetuity," which means forever and forevermore. "Preservation in perpetuity" means unchanged, natural, as is, not "so long as it is convenient or until we decide we want to change it." It is "preservation" forever and forevermore.

This mandate of permanency, forever, is not an isolated one in the **Ordinance**. **Section 9.48 B** refers to preservation and permanency, too, and **Section 9.48 B** also requires ("must") that "vegetation and topographic (that is, land) alterations be

"prohibited." "Additional buildings or storage of vehicles and other materials" are "prohibited." The **Ordinance** makes no exceptions: None. Zero.

Section 9.49, titled "Open Space *Requirements*" (emphasis added), this English also being plain, states one of the open space requirements in this way: "[O]pen space must not include commercial facilities or uses." Protection against such uses must be "permanent," a word used twice in two consecutive lines in **Section 9.49 (7).**

The commercial applicant, however, after PPUD approval in which a proposed open space covenant was not made available to the public and was not part of the PPUD application, has now proposed in connection with its FPUD application, then modified after notice was given and the proceedings were underway, an open space covenant which is plainly contrary to the requirements of Resolution and Order 27 and to **Section 9.48**.

This is a commercial applicant for a commercial planned unit development which will use the land for the only purposes a commercial entity can use land – *commercial uses,* thereby allowing the commercial applicant to (a) use the open space to further its commercial ends, to (b) send commercial visitors to, on, on to, in and into the open space, (c) including the conservation easement area which, by the express terms of the easement itself prohibits commercial land use of the easement, to (c) develop the open space with structures and facilities in the future, if need be by commercial CUP application, to (d) change the terms of the open space covenant, not rendering preservation in perpetuity, and to (e) alter the amount of acreage that is in open space, reducing it by a material number of acres. The required, ordinance mandated "in perpetuity" preservation character of the writings protecting the open space, is rendered meaningless by the commercial applicant's charade of an open space covenant presently endorsed by the Planning Commission, which now has an opportunity to repair the damage by denying FPUD permission.

The commercial applicant has, again, as it did 8 years ago, attempted to "pop" an important document upon an unsuspecting public by bringing its proposed to be adopted open space covenant to light after commencement of a public hearing, sandbagging everyone but the commercial applicant. Newton was given no notice of covenant content 8 years ago, but insisted at the time that any covenant had to be protective "in perpetuity." The suggestion that Newton agreed to a covenant 8 years ago, "popped" on the public then, is unfair and inaccurate.

However, the fact is that that whatever that covenant contained, it was completely tied to the 2006 Planning Commission approvals that were vacated by the

Court of Appeals and which resulted in the very proceedings we are now engaged in (and the commercial applicant argued the same way, on a different point regarding the covenant, before the Planning Commission on March 12). Two major differences, however, as between the commercial applicant and Newton and the effects of the 2006 covenant 8 years later: (1) Vacation of the prior permissions given by the Planning Commission in turn had to do with the Court of Appeals ordering the EAW which the County refused to order. Now, an EAW has been done and there are considerable volumes of new and additional evidence that render whatever was said or done by Newton in 2006 with respect to a covenant to be meaningless and (2) *prior to* the PPUD proceedings, by its current permit application, the commercial applicant reiterated the use of 137.5 acres of open space covenant protection (an acreage count which it *now, at the FPUD proceedings*, wishes to abandon by convincing the Planning Commission to reduce open space by 11.5 acres) and at the PPUD proceedings, the commercial applicant orally renewed its commitment to the terms of the 2006 covenant. Newton assuredly did not renew any possible commitment to the discarded 2006 covenant (this point is enlarged upon below).

In addition, the Ordinance requirement for 50% open space is tied to the land belonging to the commercial applicant by legal description and has nothing to do with the location of the ordinary high water ("OHW") level of Deer Lake, contrary to the commercial applicant's argument. That argument is a red herring. Environmental protection, through the open space requirements of the **Ordinance**, are based on the gross volume of land in the commercial land use application, which makes no reference whatsoever to "OHW."

The Planning Commission has no subject matter jurisdiction to approve, at the FPUD stage, an open space covenant which is attempted to be shoe horned into these proceedings late and which is inconsistent with the requirements of both the Ordinance and with Resolution and Order 34. This substance-less covenant, which is not a covenant in either the legal or biblical senses of the word, studiously ignores the provisions of **Section 9.49, "Open Space *Requirements*"** (emphasis added) (see, e.g., **Paragraph 6 of Section 9.49** ["open space must not include commercial facilities or uses"] of the Ordinance. The proposed "covenant" contains no reference to permanence, preservation and protection in perpetuity, but instead contains caveats and disclaimers and "holes" and exceptions and "spins" of avoidance of all that the law requires, including, but not limited to, the possible creation of commercial structures or facilities in open space already to be used as commercial land uses, the result of which is a legal vapor of a document, a wisp, a gossamer, of no substance, legal or otherwise, not remotely conforming to the law and upon which the commercial applicant asks the people of Itasca County, through the Planning Commission's approval, to become complicit in violation of the law and the environment.

At the March meeting, the commercial applicant attempted to "re – plan" ball field locations, and roads to them, placing at least some such fields and never before referred to, described or illustrated roads (the roads still are not illustrated on any site plan) to those ball fields, all in apparent open space areas, open spaces meant by ordinance to preserve nature, not cultivate ball fields and roads to them, some of which land uses, according to the commercial applicant, would also require grading (perhaps twice as much as is claimed for the building sites), but none of which was before the Planning Commission on the PPUD application and all of which the Planning Commission lacks FPUD subject matter jurisdiction to act upon. All that the Planning Commission can do is deny.

The commercial applicant's proposed open space covenant is an exercise worthy of Lewis Carroll's hallucinatory world of "Alice in Wonderland." For example, the proposed covenant states that it will conform in duration to **Section 9.48 B** (which does use "permanent" was picked and chosen by the commercial applicant over **Sections 9.48 A and 9.49,** both of which use "perpetuity"), which contains no reference to "perpetuity" (**Sections 9.48 A and 9.49**, not liked by the commercial applicant, do). This request of the commercial applicant for commercial FPUD approval, if granted, will cause the Planning Commission's decision to be most willful, irregular, contrary to law and arbitrary and capricious, and when coupled with other failures of control, conditions and mitigations, will render the County's negative declaration of need for an EIS, expressly conditioned upon the many promises and understandings of the commercial applicant, irrational and a harbinger of environmental harm to come.

While the commercial applicant may attempt to make only some of the law apply to it, ignoring other parts of the law, the Planning Commission cannot. The FPUD application should be denied.

The Planning Commission must also stop the dissembling of the commercial applicant on "how much?" land must be protected, in perpetuity, by a proper open space covenant. Newton agrees, but for one crucial point, that the commercial applicant is not bound by the 137.5 acres referred to in the 2006 open space covenant (interestingly, the commercial applicant has argued that that number does not bind it, since the 2006 covenant was vacated by the Court of Appeals' vacation of the 2006 PUD approvals; similarly, there is no legal significance to any – even misrepresented – attributions to Newton concerning the 2006 covenant).

However, the "crucial point" causes there to be a major, different effect with respect to the number of acres required to be in the open space covenant, once properly worded to provide the Ordinance required protections:

In the Planning Commission decision of January 30, 2014, un-appealed from by the commercial applicant, the Planning Commission found that the commercial applicant promised to enter into "the same terms" as the 2006 covenant and to preserve 137.5 acres. See Finding 34.

As described above, the Planning Commission cannot, now, in a FPUD proceeding, allow the commercial applicant to re – plan its application, especially doing so – once again – at the last minute and without notice to the public. The commercial applicant's FPUD efforts to eliminate 11.6 acres from environmental protection in perpetuity is unconscionable, contrary to law, highly irregular and unfair, and should be repulsed by the Planning Commission. The only effective way to do that, now, is to deny FPUD approval.

Summary

In March 2014, as has been the case throughout these proceedings, the commercial applicant placed "new and revised" material (new open space covenant, new "certification" from the commercial applicant's engineer regarding acreage in open space, new site plan) before the Planning Commission, wanting that material to be acted upon affirmatively by the Planning Commission. The Planning Commission has, to date, allowed these "submissions" into the record.

FPUD ordinance procedures do not allow this, as described above.

The Planning Commission must, in light of this highly irregular behavior by the commercial applicant, allow the public (which had no fair notice and no fair opportunity to address these materials) at least to have their materials now requested by them to be considered and acted upon by the Planning Commission to be in the record and to be considered.

Newton opposes FPUD approval for all of the reasons she has argued against PPUD, FPUD and conditional use permit ("CUP") approvals given by the Planning Commission and by the County Board sitting as the Responsible Governmental Unit ("RGU") with respect to environmental review of this commercial development.

Clear, clean and readily available reasons exist to deny FPUD approval and, curiously, in each instance those easy to understand reasons have to do with protection of the environment – for example, open space preservation in perpetuity, prohibited uses of conservation easement protected environmental assets, stormwater management,

grading, land uses which should, but do not, provide for numerous adults and address the challenges of more vehicles than parking is allowed for – about which the commercial applicant claims allegiance in its words, but betrays that allegiance in its very contrary actions.

Candidly, the Planning Commission has seen few things Newton's way. An opportunity is present, here and now, to demonstrate sound judgment, not the force of will, to deny the FPUD for the reasons stated.

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