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THE PRINCE GEORGE'S COUNTY PLANNING BOARD OF
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

SUFFRAGE POINT
Remand, DSP-21001

T R A N S C R I P T
O F
P R O C E E D I N G S

COUNTY ADMINISTRATION BUILDING
Upper Marlboro, Maryland
November 2, 2023
VOLUME 1 of 1

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BEFORE:

- PETER A. SHAPIRO, Chairman
- DOROTHY F. BAILEY, Vice-Chair
- WILLIAM M. DOERNER, Commissioner
- A. SHUANISE WASHINGTON, Commissioner

OTHERS PRESENT:

- JILL KOSACK, Staff
- SUZANN KING, Acting Planning Director
- DAVID WARNER, Senior Counsel
- LAURA TALLERICO, Associate General Counsel
- JESSICA JONES, Planning Board Administrator
- JOE PARSONS, Sr. Technical Hearing Writer/Editor
- JAMES HUNT, Division Chief, Development Review Division
- RYAN CRAUN, Staff
- NORMAN D. RIVERA, Attorney for Applicant

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MR. CHAIR: Next item on our agenda is Item 10. This is a remand by the District Council for a Detailed Site Plan, DSP-21001, Suffrage Point. Just to note, this case was approved at the Planning Board meeting on February 2nd, 2023, remanded by the District Council on April 24th, 2023, and continued from the October 5th, 2023 Planning Board meeting.

We have Mr. Rivera, who's representing the applicant. We also have Ms. Giles and Mr. Mauney, I think it's pronounced, from DPIE, who can answer some technical questions that there might be as well.

There are some additional exhibits that have been added to the record from both the applicant and the opposition. I want it just to be clear, one, Sustainable Hyattsville, I believe, is the one where there was an email of a Dropbox link, but staff was unable to locate any documents in the link, which was filed at the -- just a minute or two before the deadline. So that information will not be included in the record.

This is an evidentiary hearing, so I'm going to require all those intending to provide testimony to take an oath, to be sworn in. Before I do that, I just want to reiterate what's happening today, because I know there's a fair bit going on. There's a lot of folks who are going to

1 want to be speaking as well. So the reminder for this is
2 that this is a remand hearing for DSP-21001, Suffrage Point.

3 As will be noted in the technical staff report,
4 the District Council's order of remand found that the
5 Planning Board's decision was based on three -- in their
6 interpretation, was based on three legal errors. One was
7 improper reliance on an invalid floodplain waiver from DPIE.
8 The second, there's insufficient evidence to support the
9 Board's findings that floodplain impacts had been approved
10 by DPIE because the floodplain waiver was invalid. And then
11 the third, lack of substantial evidence for the finding that
12 the 41 proposed single-family attached dwelling units
13 complied with a maximum permitted density for the subject
14 property.

15 So these are the legal errors, according to the
16 District Council. These are legal errors that the Planning
17 Board has been directed to reopen the record and accept
18 testimony and evidence limited to issues related to those.
19 So it's limited to the applicant was permitted to either
20 withdraw or resubmit to DSP-21001.

21 Any resubmitted DSP was to contain a new
22 floodplain waiver from DPIE, evidence of all Federal and
23 state permits required to commence with any development of
24 the proposed project, and a worksheet explaining the density
25 calculation. We are only accepting testimony and evidence

1 related to these limited items. So testimony and evidence
2 not related to the remand items listed in the District
3 Council's order, they're not before the Board and we're not
4 considering those.

5 That does not mean that I'm going to spend -- I
6 will wield the gavel with some bit of flexibility. So I'm
7 sure that folks will have other things that they want to say
8 as well, but note that we'll provide some latitude, but not
9 a lot of latitude because what is before us is quite
10 limited.

11 I've asked our counsel, our associate counsel, Ms.
12 Tallerico, Mr. Warner, I've asked them to jump in if they
13 feel that things are getting too far afield, to assist me
14 with that as well.

15 And Commissioners, I hope that is clear with what
16 we are dealing with here. Yeah. Any questions about what's
17 before us broadly before we get into it? Okay. Good.

18 So now, as is our practice -- actually before
19 that, I'm going to ask folks to be sworn in. So anyone
20 who's planning on speaking, ideally if you could turn your
21 camera on so I can see you raise your right hand, but you
22 don't have to. It's not a requirement. But I'm going to
23 ask everybody who's planning on testifying to be sworn in.
24 So please come online if you can and raise your right hand.

25 Do you solemnly swear or affirm that your

1 testimony will be the whole truth and nothing but the truth?

2 UNIDENTIFIED SPEAKER: Sure.

3 MS. SIMMONS: Yes.

4 MR. CHAIR: Okay. Others?

5 Ms. Simmons, I got you? You're sworn in?

6 MS. SIMMONS: Yes.

7 MR. CHAIR: Okay. Okay. Ms. Giles? You need
8 swearing in, Ms. Giles? Can't hurt to swear in Ms. Giles,
9 right?

10 MS. GILES: Yeah, I do.

11 MR. CHAIR: Okay. Great. So that's it. I'll ask
12 if folks have been sworn in as they are planning on
13 speaking. And if I missed anybody, we'll swear them in at
14 that time. We'll start with the staff presentation; that's
15 Ms. Kosack. And then we'll hear from the applicants, and
16 then we will turn to folks from the public who have signed
17 up to speak.

18 And when we get to that point, I'll actually go
19 through the list and just make sure I'm not missing anybody.
20 Okay. So start with Ms. Kosack. Take it away.

21 MS. KOSACK: Good morning, Mr. Chair, members of
22 the Board. Can everyone hear me?

23 MR. CHAIR: Yes, perfectly.

24 MS. KOSACK: Okay. Great. For the record, my
25 name is Jill Kosack with the Urban Design section. The item

1 before you is number 10, the remand of DSP-21001 for
2 Suffrage Point. The DSP proposes to develop 41 single-
3 family attached dwelling units on the lower parcel of the
4 project formerly known as Magruder Pointe.

5 The staff is recommending approval with conditions
6 for the remand of DSP-21001. Additionally, as the Chair
7 noted, Mary Giles from DPIE is present today to answer any
8 questions the Board may have relative to issues which are
9 within DPIE's purview, such as the floodplain waiver. I
10 will first provide a brief overview of the application
11 before focusing on the remand points.

12 Next slide please. The site is located in
13 Planning Area 68 and Council District 2, and is within the
14 municipal limits of the City of Hyattsville.

15 Next slide, please. The subject DSP is for what
16 is known as the lower parcel of the Suffrage Point property,
17 which is located between 40th Place and Driscoll Park.

18 Next slide, please. The subject property is in the
19 current RSF-65 zone. The property was previously in the R-
20 55 zone, as rezoned via the approved conceptual site plan,
21 CSP-18002.

22 Next slide, please. The subject property is
23 currently not in any overlay zones. However, under the
24 prior zoning ordinance, which this DSP is adhering to, the
25 property is within the traditional residential neighborhood

1 character area of the Gateway Arts District Sector Plan and
2 SMA Development District overlay zone, as shown on the
3 right.

4 Next slide, please. Next slide, please.

5 The aerial shows the site is vacant and was
6 previously cleared and graded pursuant to the approved DSP-
7 18005, which included infrastructure development of the
8 lower parcel. The site has little slope and was largely in
9 the existing floodplain. The entire Suffrage Point property
10 is exempt from the Woodland Conservation Ordinance as it has
11 less than 10,000 square feet of woodland on site and had no
12 previously approved tree conservation plans.

13 Next slide, please. I'm not sure if I'm getting a
14 lag. Next slide. Oh, okay. Please move to the next --
15 slide 8, please.

16 MR. CHAIR: Slide 8, please. There we go.

17 MS. KOSACK: Thank you.

18 The map show -- this map shows the adjacent master
19 plan rights of way, which includes Hamilton Street, which is
20 a collector roadway to the west.

21 Next slide, please. This enlarged aerial shows
22 the infrastructure development that has already occurred on
23 the property pursuant to DSP-18005.

24 Next slide, please. The subject proposes
25 development of the lower 4.66-acre parcel with 41 single

1 family attached dwelling units. The layout and development
2 amount is consistent with the approved preliminary plan of
3 subdivision, 4-21052, and conceptual site plan CSP-18002.
4 The proposed 41 single-family attached dwellings are located
5 in two rows, one fronting the roads -- the public roads to
6 the east, and one fronting the parkland to the west, with an
7 intervening parcel for compensatory floodplain storage.

8 A 22-foot-wide public alley, which provides access
9 to the garages, runs between the townhouse roads and has an
10 access point at either end, off of Gallatin Street and the
11 other off of 40th place.

12 Parcel C, located in the upper-left-hand corner,
13 and D, located in the middle-left side of the image, are
14 proposed to be dedicated to the City of Hyattsville, as they
15 requested, to accommodate existing and future improvements
16 to on Driscoll Park.

17 Parcel B-2, in the lower-left corner of the
18 property, will be used mainly for compensatory floodplain
19 storage and will be owned by the HOA.

20 Next slide, please. The submitted landscape
21 plan --

22 MR. CHAIR: The slide to follow --

23 MS. KOSACK: No, 11. It's fine.

24 MR. CHAIR: It's okay?

25 MS. KOSACK: Yeah.

1 The submitted --

2 MR. CHAIR: Oh, you were at 11; it's fine?

3 MS. KOSACK: The submitted landscape plan
4 demonstrates conformance to all applicable DDO landscape
5 standards, as was required in the approval of CSP-18002, and
6 to the Tree Canopy Coverage Ordinance with 15 percent tree
7 canopy in proposed plantings on site.

8 Next slide, please. The submitted view shed
9 exhibit shows the relationship of the proposed townhouses on
10 the right, with Driscoll Park on the left, with a
11 compensatory floodplain storage on parcel B-2 in between.

12 Next slide, please. The DSP includes two
13 proposed -- oh, I'm sorry. This image shows an illustrative
14 rendering of the development from the park property, showing
15 the change in elevation and proposed architecture.

16 Next slide, please. The DSP includes two proposed
17 architectural models. However, we will just quickly move
18 through these architecture slides, as the remand order did
19 not contain any issues or points regarding the architecture.

20 So if you could slowly flip through to slide 20, I
21 believe. The next slide. And then just finally, this slide
22 shows potential interpretive signage on the property. This,
23 again, was not an issue discussed in the order of remand.

24 So the next slide, please. Here we have the
25 remand points. In their order of remand, dated May 16th,

1 2023, the District Council ordered the Planning Board to
2 reopen the record and take further testimony or evidence
3 relevant to five specific points which are written out here.
4 In a letter dated August 7th, 2023, which starts on page 38
5 of the backup, the applicant provided a response to these
6 points.

7 Additionally, in a letter dated July 25th, 2023,
8 Abraham to Dernoga, which starts on page 71 of the backup,
9 DPIE provided a response to the District Council to the
10 remand points relative to the issues which are within their
11 purview, such as the floodplain waiver. Staff's memo, dated
12 October 17th, 2023, gives a summary of the responses to the
13 remand points.

14 The first three points are relevant to the
15 floodplain on the property. Point number 1 allows the
16 applicant to withdraw the site plan. However, the applicant
17 shows in the alternative to proceed as allowed per remand
18 point number 2. In response to point 2, DPIE issued a
19 revised approved floodplain waiver letter dated July 25th,
20 2023, which starts on page 51 of the backup.

21 Per remand point 3, DPIE's revised decision on the
22 waiver makes all required findings and considerations in
23 Prince George's County Code, Section 32-206(d) through (j),
24 (d) and (j), as amended by CB-38-2016. And DPIE found that
25 there will be no homes constructed within the 100-year

1 floodplain and no construction in a FEMA designated
2 floodway. In addition, DPIE noted that the original
3 floodplain waiver was based upon the current Prince George's
4 County Code, but did contain a clerical error. No revision
5 to the site plan is required to comply with the revised
6 floodplain waiver letter.

7 Per remand point 4, the applicant submitted
8 evidence that the project has received all required Federal
9 and state permits to date. They also submitted
10 documentation of all inspections indicating no on-site work
11 violations currently.

12 Additionally, documentation from the Maryland
13 Department of the Environment indicated that the required
14 Nontidal Wetland and Waterway authorization and a general
15 permit for the discharge of construction stormwater can only
16 be issued following the DSP, approval as required by MDE
17 regulations. Upon review of this, DPIE indicated that they
18 will not issue any new grading or building permits for the
19 floodplain portion of the property until the developer
20 secures the required MDE permit, which can only happen
21 following the DSP approval.

22 Remand point 5 requires the applicant to include a
23 density calculation explaining the net lot acreage or net
24 tract acreage of the lower parcel that is subject to be
25 developed. The applicant submitted a supplemental

1 memorandum, dated September 27th, 2023, which starts on page
2 155 of the backup, which includes this explanation.

3 The applicant chose to use net tract acreage,
4 which per the zoning ordinance definition requires only the
5 100-year floodplain and land that has been dedicated,
6 donated, or otherwise conveyed to be subtracted from the
7 gross tract area. As discussed in the applicant's memo, no
8 land has been dedicated, donated, or otherwise conveyed at
9 this time.

10 Therefore, the net tract area is the gross tract
11 acreage of 4.66 acres, minus the 1.29 acres of proposed
12 floodplain area per the DPIE-approved revised floodplain
13 waiver. This results in a net tract area of 3.37 acres and
14 a density of 12.17 dwelling units per net tract acre. This
15 formula is the same as was used in approving DSP-21001
16 originally.

17 Next slide, please. With that, the Urban Design
18 section recommends that the Planning Board adopt the
19 findings in the additional staff memo and reapprove DSP-
20 21001 for Suffrage Point, and issue an amendment to
21 resolution 2023-15 with no new conditions.

22 However, there is one technical correction Staff
23 would like to point out. The prior condition 3 in the
24 resolution will have to be revised to refer to condition 12,
25 instead of condition 11 within the approved, revised

1 floodplain compensatory storage waiver. The number just
2 changed with the revised approved waiver.

3 So again, with that, Staff would recommend the
4 Board approve DSP-21001. And this concludes Staff's
5 presentation. Thank you.

6 MR. CHAIR: Thank you, Ms. Kosack.

7 Commissioners, questions for Staff? None at this
8 point.

9 Okay. Thank you, Ms. Kosack. Much appreciated.

10 Now I'll turn to the applicant, Mr. Rivera. If
11 you could introduce yourself for the record and members of
12 your team, as appropriate, and the floor is yours.

13 MR. RIVERA: Good morning, Mr. Chairman, members
14 of the Board, participants, staff.

15 MR. SMITH: Mr. Chairman?

16 MR. CHAIR: Somebody is speaking?

17 MR. SMITH: I'm sorry to interrupt. This is Greg
18 Smith. I was hoping to ask Ms. Kosack some questions on
19 cross. Is that -- should I do it now, or would you like to
20 wait?

21 MR. CHAIR: That's a good question.

22 Mr. Warner, let me ask you or Ms. Tallerico, let
23 me ask your advice on this. When is the -- when is the most
24 appropriate time to give the opposition a chance to cross?

25 MR. WARNER: David Warner, principal counsel.

1 Thank you, Chairman. The appropriate time to cross is after
2 the testimony given by a witness in this case. The staff
3 has given what we don't consider testimony, but we have
4 permitted cross in the past. So cross would be appropriate
5 right now for Mr. Smith if he'd like to, as long as it's, of
6 course, kept within our procedural requirements.

7 MR. CHAIR: Okay. All right. Thank you, Mr.
8 Smith.

9 So Mr. Rivera, hold the point.

10 And Mr. Smith, if you could introduce yourself for
11 the record. You haven't sworn in correctly. Correct?

12 MR. SMITH: Yes. I raised my hand and agreed when
13 you asked us to testify under oath.

14 MR. CHAIR: All right. So take it away with
15 cross. And again, cross-examination, as you know, is
16 related to items that Ms. Kosack brought to us when she was
17 speaking a few minutes ago.

18 MR. SMITH: Okay. A few questions here.
19 Referring to several of the slides in Ms. Kosack's and the
20 Staff's PowerPoint, it shows the boundary of the property
21 extending into Magruder Woods Park and encompassing an
22 adjacent residential property. It shows this on several
23 slides. That appears to be an error. Is it?

24 MR. CHAIR: Which slide are you referring to? And
25 Ms. Kosack, certainly jump in.

1 But which slide are you referring to?

2 MR. SMITH: It's on -- at least on slide number 1,
3 and it's on -- I think it's on two or three other slides at
4 least.

5 MS. KOSACK: I do know that the slides -- the red
6 line that's outlined is approximate. The aerial does not
7 always line up with property limits and in that sort of
8 thing. However, the boundary that is shown on the site
9 plan, which is reflective of the 4.66 gross acres, has been
10 reviewed and verified by Staff as being the correct limits
11 of the property. I excuse if there's any overlap or shift
12 in the images shown here.

13 MR. SMITH: Okay. My next question -- thank you,
14 Ms. Kosack. My next question is, you referred to the waiver
15 request that Werrlein had submitted to DPIE. Is that waiver
16 request in all of the supporting documentation in the record
17 for public review and for the Planning Board to review? And
18 was it provided in a timely way for public review, if it is?

19 MS. KOSACK: The DPIE-approved floodplain waiver
20 letter is in the backup for this case for this hearing today
21 and it was, I believe, originally published online at least
22 two weeks prior to today, if not prior to that.

23 MR. SMITH: Well, that wasn't my question, Ms.
24 Kosack. I asked whether or not Werrlein's application, the
25 request for the floodplain waiver letter and the supporting

1 documentation upon which DPIE supposedly relied is in the
2 record and was it made available in a timely way for the
3 public to view? These are fairly technical documents, so
4 are they or are they not?

5 MR. WARNER: And Mr. Chair, I can step in here and
6 answer that. Ms. Kosack answered the question. Everything
7 related to the waiver was in the record at least two weeks
8 prior to this hearing. So that answered -- that question's
9 been answered.

10 MR. SMITH: Well, Mr. Warner, I have to disagree
11 here. And I didn't -- she said that the -- she specifically
12 said that the waiver letter itself, and there's a floodplain
13 study. I know that, or at least parts of it --

14 MR. WARNER: Mr. -- Mr. --

15 MR. SMITH: My question was whether the
16 application --

17 MR. WARNER: Hold on. Hold on, please.

18 MR. SMITH: My question is whether the --

19 MR. WARNER: Mr. Smith, the cross-examination
20 relates to the items for this remand. This item regarding
21 the waiver letter is what Mr. Shapiro, the Chair, said the
22 condition requires the Planning Board to receive. And Ms.
23 Kosack told you that the waiver letter is in the record two
24 weeks ahead of time. So that's the answer.

25 MR. SMITH: And I've asked the question --

1 MR. WARNER: And whether you disagree or not is
2 not part of cross-examination. You're just asking
3 questions, not giving opinions. Thank you.

4 MR. SMITH: Mr. Warner, I asked a question whether
5 the application that Werrlein or Dewberry submitted to DPIE
6 and its supporting document are in the record. I didn't ask
7 whether or not the waiver letter is in the record. I asked
8 whether the application and supporting documents were made
9 available for public review. It's a yes or no.

10 MR. WARNER: But again, the waiver letter is the
11 issue with respect to remand.

12 MR. SMITH: This is well within the --

13 MR. WARNER: It's not whatever application the --

14 MR. SMITH: -- scope of this hearing.

15 MR. WARNER: -- they might have submitted to DPIE,
16 okay?

17 MR. SMITH: Okay. I'll --

18 MR. WARNER: So just narrow your questions to what
19 the issues are here at remand. Thank you.

20 MR. SMITH: Since you're not saying yes, this is
21 well within the scope of the remand. It's essential
22 information for the public to be able to review and provide
23 comments on.

24 MR. CHAIR: Mr. Smith --

25 MR. SMITH: It has to be -- it has to be

1 documented (indiscernible).

2 MR. CHAIR: Mr. Smith --

3 MR. SMITH: Let's just go ahead and move on.

4 MR. CHAIR: Mr. Smith, keep in mind that these are
5 things you have opinions about these things, but when you
6 ask and the question is answered, you may disagree with the
7 answer, but it is still asked and answered.

8 MR. SMITH: All right. Thank you, Mr. Shapiro.
9 I'll move on.

10 I believe Ms. Kosack said at one point that
11 Werrlein had obtained all the required state, Federal
12 permits. And then she went on to say something that
13 contradicted that. So I want some clarity on this.

14 At one point, Ms. Kosack, you said they had all
15 the required state, Federal permits. And in another point,
16 you said that MDE has informed you all that they will not
17 issue two required permits until -- until or unless there's
18 a DSP approved. Can you just explain the contradiction
19 here? Because there have been other hearings in the past
20 where Mr. Rivera and planning staff have claimed that
21 Werrlein had all the required permits when they clearly did
22 not. And you can look on MDE's website and find that they
23 don't.

24 So could you provide some clarity, the
25 contradiction between those two statements that allegedly

1 they have all the required permits, but MDE won't issue them
2 until unless there's an approved DSP?

3 MR. CHAIR: Ms. Kosack?

4 MS. KOSACK: Yes. I'm sorry. I had said that
5 they had received all required permits to date, as of today.
6 And then I clarified that it is standard MDE operating
7 procedure not to issue those specific permits until final
8 zoning approval is approved, which is essentially this
9 Detailed Site Plan. So their operating procedure is not to
10 issue those final permits until the Detailed Site Plan is
11 approved. So once that is approved, then they will issue
12 those.

13 MR. SMITH: So just a point of clarification. It
14 sounds like you're saying that Werrlein had all the
15 authorizations it needed prior to regrading and stripping
16 and excavating on the lower parcel. Is that what you're
17 saying?

18 MS. KOSACK: I'm not saying --

19 MR. CHAIR: I'm --

20 MS. KOSACK: -- what would have happened in the
21 past. I'm saying as of today they have what they need,
22 exclusive of these permits, which can only happen after the
23 Detailed Site Plan's approved.

24 MR. SMITH: Okay. At any point in your review
25 of -- I'm assuming that after we raised these issues in the

1 past about the adequacy or the accuracy of the waiver letter
2 and related matters that you might have -- you might have
3 taken a close look at this particular waiver letter and its
4 supporting floodplain study. At any point did you determine
5 whether or not they used recent climate and precipitation
6 data to determine -- to inform the decisions?

7 MR. CHAIR: You're asking why Staff did that?

8 MR. SMITH: Yeah, I'm asking -- I'm asking about
9 it. We've raised this issue repeatedly in hearings before.
10 In fact, all the -- going all the way back to July 2018 as
11 to whether or not these delineations and these approvals
12 take climate change into account. And it was a core issue
13 in our testimony before you and before the District Council
14 on this DSP. And it's a critical issue. It's completely
15 appropriate.

16 And so I'm asking whether or not in reviewing the
17 adequacy of the documents that they are relying on in making
18 recommendations to this Board, whether Planning Staff went
19 back and took our concerns, our legitimate concerns into
20 account and tried to ascertain whether or not the waiver
21 letter and its supporting documents and the delineations
22 take climate change into account.

23 MR. CHAIR: And so why --

24 MR. SMITH: And that's my question, because we
25 have put on the record the fact that --

1 MR. CHAIR: Mr. Smith.

2 MR. SMITH: It's just a yes-or-no question.

3 MR. CHAIR: If you continue to interrupt me, then
4 we are going to take a recess until you can figure out how
5 to just contain yourself so we can conduct this in a civil
6 manner.

7 MR. SMITH: I'm sorry, Mr. Chair. I didn't mean
8 to interrupt you. I was trying to finish my question and
9 frame it in a way that might be clearer. That's all I was
10 doing. Thank you.

11 MR. CHAIR: Thank you, Mr. Smith. I do not -- and
12 I'm happy to hear from Staff on this, but what is before
13 Staff, I'm not hearing that it is within Staff's purview to
14 take broadly defined climate change into account as you make
15 your decisions. You have rules and regs before you that you
16 are required to adhere to.

17 So that's my interpretation of that question, but
18 Ms. Kosack or Mr. Warner or Mr. Hunt, please weigh in as
19 well, or even Ms. Giles.

20 MR. WARNER: Well, I --

21 MR. HUNT: Mr. Chair, for the record, James Hunt.

22 MR. WARNER: -- recall that -- I'm sorry, James.
23 Go ahead.

24 MR. HUNT: No, no. Go ahead, David. That's fine.

25 MR. WARNER: Well, just a point of clarification.

1 Recall that cross-examination is only on things
2 that Ms. Kosack said. She said there's a waiver letter
3 here. She didn't claim to have the start -- down a list of
4 all of the analysis in that waiver letter.

5 And just to move things along, fortunately today,
6 we do have Ms. Giles here from the department that prepared
7 the waiver letter that has all that expertise. So really,
8 to get to the answer that Mr. Smith is seeking, when we hear
9 Ms. Giles testimony, that'll be the right person, or from
10 the applicant, to really answer those questions. Ms. Kosack
11 didn't talk about any of the specifics in the waiver letter
12 in terms of what was analyzed and what wasn't.

13 MR. CHAIR: Yeah, that's true. I think, Mr.
14 Smith, I would agree with what Mr. Warner said. We'll hear
15 from Ms. Giles, and I'll give you the opportunity to ask her
16 questions, as well of Ms. Giles. I want to make sure you
17 have that opportunity, but that feels more relevant to me.
18 Because as far as Ms. Kosack is concerned, I feel like your
19 question was asked and answered. But please continue. Mr.
20 Smith.

21 MR. SMITH: I'll go ahead and wrap it up there,
22 Mr. Chair. Thank you very much.

23 MR. CHAIR: Okay. Thank you.

24 So any more cross? Mr. Warner, help me with our
25 own procedures. Do we allow Mr. Rivera to have cross if he

1 chooses as well?

2 MR. WARNER: If he wanted to cross Staff, sure,
3 certainly, yeah. The idea behind cross-examination is that
4 it's best done right after the person makes testimony, so
5 the questions tie together. So that's how we do it.

6 MR. CHAIR: All right. Mr. Rivera, any cross?

7 MR. RIVERA: No, sir.

8 MR. CHAIR: Okay. Thank you.

9 All right. So we have the Staff presentation.
10 I'll also advise Mr. Warner, I do want to hear from Ms.
11 Giles. I'm trying to think of when it makes the most sense
12 to hear from Ms. Giles if she has anything to present.

13 Or Ms. Giles, do you just want to be available for
14 questions?

15 MS. GILES: I'm available for questions.

16 MR. CHAIR: Okay. So we'll leave it at that.
17 There may be questions from us commissioners as we go along.
18 I imagine there'll be questions from folks in the public as
19 well, which I feel is appropriate. So we'll do that.

20 So we've heard from Staff. We'll now turn to the
21 applicant.

22 Mr. Rivera, back to you. Please introduce
23 yourself and the floor is yours.

24 MR. RIVERA: Thank you, Mr. Chairman, members of
25 the Board, Staff, and guests. For the record, Norman

1 Rivera, attorney in Bowie, representing the applicant in
2 this case.

3 I'm glad the Chair and Mr. Warner and others have
4 set the table, if you will, for what we're here for today.
5 So not to belabor the point, but under the Zimmer case, if
6 the District Council remands an item back to the Planning
7 Board for certain items, it's only the planning -- it's the
8 Planning Board's job is to just really address those five
9 points that was one of the slides on the screen that Ms.
10 Kosack presented.

11 In her report, she has gone through each of those
12 five items in detail. And I would remind the Board, as you
13 already know, that this DSP was already approved back in
14 February, and that is what was remanded back to the Planning
15 Board.

16 But basically to address the floodplain waiver and
17 related matters, which again are not part of the review of a
18 DSP under 27-285, the Staff, report prior issue, as well as
19 your resolution clearly indicates where the findings are and
20 how the Staff and the evidence presented meets those
21 requirements. So that is kind of the basis for the remand,
22 because otherwise, there wouldn't be anything to remand. So
23 with that, I just wanted to concur with you and your Staff
24 about the limit of the remand.

25 We submitted a letter September 27th, 2023, our

1 response to the five points of the remand, which Ms. Kosack
2 had reviewed, and there are certain elements in there I just
3 wanted to touch upon.

4 The District Council on May 8th, when they
5 actually voted to remand the case, was concerned about how
6 they couldn't figure out the density and the methodology of
7 how to do that. So Exhibit 8 of my submission on September
8 27th, there is a letter from Dewberry, our planning and
9 engineering firm, that indicates how you get from gross
10 acres minus the net acre of floodplain to equal what's the
11 net acres times 12.3.

12 So we have evidence in the file. Ms. Giles has
13 reviewed it. They issued their letter on July 25th, '23, in
14 response to the request to issue a new floodplain waiver
15 according to the current code. And although the first
16 letter in 18 was reviewed according to that current code,
17 there is a clerical error and that there is an attachment
18 from a prior ordinance. But the criteria I cited when I
19 filed the request and the Dewberry folks filed, and what
20 DPIE reviewed is up to snuff in conformance with subtitle
21 32.

22 So it's clear that they have re-evaluated
23 everything for the District Council's request. And the net
24 acreage is the gross 4.66 minus the floodplain, which is
25 1.29, and that is clearly indicated in the Dewberry letter

1 of 5/11/23, Exhibit 8. So I just wanted to make that clear
2 because there's some consternation at the District Council.
3 They're not used to doing these calculations. So it was a
4 little bit tough for them to do so.

5 The other point they were confused about on
6 density and net acres is that you can only deduct roads that
7 already exists were any donations like a conveyance to an
8 open space or something. So there's nothing been dedicated
9 because we can't do that yet. We have to have the DSP,
10 which then goes to the record plat. But that calculation is
11 done at preliminary plan, which has already been approved
12 with 4-21052, the DSP back in February. So I think that
13 issue is settled.

14 But I'm glad we're having this discussion so that
15 I could put that in the record for later use at the District
16 Council. I know you know what -- you all did the right
17 thing at the staff level, but I have to make that clear for
18 the record. There was no dedication, it's just the
19 floodplain, and that was documented in our methodology
20 submitted to DPIE that they reviewed to come up with their
21 July 25th letter.

22 With respect to Mr. Smith had filed a letter of
23 October 31st, two days ago, citing many, many things and I
24 think when you read that, you'll see that 90 percent of it
25 is not relevant to the remand in the five points. He's

1 talking about climate change, which you just mentioned, Mr.
2 Chair. That's not part of the staff review.

3 He's mentioning that FEMA has bad maps or bad
4 methodology. That's not before the Staff or the Board.

5 He's mentioning precipitation counts. All of that
6 is out of bounds of the remand. And even if it wasn't a
7 remand, it's still out of bounds as the criteria for
8 approval of a DSP. There are very specific regulatory items
9 that we all have to adhere to. So for that matter, I think
10 you can only give it the weight it deserves.

11 He did talk about density, is the only thing I
12 could see that related to the remand. And I just spoke
13 about it, and Ms. Kosack spoke about it. And the prior
14 resolutions and approvals by the Board also speak to that.
15 So I think that issue should be settled, but it has to go on
16 to the District Council.

17 Let's see what else I have here. I really don't
18 have much to add, Mr. Chair, members of the Board. I just
19 wanted to say that the record is complete. I'm glad that
20 letter was struck. The letter I had filed was not relevant
21 to the DSP either, so that's my fault. It's related to
22 possible flooding issues in this area. But again, it's not
23 in scope of the remand as evidenced by the Zimmer case.

24 What else do I have? With that, really, that is
25 our presentation. I'm not going to argue with what already

1 DPIE said, what the staff said. We thought it was settled.

2 This is really the Council's request of the staff.

3 And as the Chair said back on October 5th, I think the duty
4 of the Board to this particular kind of a case is to gather
5 the evidence, transmit it to the District Council, so they
6 can review it and make their own decision. But you're the
7 hearing of record. You have original jurisdiction. And
8 that, in Zimmer, is a huge point, as well as what the scope
9 of an appeal is has to be limited to what was reviewed. So
10 with that, I would urge that you adopt the recommendations
11 for the transmission of the record, and then I'll be happy
12 to react to the comments by the citizens. Thank you.

13 MR. CHAIR: Thank you, Mr. Rivera. And now,
14 typically, we do not allow cross for attorneys. But since
15 Mr. Rivera is the only one who's been speaking on behalf of
16 the applicant, I want to, Mr. Warner, unless you strongly
17 object, I want to see if Mr. Smith has any cross for the
18 applicant's team, I would allow that.

19 Mr. Smith, I don't know if you have. You're on
20 mute, Mr. Smith. I can't tell if that's a yes or no.

21 MS. KOLE: I have a question. This is --

22 MR. CHAIR: Ms. Kole.

23 MS. KOLE: Hi.

24 MR. CHAIR: Ms. Kole, you were sworn in, correct?

25 MS. KOLE: I'm sorry.

1 MR. CHAIR: You were sworn in?

2 MS. KOLE: Yes, sir.

3 MR. CHAIR: Okay. Thank you, ma'am.

4 MS. KOLE: My question --

5 MR. CHAIR: Can you introduce yourself for the
6 record, too?

7 MS. KOLE: Oh, thank you. I am Allison Kole. I'm
8 a board member of Sustainable Hyattsville but speaking on
9 different issues than the comments submitted.

10 Just for Mr. Rivera. What part of the Zimmer case
11 speaks to the Planning Board's purview on remand? It
12 actually does --

13 MR. RIVERA: Well --

14 MS. KOLE: My understanding is that it doesn't
15 speak to that at all. So I'd like to see -- to hear about
16 that.

17 MR. RIVERA: Well, I have the case right here. I
18 think it's question presented number 4. The Honorable Glenn
19 Harrell wrote a very great opinion covering the whole
20 waterfront planning and zoning. He basically defined that
21 what the District Council's role is by the Land Use Article.
22 The Planning Board clearly is the hearing of record.

23 When the District Council sends the case back
24 down, they have to cite specific items that have to be
25 addressed by the lower body, which has happened in this

1 case.

2 MS. KOLE: Okay.

3 MR. RIVERA: So I'll have to find --

4 MS. KOLE: Yes.

5 MR. RIVERA: -- the page where it talks about
6 remand.

7 MS. KOLE: But in what way does the District
8 Council's order on remand limit the authority of the lower
9 body? Because --

10 MR. RIVERA: With the lower body --

11 MS. KOLE: -- I mean, I can talk about this in my
12 testimony. I just wanted to sort of correct --

13 MR. RIVERA: A little hard to understand, but it's
14 really the District Council directs the Planning Board,
15 because on a remand they have to indicate exactly what
16 they're looking for. You can't just remand it for a brand
17 new hearing. So when they remand a case, it's for specific
18 issues, whether it be traffic, or in this case, the
19 floodplain waiver.

20 So when the Planning Board hears it, they're
21 limited to those questions asked by the Council. Because
22 really quite (indiscernible), they ask this question
23 (indiscernible).

24 MS. KOLE: Okay. Thank you.

25 MR. RIVERA: You're welcome.

1 MR. CHAIR: I'm sorry. I was on mute.

2 Additional cross? Mr. Smith, you had cross?

3 You're on mute, Mr. Smith.

4 MR. SMITH: I'm sorry. Yes, I do have some
5 questions for Mr. Rivera.

6 Mr. Rivera, in your density calculation that you
7 want us all to rely on, you know the code defines density as
8 gross acres minus the floodplain minus any streets, alleys,
9 or other public ways. In your previous plans, Werrlein has
10 shown that lower parcel alley as the dedicated public right
11 of way. All right. Yeah, well, so I'll rephrase that and
12 then I'll go back to that point.

13 Are you considering the lower alley public or
14 private right of way at this point for the sake of your
15 density calculation?

16 MR. RIVERA: For the sake of the density
17 calculation, whether they're public or private, they have
18 not been dedicated, donated, otherwise conveyed out of the
19 tract, which is a literal quote from the definition of net
20 tract area as distinguished from --

21 MR. SMITH: Well, I'll --

22 MR. RIVERA: -- their --

23 MR. SMITH: -- I'll go back -- I think that net
24 tract --

25 MR. CHAIR: Mr. Smith, bear with me.

1 MR. SMITH: I do want to ask my question, Mr.
2 Shapiro, if I may.

3 MR. CHAIR: Mr. Smith, Mr. Smith, bear with me.
4 Hold.

5 Mr. Warner, I just want your advice on this,
6 because that level of detail, the question that Mr. Smith is
7 asking, I did not hear that at all in what Mr. Rivera was
8 saying. And so while I want to give Mr. Smith all the space
9 in the world to talk about what he wants to talk about, this
10 feels like too much detail for cross. That's my reaction.
11 But I don't know, Mr. Warner, I'd like to hear where you are
12 on that.

13 MR. WARNER: Yeah, actually, Chairman -- David
14 Warner -- I didn't have any problem with that question
15 because it definitely falls within what Mr. Rivera submitted
16 in his testimony and what he's referring to when he talks
17 about it. And he's well qualified to answer that. It's a
18 very simple question.

19 MR. CHAIR: Okay. Thank you for that.

20 Mr. Smith, back to you.

21 MR. SMITH: Okay. So all right. Let me phrase
22 this another way.

23 Mr. Rivera, what makes you think it's appropriate
24 to rely on net tract area in this case versus net lot area
25 when the definition of density in the zoning ordinance

1 states that it's based upon the density of dwelling units
2 per net lot area? What makes you think that that definition
3 does not apply in this case?

4 MR. RIVERA: The Court opined that we have to use
5 net acreage, which is the gross, 4.66 minus 100-year
6 floodplain, which is 1.29 as documented in our submission by
7 Dewberry to DPIE, which Ms. Giles and her team reviewed and
8 approved and agreed with.

9 We're not required to -- the record would be 8,000
10 pages long if we submitted all the engineering data.

11 MR. SMITH: I --

12 MR. RIVERA: That is a ministerial act with DPIE
13 simply, a ministerial act by DPIE to review any submittal
14 that is not normally part of the record. And in fact, the
15 District Council only said DPIE, you issue a new floodplain
16 waiver letter. We are required as an applicant to fulfill
17 the requirements for submittal of the information so they
18 can do their job and they have, and that really is the
19 issue.

20 MR. SMITH: Yeah. I don't think you answered my
21 question. I asked you what makes you believe that net tract
22 is more appropriate than net lot given the definition in the
23 code. I didn't ask you about DPIE's floodplain letters.
24 Let's move on.

25 Again, in your calculation, does your calculation

1 exclude the .4 acres -- acre that you have attributed --
2 your client has attributed or allocated to the public alley
3 on the lower parcel? Do you exclude that from the acreage
4 in coming up with your density calculation?

5 MR. RIVERA: That comes directly from the code.
6 It's not my discretion to make that decision.

7 MR. SMITH: The answer is --

8 MR. RIVERA: If I --

9 MR. SMITH: Are you saying -- I'm sorry. Are you
10 saying that the code requires you to include the alleyway
11 despite the definition set forth for density in the code?

12 MR. RIVERA: Yes, because it literally says
13 conveyed, donated, et cetera. Neither of those things has
14 happened. In fact, the DSP has to be approved to go to
15 record plat to create lots. So therefore there's no net lot
16 area because there's no lots. This is one big parcel that
17 has preliminary plan, DSP --

18 MR. SMITH: Okay. So moving on.

19 You've alleged that the evidence that we put in
20 the record regarding the inadequacies of how floodplain maps
21 are currently developed, and the fact that the precipitation
22 data typically relied upon to delineate floodplains and
23 design stormwater facilities and design compensatory
24 mitigation, you said that all of that is irrelevant. Are
25 you saying that understanding whether or not the agency has

1 relied on current and accurate data is irrelevant to their
2 floodplain delineation -- the accuracy of their floodplain
3 delineations?

4 MR. RIVERA: I don't --

5 MR. SMITH: And are you saying -- I'm sorry. Let
6 me finish my question, please.

7 MR. RIVERA: Okay.

8 MR. SMITH: Are you saying that understanding
9 whether that is so is irrelevant to understanding whether or
10 not this floodplain delineation is accurate or understanding
11 what the environment -- the impacts of this project might be
12 on the environment and surrounding community?

13 MR. WARNER: Sorry to interrupt you just to help
14 with the cross-examination.

15 Mr. Smith is free to ask those questions, but one
16 of the things when you are conducting cross-examination is
17 you're not allowed to ask compound questions with three or
18 four different questions.

19 MR. SMITH: Oh, all right.

20 MR. WARNER: So one question at a time is the
21 appropriate approach.

22 MR. SMITH: Okay. All right. All right. Let
23 me -- I'll back up. Thank you for that clarification, Mr.
24 Warner. I appreciate it. Obviously, I'm a bit of a novice
25 here.

1 It's my understanding -- this model framing, it's
2 my understanding that in looking at this DSP or, actually,
3 any other application before it, the Planning Board has
4 had -- has an affirmative obligation to determine what --
5 understand the impacts of the project on the community
6 environment and to make a determination as to whether or not
7 those impacts somehow comply with the goals set forth in the
8 zoning ordinance and the general plan and the sector plan,
9 make an informed determination based upon the best available
10 information. So essentially, you've said that all the
11 evidence that we've placed in the record for this hearing
12 and the prior hearings about the potential environmental
13 impacts, community impacts is --

14 MR. CHAIR: Is Mr. Smith, I'm going to interrupt.

15 MR. SMITH: -- irrelevant. So here's my question.
16 I'm sorry, sir. Here's my question. Is that your --

17 MR. CHAIR: That's a lot of --

18 MR. SMITH: Is that your assertion?

19 MR. CHAIR: -- (indiscernible). Do you have a
20 question somewhere?

21 MR. SMITH: I'm sorry. Is that your assertion,
22 Mr. Rivera, that understanding the environmental impact is
23 irrelevant to the Planning Board's decision here?

24 MR. RIVERA: I didn't say that. I said that your
25 statement in your letter of October 31st were largely

1 irrelevant to the scope of the remand. You're diving into
2 the analysis that a line agency makes in the review, as well
3 as what park and planning does. The code dictates the
4 issues on preliminary plan for regulated environmental
5 features, at the same time as refined in DSP, and again at
6 building -- grading permit and building permit.

7 Our stormwater management concept plans are all
8 reviewed according to data that is available. You used the
9 term best available. We're not going to check rainfall
10 every day to see if the rain is -- what it is or whatever
11 it's not. There are certain methodologies that they have to
12 use that are industry standards, and that's what DPIE does.
13 We don't make up the standards. They review the day-to-day
14 request. And if they need more or less, they ask us for
15 that, and that's what we do.

16 MR. SMITH: All right. Let me come at this from a
17 slightly different direction.

18 We've put evidence in the record that, basically,
19 the county and the state recognize that climate change is a
20 serious issue. And if you were to go to the climate action
21 plan, go to the general plan, you would see that they're
22 replete in recommendations to use the best available
23 science, and they actually include statements about what has
24 been happening and will happen.

25 So we do have -- we have a floodplain delineation

1 developed by Dewberry for Werrlein. We've got DPIE's
2 floodplain waiver letter that's based upon Dewberry's
3 floodplain study and delineation. And are you saying that
4 given the evidence we put in, the kind of precipitation is
5 usually depended on by engineers and agencies, the evidence
6 we've placed on the record -- this is not -- this is
7 evidence coming from publicly funded studies and from public
8 agencies like NOAA, a Federal agency, are you --

9 MR. CHAIR: Mr. Smith?

10 MR. SMITH: -- are you saying that it's not --

11 MR. CHAIR: Mr. Smith?

12 MR. SMITH: If I could finish my question,

13 MR. CHAIR: Wait, Greg. Greg, when I speak, you
14 have to stop speaking.

15 MR. WARNER: Right.

16 MR. SMITH: I'm sorry.

17 MR. CHAIR: Everybody does. I'm the Chair. If
18 I'm asking you to stop, you have to stop.

19 MR. SMITH: I'll just say my -- may I finish my
20 question?

21 MR. CHAIR: I'm interrupting because you are not
22 sticking with what's before us. I hear you loud and clear
23 that you have a different opinion about this. But this is
24 asked and answered. Mr. Rivera has made it clear that he is
25 working with the established standards.

1 Now, clear as day, you are making a point that you
2 disagree with those established standards. I hear you. But
3 it's asked and answered. That is repetitive for you to
4 continue to say that you are just disagreeing with the
5 established standards. You want Mr. Rivera to say he
6 disagrees with the established standards, as well. You're
7 not going to get that from him.

8 MR. SMITH: May I finish my question, please?

9 MR. CHAIR: Sure.

10 MR. SMITH: So I simply want a yes or no answer to
11 this, Mr. Shapiro.

12 And that is, Mr. Rivera, are you asserting that
13 the evidence that we've placed in the record about the
14 deficiencies in these kinds of tools, the floodplain maps
15 and floodplain studies, is irrelevant to the Planning
16 Board's consideration as a project's community environmental
17 impact?

18 MR. RIVERA: I disagree with that statement. The
19 Planning Board is not the agency with the expertise to make
20 those determinations. DPIE, MDE, FEMA, you're questioning
21 their practices, their regulatory authority, their
22 methodologies. That's not before us today. It's not
23 covered in the remand. They didn't say, look behind
24 everything; they said give us a new floodplain waiver. Your
25 opinion is just that, with all due respect.

1 MR. SMITH: Thank you. Thank you.

2 I'll go ahead and end my questions here.

3 MR. CHAIR: Thank you, Mr. Smith. Any other cross
4 for Mr. Rivera from anyone?

5 (No affirmative response.)

6 MR. CHAIR: No more cross, we'll now turn to the
7 public. I've got (indiscernible) folks who decided to
8 speak. I also want to talk about the timing of this, how
9 much time we have.

10 What we typically do is we will allot that the
11 opposition, such as it is to have the same amount of time as
12 the applicant. Mr. Rivera did not take a lot of time on his
13 presentation. According to my watch, he took seven minutes.
14 So I do not want to restrict all the folks who have spoke --
15 who are planning on speaking in opposition to just seven
16 minutes. But I do want to manage the time tightly on this.
17 So first, let me go through to see who we have. We have
18 obviously, Mr. Smith. We have Ms. Kole. I have a few other
19 people signed up to speak.

20 Ms. Simmons from the City of Hyattsville, I see
21 you. We'll let you go first -- we'll ask you to go first,
22 Ms. Simmons.

23 In addition, I have a Shanna Fricklas.

24 Ms. Fricklas, are you there?

25 (No affirmative response.)

1 MR. CHAIR: I see your hand up, Mr. Smith. I'll
2 get to you in a second.

3 Ms. Fricklas, are you there?

4 (No affirmative response.)

5 MR. CHAIR: No? I have a Irene Marsh.

6 Ms. Marsh?

7 (No affirmative response.)

8 MR. CHAIR: No Ms. Marsh. And I have a Chris
9 Currie.

10 Mr. Currie, are you with us?

11 (No affirmative response.)

12 MR. CHAIR: No. Okay. So the only folks that I
13 have who are here beyond Ms. Simmons, who represents the
14 City of Hyattsville, are Mr. Smith and Mr. -- Ms. Kole.

15 Sorry, Ms. Kole.

16 So Mr. Smith and Ms. Kole, give me some sense of
17 how you want to manage the time. I'll give you a little bit
18 of latitude around this, but how much time do you think you
19 need?

20 MS. KOLE: I can --

21 MR. SMITH: I'm sorry. I didn't hear what order
22 you'd like to go in.

23 MR. CHAIR: I'm going to start with Ms. Simmons.
24 And then after that, Mr. Smith, you and Ms. Kole. I see you
25 as the party in opposition. So we typically give you all

1 the same amount of time the applicant took, which would be
2 seven minutes. But I want to give you a little bit more
3 latitude if you need a little bit more time than that.

4 MR. SMITH: All right. If I may -- if I may
5 respond real quickly. We've dealt with this issue in past
6 hearings. I mean, the role of the Planning Board, as I
7 understand it from speaking with other folks and looking at
8 the law, is to conduct the full evidentiary hearing, not to
9 make sure that each side gets something close to the same
10 number of minutes. You're a fact-gathering body. You're
11 supposed to make your recommendation based on a full body of
12 evidence. So I don't -- I know you like to be expeditious
13 in these hearings. But just because the applicant kept
14 their presentation short shouldn't truncate our ability to
15 put on our case.

16 MR. CHAIR: I hear you disagreeing with the
17 process, but this is the process that's laid out before us.
18 So tell me, roughly -- you know, if you need 10 or 15
19 minutes, I can give you 10 or 15 minutes.

20 MR. SMITH: Well, I think that could work. And
21 I'll do my best to keep it tight and short and sweet because
22 we have put a lot of evidence in the record and we have
23 addressed some of these points before, and --

24 MR. CHAIR: I'm going to manage the time, Mr.
25 Smith. So if you want up to 15 minutes, you have up to 15

1 minutes, and we'll set the clock at that. Okay?

2 MR. SMITH: All right. I don't need to go first.
3 If Ms. Kole would like -- others would like to go first, I
4 can wrap up.

5 MR. CHAIR: So what I'll do then, Ms. Kole, if
6 that's all right with you, I'll start with Ms. Simmons.
7 I'll then turn to you, Ms. Kole. We'll end with Mr. Smith.

8 Ms. Simmons, as is our practice, as represented in
9 the City of Hyattsville, she takes the time that she needs.

10 And then for you, Mr. Smith and Ms. Kole, the two
11 of you will have a combined, up to 15 minutes. And we'll
12 set the clock for that. But let me start with Ms. Simmons.

13 If you could introduce yourself for the record,
14 and the floor is yours. And you were sworn in, I saw
15 before, so go ahead.

16 COMMISSIONER DOERNER: Chair Shapiro, before --

17 MS. SIMMONS: My (indiscernible) --

18 COMMISSIONER DOERNER: -- (indiscernible) City of
19 Hyattsville, can I ask Mr. Rivera just some questions?

20 MR. CHAIR: Who's speaking?

21 COMMISSIONER DOERNER: Commissioner Doerner.

22 MR. CHAIR: Oh, yeah, sure, Commissioner. I'm
23 sorry. Yeah, absolutely.

24 COMMISSIONER DOERNER: I didn't chime in during
25 cross because I figured I wasn't actually crossing any

1 witnesses or anything, so I was just waiting.

2 MR. CHAIR: Well, you're part of the judging team,
3 so you don't cross.

4 COMMISSIONER DOERNER: So what I want to go
5 into -- I don't know if the different reports that Mr.
6 Rivera had submitted with, like, MDE's and different kinds
7 of, like, runoff that was presumably used in the DPIE flood
8 waiver analysis that was done in July, I don't know if
9 that's in the record or if it's not because I was unclear
10 about what was stricken. So that was one thing I just
11 wanted to hear a little bit more about because those are
12 some of the concerns that I've raised in February, back in
13 the initial hearing that we had for this DSP.

14 The other question that I wanted to kind of pry
15 into Mr. Rivera and then also maybe ask Ms. Giles for a
16 little bit of clarification on is on MDE. So we have a lot
17 of -- we have a lot in the backup, and I'm trying to kind of
18 read through this and figure out some aspects of the
19 floodplain waiver that were brought up today. It was
20 mentioned that MDE is holding off in giving their approval
21 for this, and they've got two permits. One is a nontidal
22 wetlands and waterways authorization, and the other one is a
23 general permit for discharges of stormwater associated with
24 construction activity. I'm more interested right now in the
25 first one, although both are potentially important.

1 But in the first one, the backup letter that we
2 have from MDE, it basically said that they can't issue the
3 authorizations, so the project complies with local zoning
4 requirements. And that's where I'm just like -- I don't
5 think they're actually correct entirely. And that's why I'm
6 sort of confused in terms of how we get to that point and
7 how we can actually issue a valid floodplain waiver, knowing
8 that this was done back in -- originally in 2018, and now we
9 have a new one in July. Because if you look back at COMAR,
10 which is the state regulations for this, you've got
11 26.17.04.04 J, the state regulation is actually a little bit
12 relaxed. And it says that the administration may -- and I
13 think the key word "may" -- refuse to process an application
14 until the applicant has certified in writing that all the
15 local land use requirements, including zoning, et cetera,
16 that are necessary for that location have been satisfied.
17 And it says, as the applicant, it's their responsibility to
18 obtain state, Federal, and local approvals that aren't
19 addressed potentially in the regulation, which I think
20 they're attempting to do. But obtaining the permit under
21 this chapter doesn't relieve them from obtaining other
22 permit approvals or other approvals, just in general.

23 So in that that statement of "may", I think it
24 actually is within the MDE's ability and authority actually
25 to issue it. So what I wanted to find out from Mr. Rivera

1 was between the approval in February, when you got the DSP
2 approved, and before the District Council actually called up
3 the case, did you meet with MDE to try and talk with them or
4 figure this out or try and obtain that approval or maybe
5 even after that, the hearing that remanded it to us, have
6 you reached out to them to try and find out would they
7 approve it? Because there's sort of this chicken and the
8 egg that I'm struggling with, is that if we approve this
9 today, if you get the approval of our body, then all of a
10 sudden, MDE would allow it potentially to happen. However,
11 the CSP says we cannot approve it until MDE has actually
12 approved it. And on the floodplain waiver, it says that
13 you're supposed to have all state and Federal, and veteran
14 local regulations or approvals in place.

15 So there's this sort of, like, what comes first
16 kind of a question. And I was wondering if you had taken
17 the legwork and the time to actually ask MDE, since they
18 have that "may", it doesn't say shall, but if you've taken
19 the legwork and talked to them about approving it because
20 our approval is being held up by them. And their sort of
21 objection to this was prior encroachments or work that was
22 done in the floodplain, which by us approving the DSP, we
23 can't rectify that. Like, that's not within our authority.
24 That would be DPIE that would do that.

25 So have you talked to MDE about this? Because

1 that's to me one of the quirks in whether or not this
2 floodplain waiver is actually valid or not, is contingent
3 upon sort of timing and their approval for it.

4 MR. RIVERA: Thank you, again. For the record,
5 Norman Rivera. To answer that last question directly, we
6 constantly have talked to MDE to go ahead and issue, in
7 seeing that same permissive language of may. They have
8 simply chosen not to.

9 Because of the nature of this case, the sensitive
10 nature, they want us to get full approvals, which in their
11 mind is a DSP. So if the Board approves this today and then
12 the District Council does later on down the road, we should
13 be able to get the MDE permit. The MDE permit is our full
14 waterway construction permit. They have given us emergency
15 authorization because, as you all know from prior testimony
16 by us and our experts, the WSSC facility and parking lot had
17 zero stormwater management. Anything we do is better than
18 that.

19 So if we get the MDE permit -- we've already
20 stabilized the site, upper lot where the homes are built and
21 now the lower lot. So it has set up erosion patrol. We
22 have evidence in the record of the traps. Everything used
23 to sheet flow right over the parking, running into the bog.
24 Now it's being improved.

25 But the waterway construction permit is critical.

1 Mr. Smith and others keep expressing their concerns. But
2 you're really holding up the process. The DSP allows other
3 steps.

4 And speaking of other steps, Mr. Doerner, it's
5 probably helpful -- I had to learn on the job, as they say.
6 So the floodplain waiver has several conditions of approval.
7 It in and of itself does not allow anybody to do any
8 grading. The floodplain waiver was a requirement as part of
9 the DSP to help establish the net acreage, the density, and
10 to provide the stormwater management facility required for
11 this development. So once the DSP is approved, we go to
12 record plat, we go to grading permit, and we file for a
13 grading permit to do the compensatory storage pursuant to
14 the floodplain waiver, and we have to satisfy those
15 conditions.

16 Those conditions, as you correctly stated, say we
17 need all local, state, and Federal permits. That point is
18 where we ask for those, once the DSP is approved, record
19 plat is approved because under the zoning ordinance under
20 the order of approvals, you can't get any permit without a
21 DSP record plat. So we do the DSP record plat, we take our
22 floodplain waiver with the conditions, we make all the
23 appropriate applications to those agencies, they issue the
24 permit. And DPIE won't give me a grading permit till I show
25 them evidence that I had the local, state and Federal

1 permits.

2 Everybody's conditioning everything to whatever
3 somebody else does, which is a chicken and the egg thing.
4 But we wish MDE we would have let us do it because the water
5 situation would be much better now. But we're waiting, and
6 this DSP has been appealed. It's on remand.

7 It's going to be two or three months now just to
8 get to the District Council. Then we have to go to record
9 plat, then apply for permits. So you're talking really till
10 the rest of the year, easy -- I mean next year, into the
11 middle of next year to provide the solution that everybody
12 seeks. So we're eager to move forward.

13 We've done everything we can. On the DSP, back on
14 February 2nd, we proffered four or five conditions,
15 voluntarily subjecting us to more issues regarding
16 inspections. That's not part of the remand, so I don't want
17 to bring that up, but it's just the fact. We want to get
18 the MDE permit because it's a condition of the floodplain
19 waiver, and it allows us to continue our work. We're not
20 shrugging off any obligations. It's just the way the
21 different process is intertwined between the state, the
22 Feds, and the locals. I hope that answers it.

23 MR. CHAIR: Yeah, Doerner, the floor is still
24 yours.

25 COMMISSIONER DOERNER: That gets into like sort of

1 the processes of this. So how do we -- would it be MDE or
2 would it be DPIE that rectifies some of MDE's concerns,
3 which earlier, when you guys had the unauthorized work in
4 the floodplain at the stream and channel area, that was what
5 they had cited as kind of their hesitation for giving the
6 full approval, and that they -- I guess they assume that
7 when we approve DSP, then it's rectified. But do they have
8 to okay that or is that DPIE that does that? Because we
9 don't have that authority? Like, we're not a -- we're not
10 an enforcement agency. So who kind of approves that
11 everything is okay from that standpoint?

12 MR. RIVERA: I'm sorry I missed that, Mr. Doerner.

13 COMMISSIONER DOERNER: In the MDE letter, they
14 mentioned that word on your client, had early unauthorized
15 work in the floodplain at the stream channel, and that was
16 one of their hesitations for actually approving the nontidal
17 wetlands and waterways authorization. But we don't have an
18 ability in the DSP process to actually address that because
19 we're not an enforcement agency. So is that going to take
20 DPIE then going back and saying, look, we no longer consider
21 this to be a violation or a problem, like, because Zoning
22 can't fix enforcement issues.

23 MR. RIVERA: So the answer, Mr. Doerner, is that
24 since February, we have received inspection reports, clean
25 inspection reports, meaning there's no violations, every

1 week since February, to date. And that includes
2 representatives of the MDE. There was that initial illegal
3 work on the floodplain that was stabilized. We put a
4 headwall in. Everything is fixed. We're not touching
5 anything. We're going to wait till the DSP is approved.

6 And DPIE can't force MDE issue a waterway permit
7 because their legal team down in Annapolis is defined in
8 this particular matter that DSP must be approved even though
9 the Code says "may". So we're proceeding as we are told to
10 do at this point. DPIE also has made all those inspections,
11 and they have no violations. So MDE and DPIE are clear.

12 In fact, MDE keeps asking me, where is the DSP
13 approval? So you know, we update them regularly. We're
14 hoping that this gets resolved today and then further on
15 down the road at the District Council.

16 COMMISSIONER DOERNER: Okay. So then I think part
17 of my question might be aimed at Ms. Giles later on. I
18 don't know when we want to, kind of, get her input, but I'd
19 like to know just clarification, like, say the DSP gets an
20 order today --

21 MR. CHAIR: Mr. Doerner, I think now's a good
22 time. If you have a question for Ms. Giles, you know, jump
23 right in.

24 COMMISSIONER DOERNER: Okay. Thank you.

25 So tell me, Ms. Giles, on what I was just asking

1 about with the kind of earlier citation of the unauthorized
2 work in the floodplain, would your office be the one that,
3 if the DSP is approved, goes back to MDE to tell them that
4 this is no longer an issue, or it's sort of an extant issue,
5 that they don't have to worry about, that the DSP is going
6 to approve and there's no existing violations on here, or
7 how does that -- how does that happen in the approval
8 process to make sure that's not a remaining issue,
9 potentially? And would your office continue to monitor it
10 or would it be MDE at that point?

11 MS. GILES: Well, good morning. For the record,
12 Mary Giles with the Department of Permitting, Inspection,
13 and Enforcement. Yes, the DPIE reissued our floodplain
14 waiver in July of this year. Before we reissued our
15 floodplain waiver, we coordinated with MDE specifically on
16 this matter of compliance -- response to the previous
17 violations. MDE informed our agency that they were not
18 going to proceed to issue the waterway construction permit
19 nor the discharge permit for the phase two, which is the
20 lower parking lot phase until this zoning approval, i.e.
21 this detailed site plan we're talking about today is
22 approved. MDE did indicate that the violation was not fully
23 satisfied due to the lack of those permits.

24 DPIE issued our floodplain waiver with a
25 contingency that DPIE is not going to issue a grading permit

1 for this site until the state permits have been issued and
2 the violation associated with the MDE action is cleared and
3 taken care of. So the order of events here is DPIE reissued
4 the floodplain waiver. The detailed site plan has to get
5 approved. The applicant then has to come in and get council
6 approval of the detailed site plan. Then the applicant has
7 to secure state permits, the two permits we're talking about
8 here today. And then DPIE would be in a position of issuing
9 a grading permit, thereafter.

10 COMMISSIONER DOERNER: Okay. That's helpful in
11 terms of the timing of it. What I also wanted to find out
12 in terms of your floodplain waiver that you issued in July,
13 not the 2018 one from before -- I guess between the 2018 one
14 and all the way up until July, there was the encroachment on
15 the floodplain, and then there's a number of other sort of
16 Code violations that happened in that area.

17 There were streets that were blocked off, that
18 required police access to actually, like, keep the streets
19 from flooding and from people going in that area. And in
20 the findings or in the determinations that you have to make
21 in the floodplain waiver, one of them is just not having any
22 additional threat to public safety or any other adverse
23 impacts on upstream or downstream. And my concern is, I
24 live in this area.

25 I use the playground down there. I go through the

1 wetlands and hike around there. I was just there on Tuesday
2 riding through and looking at deer and stuff in the area.
3 I'm concerned about the downstream impacts on this and
4 whether or not we're actually appropriately controlling for
5 any sort of floodwater in that area, any kind of, like,
6 damage or any sort of danger to life and property, which are
7 all considerations in that waiver.

8 What I didn't see in the correspondence to the
9 District Council, I saw that basically it said, yeah, we
10 considered that Section G and J in the County Code, but it
11 didn't say anything about flooding. And the sort of the
12 prior activity, it just sort of like looked ahead and said,
13 we don't think it's going to be a problem in the future,
14 which I agree. If they do it correctly, like, it shouldn't
15 be a problem in the future. And technically, it's not going
16 to be in a floodplain.

17 However, what concerns me is everything that's
18 happened in the past has not given us a good indication of
19 whether or not they could successfully do this. I think
20 over the -- since February, I've seen the reports that the
21 applicant has submitted. It looks like they've got it under
22 control. And that was one of my sort of messages to them in
23 February, is that you just need more time to look at this.
24 But to what extent did your floodplain waiver consider that,
25 and how do we deal with that at a local level?

1 Because if this does go forward, I want to make
2 sure that we have a mechanism for continuing to make sure
3 that they remain in compliance, because this is a very
4 sensitive project that we haven't done before to this scale
5 in a floodplain. And I want to make sure it doesn't destroy
6 the lower kind of very sensitive wetland areas down there or
7 anything around there, and it doesn't become a cost that's
8 back on the City of Hyattsville, who's had to shut down the
9 streets and hasn't gotten reimbursed or anything for that.
10 So I understand some of that is outside the hands of the
11 applicant because it was WSSC pipes and other things that
12 burst. But then there are some things that have been at the
13 fault of the applicant. To what extent does the floodplain
14 waiver take that into account, and then what is DPIE going
15 to do in the future to kind of make sure that we continue to
16 be on the right side of everything?

17 MS. GILES: Well, the floodplain waiver was issued
18 with certain matters that considered some of those questions
19 you have. For example, this project in the lower phase,
20 we're talking about, is approved to install a stormwater
21 management pond that controls not just water quality but
22 also quantity control. So there is a stormwater pond that
23 will be built in that lower parcel if it goes -- if this
24 project goes forward. That'll provide quantity control to
25 reduce the runoff and ensure no downstream impact because of

1 this project. This project also is part of the floodplain
2 approval, had to demonstrate that the access roads to the
3 property were not flood prone, which that was considered in
4 the waiver, as well. The roadways that are adjacent to this
5 property are above the floodplain and are not flood prone.

6 You know, this project, actually, in the
7 floodplain, the amount of fill that's being placed into the
8 floodplain based on this waiver is less than the amount of
9 cut that is being excavated out of the floodplain. So the
10 actual volume of dirt going in the floodplain will be less
11 than it is today. That's a basic tenant in most county
12 floodplain approvals, that the amount of cut and the amount
13 of fill balance each other out. So that was verified as
14 part of our floodplain approval process.

15 COMMISSIONER DOERNER: Again in going forward, how
16 are we going to make sure that this continues to be
17 enforced? Because that's been one of the issues, from my
18 understanding in this area, is that when there's been
19 flooding, whether it's due to the applicant or other things,
20 there's been this sort of, like, who's in charge of it? Is
21 it MDE or is it DPIE? And it hasn't really been enforced.
22 And my understanding is that the City of Hyattsville, who
23 can speak better on their own accord, hasn't had really good
24 cooperation from your department in actually making sure
25 that this continues to be not having high levels of, like,

1 runoff and stuff that could damage the streamline and
2 wetland areas.

3 MS. GILES: DPIE enforces what it will be in these
4 permits that are getting issued. It is important for folks
5 to understand that in this county there's floodplain, and
6 there are existing structures that were built long time ago
7 that are in the floodplain. This project, you know, that's
8 just an existing and latent condition. A new project --
9 it's not possible for a new project to be able to fix, you
10 know, kind of all the problems that exist in a downstream
11 floodplain. But new projects are. This project is designed
12 to eliminate any increases in stormwater discharges leaving
13 the site, so.

14 COMMISSIONER DOERNER: Yeah. No, I understand --
15 I understand both points. It was a parking lot before.
16 Like, it had no ability to actually absorb the rainwater
17 that was either falling directly on the property or coming
18 across it.

19 My concern is just in the process. I want to make
20 sure that as we continue to go through this development that
21 does get approved, that DPIE is paying attention because
22 they were not. And your office failed miserably on some of
23 these things. And that's as nicely put as I can say it,
24 being a resident in this area and seeing some of this stuff.

25 And I realize there wasn't any controls in place

1 before, there should be controls in the place in the future,
2 and it should work really well if it works correctly. But
3 I'm interested in the transition period. Like, is DPIE
4 going to actually be involved and monitoring this?

5 MS. GILES: DPIE has enforcement authority for
6 zoning requirements, that whatever's on this site plan gets
7 built according to the approved plans. DPIE has enforcement
8 authority for sediment leaving the site, and so on. I was
9 asked to participate in this hearing today for the
10 floodplain waiver. I did not know that questions about
11 enforcement were going to be coming up, so I do not have
12 folks from Inspections here today. But it's fair to say
13 that DPIE has issued many violations on this site and
14 followed up, you know, numerous times on violations, so.

15 COMMISSIONER DOERNER: That's fair enough. I
16 don't mean to, like, beat you over the head or anything with
17 a stick about the enforcement issues. I just wanted to
18 convey that I was less than pleased in the process, so far.
19 And I want to make sure, going forward if it does get
20 approved because it's so sensitive, that we're working
21 together, and that the county offices are actually
22 coordinating with the city and helping them, because some of
23 the aspects in the floodplain waiver talk about remedies or
24 things that the applicant would have to do.

25 It would have to reimburse the city for police and

1 stuff like that. That stuff hasn't happened so far. So
2 when I read those kinds of things in the letter or the
3 transmission to the District Council, it really makes me
4 wonder where the faltering on the communication is
5 happening, because that hasn't happened so far, and it's
6 been problematic to date.

7 Over the last nine months, the applicant has done
8 a much better job because, I mean, I think Commissioner
9 Washington, who made the motion in February, had said that I
10 was going to have eyes on going in that area and the
11 applicant could expect, then. And I have been. They've
12 done a much more better job since that hearing in February
13 at controlling the runoff and addressing the issues.

14 But it hadn't been the case before. And that's
15 why I'm hoping that you can take that back to your
16 colleagues. Because since that was the basis for parts of
17 your waiver approval, I'm hoping that you can also talk with
18 your enforcement staff and just make sure that we're being
19 careful to keep the silt filters and the other things in
20 place and working properly. So that would just be my
21 request back to you.

22 But I appreciate you coming here today and
23 clarifying, particularly with the darn process of, like --
24 from MDE, because I was utterly confused of, like, what we
25 were supposed to do and wanted to make sure that that was

1 clear, and that we weren't going to be making a misstep
2 again or something by sending this forward if we needed to
3 do something else in the process. So I'll stop there.

4 But thank you for taking the time to come. That
5 was really helpful.

6 MR. CHAIR: Thank you, Commissioner Doerner.

7 Thank you, Ms. Giles.

8 Commissioners, any other questions for Ms. Giles?

9 Okay.

10 Mr. Smith, do you want to cross Ms. Giles?

11 MR. SMITH: I would. I just have a -- am I on
12 mute, or can you hear me?

13 MR. CHAIR: No, we can hear you.

14 MR. SMITH: Okay. Thank you. Your Honor, I just
15 have a couple of questions for Ms. Giles and probably more
16 appropriate to her than Mr. Rivera. In issuing the
17 floodplain waiver letter and reviewing where lines --
18 delineations and their floodplain study, did DPIE take
19 into -- does DPIE or did DPIE take into account the more
20 recent climate data in order to determine whether or not
21 these delineations and studies were up to date and fully
22 protective, as is required under Subtitle 32 and the zoning
23 ordinance and Code of Maryland Regulations and the
24 Environment Article, and the Clean Water Act? Did DPIE make
25 any attempt to incorporate the more recent climate data and

1 determine whether or not these -- the compensatory
2 floodplain and the delineation and the stormwater management
3 facilities would actually protect public health and life and
4 property and the environment?

5 MS. GILES: The floodplain waiver is based on the
6 FEMA maps that were updated in 2016. FEMA updated all the
7 floodplain maps in the entire county in the year 2016.
8 That's what the floodplain delineation and the floodplain
9 waiver is based on.

10 The State of Maryland is active -- the State of
11 Maryland and all the counties in Maryland are actively
12 participating in a study right now to evaluate climate
13 change. In all likelihood that study will end up with
14 increasing rainfall rates. Both state and county codes will
15 in all likelihood be updated and rainfall rates will be
16 going up. But that hasn't happened yet. So this project is
17 based on the current criteria.

18 As it stands, any floodplain delineation in this
19 county, there's a base flood elevation that's established by
20 the study of one vertical foot of freeboard is added to that
21 elevation as a safety factor, and that's what's delineated.
22 And then houses are supposed to be elevated to what's called
23 the flood protection elevation, which is two feet vertical
24 feet above the mapped elevation.

25 In this instance, the houses on this project are

1 4.1 to 7.7 feet above the base flood elevation. So while
2 climate change is certainly here and happening, these
3 houses, as designed, will -- I just don't see a scenario in
4 which they would be impacted by climate change.

5 MR. SMITH: Thank you. If I could follow up, and
6 Ms. Giles, it's nice to meet you sort of in person. We've
7 traded emails in the past. Thank you for pointing out that
8 Maryland is currently working to try to update its
9 understanding of what climate change is doing to
10 precipitation patterns and how they may affect decisions and
11 impact. It was actually in reviewing Werrlein's application
12 for a stormwater permit and waterway construction permit
13 back in 2021. But I'll just point out, they're belated
14 applications because they had already undertaken substantial
15 work on the site without even applying for this permit. It
16 was actually in reviewing that permit --

17 MR. CHAIR: Mr. Smith, Mr. Smith, you're on cross.

18 MR. SMITH: I'm going to ask my question, but --

19 MR. CHAIR: Please ask the question.

20 MR. SMITH: I will. I will. I'll frame it,
21 though.

22 It was actually in researching that, that I came
23 across one of the studies you're probably aware of, the
24 MARISA study done by RAND on whether or not Atlas 14's
25 intensity duration frequency curves, which are generally, as

1 far as I know, relied upon by agencies like DPIE and
2 designing engineers in designing projects and reviewing
3 projects that I came across that and got a clear
4 understanding of what I thought I knew intuitively.

5 And I think I understand from your answer that in
6 reviewing the delineation and the floodplain study and the
7 proposed facilities that DPIE did not take into account the
8 kind of findings that were put forth by the MARISA group,
9 which was actually partly funded by the State of Maryland.
10 Is that true, yes, DPIE did not take into account those more
11 recent findings?

12 MS. GILES: The MARISA rainfall rates from that
13 MARISA model have not been implemented in Prince George's
14 County for any project, yet. Like I said, it's in the study
15 phase right now. Generally speaking, DPIE follows the lead
16 from MDE. When MDE issues a model ordinance to change
17 things about the floodplain or the stormwater code, then the
18 counties follow. So it's in its study phase right now. But
19 I don't know of -- I certainly know that in this county and
20 our neighboring counties that has not been implemented, to
21 my knowledge, definitely not in this county. We're waiting
22 for the outcome of this A (phonetic sp.) storm committee
23 with MDE to then implement changes to rainfall.

24 MR. SMITH: Okay. Thank you. That helps.
25 Relatedly, you relied on the effective map approved by FEMA

1 in September of 2016, and that consultation process with the
2 county began probably around 2008. Again, this is yes or
3 no. What is your -- is it your -- what is your
4 understanding of whether or not the effect of maps, flood
5 insurance maps incorporate any climate data that's any more
6 recent than 2000? Did they rely on Atlas 14?

7 MS. GILES: I'm not certain which rainfall rates
8 FEMA maps are based on.

9 MR. SMITH: Okay. Thank you. And this follows up
10 on Commissioner Doerner's questions. Clearly, Werrlein has
11 a long history of operating without required permits, not
12 installing required stormwater management and erosion
13 control, discharging repeatedly. Did DPIE take --

14 MR. CHAIR: Mr. Smith?

15 MR. SMITH: Excuse me. Did DPIE take any --

16 MR. CHAIR: Mr. Smith --

17 MR. SMITH: -- (indiscernible) --

18 MR. CHAIR: Mr. Smith, stop talking.

19 Ryan (phonetic sp.), Kenny (phonetic sp.), if he
20 doesn't stop talking when I ask him to, mute him.

21 MR. SMITH: May I finish my question?

22 MR. CHAIR: No, not when I'm talking. What I'm
23 asking you to do is to not use this as an opportunity to
24 make an argument. If you have a question, ask a question.
25 Okay? You're on cross-examination of Ms. Giles. Feel free

1 to ask Ms. Giles a question. You will have an opportunity
2 to testify.

3 If you could take him off mute, Kenny, and I'll
4 allow him to speak again.

5 Yeah, hold on. I just want to make sure because
6 you're still on mute, Mr. Smith. Give him a second. We'll
7 work out the technology. Come off mute.

8 MR. SMITH: All right. Thank you. All right.
9 This is my simple question, which I was framing, in deciding
10 to issue the floodplain waiver and any other permits that it
11 has for this site, did DPIE take into account Werrlein's
12 record of violations and noncompliance on the site?

13 That's a yes or no question, Mr. Shapiro, so
14 hopefully, that works.

15 MR. CHAIR: Yes, sir. Absolutely.

16 MS. GILES: Yes, DPIE did. We issued the revised
17 floodplain waiver with a contingency in it that requires the
18 applicant to secure the Waterway State and the e-Waterway
19 Construction permit and another NOI, Notice of Intent to
20 Discharge permit before the county will issue a Grading
21 permit. So yes, we did.

22 MR. SMITH: Thank you.

23 MR. CHAIR: Are there other questions, Mr. Smith,
24 on cross?

25 MR. SMITH: I think I'm done, Mr. Shapiro. Thank

1 you for the opportunity.

2 MR. CHAIR: Okay. Thank you.

3 MR. SMITH: And thank you, Ms. Giles.

4 MR. CHAIR: So we'll now move to speakers. We'll
5 start with City of Hyattsville. Ms. Simmons, we are back to
6 you. Introduce yourself for the record, and the floor is
7 yours.

8 COMMISSIONER DOERNER: Before we jump over to
9 (indiscernible). This is Commissioner Doerner.

10 MR. CHAIR: Yes, sir.

11 COMMISSIONER DOERNER: I just wanted to ask Mr.
12 Rivera, if you could just review the reports that you had
13 used or that you had submitted into the testimony, because
14 that's new material that I think is relevant to the
15 floodplain waiver.

16 And I just wanted you just to, if you have -- if
17 you're able to, or if you have an expert on that, could just
18 talk about what's happened since then. Because that was one
19 of my concerns about the floodplain waiver, initially.

20 MR. RIVERA: Sorry about that. You're asking me
21 to review the studies that went to DPIE as to the floodplain
22 waiver?

23 COMMISSIONER DOERNER: Yeah. Because you
24 submitted a number of reports, I think like GTA reports that
25 you had had, about the runoff that was happening in that

1 area. Some of them, I think, were February to July kind of
2 period before DPIE had gotten them. And we didn't really
3 hear much about that, so I just wanted just if you have a
4 quick overview of them, if you can provide a little bit of
5 background in terms of what they mean.

6 I think in terms of the NTUs, that anything below
7 50 is probably fine, but I'm quickly getting outside of my
8 climate background in terms of knowing like how to interpret
9 those reports.

10 MR. RIVERA: Let me just see what I can -- okay.
11 So I think what you're referring to are GTA as a consultant.
12 Back in February, we had voluntarily added conditions to do
13 more self-enforcement to work with DPIE, MDE.

14 One of your concerns that you mentioned is when
15 you were walking the dog in the park over there, you saw
16 that there was dirty water in that trap, but that trap is
17 exactly supposed to be dirty. It's a sediment and erosion
18 control facility that captures the water coming off the
19 site, treats it, there's stone called riprap and other
20 materials that protect the actual stream so that the water
21 is filtered. So that water looks brownish, and that term of
22 art is called turbidity. So GTA, our soils consultant,
23 constantly monitors our turbidity levels.

24 It's not really a specific regulatory issue, but
25 we don't want DPIE or anybody to think we're not doing our

1 job. And that's how the sediment erosion control traps are
2 programed or designed to keep cleaning the water as it
3 enters the trap. So those are those studies that deal with
4 that, which is different than studies that deal with the
5 floodplain waiver, which is a different type of calculation,
6 as Ms. Giles stated.

7 COMMISSIONER DOERNER: Okay. And what's the
8 magical number that we should be -- obviously, like the
9 number is going to be a lot higher at the trap if it's being
10 taken or read in like right above it. But then you also
11 have a couple of measurements that are in, like, the stream
12 water valley, like, below that. What are appropriate kind
13 of ranges for the NTUs that we should be seeing?

14 MR. RIVERA: The industry standard is 150 leaving
15 the trap, so it's way higher than that, obviously, because
16 it's dirty, and then it goes down.

17 COMMISSIONER DOERNER: Okay. All right. Thank
18 you.

19 MR. RIVERA: You're welcome.

20 MR. CHAIR: Thank you, Commissioner.

21 All right. Now, we're on to Ms. Simons --
22 Simmons -- I'm sorry, Ms. Simmons -- City of Hyattsville.

23 MS. SIMMONS: Chair Shapiro and Members of the
24 Board. For the record, Holly Simmons, Acting Director of
25 Community and Economic Development with the City of

1 Hyattsville. I'm here this morning to reaffirm the City's
2 request for denial of the subject application and to speak
3 to the City's concerns as they relate to the order of remand
4 issued by the District Council on May 16th of this year.

5 We'll also refer you to the city's correspondence
6 to the Planning Board dated December 7th, 2022, and January
7 26th, 2023, which are included in the record. We reviewed
8 the materials submitted by the applicant in response to the
9 District Council's order of remand and believe that the
10 applicant has not adequately demonstrated compliance with
11 floodplain requirements outlined therein.

12 In Section E3 of the District Council's Order of
13 Remand, the District Council requires that any revised site
14 plan submitted by the applicant shall contain a new decision
15 from DPIE on the applicant's new application request for a
16 waiver to construct in the 100-year floodplain. DPIE's new
17 decision on the applicant's waiver request shall make all
18 required findings and considerations in PGCC Section 32-
19 206(d) and (j) as amended by CB-38-2016.

20 The applicant has provided a new floodplain waiver
21 from DPIE dated July 25th, 2023. However, the new waiver
22 does not address the findings and considerations of PGCC
23 Section 32-206, parts (d) and (j). Part (j) outlines that
24 the director shall consider and make, at a minimum, 12
25 findings of fact. Instead of including these findings of

1 fact in the waiver issued on July 25th, DPIE responds to
2 them in a separate response document and states that the
3 floodplain waiver is based on these code requirements.

4 Part (d) requires the floodplain waiver shall be
5 granted only upon nine determinations, including but not
6 limited to, there is good and sufficient cause that is based
7 solely on the physical characteristics of the property and
8 cannot be based on the character of the improvement, the
9 personal characteristics of the owner or inhabitant, or
10 local provision that regulates standards other than health
11 and public safety.

12 The granting of the waiver will not result in
13 additional threats to public safety or other adverse impacts
14 on other public or private property, either upstream,
15 downstream, or adjacent to the subject property. The waiver
16 is the minimum necessary, considering the flood hazard, to
17 afford relief to the owner, and public funds shall not be
18 expended to mitigate the results of the waiver. And the
19 failure to grant the waiver would result in exceptional
20 hardship due to the physical characteristics of the
21 property.

22 The July 25th floodplain waiver submitted by the
23 applicant does not address the specific determinations in
24 part (d). In relation to part (d), DPIE's separate response
25 to the order of remand indicates that this floodplain waiver

1 has been reviewed and approved in accordance with these
2 requirements. However, neither the waiver nor the response
3 addressed the individual determinations as required by the
4 District Council.

5 A history of environmental violations on the site
6 underscores the City of Hyattsville's respectful request to
7 see the necessary determinations of findings of fact
8 included in the floodplain waiver as required in the
9 District Council's order of remand. Throughout its
10 redevelopment of the former WSSC headquarters site, the
11 applicant, developer, Werrlein Properties, has consistently
12 failed to adequately address environmental issues.

13 Incidents are described in detail in the City's
14 letter to the Planning Board dated January 26th and in the
15 testimony provided by the city at the Planning Board's
16 limited scope hearing on February 2nd and to the District
17 Council on May 8th, 2023.

18 As the Planning Board is aware, the City of
19 Hyattsville is not an environmental regulatory agency, and
20 so our community has had to rely on corrective and
21 enforcement actions from both the Maryland Department of the
22 Environment and Prince George's County Department of
23 Permitting, Inspections, and Enforcement.

24 Based on materials submitted with the applicant's
25 response to the District Council remand, we understand

1 recent inspection reports from DPIE and MDE indicate no
2 onsite violations. However, this does not negate the need
3 to include required determinations and findings of fact in
4 the new floodplain waiver.

5 We agree and affirm that any revised site plan
6 submitted by the applicant should address the requirements
7 of the District Council order of remand related to the
8 floodplain waiver. We believe it is reasonable and
9 appropriate for the Planning Board to proceed with the
10 following actions.

11 One, deny the detailed site plan application; and
12 two, in any future DSP application, require, as per the
13 District Council, any revised site plan submitted by the
14 applicant shall contain a new decision from DPIE on the
15 applicant's new application request for a waiver to
16 construct in the 100-year floodplain.

17 DPIE's new decision on the applicant's waiver
18 request shall make all required findings and considerations
19 in PGCC at Section 32-206(d) and (j) as amended by CB-38-
20 2016. Thank you.

21 MR. CHAIR: Thank you, Ms. Simmons, for the very
22 thoughtful comments on behalf of the City. Much
23 appreciated. We'll see if there are any questions from
24 commissioners, and then we'll give folks an opportunity to
25 cross as well. So Ms. Simmons, hold on.

1 Commissioners, any questions for City of
2 Hyattsville for Ms. Simmons?

3 (No affirmative response.)

4 MR. CHAIR: None. Okay.

5 Mr. Smith, any cross of Ms. Simmons?

6 (No affirmative response.)

7 MR. CHAIR: No. Mr. Rivera, any cross of Ms.
8 Simmons? And you'll have an opportunity at a rebuttal to
9 address any issues when the time comes.

10 (No affirmative response.)

11 MR. CHAIR: Okay. Thank you, Ms. Simmons.
12 Appreciate it. Much appreciated.

13 Now, we will turn to Ms. Kole and then Mr. Smith.
14 You'll have 15 minutes, altogether for the two of you to
15 manage your time as you will. We'll start with Ms. Kole.
16 Mr. Smith, do you have a question?

17 MR. SMITH: Excuse me, Mr. Chair?

18 MR. CHAIR: Yes, sir.

19 MR. SMITH: I think Shanna Fricklas may have
20 joined the call. I've informed her that we've -- that the
21 Planning Board has gotten to the opposition statements, so
22 I'm happy to go -- as usual, I'm happy to go last if that
23 works.

24 MR. CHAIR: Ms. Fricklas, are you on the line.
25 Ms. Fricklas?

1 MR. SMITH: She may be trying to get on. Let
2 me -- we were just trading texts. She's bouncing back and
3 forth between work and this.

4 MR. CHAIR: Let's start with Ms. Kole.

5 MR. SMITH: Let me see what -- let me --

6 MR. CHAIR: Let's start with Ms. -- Mr. Smith,
7 take it offline. We'll start with Ms. Kole. Hopefully, you
8 can get Ms. Fricklas on, and then, we'll take -- we'll hear
9 from her after Ms. Kole.

10 So Ms. Kole, take it away. Introduce yourself.
11 The floor is yours.

12 MS. KOLE: Thank you. Thank you to the Board and
13 participants for listening to my testimony. My name is
14 Allison Kole, and I oppose this project. Just as an initial
15 matter, Mr. Rivera's interpretation of the Zimmer case is
16 erroneous, as the court's decision only related to the
17 District Council's authority and ability to call up issues
18 after the Planning Board's decision on remand.

19 That case does nothing to limit the Planning
20 Board's authority as to DSP approval on remand and the scope
21 of questions that we're able to talk about today.
22 Statements made today, and even in the Maryland National
23 Capital Park and Planning Commission March report discusses
24 the fact that evidence of harm proffered in the record is
25 largely irrelevant to the DSP approval decision today.

1 But I disagree, particularly when it relates to
2 such a core issue as density calculation. Setting aside
3 that this is dismissive of harm suffered by the community,
4 credibility of applications and reliability of required
5 permits should matter at this approval stage, particularly
6 as it relates to the reliability of important components of
7 a plan, such as calculating the floodplain and promises in
8 the revised waiver that no damage will take place around the
9 site and further downstream. I think Mr. Doerner's
10 questions go to this point also.

11 Moving on to the current density calculation
12 submitted, it does not take into account instructions from
13 the District Council which stated, applicant may not utilize
14 acreage in the 100-year floodplain and the two parcels
15 should be conveyed out of the tract to the City of
16 Hyattsville to calculate density. Furthermore, the record
17 lacks substantial evidence to demonstrate a density
18 calculation, excluding alleys, streets and other public
19 roadways.

20 I understand that Werrlein disagrees, that
21 complying with these instructions is legally required.
22 However, it is still unanswered, calculations based on
23 infill estimates and that do not include future planned
24 conveyances or easements, if that's what it ends up being or
25 unavailing, as to the fact that Werrlein has met the

1 Council's order on remand.

2 As an aside, Mr. Rivera's statement seems to
3 indicate that the actual number of townhouses could change
4 at the planning stage, but I somehow sincerely doubt
5 anything will have changed four years from now as it relates
6 to how Werrlein's planted the flag on density. Moreover,
7 the density calculation undermines the purpose of RSF-65
8 zoning, which I do think is still at issue despite
9 statements that the issues are limited on remand. There's
10 been no legal or regulatory evidence as to why we should not
11 talk about this issue.

12 This zoning rule should guide this Planning Board
13 at all stages of the process, even with revised proposals.
14 Even products that fall into other uses, such as townhouses,
15 should be approved with these purposes in mind. One of
16 those purposes is to encourage preservation of trees and
17 open space, and another is to encourage development that
18 uses the natural terrain. The fill-and-build approach of
19 this project and density ensures profitability over
20 safeguards like maximizing permeable surfaces, and this
21 contradicts the zoning rule.

22 The point I'm trying to make here is that this
23 body has an independent obligation to ensure the purpose of
24 zoning rules are followed and deem not accept the District
25 Council, now years old, density maximum for this project

1 which was really an estimate. In the midst of the national
2 movement to change FEMA's sanction of the fill-and-build
3 process, I ask the Board to do more to protect the
4 community. Instead of grant variances that lack adequate
5 rationale, such as those concerning minimum lot sizes and
6 lots and limits to impervious surfaces, these only
7 exacerbate the issue. With that, I hope that the Board
8 takes these comments into consideration.

9 MR. CHAIR: Thank you, Ms. Kole. Appreciate that.

10 If you could stop the clock, Mr. Craun. Add 8
11 minutes onto that because I'd said that they'd have up to 15
12 minutes. They may not use it, but that's what Ms. said. So
13 put up to 11 minutes at this point.

14 Commissioners, any questions Ms. Ms. Kole?

15 COMMISSIONER WASHINGTON: Mr. Chairman, not
16 specifically, but both Ms. Simmons and Ms. Kole referenced
17 how certain things that were a part of the District
18 Council's remand had not been considered by our staff in
19 terms of their recommendation. So at some point, I would
20 like Council and/or Staff, and certainly, I guess, Mr.
21 Rivera, to address that in their rebuttal and comments. So
22 thank you.

23 MR. CHAIR: Thank you, Commissioner. Appreciate
24 that. And I agree.

25 Mr. Smith, do you have any cross for Ms. Kole?

1 (No affirmative response.)

2 MR. CHAIR: No. Mr. Rivera, any cross for Ms.
3 Kole? You'll have rebuttal again when you get to it.

4 MR. RIVERA: Just one quick question, Mr. Chair.
5 Norman Rivera for the record.

6 So Ms. Kole, I think I heard you earlier say
7 you're on the Board of Sustainable Hyattsville, as I believe
8 Greg has stated before. When you write the letters and
9 speak today, are you speaking on behalf of yourself, or are
10 you authorized by the Board of Directors through valid vote
11 to make these representations to the Board? Because I've
12 seen that you represent a large volunteer organization, but
13 I'm not sure that it was subject to meeting, quorum, proper
14 vote.

15 So if it wasn't, I don't think you could represent
16 you're the board member without authorization by the Board.
17 Otherwise, it's your personal testimony. So the question,
18 is this authorized by the Sustainable Board or Corporation?

19 MS. KOLE: I don't know what you mean about a
20 quorum, but I'm listed as a board member in corporate
21 filings, and it's a registered nonprofit. But the testimony
22 is my own, did not go through some -- whatever approval
23 process you're referring to.

24 MR. RIVERA: Okay. Thank you.

25 MR. CHAIR: And for what it's worth, Ms. Kole, I

1 heard you earlier say that you were speaking on your own
2 behalf. So I hear you reiterating what you had said before.

3 Mr. Rivera, if that's helpful, I heard her say
4 that twice.

5 MR. RIVERA: Great. Thank you, Mr. Chair.

6 MR. CHAIR: Okay. Turn to Mr. Smith. You've got
7 11 minutes on the clock. The floor is yours. You're on
8 mute, Mr. Smith. We can't hear you.

9 MR. SMITH: All right. I'm sorry. How much time
10 do I have?

11 MR. CHAIR: 11 minutes.

12 MR. SMITH: 11? Okay. I'll try to make this
13 short and sweet. That's unusual for me. But for the
14 record, Greg Smith. I reside at 4204 Farragut Street in
15 Hyattsville. I serve on the Board of Sustainable
16 Hyattsville. I am the president, and I'm authorized to
17 speak on behalf of the organization.

18 A couple of quick points. First of all, I'll
19 incorporate by reference the statement by the City. I
20 thought was quite excellent, and Ms. Kole, quite excellent.

21 In both of its decisions approving the Conceptual
22 Site Plan, the Board -- I mean, rather, the District Council
23 set a hard condition that at the DSP stage, Werrlein must
24 show that it has -- demonstrate that it has all of the
25 required floodplain authorizations from the agencies of

1 jurisdiction. In this case, the agency of jurisdiction is
2 MDE with delegated authority from the EPA. MDE has not
3 issued that authorization. The condition of getting that
4 kind of authorization was also set forth in the floodplain
5 waiver letters issued by DPIE. It's in the Subtitle 32,
6 that an applicant must have all the required authorizations
7 from state and Federal agencies. It's in the environmental
8 article.

9 They don't have that authorization, so this
10 application actually should never have been accepted as
11 complete for formal review by the planning director. It
12 shouldn't be heard, and it shouldn't be approved by the
13 Planning Board. Yet, here we are.

14 Getting to density, a long history. Ms. Kole
15 placed in the record before the District Council earlier
16 this year documents that we received from the Planning
17 Board -- from the Planning Department, in September of 2022
18 containing threads of emails between Mr. Rivera and senior
19 planning staff about how to address the density issue.

20 Mr. Rivera lobbied to rely on gross acre, and
21 that's exactly what the Staff then agreed to do. And more
22 than that, they not only agreed to do that, they advised Mr.
23 Rivera that the way to approach it was to make that request
24 of Staff, they would incorporate it in a technical Staff
25 report, and then he needed to convince the Council to go

1 along with that approach. It clearly conflicts with the
2 zoning ordinance by definition, which defines density as
3 dwelling units per net lot area and defines net lot area as
4 gross area minus the 100-year floodplain minus streets,
5 alleys and other public ways.

6 That's the law. Whether they want to introduce
7 gross tract area, which was also introduced during those
8 threads of emails between Mr. Rivera and senior planning
9 staff -- and Ms. Kosack was copied on many of those emails.
10 Mr. Hunt was as well. What we have is a history going all
11 the way back to 2018 where the developer's attorney and
12 senior planning staff were basically coordinating or coming
13 up with an approach that evades those requirements in the
14 zoning ordinance. And here we are.

15 That issue is before the courts again, right now,
16 in two cases, our challenge of the District Council's re-
17 approval of the CSP and our challenge of the Planning
18 Board's approval of the preliminary plan of subdivision for
19 the upper parcel. So that's an important point.

20 Properly calculated, and as Ms. Simmons testified,
21 and I think Ms. Kole did, too, the floodplain waiver letter
22 cannot -- and presumably, the delineation cannot rely on
23 improvements. It relies on the current state, and the
24 current state with a FEMA map, if they want to adopt that
25 and their own delineation, showing the current state is 3.02

1 acres, or roughly that, in the floodplain. So the
2 calculation of density should rely on that.

3 And if you follow that and you follow the
4 provisions in the zoning ordinance, the density of the
5 townhouses on the lower parcel would be 33 townhouses per
6 acre. If you go ahead and use their delineation of 1.29
7 acres, 60 percent lower than the figure given by Werrlein in
8 most of its previous plans and stated by Staff in some of
9 their technical Staff reports, if you go ahead and buy that,
10 though, you still have to subtract the street, the alleyway
11 by law. And simply by doing that, the density goes up to
12 13.8 townhouses per acre. Subtract the sidewalks, it goes
13 up a bit further, and both of those figures would exceed the
14 12.3 that the Council approved arbitrarily, I think, in
15 October of 2022.

16 Now, getting to this question of whether or not
17 the environmental issues matter or climate change matters or
18 whether relying on current and accurate and forecasted
19 precipitation data matters, they do. They do. They
20 absolutely do. Because you are -- while you're not an
21 environmental permitting agency or enforcement agency, you
22 are a permitting agency. You issue approvals that then lead
23 to other approvals and approvals that can have profound,
24 long-lasting impacts on communities and the environment,
25 public health, and property.

1 So you have an affirmative obligation to ensure
2 that your decisions protect those things and to ensure that
3 they conform with and support the zoning ordinance's goals
4 and policies and the general plans and the sector plan. And
5 if you don't take into account Werrlein's track record of
6 violations, if you don't take into account the fact that
7 climate change is happening and the County recognizes it and
8 State recognizes it, Feds recognize it, and if you don't
9 look at the fact that these plans and these approvals don't
10 take into account climate realities, then you are casting
11 aside your affirmative responsibility, and your decision is
12 essentially arbitrary and capricious.

13 And the Fourth Circuit Court actually ruled that
14 an approval by the State of West Virginia related to a
15 pipeline that, that approval that ignored the applicant's
16 long history of environmental violations, as is the case
17 here, was by definition an arbitrary and capricious approval
18 by the state. And the Fourth Circuit Court in the United
19 States reversed the state -- or vacated the state's
20 approval.

21 So if you don't take into account these climate
22 realities and the fact that DPIE's consideration of the
23 floodplain delineation and the compensatory mitigation, if
24 you don't take into account that they don't take climate
25 change into account, you really cannot make an informed

1 decision about density because you may be working with an
2 inaccurate, incorrect floodplain delineation, and you can't
3 make an informed decision about whether or not this project
4 will meet the requirements of the zoning ordinance and the
5 Subtitle 32, whether or not it will harm public health or
6 the environment, nearby properties, and the like.

7 In her answer to my question, Ms. Giles really
8 referred only to the safety of the folks who might buy one
9 of these 41 townhouses at \$800,000, plus. That really
10 isn't -- that is just one issue, and it's the smaller issue.
11 You should be concerned about potential impacts on the
12 surrounding properties, Magruder Woods Park, Driskell Park,
13 homes that are adjacent to or very nearby, our local streets
14 which Werrlein has repeatedly flooded with sediment-
15 contaminated stormwater and yet made multiple statements to
16 the public and to Maryland's agencies saying that there have
17 not been discharges from their upper parcel and that they
18 have played no role in the flooding on Gallatin Street.
19 They have made these statements. So ignoring that fact is
20 problematic.

21 We have placed abundant information in the record
22 about how these analyses and approvals are probably
23 defective and nonprotective. But we've placed abundant
24 evidence in this record and previous records that the
25 density calculations conflict with what the law dictates.

1 Werrlein, to evade this now, wants to rely on net tract area
2 rather than net lot area.

3 But the law is absolutely clear on that point.
4 The density is defined as dwelling units per net lot area.
5 It does not refer to net tract area, and it defines net lot
6 area quite clearly, gross acres minus the 100-year
7 floodplain minus streets, alleys, and other public ways.
8 And it would be hard to come up with any kind of definition
9 under which a sidewalk, either on the periphery of the
10 property or through the property, is not a public way. If
11 it's not, what is it; is there any gate on it?

12 So we've come here, we're here now, and Werrlein
13 would like to argue, well, golly, it's been five years and
14 it's all so terrible. Well, nearly all the delay in these
15 processes have been caused by errors committed by Werrlein.
16 They've ignored the law. They've tried to get around the
17 law. They've lobbied senior planning staff to ignore the
18 law, and then senior planning staff did.

19 And then we had to go up to the Appellate Court of
20 Maryland or the Court of Special Appeals, and they reversed
21 the District Council on that density point, the density
22 point that is the subject of the threads of emails between
23 Mr. Rivera lobbying senior planning staff to ignore the law,
24 then not only agreeing to it, but then instructing Mr.
25 Rivera on how to do it, and then Mr. Rivera actually sending

1 planning staff a draft letter for them to review that he can
2 then submit to try to lobby them more directly to rely on
3 gross acres instead of net acres.

4 And it goes on and on and on. Right now, at this
5 point, Werrlein does not have a valid stormwater permit.
6 Their previous coverage expired on September 30th by law.
7 Werrlein did submit a notice of intent to seek coverage, but
8 it was inadequate.

9 MR. CHAIR: Mr. Smith, you're --

10 MR. SMITH: And --

11 MR. CHAIR: -- you're out of time. Let me give
12 you a minute to wrap up. Okay?

13 MR. SMITH: Sure. They don't have the required
14 authorizations. This case should not even be before you.
15 Their applications in every -- in every case to the State
16 have contained either inaccurate statements or failed to
17 provide required information. And in fact, MDE has
18 instructed Werrlein -- they did at the beginning of
19 October -- that their application for new coverage under
20 Maryland's storm -- general stormwater permit for
21 construction -- related to stormwater, the very thing that
22 Mr. Doerner is so concerned about and should be, their
23 application is inadequate, incomplete. And I pointed out to
24 the MDE reviewer that it also makes inaccurate statements.

25 I'll just wrap it up here. There are so many

1 points we can cover. But please don't ignore climate
2 change. And don't ignore their atrocious, environmental
3 track record at this point. Thank you very much.

4 MR. CHAIR: Thank you, Mr. Smith.

5 Commissioners, what I'd suggest, first of all,
6 there may be questions for Mr. Smith. We'll allow that. If
7 there's any cross of Mr. Smith, we'll go for that. Then
8 what I'm going to do is, as we will have the opportunity to
9 ask staff some questions because I believe that I heard
10 Commissioner Washington said that there may be other
11 commissioners who have questions for staff as well based
12 upon -- and then once that is done, then we'll close the
13 public hearing, and we'll go into deliberations. So boom-
14 boom-boom. So the first thing is, is there any cross of Mr.
15 Smith?

16 Mr. Rivera, any cross? Again, you'll have an
17 opportunity in rebuttal to say what you need to say, but do
18 you have any cross of Mr. Smith?

19 MR. RIVERA: No. Thank you, Mr. Chair.

20 MR. CHAIR: All right. Thank you.

21 There's no cross. So now, Commissioners, you may
22 have questions for Staff. So I'll start with Commissioner
23 Washington and see if there are any other questions as well.

24 Commissioner Washington, take --

25 COMMISSIONER WASHINGTON: No, I just --

1 MR. CHAIR: -- it back.

2 COMMISSIONER WASHINGTON: Thank you, Mr. Chairman.
3 No questions other than the one I posited. Again, Ms.
4 Simons -- Simmons, I'm sorry. Ms. Simmons and Ms. Kole
5 commented about certain things that had not been taken into
6 consideration with regard to the District Council's remand.
7 And I would just like to hear from staff on that.

8 MR. CHAIR: So Ms. --

9 MS. KOSACK: Yes.

10 MR. CHAIR: -- Ms. Kosack -- okay. Ms. Kosack?

11 MS. KOSACK: Yes. Just for clarification. I
12 believe Ms. Simmons was referring to DPIE's new floodplain
13 waiver did not make the required findings and considerations
14 in Section 32-206(d) and (j) as required by the remand
15 order. I think that was the one point from her. If so, I
16 would note that the -- DPIE's letter to the District Council
17 did indicate that they approved the floodplain waiver based
18 on those code requirements. It did not individually respond
19 to every bullet point within those sections. But I would
20 just say if Ms. Giles has any further input on that.

21 MR. CHAIR: Ms. Giles, we can't hear you.

22 MS. GILES: This is Mary Giles with DPIE. The
23 floodplain waiver, the applicant cited all the necessary
24 sections in the Code and responded to a DPIE review that
25 DPIE also prepared not only a revised floodplain waiver

1 letter, but also a response to the District Council, citing
2 all the aspects of the remand. We basically, point-by-point
3 responded to every item that the County Council brought up
4 in their remand.

5 COMMISSIONER WASHINGTON: Thank you both. I
6 appreciate it.

7 Nothing further from me, Mr. Chairman.

8 MR. CHAIR: Thank you, Commissioner.

9 Other commissioners, questions?

10 COMMISSIONER DOERNER: Yeah. I have a question
11 for maybe Ms. Kosack since she just mentioned the two
12 sections in the Code. But it -- it actually might get to
13 either David or Laura, depending on whoever has the Code
14 open. So just for clarification, because I opened up the
15 can of worms on some of these things. One of the things
16 that I was talking about was the MDE letter and I think the
17 Code, if we look at Section 32-206, I don't think (j) covers
18 it at all. But I think in (d) that it talks about Federal,
19 state, local laws or regulations. And I believe, just so
20 we're abundantly clear, Mr. Smith had said that the
21 applicant would have to be -- would have to have all
22 authorizations. And I think that's actually misstating the
23 Code.

24 If I recall, I think it says the development would
25 not violate other Federal, state or local laws, or

1 regulations. And I realize we're splitting hairs on here.
2 But for me, I was caught up in some of the MDE kind of
3 conflicts back and forth. But there is a difference between
4 violating, which I don't think is necessarily the case that
5 I've heard today, versus having all authorizations, which I
6 believe is a new interpretation of the Code that really is
7 not consistent with what's actually in there. So I just
8 wanted to clarify. So that way, I don't make the wrong
9 decision when it comes to voting time.

10 MR. CHAIR: Thank you, Commissioner.

11 Ms. Tallerico, Mr. Warner?

12 MR. WARNER: David Warner, principal counsel.
13 Unless Laura has looked at that particular issue, I'm really
14 looking at Section 32-206 for the first time, I think Ms.
15 Giles is probably better prepared to answer that question
16 than I would be, unless Laura knows about it.

17 MS. TALLERICO: I would concur with Mr. Warner
18 on --

19 MR. WARNER: I'm sorry, Jan.

20 MS. TALLERICO: -- Ms. Giles being the best
21 equipped to address the individual sections of 32-206 (d)
22 and (j), given that DPIE administers that part of the Code.
23 However, I can take a quick look at it.

24 MR. CHAIR: Ms. Giles, are you prepared to answer?

25 MS. GILES: With regard to the section in the

1 floodplain code that pertains to Federal, state, and local
2 permits; the floodplain code states that the development --
3 in order to grant a waiver that, "the development will not
4 violate other Federal, State, or local laws, or
5 regulations". DPIE issued the revised floodplain waiver
6 with a contingency that the Federal -- the State permits
7 that this project is lacking will be issued before we issue
8 a County grading permit. And therefore, in putting that
9 order of approvals in our floodplain waiver, we felt that
10 that was compliant with that clause.

11 MR. CHAIR: Commissioner Doerner, that's
12 addressing it?

13 COMMISSIONER DOERNER: Yeah. And I think that
14 addresses, just so they don't have to have all the
15 authorizations yet in place as long as they don't violate
16 them later.

17 MR. CHAIR: Okay. Thank you.

18 MS. GILES: Well, the Code says the development
19 will not violate other Federal, State, or local laws, or
20 regulations, so.

21 COMMISSIONER DOERNER: Okay. Thank you. That's
22 helpful.

23 MR. CHAIR: Thank you, Ms. Giles.

24 Okay. Commissioners, so any other questions for
25 staff? If not then this public hearing is closed. We are

1 under deliberation. Any deliberation and --

2 MR. WARNER: Excuse me. I'm sorry to interrupt,
3 Chair. Could we not close the hearing first? I did have
4 something I needed to add to the record.

5 MR. CHAIR: Yeah. I take back what I said. We
6 have not closed the public hearing.

7 And Mr. Warner, you have something you want to
8 include?

9 MR. WARNER: I did. And it's going to take a
10 minute. I apologize --

11 MR. CHAIR: Wait. Mr. Warner --

12 MR. WARNER: -- to everyone.

13 MR. CHAIR: -- before you do that, I see Shanna
14 Fricklas has joined us.

15 MR. WARNER: Oh. Okay.

16 MR. CHAIR: The public hearing is still open, I
17 would prefer that she goes.

18 I'm glad you were able to join us. You were not
19 sworn in. This isn't -- I don't think you were sworn in,
20 were you, Ms. Fricklas?

21 MS. FRICKLAS: No. I wasn't. And my apologies.
22 I work for FERC. I couldn't --

23 MR. CHAIR: So let me -- I'm going to swear you
24 in. Hold on one sec. All right. Please raise your right
25 hand. Do you -- I read that. Do you solemnly swear or

1 affirm that your testimony will be the whole truth and
2 nothing but the truth?

3 MS. FRICKLAS: I do. So help me God.

4 MR. CHAIR: Okay. Thank you. So consider
5 yourself sworn in. I'm going to give you up to three
6 minutes to speak. Okay? And introduce yourself for the
7 record. And the floor is yours.

8 MS. FRICKLAS: Fantastic. Thank you so much. My
9 name is Shanna Fricklas. I reside at 5008 40th Place in
10 Hyattsville, which is four doors down from the disputed
11 lower parcel that we've been discussing. I am in opposition
12 to this project for the sake of my home and my community.
13 And I believe that the PG County Planning Board should
14 similarly be motivated to deny DSP-21001.

15 So I will be echoing some of what Greg has been
16 saying, that the Planning Board should absolutely be using
17 the most recent data available, taking into account the
18 potential impacts of climate change, and believe that
19 there -- I work for a Federal agency. And there is -- but
20 we absolutely take those sorts of things into account. The
21 climate change, DPIE consistently adjusting their floodplain
22 maps for a reason, and they absolutely need to be taken into
23 account. Climate science and zoning estimations are things
24 that a planning board just like FERC, the Federal Energy
25 Regulatory Commission, where I work, takes into account in

1 doing their zoning and planning with respect to energy
2 projects.

3 And similarly, the area where they're planning to
4 put these row houses, which there are forty-one of them,
5 which is not reflective of the neighborhood make up in our
6 suburban area, which are all detached houses. I have a
7 small plot that has one-eighth of an acre. And these are
8 going to be much more dense and putting much more of a
9 impact on not only the floodplain but our busy road.

10 The 40th Place turns into Gallatin. We have stop
11 signs that have flashing lights because there is so much
12 traffic. There is an accident that had been on my street,
13 literally right in front of my house. And this -- this
14 level of density might be acceptable in an area where there
15 isn't as much of a concern.

16 But it's an extremely delicate area. We are right
17 up against Trumbule Trail and the park, Driscoll Park. And
18 I have seen -- myself documented the sediment runoff that
19 has occurred into Trumbule Trail, which then goes into a
20 tributary that takes it out into the Anacostia River. So I
21 don't trust that Werrlein, based off of their construction
22 that has been on the upper parcel, will be paying more
23 attention to environmental regulation or the fact that they
24 have again fudged the rules with respect to density, that
25 they have not had the proper permits, that they failed to

1 provide required information, or straight up lied in
2 documents.

3 I am also an attorney. And I've reviewed a number
4 of these documents. I'm clearly not here in that regard as
5 representation, but as a concerned resident of my
6 neighborhood. But you know, I certainly feel like I
7 represent the concerns and opinions of a lot of my
8 neighbors. And I am one of the closest individuals -- right
9 next door -- like I said, four doors down.

10 And so you know, my flood insurance has gone up
11 since I've moved in two years ago because of those
12 floodplain delineations changing. And the fact that the
13 Werrlein thinks that, you know, the row homes that they're
14 providing to our community are not going to impact that
15 floodplain more.

16 I actually grew up in California. And they were
17 doing a building project down my street over there. And
18 because of that, my house flooded two feet, and they'd never
19 seen that kind of flooding before. I am extremely concerned
20 that that same sort of issue could be something that I face
21 in my new home. And I just got married last month. I want
22 to be starting a family here in Hyattsville in this
23 community and taking my kids to Driscoll Park and not
24 worrying about flooding and not worrying about the
25 incredibly dangerous impact that it could be having on our

1 streets with the additional, you know, thoroughfare traffic.

2 So that about sums up my statements. And I also
3 submitted something for the record. And I have appeared
4 before you before. And I really appreciate your time and
5 consideration in this matter. Thank you so much.

6 MR. CHAIR: Thank you. I'm glad you were able to
7 take the time out and have your voice heard. Much
8 appreciated.

9 MS. FRICKLAS: Thank you.

10 MR. CHAIR: Commissioners, any questions for Ms.
11 Fricklas?

12 (No affirmative response.)

13 MR. CHAIR: None? Okay.

14 I neglected one thing --

15 And thank you, Ms. Fricklas.

16 I neglected one thing in terms of our process.
17 There's just a lot of moving parts, bear with me. Before we
18 close the hearing, I want to give Mr. Rivera the opportunity
19 for rebuttal and close. But first, let's hear from Mr.
20 Porter. Then we'll turn to Mr. Rivera. Then we will close
21 and then take up -- and we will deliberate. So Mr. Warner
22 first and Mr. Rivera.

23 MR. WARNER: Okay. Thank you. David Warner,
24 principal counsel. So since this application was initiated
25 back in 2018, you know it's five years later, and we are

1 still having debates about density, and how it's calculated.
2 And this is fresh in my mind because we argued it yesterday
3 in court in another part of this project. And so I felt
4 like that based on the discussion between Mr. Smith and Mr.
5 Rivera as to the calculation, now Ms. Washington's asked the
6 question, what is the legal support for Staff's
7 determination of density in this background report that is
8 before us?

9 Okay. So 2018, Werrlein, as they were permitted
10 to do in an overlay zone, were allowed to bring forward a
11 request to add to the table of uses and change any of the
12 bulk regulations associated with those uses, which is
13 permitted in the overlay zone. They came forward with a
14 request for townhouses. And they came forward with a
15 request for a certain number of dwelling units per acre.

16 And the Planning Board looked at that, said it was
17 fine. It went up to the District Council. District Council
18 said that looks good to us. And that was appealed. I don't
19 know all the parties to the appeal. Mr. Smith sounded like
20 he said he was one of the parties because he said "they".
21 It says Sara Eisen and several neighborhood residents
22 appealed, which is fine.

23 But it's important to note that it was the
24 residents that appealed. Because if you go to the decision
25 of the Appellate Court in this case, which determined that

1 the density calculation of the District Council and the
2 Planning Board was incorrect, they said no, no, it's not
3 gross density; it's actually -- should be the number of
4 dwelling units per net acre of net lot or tract area. It
5 directed the District Council to calculate it as the number
6 of dwelling units, I'm going to say it again, per net acre
7 of net lot or tract area. It's the very last sentence in
8 the case.

9 Now it's confusing because if you go to the zoning
10 code, the definition of density is, as Mr. Smith put it, the
11 number of dwelling units per acre of net lot area, period.
12 However, the appellants -- according to the Appellate Court
13 opinion, the appellants, the Eisen party, said you should
14 look to Section 27-442(h) of the zoning code to determine
15 density. And the Appellate Court agreed with their proposal
16 and said, "the table expresses density as the maximum
17 dwelling units per net acre of net lot or tract area". It's
18 actually a slash. The Court interpreted that as "or". Why
19 does this matter? Well, the zoning ordinance has two
20 different definitions.

21 There's a definition of net lot area. And there's
22 a definition of net tract area. And they are two different
23 definitions. And what the Court said is, "you need to
24 determine density based on the number of dwelling units per
25 net acre of net lot or net tract area". It's like they gave

1 you a choice. So net lot area is defined as the total
2 contiguous area, excluding alleys, streets and other public
3 ways, and land line in the floodplain. The definition of
4 "net tract area" is gross tract area minus land in the
5 floodplain, and land that has been dedicated, donated, or
6 otherwise conveyed out of the tract. There's two
7 definitions.

8 The applicant -- and this is in the applicant's
9 submission, that's where I saw it written -- has said I'm
10 going to use net tract area. And I'm going to read that
11 definition exactly as it's read because the Appellate Court
12 said I could use tract area. And I'm going to subtract out
13 the floodplain. And I'm going to subtract out land that has
14 been dedicated, donated, or otherwise conveyed out of the
15 tract of which there has been none. And I'm going to use
16 that definition. And at the time we had this case in
17 February, he or his team had provided staff with a
18 calculation that said the floodplain would be 1.29 acres at
19 the end of the -- for the waiver period -- once the waiver
20 is issued.

21 Now we have evidence, since submitted by DPIE in
22 their new waiver letter, that that figure is correct, 1.29
23 acres. So Staff took the applicant's request to use net
24 tract area, calculated the gross tract area as the 4.66
25 acres -- is that right -- subtracted out the floodplain that

1 both DPIE and the applicant said is the size, 1.29 acres,
2 and then subtract out any of the land that's been dedicated,
3 donated, or otherwise conveyed because there hasn't been
4 any. And so that's how we get to the calculation in the
5 background. And it comes straight from the Appellate Court,
6 which was using the formula that was recommended by the
7 appellants themselves.

8 So I think that hopefully, at least lays out the
9 legal background for how they got to this calculation. And
10 I felt like it's important not only in response to the
11 question from Commissioner Washington, but there continues
12 to be debate about this. And I think we get this into the
13 record at least, when this returns to the District Council
14 they'll understand the legal analysis behind our background.

15 MR. CHAIR: That's very helpful.

16 COMMISSIONER WASHINGTON: Thank you.

17 MR. CHAIR: Mr. Warner, thank you for that.

18 Commissioners, any questions for Mr. Warner in
19 this issue?

20 COMMISSIONER WASHINGTON: No. But a huge thank
21 you. That certainly clears it up. And I think that detail
22 is certainly appropriate for the record. Thank you.

23 MR. CHAIR: Yeah. Thank you.

24 All right. So with that, we'll turn to the
25 applicant for rebuttal and close.

1 Mr. Rivera?

2 MR. RIVERA: Yes. Thank you, Mr. Chair.

3 Members of the board, thank you for your patience,
4 everyone. I'll be brief.

5 Thank you, Mr. Warner, definitely, for that. It
6 was a refresher of my being in court yesterday and Planning
7 Board today. So that was a wonderful dissertation. That
8 was what the District Council was concerned about at the
9 remand hearing on May 8th. They didn't understand how you
10 get from here to there. The gross, the floodplain, there's
11 no dedication. So I'm glad you went through that. It would
12 be important for me to point out to them in the transcript
13 following.

14 I had also earlier in my presentation cited
15 Exhibit 8, which talks about how Dewberry justified the
16 floodplain was equal to 1.29 floodplain acreage, which is
17 deleted from the 4.66 to get to the density calculation. So
18 now the logic and the math works. So it's a wonderful way
19 to express that. And you really put it in cogent terms for
20 everybody.

21 One point of clarification on that Zimmer case I
22 think Ms. Kole disagreed about the Planning Board's limited
23 consideration ability.

24 Looking at page 92, the Zimmer case went to the
25 Court of Special Appeals -- the Circuit Court Specials, and

1 then the Court of Appeals. Within the Court of Appeals --
2 Appeals -- Special Appeals decision, page 92 of the Court of
3 Appeals decision, where the Court cited in the Court of
4 Appeals that the Planning Board's consideration was limited
5 by the District Council to the issues remanded to the Board.
6 That's what I meant by the Planning Board jurisdiction be
7 limited. If it was a regular site plan, everything would go
8 in related to the criteria for approval of the site plan.
9 But the record already is replete with the Staff report, the
10 resolution, and all the other evidence in the record.

11 So the Court of Appeals said, we agree with this
12 construction. So I just wanted to make that clear because
13 the Zimmer case is a little convoluted. But that's what it
14 said with respect to jurisdiction.

15 I'm glad, Ms. Washington, you asked the question
16 about the floodplain and the criteria. As Mary pointed out,
17 the July 25th letter to the District Council went point, by
18 point, by point as to the findings and all the criteria
19 which they elucidated to the Council that they met as well
20 as in the floodplain waiver letter. Again, in summary, the
21 floodplain waiver is conditional. That allows us to go
22 forward, just like the DSP allows us to get the MDE waterway
23 construction permit so we can hopefully bring all these
24 things to closure as we proceed forward.

25 I thank you for your time. I urge the Board to

1 forward this record with the positive recommendations to the
2 District Council. Thank you very much.

3 MR. CHAIR: Thank you, Mr. Rivera. That is your
4 rebuttal in close.

5 So with that, we will close the public hearing.
6 And now, Commissioners, we're on for deliberation.
7 Commissioners, thoughts, reactions, comments?

8 MR. SMITH: Excuse me, Mr. Chair.

9 MR. CHAIR: Mr. Smith? Yes.

10 MR. SMITH: Yeah. I'm looking at the -- unless
11 they've changed since I downloaded them, I'm looking at the
12 Planning Board's rules of procedure. And the rules state
13 that the order of a hearing is rebuttal by the applicant,
14 and then summation by each side and Staff. And what we've
15 had here is Staff giving a summation, and then Mr. Rivera
16 being allowed to rebut or sum up his case, but not us. So
17 it seems like, according to your rules and procedure, we
18 should have a chance to briefly --

19 MR. CHAIR: So --

20 MR. SMITH: -- sum up our case.

21 MR. CHAIR: -- hold on one second, Mr. Smith.

22 Mr. Mr. Warner, did I misstate our own processes
23 as Mr. --

24 MR. WARNER: No. No. David Warner, principal
25 counsel. Mr. Smith is looking at the current zoning

1 ordinance. This case, of course, is being conducted under
2 the prior zoning ordinance. And our current procedural
3 rules follow the process that you've followed here. So
4 everything is in accordance with both the law and our rules.

5 MR. CHAIR: Okay. Thank you.

6 Thank you, Mr. Smith.

7 So we are following the process that we typically
8 follow.

9 So we are closed again. Commissioners, any
10 deliberation? If not, I would look for a motion.

11 COMMISSIONER WASHINGTON: No deliberation from me.
12 But I did want to thank everybody for the added testimony
13 today.

14 And I wanted to specifically -- especially thank
15 you, Ms. Giles, for not only making yourself available, but
16 because you certainly helped, I think, not only me, but us
17 fill in a lot of procedural gaps in terms of how things are
18 handled and managed. So I just wanted to say on record,
19 thank you. Thank you for your presence today.

20 MS. GILES: Okay. And Mr. Chairman, I --

21 MR. WARNER: I --

22 MS. GILES: -- oh.

23 MR. WARNER: I apologize. I'm sorry to interrupt,
24 but my excellent team here pointed out to me and said,
25 David, actually the procedures do have a summation

1 requirement. We have not followed that in our regular
2 accordance with our cases. We have rebuttal and that's
3 where we finish things. So I apologize to Mr. Smith. But
4 he did point that out in our rules, which is now a legal
5 requirement in the new law. So I thought he was referring
6 to that. But I'm impressed. So --

7 MR. CHAIR: Thank you for catching that.

8 MR. WARNER: -- he's entitled an opportunity to
9 provide summation. And I would grant him that. Thank you.

10 MR. CHAIR: Yeah. Thank you for bringing that up.

11 And Mr. Smith, you have another bite at the apple
12 where you can have your close.

13 And then we always give the applicant the final
14 word. So after you speak, Mr. Warner, Mr. Rivera, if you
15 have anything else you want to add, you can.

16 But Mr. Smith, the floor is yours.

17 MR. SMITH: Thank you, Mr. Chair. I'll do my best
18 to make it mercifully brief. The District Council's
19 decision was clear. The condition is that Werrlein must
20 have all -- must demonstrate that it has -- possesses all of
21 the required floodplain authorizations from the agency with
22 jurisdiction. They do not. They clearly do not. The order
23 does not say that Werrlein has applied for or is negotiating
24 with MDE issue, or that DPIE might negotiate with MDE to
25 ignore the Council's order. It's just very clear. It's a

1 clear mandate from the counsel. It's in the CSP. That case
2 is now before the courts. You would have to -- you would
3 have to have the Council revise its CSP order in order to be
4 able to move forward and approve this DSP.

5 On the density issue, the courts were not clear on
6 net lot versus net tract. Our ordinance is clear on how
7 density is defined and how it's calculated. So that should
8 be, I think, the -- the ruling law.

9 We have placed abundant evidence in the record
10 regarding Werrlein's deplorable track record. They are
11 discharging less now than they were because they've built
12 out the upper parcel. And we're allowed to do it, despite
13 having so many violations and despite not having applied in
14 a timely way for the required permits.

15 And it's appalling. DPIE allowed Werrlein to
16 proceed with work in 2019 and in 2021, despite Werrlein
17 never having applied for the required permits. It was only
18 once we brought MDE on the scene that there was any real
19 enforcement. That's appalling. If you want to rely on
20 DPIE's work, please take that into account.

21 Again, the Fourth Circuit Court was clear.
22 Ignoring the environmental violations of an applicant and
23 then determining that somehow, they're going to behave going
24 forward as a rationale for issuing the permit -- in this
25 case, you're issuing an approval -- is arbitrary and

1 capricious.

2 Ignoring the evidence we've place on the record
3 regarding climate change and how the evidence comes from the
4 state and Federal agency, the county agency, and all that
5 climate changes has been bringing and will bring, and then
6 the findings or studies, like the one that the State of
7 Maryland helped fund by Rand Corporation through the MARISA
8 program, that the intensity duration, frequency curves that
9 are typically relied on by agencies and engineers in
10 designing storm water facilities and floodplain facilities
11 are -- at this point -- a quarter century out of date. And
12 not only are certain underestimated impacts can lead to
13 underdesigns but have been -- probably leading to
14 underdesigned facilities. Ignoring that, again, is
15 arbitrary and capricious. And we appreciate the issues are
16 somewhat complex.

17 I'll go back Mr. Rivera's testimony on July 26th
18 of 2018, where he practically opened his testimony by
19 thanking planning staff for, quote, "rescuing the project".
20 It's time to stop rescuing this project. The Council's
21 order was clear. The density law is clear. And you have
22 ample grounds for denying this application. Thank you.

23 MR. CHAIR: Thank you, Mr. Smith. Appreciate
24 that.

25 Mr. Rivera, back to you for a final close.

1 MR. RIVERA: Thank you.

2 MS. SIMMONS: I apologize --

3 MR. CHAIR: Hold on a second, Mr. Rivera.

4 MS. SIMMONS: -- Mr. Chair and Mr. Rivera.

5 Would it be all right if I provide some brief
6 summary comments, as well?

7 MR. CHAIR: Let me think about that from a process
8 perspective.

9 MS. SIMMONS: Sure.

10 MR. CHAIR: Because you are now a party in
11 opposition, Ms. Simmons. So I'm always looking --

12 MS. SIMMONS: Oh.

13 MR. CHAIR: -- to be deferential to the city in
14 this.

15 Mr. Warner, given their position, do you have an
16 opinion about that?

17 MR. WARNER: No. I'm just going to quote just so
18 we have it. "The summation is by each side and Staff". She
19 could be considered, you know, a side, I suppose. So that's
20 fine.

21 MR. CHAIR: Okay. So we'll give you -- certainly,
22 you'll get latitude, Ms. Simmons. So go ahead the floor is
23 yours.

24 MS. SIMMONS: Thank you very much. I do
25 appreciate it, Mr. Chair. Just to be very brief, I did hear

1 testimony to the effect that the specific points in parts
2 (d) and (j) have been included in the materials for this
3 case. And specifically to part (d), I haven't seen those
4 responded to directly. So that is something that I perhaps
5 am wrong in, but I would be interested to see where those
6 are particularly.

7 And additionally, I do believe that it is
8 important to include the direct responses to those points in
9 the waiver itself as required by the District Council in
10 their order of remand, particularly the points where there's
11 good and sufficient cause that is based solely on the
12 physical characteristics of the property, and the waiver is
13 the minimum necessary, and that failure to grant the waiver
14 would result an exceptional hardship due to the physical
15 characteristics of the property. These are not
16 insignificant standards to meet. So seeing those for the
17 purposes of recordkeeping, consistency, clarity in that
18 single-waiver document I think is important. So thank you
19 very much for your consideration and your time. I
20 appreciate it.

21 MR. CHAIR: Thank you, Ms. Simmons. I appreciate
22 it.

23 Okay. Mr. Rivera.

24 MR. RIVERA: All right. I see it's a record time
25 for this case, 1:29. Again, for the record Norman Rivera,

1 representing the outfit. A very quick, brief summary, if
2 you will.

3 Just to address a couple of points by Mr. Smith.
4 He says we have to have all our permits, but that's not
5 quite what the order says. He purports to state that the
6 County Council said that, but it does not say that. The
7 point for the remand order -- I'll read it verbatim on page
8 8 of the decision -- "Any revised site plan submitted by the
9 applicant shall include evidence of all Federal and state
10 permits required to commence with any development of the
11 proposed project". So they're required to commit with any
12 development. So any development, as we all know, starts at
13 phases, grading, paving, et cetera, et cetera. So whatever
14 Federal and state permits is associated with that phase for
15 that type of development, we will get. We're not ignoring
16 that requirement. That is standard procedure. And it also
17 is repeated in one of the 14 conditions of approval of the
18 DPIE floodplain waiver.

19 To address -- I think it was -- Ms. Simmons's
20 statements about the records, I agree with you. And the
21 other letters of July 25th, by DPIE to Dernoga, outline all
22 the criteria for approval, point by point, as well as the
23 floodplain waiver letter from DPIE dated July 25th. So the
24 record is covered and I'm glad we went through that exercise
25 because that is one of the things that will come up later at

1 District Council.

2 The net track area that Mr. Warner spoke about was
3 the correct dissertation on how that has occurred. We have
4 filed it, contrary to what Mr. Smith had said. The Court of
5 Special Appeals opined in that. Then the Court of -- the
6 Circuit Court remanded it to District Council. Then
7 District Council remanded it back to the board and it has
8 been re-approved with that correct court-corrected
9 calculation, as elucidated by Mr. Warner. So I think we're
10 all good there.

11 With that, Mr. Chair, members of the Board, I
12 conclude.

13 MR. CHAIR: Thank you. Thank you, Mr. Rivera.

14 And now we, now we are officially closed.

15 Mr. Warner, before I say that for the seventh
16 time, any other process issues?

17 MR. WARNER: I hope not.

18 MR. CHAIR: Okay. Thank you.

19 MR. WARNER: But none that I see.

20 MR. CHAIR: All right. Thank you.

21 So we are closed. Commissioners, deliberation?

22 MS. VICE CHAIR: No. Just thank everybody, again.

23 I can appreciate the learnings as part of the procedural
24 process, so.

25 MR. CHAIR: Thank you.

1 COMMISSIONER WASHINGTON: Yes. I was also --

2 MR. CHAIR: Appreciate the input.

3 COMMISSIONER WASHINGTON: Yes. Mr. Chairman, I
4 was going to add that and thank all of the participants
5 today, especially, Ms. Giles and everyone who came to
6 participate in this process. For many of us at times, it
7 becomes a relearning experience and a new learning -- I
8 mean, over and over again it seems the same lessons. But
9 the citizens help us to think it through and come to a
10 decision that benefits the community. And thank you all for
11 participating.

12 MR. CHAIR: Thank you.

13 Commissioner Doerner.

14 COMMISSIONER DOERNER: Yes I'll also chime in and
15 say, identical to what my colleagues have said. But
16 particularly, I should probably say thanks to Ms. Giles
17 because I have her such a hard time here. But I --

18 MS. VICE CHAIR: Yes. You're hazing, Will.

19 COMMISSIONER DOERNER: (Indiscernible) --

20 COMMISSIONER WASHINGTON: Let him suck up.

21 COMMISSIONER DOERNER: -- that I wanted to know
22 about because I agree with some of what's been said today
23 by, like, the City of Hyattsville, Ms. Simmons mentioning
24 that the responses themselves were not in the waiver letter.
25 That would've been a lot more helpful if they had been in

1 there. Because I looked for the same thing.

2 I would disagree with Mr. Rivera that all of the
3 points were adequately addressed. They were addressed. On
4 that note, he is correct. They were addressed in the letter
5 to the District Council, but they were subpar in any of
6 their kind of determinations of the determinations and of
7 the findings. Like, on some of the issues on the state and
8 local stuff and on the floodplain and danger to life and
9 property, it's just like a little paragraph saying, we
10 considered this. We're not saying how or what or why it was
11 okay now, in July when that was penned, as opposed to 2018,
12 conditional upon all of the issues that have happened
13 between then and have been raised in the community.

14 Having that additional context would've been so
15 much more helpful in reviewing that letter to the District
16 Council. And that's why I pressed today. And that's why,
17 even though I don't think those elements were there in that
18 letter to the District Council, and they certainly weren't
19 in the waiver letter for the floodplain, I think they were
20 mentioned today. And they were discussed by Ms. Giles.
21 Whether or not we think it's adequate enough or not, I think
22 it's probably outside the scope of some of the decisions
23 that we have to make. I would've preferred perhaps more and
24 more care being taken, but that's not necessarily the point
25 at which we get to make -- which I'm going to make the

1 decision on in a few minutes.

2 And I do want to mention -- since everyone has,
3 sort of, brought up what they do for their day jobs -- one
4 of my day jobs and my side job is that I run a research team
5 for the Federal Government for an agency. And literally in
6 October -- when we had this case come before us on
7 Thursday -- two days prior, we had organized a whole event
8 on climate change. And I'm fairly quantitative, as most of
9 you have kind of figured out, probably watching cases. And
10 we brought in experts for FEMA and from other places who are
11 trying to measure the impacts on climate change. And it's
12 tough. FEMA is understaffed and very far behind in terms of
13 updating the flood maps. It's a massive project for them to
14 do on any sort of routine basis.

15 Years ago, before we even were talking about
16 climate change, I'd gone out and actually contracted up and
17 licensed some of the data. I got the FEMA flood maps and
18 FIP data, because we were concerned about the impacts of
19 flooding and sort of how that would impact housing assets
20 and stuff that we value at my agency. And I contracted up
21 with First Street Foundation, which the opposition has
22 mentioned before, got all their data. And I was probably
23 one of the first federal agencies who did that. So even
24 though I say I'm not really first in climate change -- I'm
25 not a climate scientist or an environmentalist -- but I have

1 a lot of quantitative background in thinking through these
2 issues now.

3 And that's really where I came from, a substantial
4 amount of concern in February when I voted against this
5 project. And in my comments at that point, I had mentioned
6 that it was just too early for me to make a decision about
7 whether or not they could actually do this. And Mr. Smith
8 actually even mentioned it today about we'd be making a
9 mistake if we sort of assume that they'll behave differently
10 going forward. And I would have agreed if I had heard that
11 in February, perfectly consistent with what I had said in my
12 closing remarks.

13 However, what I've seen since that point is at
14 least getting me over the hump of some of the runoff issues
15 that I had raised at that point. I had said it should be
16 contact sensitive, we should be careful about the runoff,
17 they hadn't done a good job. That's well documented.

18 My personal feelings is that this project is a
19 potential disaster in some ways for the wetland areas down
20 below. I'm really concerned on a personal level for that.
21 But on a quantitative level, when I sort of separate myself
22 from the ethos of it, I look at the reports that have been
23 filed, with both MDE who's going -- they're regularly now --
24 and in some of the private consultant reports, measuring the
25 outfall from that storm entrapment that they had, and

1 they're actually doing a good job. I was willfully
2 underimpressed with the applicants experts, who I didn't
3 think gave any expert kind of advice in the February
4 hearing, when they just said oh, we're just going to put
5 more people out there, or we're just going to change the
6 filters. Like, that is not at all technical or what I would
7 pay anyone to say on the stand. But that aside, I think
8 they've done a good job since then, in at least addressing
9 my major concern that had caused me to vote against this
10 project at that point.

11 So I think today I've gotten past that one main
12 concern on the floodplain. I'm still, personally, kind of,
13 like, terrified of, potentially, if this goes wrong, it's
14 going to go wrong really poorly and really to an extreme,
15 potentially. But what we are obligated to consider, I think
16 they've met those considerations now.

17 And it's tough to put those -- I've done this for
18 this particular case on either the upper or the lower leg, I
19 guess, several times where I voted against it rather than
20 support. But today they've gotten past my concerns, and I'm
21 hoping that that's at least a testament to, like, being open
22 to considering testimony and things and how they've changed
23 over time, whether for good or for bad. And I'm hoping that
24 the applicant will continue to be mindful of the things
25 around there and the runoff in the transition process to

1 getting their property out of the floodplain. And at the
2 same time, I'm hoping that -- Ms. Giles, since, you're still
3 on -- could take back to your colleagues and really be
4 closely monitoring to make sure that we don't destroy that
5 area, because it's precious.

6 There's a lot of really great things down there.
7 We have beautiful ecosystems in that area. There's a nice
8 walkway in the park down there to walk through. I very
9 routinely am on the playground there with my kids. And I
10 would be really upset if this were damaged in some way. And
11 I'll continue to have a mindful approach in there in making
12 sure that it is in conformance, and I hope the DPIE will do
13 the same.

14 My suggestion when we get to the motion, is just
15 one minor clarification -- because in being quantitative,
16 I'm also very nitpicky -- in the Staff report there's -- Mr.
17 Rivera actually just cited -- number 4 in the remand, refer
18 back to what it said, it said any revised site plan
19 submitted by the applicant shall include evidence on federal
20 and state permits required to commence with any development
21 of proposed project. Honestly, I don't think the District
22 Council is paying attention well enough to its own County
23 Code, because it's not talking about local laws in there or
24 really even properly citing the County Code. In Section (j)
25 within there -- actually, sorry. Section (d) which talks

1 about what I had asked earlier with respect to whether or
2 not we have to consider if they are violating or they're
3 just sort of -- they have all the improvements. And County
4 Code 32-206, when we got down to the (d) (5), it says the
5 development will not violate other federal, state, or local
6 laws of regulations. I think we need to have that
7 specifically in that section in the Staff report when we
8 transmit this.

9 And there's one word that I would pick at in the
10 Staff report because that's what threw me off in preparing
11 for this case. In the response, like midway through that
12 paragraph, it says that a general permit for the discharging
13 of construction stormwater can only be issued following DSP
14 approval. That's not true. We need to submit that word and
15 change it to will only be issued following DSP approval.
16 And this is referring to MDE's approach.

17 If you look at the state regulation, it doesn't
18 say can. They have the ability to do that. It says they
19 may do it. They've taken the stance that they don't want
20 to, which is fine; they can do that. But we need to change
21 that word to say will only be issued, and then I would
22 insert in that other phrase at the very end about not being
23 in violation of other Federal, state, or local laws and
24 regulations just to be consistent with what we've heard
25 today. Because I think that -- even if the District

1 Council's not clear on their own code or not consistent with
2 their own code, that doesn't mean that we should also follow
3 the same policy. We need to be tight on the state
4 regulations and the County Code. And so at least from our
5 own stance, we have it clear in terms of what came out of
6 this deliberation.

7 So I'll stop there, but reiterate thank you to the
8 citizens and other folks. I've gone back and forth on these
9 issues a number of times; I think there's great points made
10 from both sides. On a personal level, I side with the
11 opposition on a lot of the personal concerns on this stuff.
12 But just on a voting level, I'm going to vote in favor
13 because I think they've got me past the point at which I was
14 stuck back in February.

15 And I appreciate Mr. Rivera for indulging my
16 nitpickiness and actually measuring on a very routine basis
17 what's going on there. Because even if I'm not happy about
18 what's happening, I can at least see it from a quantitative
19 standpoint that things are doing a good job there.

20 MR. CHAIR: Thank you, Commissioner. Appreciate
21 that.

22 So Mr. Warner, I'm going to turn to you. On
23 Commissioner Doerner's points, there's two things that he
24 suggested out. I don't know if those are technical enough
25 or substantive enough or where that falls. I don't want to

1 open a can of worms around this. Sorry. Do you see any red
2 flags with that?

3 MR. WARNER: No. None whatsoever. I did have a
4 question for Ms. Kosack, if she's still available.

5 MR. CHAIR: Ms. Kosack, are you still on the line?
6 Yes.

7 MS. KOSACK: Yes, I'm here.

8 MR. WARNER: Yes. So our recommendation is to
9 adopt the additional findings of your memorandum and issue
10 an amendment to the resolution. So just to clarify, Mr.
11 Doerner's suggestions would be included in the resolution
12 that we will amend and bring back for approval?

13 MS. KOSACK: Absolutely, yes.

14 MR. WARNER: Okay.

15 MS. KOSACK: Yes.

16 MR. WARNER: All right.

17 MS. KOSACK: I heard --

18 MR. WARNER: Yes.

19 MS. KOSACK: -- what he said and it can be revised
20 as such.

21 MR. WARNER: Yeah. Okay.

22 MR. CHAIR: All right. So the --

23 MR. WARNER: So there'll be a resolution that
24 returns. just like any DSP, you're approving the DSP today,
25 and then the --

1 MR. CHAIR: When we see the resolution --

2 MR. WARNER: -- resolution will come back to be
3 amended?

4 MR. CHAIR: When we see the resolution we can
5 look -- Commissioner Doerner and others -- we can look to
6 make sure that that feels like it's reflecting this
7 conversation. Okay?

8 So with that, commissioners, the only thing I want
9 to add is what a number of you said, I want to thank Ms.
10 Giles for being a trooper, going above and beyond sticking
11 with us through this, and incredibly helpful that you've
12 been both educating us, responding, taking a few hits, going
13 through the whole process with us. I appreciate it.

14 And I want to thank the residents, the citizens
15 for making sure that -- and the city -- for making sure your
16 voice is heard on this issue, a bit contentious at times.
17 But as is often the case, this kind of robust debate leads
18 to healthier decisions. So much appreciated.

19 So with that, commissioners, it's the Staff
20 recommendations to approve the conditions. And what is your
21 pleasure?

22 COMMISSIONER WASHINGTON: Mr. Chairman, based on
23 the testimony and evidence in response to the District
24 Council's order of remand, I move that we adopt the
25 additional findings that are detailed in staff's memo, and

1 issue an amendment to PGCPB Resolution Number 2023-15 for
2 DSP-21001 to include the technical modification to Condition
3 3, as read into the record earlier by Staff, as well as
4 including the technical amendments as stated on the record
5 by Commissioner Doerner.

6 MS. VICE CHAIR: And I vote for Commissioner
7 Washington. Second.

8 MR. CHAIR: I think that motion by Commissioner
9 Washington is second by Vice Chair Bailey. Discussion on
10 the motion. Team, then, I'll call the roll on Commissioner
11 Washington.

12 COMMISSIONER WASHINGTON: I vote I.

13 MR. CHAIR: Vice Chair Bailey?

14 MS. VICE CHAIR: Vote I.

15 MR. CHAIR: Commissioner Doerner?

16 COMMISSIONER DOERNER: Vote I.

17 MR. CHAIR: I vote I, as well. The I's have it
18 four-zero.

19 I want to thank everybody for their time and
20 participation on this often contentious issue.

21 And again, Ms. Giles, thank you for sticking with
22 us and being a trooper on this. Super (indiscernible).

23 So with that, Commissioners, I believe that
24 concludes all the items for today's agenda.

25 Unless, Mr. Hunt, you have any further business to

1 cover for us?

2 MR. HUNT: Mr. Chair, there are no additional
3 business items before the Board today. Have a great
4 weekend.

5 MR. CHAIR: Thank you.

6 So without objection, Commissioners, we are
7 adjourned.

8 Thanks everybody for your time.

9 MS. VICE CHAIR: Thanks, everybody. Have a good
10 one. Take care.

11 COMMISSIONER WASHINGTON: Have a great day.

12 MS. VICE CHAIR: Bye.

13 (Whereupon, the proceedings were concluded.)

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SUFFRAGE POINT REMAND

Remand, DSP-21001

By: 

Date: December 27, 2023

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