

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

TRANSCRIPT OF

INTERPRETATION OF THE SUBDIVISION ORDINANCE
RESUBDIVISION CRITERIA

BEFORE THE
MONTGOMERY COUNTY PLANNING BOARD

APRIL 23, 1998

COMMISSIONERS PRESENT:

William H. Hussmann, Chairman

Davis M. Richardson, Vice Chairman

Allison Bryant

Arthur Holmes, Jr.

Wendy Collins Perdue

1 CHAIRMAN WILLIAM H. HUSSMANN: Good evening. We have one
2 item on the agenda this evening, that's for us to discuss
3 the views of the Board regarding provision of subdivision
4 regulations at issue this evening. I guess we will do two
5 things. One, first we will discuss as a matter of policy,
6 how we view the subdivision regulations and intend them to
7 be applied by staff and ourselves, on applications that will
8 be filed either in the future or pending. The second thing
9 we'll do after that is discuss among ourselves how that
10 opinion of the Board would be applied to things that are
11 either pending or filed in the future. This is not a meeting
12 about Great Falls. You can talk about that if you want to,
13 but from my point of view, it's not gonna work. Here to do
14 this evening, this is a matter of general interpretation of
15 significance to our whole community, and I hope that your
16 individual comments will look at it from that point of view
17 and not try to get us to decide Great Falls this evening,
18 because that's not what we're here to do. So with that, I'll
19 turn it over to staff. And after that we have number of
20 speakers. Probably an hour or so of testimony. And the Board
21 will discuss it itself.

22 COMMISSIONER ALLISON BRYANT: Let me say something first,
23 please, so that I can get this on the record. I have before
24 me a letter dated April 17, 1998, from Mr. Norman Knopf, who

1 is the attorney for Concerned Citizens of Great Falls,
2 Maryland, and individual homeowners, and the letter simply
3 asked me to recuse myself from this policy discussion and
4 the subsequent vote, as it relates to the application of
5 this policy to any other cases that have come before us.
6 This response is for Mr. Knopf and, my good friend, Mr. Cary
7 Lamari, and that is I really think it's crucial that I
8 participate in a policy discussion of resubdivision.

9 However, what I will not do is participate in the vote as it
10 applies to any cases. That way, I'm under the impression
11 that I'm still within the confines of not only the law, but
12 also the spirit of law in terms of not impacting directly
13 any particular case that's come before us up to this point.
14 So, yes, I will participate in the policy discussion, but I
15 will not take a vote as it relates to the application of
16 that policy decision to any case.

17 CHAIRMAN HUSSMANN: Okay. Anybody else want to explain
18 what they're doing? [LAUGHTER]

19 CHAIRMAN HUSSMANN: Turn it over to staff.

20 MR. JOSEPH R. DAVIS, DEVELOPMENT REVIEW DIVISION: Good
21 evening, Mr. Chairman, members of the Board. For the record,
22 I'm Joe Davis of the Development Review Division. With me
23 this evening is Malcolm Shaneman, also with the Development
24 Review Division. The discussion item this evening concerns

1 the Planning Board's practice of, I guess the practice or
2 interpretation concerning the resubdivision criteria. The
3 Board's practice has been not to apply resubdivision
4 criteria to resubdivisions that involve the assemblage of
5 lots into one lot. I would just note for the record that the
6 resubdivision criteria is contained in Section 50-29(b)(2)
7 of the subdivision regulations. Historically, the
8 resubdivision criteria has been applied exclusively to
9 resubdivisions that involve changing previously platted lots
10 into additional lots. And an example of this would be, we're
11 dealing with property in the R-200 zone that has lots that
12 had been platted at one acre in size, even though the zone
13 may allow half-acre lots, if someone were to come in a
14 propose splitting those one-acre lots into two half-acre
15 lots, they would not be able to meet the resubdivision
16 criteria. And I think, just to state the significant
17 elements of that criteria that would have to be evaluated,
18 we're talking about evaluating proposed lots from the
19 standpoint of, that they have to be of the same character as
20 the street frontage, alignment, size, shape, width, area,
21 and suitability for residential use as other lots within the
22 existing block, neighborhood or subdivision.

23 The Planning Board's interpretation of not applying resub
24 criteria to the assemblage of lots is a long-term policy. It

1 dates back to at least prior to 1985, and in effect, it has
2 allowed larger lots to be created in neighborhoods. It
3 allowed for a variety of uses. Some permitted by right, and
4 some permitted by special exception. In the memorandum that
5 we provided to the Planning Board, we noted that in 1985
6 there was legislation approved by the District Council that
7 did affect this issue. That legislation in 1985 amended the
8 definition of subdivision, which had previously been defined
9 as dealing with, um, I lost my place, as being the division
10 of property into lots. It was revised to include the
11 assemblage of lots. Also, there was a definition of
12 resubdivision added to the subdivision regulations to
13 emphasize that a resubdivision was also a subdivision.

14 Another aspect of this legislative change in 1985
15 concerned Section 50-20 which concerns issuance of building
16 permits. And it specifically adds to that section provisions
17 dealing with the fact that building permits were not to be
18 issued for property unless the property was a lot. And it
19 was not to be issued for properties that involved
20 development across lot lines, or out lots, or things like
21 that.

22 The reason this legislation was proposed and enacted in
23 1985 was in response to some changes. There was a court
24 decision that had been approved. It made, ah, a Circuit

1 court decision, I believe it was in 1984, concerning a
2 resubdivision case involving assemblage of lots, which the
3 Board had recommended denial of the subdivision. And as I
4 understand it, the court in effect overturned the Board's
5 decision and decided, ah, determined that a subdivision, in
6 fact, was not required and a building could be constructed
7 across a lot line, and the building permit could be issued
8 without the assemblage. The Planning Board was very
9 concerned by this and proposed legislation to correct it,
10 the problem being expressed in letters that were submitted
11 to the County Council by then Chairman Christeller. The
12 concern was that by allowing these properties to go forward
13 to building permit without bringing them back to the Board
14 to be resubdivided, in effect allowed the properties to
15 proceed forward to development without an adequate public
16 facilities test. And that was the primary concern of the
17 Planning Board and the Council when that legislation was
18 approved. I would note for the Board that at the time of
19 this legislation there was no mention of the resubdivision
20 criteria applying in these situations. And, in fact, the law
21 did not address the resubdivision criteria at all. Which did
22 exist in the regulations at that time.

23 Since 1985, as I've stated, the Board continued the
24 practice of allowing for the assemblage of lots without

1 imposing the resubdivision criteria. I think it's also
2 important to note that the resubdivision criteria applies to
3 residential lots. It's not meant to apply to commercial or
4 industrial situations. So with that, basically, I think that
5 sort of outlines or restates what was contained in our
6 memorandum.

7 At this time staff would recommend that regardless of
8 where the outcome of the Board is on this issue, there
9 probably needs to be some clarifying legislation. Based on,
10 I think, staff's position, looking at the historic
11 perspective of this, our recommendation would be that
12 legislation that the Board at a later date consider specific
13 legislation, that would add a sentence to the subdivision
14 regulations to the resubdivision criteria to state that the
15 assemblage of lots is not subject to the resubdivision
16 criteria. That would, in effect, state the Board's past
17 practice. But clearly, this evening the Board wants to
18 discuss, debate the issue, and at this point, I think
19 staff's comments are finished, and obviously, we'd be happy
20 to try and answer the questions Board members may have.

21 COMMISSIONER BRYANT: Let me ask you just one quick
22 question. If a sentence like that, if the outcome of this
23 evening session resulted in a sentence like that, what would
24 be the practical application, the practical impact as it

1 relates to the remaining lots? Spot lots as they're called,
2 in the various communities, what would be the practical
3 application?

4 MR. DAVIS: If it's the assemblage of lots, we would not
5 apply the resubdivision criteria to those lots. They would
6 be able to come in as they have in the past and go through
7 the normal evaluation. Obviously, there's an adequate public
8 facilities test that's involved to make sure that if they're
9 coming in and proposing a use creating additional trips,
10 that it receives the proper review from the standpoint of
11 traffic.

12 COMMISSIONER BRYANT: But, you still could not build a
13 structure across lot lines, and in fact, unless you own all
14 of the parcels. Is that correct?

15 MR. DAVIS: You could not build across a lot line. You
16 would have to resubdivide.

17 COMMISSIONER BRYANT: Okay.

18 CHAIRMAN HUSSMANN: Can you help me with, um. I don't know
19 what the name of the case was. Was it, uh, the Lee case, uh,
20 this section was, uh, at issue within the past year or so
21 regarding practices of the Board, interpretation of staff,
22 which I guess our practices had been to say that what we
23 thought this section was saying, and then the court said, no
24 read it like it reads. That it says what it says, and that's

1 the law, not your interpretation of what it was meant to
2 say. Can you help me with that case as to what, uh, was at
3 issue and what was decided?

4 MR. DAVIS: Well, I think that, again, that was a specific
5 case where, obviously, the resubdivision criteria did apply.
6 It was a resubdivision of a number of lots to create
7 additional lots, and I believe that, based on the testimony
8 presented in the case, there was a concern raised that the
9 staff and the Board, in terms of the action taken, had not
10 adequately addressed all of the criteria associated with the
11 resubdivision criteria.

12 CHAIRMAN HUSSMANN: But we're interpreting it to not
13 include all of the criteria. I mean, we're interpreting it
14 narrow so based on past practice, and some

15 MR. DAVIS: I don't think that the Lee case involved so
16 much a past practice issue, as to the specific case that was
17 at hand there. The concern of the court was that the record
18 in that particular instance didn't really support the
19 Board's findings that the lots created were the same
20 character as to street frontage, alignment size, shape,
21 width area, suitability for residential use. I think that in
22 looking at the issues here, I think that probably as a staff
23 originally, was that we had not looked at it as seven
24 specific items. I think we had applied a more generalized

1 approach to it. I think when the Board then considered the
2 case, there was still a generalized approach in that
3 particular situation. And I think that was the problem that
4 the court had. It didn't seem to be any question of Board
5 practice. It seemed to be specific to that case. And I can
6 think of cases where we had been very explicit in terms of
7 attempting to address all seven criteria. So, I think it was
8 just unique to the facts of that case in terms of the depth
9 of review that had been provided.

10 CHAIRMAN HUSSMANN: Wendy?

11 COMMISSIONER WENDY COLLINS PERDUE: I want to clarify, um,
12 when you, when we talk about, um, the resubdivision
13 criteria, we are only talking about 50-29.

14 MR. DAVIS: Correct.

15 COMMISSIONER PERDUE: So when, and when you say the
16 recommendation is that we interpret resubdivision criteria
17 not to apply to aggregations, and we're talking only about
18 that

19 MR. DAVIS: Correct.

20 COMMISSIONER PERDUE: you're not saying that the adequate
21 public facilities requirement of 35 does not apply. Is that
22 a double negative? I'll put it in the positive. Yeah. I
23 think your memo says that your view is that the adequate
24 public facilities requirement does apply to aggregation.

1 MR. DAVIS: Absolutely.

2 COMMISSIONER PERDUE: And that the requirement in 35(1)
3 that the Board must consider the applicable master plan does
4 apply.

5 MR. DAVIS: That's correct.

6 COMMISSIONER PERDUE: To aggregation.

7 MR. DAVIS: That's correct.

8 COMMISSIONER PERDUE: And those aren't the issue. That's
9 not the forest. COMMISSIONER PERDUE: We're only looking at
10 29.

11 MR. DAVIS: That's correct.

12 COMMISSIONER PERDUE: Okay.

13 COMMISSIONER BRYANT: I do have another question. I'm not
14 sure whether or not you or Malcolm can answer it. And that
15 is, as I've read the staff report, a lot of, not a lot, but
16 some of what, of the conclusions state to lessons that there
17 has been a practice, meaning there's a precedent, a history.
18 Have we always stuck with history and precedent, or if we
19 found out that something did not make sense in the final
20 analysis in terms of how we were interpreting and practicing
21 it, did we change?

22 MR. DAVIS: I'm trying to think of a specific incidence in
23 terms of change in practice. I suppose the closest thing I
24 can think of is again, going to the Lee case. And I think

1 based on that court decision, we definitely take a much
2 closer look at the different components of the resubdivision
3 criteria. Ok? I don't view that, but then again, I don't see
4 that so much as changing practice as just an additional step
5 to make sure that we're looking at it carefully. I don't
6 regard the issue tonight to be the same character.

7 COMMISSIONER BRYANT: Okay. What's the practical
8 application of this discussion as it relates to the Board of
9 Appeals?

10 MR. DAVIS: You mean the Board of Appeals generally in
11 terms of their approach to special exceptions?

12 COMMISSIONER BRYANT: Right. And relates to subdivision,
13 et cetera.

14 MR. DAVIS: Okay. Well I think that there's a letter that
15 has been submitted to the Board by the Board of Appeals. The
16 Board members all have copies of that. I think that the
17 Board of Appeals has some concern that if the Board were to
18 apply the resubdivision criteria to special exceptions
19 involving the assemblage of lots, I think their concern is
20 that, in effect, it's creating like two reviews of the same
21 type of issue. Now, I think that while the Board of Appeals
22 is concerned about compatibility in terms of how the
23 proposed use fits into the character of the area, under
24 resubdivision criteria, we're looking at how lots fit into

1 the character of the area. But, I think they're both getting
2 at the same thing, which is that the ultimate development in
3 terms of how compatible that is in terms of surrounding
4 character. So, I think that the Board's concern about the
5 potential for double review, I think at the staff level
6 here, we're concerned that certainly there is an element of
7 this type of double review. A special exception use, if it
8 involves subdivision, a special exception use has to be
9 approved first before the subdivision is brought to the
10 Planning Board. And I think we have concern that where the
11 Board of Appeals has found that a project is compatible, if
12 we were to suddenly say under the subdivision controls that
13 it's not really compatible because it doesn't meet this
14 particular element, I think that's creating sort of a double

15 CHAIRMAN HUSSMANN: It's doing what? I mean, as I've said,
16 we do have separate but perhaps overlapping responsibili-
17 ties. It's set forth both in the subdivision regulations and
18 in the zoning ordinance, our respective prerogatives and
19 responsibilities. And we are both required to reach a
20 finding affirmatively.

21 COMMISSIONER BRYANT: Right.

22 CHAIRMAN HUSSMANN: In both categories. And so, one, I,
23 you know if there's some place in law where it says that
24 either one of us, the prerogatives of one are subordinate to

1 the responsibility of the other, I'd like to see it. But I
2 don't know of any such language.

3 MR. DAVIS: Well, I can give you one example, it concerns

4 CHAIRMAN HUSSMANN: But in the zoning ordinance, I think
5 that, you know, the responsibilities of the Board are pretty
6 well recognized.

7 MR. DAVIS: They are, but there is one specific item to
8 draw to your attention. That deals with the adequate public
9 facilities findings associated with a special exception use.
10 If that special exception use has to then undergo
11 subdivision, the zoning ordinance clearly states that the
12 Board of Appeals has to, in effect, defer to the Planning
13 Board for the findings of adequate public facilities as part
14 of the subdivision.

15 COMMISSIONER ARTHUR HOLMES, JR.: Joe, are you saying that
16 when you talk about compatibility with respect to the Board
17 of Appeals that they're looking at something other than
18 lots? Is that what, isn't that what you're saying? And
19 there's another question goes along with that. When you're
20 talking about resubdivision, are you causing that to be
21 exclusively used in terms of residences as opposed to other
22 types of buildings, types of uses.

23 MR. DAVIS: I don't think that the Board of Appeals
24 focuses in to lots. I think they're more interested in what

1 the land use pattern is around the proposed project. Okay.
2 And that's just, I don't deal with the Board of Appeals on a
3 regular basis. That's just an understanding of the process.
4 From the standpoint of the resubdivision criteria, it does
5 speak to the fact the resubdivision criteria applies to
6 residential use. My own opinion is, in terms of its historic
7 application, we've dealt with residential zones, we're
8 dealing with residential subdivisions, and we're talking
9 about the creation of additional lots. Residential lots.
10 That's how at the staff level we have interpreted it that
11 way.

12 MR. CHARLES R. LOEHR, CHIEF, DEVELOPMENT REVIEW DIVISION:
13 Let me just add one thing, Charlie Loehr for the record. I
14 think this is a critical question that goes to the heart of
15 the matter because the, in the zoning ordinance, the Board
16 of Appeals is charged with looking at the use from a
17 compatibility perspective, or from the master plan
18 relationship. In the subdivision regulations, the Planning
19 Board is charged with looking at the suitability of the
20 lots, or the appropriateness of the lots. And I think that
21 is the distinct difference. As we mentioned in our memo,
22 there is another section of the subdivision regulations that
23 talks about the need for the Board to make a finding that
24 the application is consistent with the master plan, and if

1 there is specific language in the master plan regarding
2 these other issues, then I think the Board would use that as
3 the basis for making a decision on the use. But given the
4 specific language of the resubdivision criteria, it's
5 staff's belief, the reason for our past interpretation is
6 that we're only looking at the appropriateness of the
7 suitability of the lots themselves, absent the use.

8 COMMISSIONER HOLMES: If you're talking about a special
9 exception, then you're talking about something that is
10 different than you've had in the norm, right?

11 MR. LOEHR: That's correct.

12 COMMISSIONER HOLMES: That's why would have it. Then, you
13 couldn't have, you couldn't have that exception if you were
14 gonna apply the same criteria to it. You couldn't. You'd
15 never be able to have that special exception, would you?

16 MR. LOEHR: That's part of our position, yes.

17 MR. DAVIS: And that's one of the concerns we have with
18 this, is we've looked back over the cases that have come
19 before the Board in terms of their ability, if they were
20 also required to meet the resubdivision criteria, our view
21 is they probably would not have been able to move forward.

22 VICE CHAIRMAN DAVIS M. RICHARDSON: Now, this is for
23 residential use. So, how can you interpret any of the
24 special exceptions to be suitable for residential use? By

1 the very nature of special exceptions are not residences.

2 MR. LOEHR: That's right. Right.

3 COMMISSIONER PERDUE: Just one other thing. I was just a
4 little confused by your talking about the letter from the
5 Board of Appeals, and I comment that the Board of Appeals,
6 and I won't ask you try and explain their position here on
7 their behalf. But they did express concern about apparent
8 conflict that we might be looking at things that they'd
9 already looked at. But with respect to the master plan, they
10 take into account the master plan?

11 MR. DAVIS: I believe they do. I don't have the language
12 in front of me, but I think there may be some general
13 language about compatibility with the master plan.

14 COMMISSIONER PERDUE: But, we have a specific requirement

15 MR. DAVIS: Yes.

16 COMMISSIONER PERDUE: to look into the master plan, and so
17 whatever concerns they, you have expressed about our doing a
18 second look at something that they've already looked at,
19 that does not extend to looking again at the master plan.

20 MR. DAVIS: Correct. And by that, I'm referencing
21 specifically Section 50-35(1), which speaks to the relation
22 of the master plan. And there it states that in determining
23 the acceptability of the preliminary plan submitted under
24 the provisions of this chapter, the Planning Board must

1 consider the applicable master plan. A preliminary plan must
2 substantially conform to the applicable master plan,
3 including maps and text, unless the Planning Board finds
4 that events have occurred to render the relevant master plan
5 recommendation no longer appropriate. It seems to me that's
6 very clear authority.

7 MR. LOEHR: And the language in the zoning ordinance
8 regarding special exceptions is that the special exception
9 will be consistent with the general plan, including any
10 master plan. So, I think it's clear that the subdivision
11 language is stronger than the zoning ordinance direction to
12 the Board of Appeals.

13 CHAIRMAN HUSSMANN: I guess we are, at least we know from
14 different points of view, the different levels would be, you
15 know, of what's at issue here. I guess I could create some
16 structure out of ah, if I wanted, but at some point we ought
17 to start listening and then come back to our discussion.
18 Unless there are more clarifying comments, the Board would
19 like from staff before we do that. Well, let me find out
20 what I did with the list. Somewhere we had a bunch of
21 speakers.

22 COMMISSIONER BRYANT: Well, we can't have speakers if you
23 can't find the list.

24 CHAIRMAN HUSSMANN: Norman Knopf's the first one. I'm sure

1 by the time he finishes, I'll find the list. [LAUGHTER]

2 MR. NORMAN G. KNOPF, ATTORNEY FOR CONCERNED CITIZENS OF
3 GREAT FALLS: Good evening. My name is Norman Knopf. I'm here
4 as an attorney on behalf of the concerned citizens of Great
5 Falls, Maryland, the Dennises and all the other homeowners
6 who are parties to the pending preliminary plan subdivision
7 in Great Falls care home, 1-96068. I have previously sent a
8 letter to the Board which I believe is part of the record,
9 protesting this proceeding, and I will not bother to read
10 this at that. But, I just want to make clear we're not
11 waiving our objection.

12 I would like to make as a first and crucial point that
13 policy exists as a proper tool where there is no law which
14 sets the policy. Here we have crystal clear law as to what
15 the policy is, and therefore, there should be no policy
16 discussion. All we're asking is that the law be applied.
17 There are three points I'd like to make on this. First, you
18 have exclusive jurisdiction to administer the subdivision
19 regulations. Second, resubdivision, including conglomerating
20 lots is part of subdivision. The law makes no distinction
21 between whether you add lots, you combine lots, or you
22 divide lots. I'll explain these. And third, the criteria for
23 resubdivision is clear. It applies to special exceptions.
24 There are no exemptions. Let me explain those three issues.

1 In my letter to you of April 17 on page 2, we note that
2 the Regional District Act expressly confers upon this Board
3 exclusive jurisdiction, exclusively it says, to handle
4 subdivision regulations. Section 50-4 of the subdivision
5 code of the County said: this chapter shall be administered
6 by the County Planning Board, not the Board of Appeals. By
7 State law, by County law, you have the exclusive
8 jurisdiction, not the Board of Appeals.

9 Mr. Hussmann, in response to your question to your staff,
10 I'd like to provide an answer. Because the law provides
11 where there is a conflict or an overlap who has precedent.
12 You do. Because it says in Section 50-5 on page 2, this
13 chapter, meaning the subdivision chapter, shall not be
14 deemed to repeal or modify or otherwise affect in any manner
15 any other ordinance, resolution, rule or regulation of the
16 County, provided that whenever this chapter, means
17 subdivision chapter, imposes more stringent regulations,
18 restrictions, limitations or requirements, this, the
19 provision of this chapter, meaning the subdivision chapter,
20 shall prevail. In other words, if you've got any conflict or
21 overlap between the Board of Appeals and the zoning code and
22 your code, the County Council has told you: you prevail. You
23 have the stricter requirements. If you're gonna apply the
24 subdivision criteria, you must prevail.

1 CHAIRMAN HUSSMANN: You're at what point in the
2 subdivision regulations?

3 MR. KNOFF: 50-5. Excuse me, I can talk faster than
4 anybody can follow anything. The second point where I said
5 the law makes no distinction between whether you're adding
6 or subtracting, I call your attention to the definition of
7 subdivision. Subdivision or assemblage of a lot, tract or
8 parcel into more, excuse me, subdivision is the division or
9 assemblage of a lot or tract, of a lot or parcel into one or
10 more lots. It goes on to state that a resubdivision is part
11 of subdivision. It further goes on to state that there's
12 one, only one exemption, and that's for agricultural land.
13 Now interestingly, this is your, your meaning the Planning
14 Board's, legislation. You proposed that to the County
15 Council in 1985, and they adopted it. You're the ones that
16 came before them and said, we have a problem, up to now,
17 we've been only treating the dividing of land as a
18 subdivision. We now want to treat when you combine land as a
19 subdivision. And the Council said, right. And that's the
20 law.

21 But apparently, as I hear Mr. Davis explain it, there's
22 been an inadvertent overlooking of the plain provisions of
23 that law. As a lawyer, I will advise, I'm sure it comes as
24 no surprise, longstanding administrative practice that is

1 contrary to the law does not make it right. You stop the
2 practice, and you do what has to be done under the law. The
3 cases are clear. Common sense dictates that. This is your
4 provision. We are asking that you apply it. And not applying
5 it, I mean I respectfully suggest, makes absolutely no
6 sense. From what I hear, if you have one-acre lot
7 subdivision and somebody came in and wanted to divide ten
8 acres into two five-acre lots, you might say that's not the
9 same character and deny it. Because five-acre lots are not
10 one-acre lots. And that's dividing. But, you're now saying
11 we can take five one-acre lots and divide it into one five-
12 acre lot, and that's okay because it's a combination. You're
13 arriving at the same result. It doesn't make any sense.

14 My third point was that the criteria for resubdivision
15 applies to Board of Appeals, special exceptions, and across
16 the board for assemblage. There are no exceptions except
17 agriculture, that's in the subdivision definition. I call
18 your attention to the Lee case. The Chairman's right on
19 point. Lee said to this Board, you've gotta read what the
20 statute says and apply it. It said you shall apply seven
21 criteria. It means you should do it. The statute says: you
22 shall treat subdivision as whether you combine it or divide
23 it. We're saying, please do it.

24 Now the meaning, when you apply resubdivision to Section

1 50-29(b), it makes sense to apply it regardless of use. Let
2 me explain. Section 50-29(b)(2), the purpose of that is
3 where you have a resubdivision, a subdivision, an existing
4 subdivision for residential use. Let's say you have a
5 hundred one-acre lots, and it's residences there, for
6 residential use. When you go to resubdivide that, the law
7 says you have to create new lots that are the same character
8 as the existing lots. Why? In order to protect the existing
9 residential homeowners who have purchased their homes and
10 lots from having something incompatible. So if the new use
11 under the resubdivision is not to be a residential use,
12 that's irrelevant. It's the protection of the existing homes
13 in that subdivision that this seeks to reach. That's the
14 remedy that's here. People rely on subdivision as well as
15 master plans. They buy a house, they say, look, all the lots
16 seem to be one acre, all the houses seem to be one acre.
17 I'll buy my home. I see an empty lot next to me. That's one
18 acre. I guess I can rely on it's gonna stay one acre, and a
19 house'll go up. They don't expect someone to be able to come
20 along and change that into a five-acre lot and build
21 something bigger. That's what the zoning code, the
22 resubdivision code precludes.

23 Now in response to Mr. Holmes' concern, which is a
24 legitimate one. Would that mean we're precluding special

1 exceptions uses? The answer is no. I set forth that in my
2 letter to you. For many reasons, the answer is no. Let's
3 take Care Home as an example. You have care homes that are
4 allowed as a matter of right in certain zones, such as the
5 CBD zone. Clearly, this would not affect that. You have care
6 homes with a minimum acreage of two acres. Obviously, in all
7 zones in which there's a minimum of two acres for the zone,
8 you can have a care home without any problem. Even in zones
9 that are less than two acres, because it's a two-acre
10 minimum, let's say there's a one-acre minimum. There are
11 empty lots that might be two acres already subdivided and
12 recorded. Then someone can come in and apply for special
13 exception there and not have to get a resubdivision. So it
14 goes up there as a matter of, without any problem.

15 Now let's take the harder position. Harder thing. There
16 is a less than two-acre lot and somebody wants to combine,
17 let's say two one-acre lots to make a two-acre lot, in order
18 to put the care home. You can have a care home without going
19 through resubdivision. You build your care home on the one-
20 acre lot, and you have the next one-acre lot adjoining it
21 without combining it, that could become the parking lot and
22 the buffer. You just can't build a building over that line.
23 Yes, it results in a smaller care home. But as I'm sure
24 staff will agree, we have two precedents in this County, the

1 victory homes care homes. Victory housing care homes, in
2 which this Board recommended and this subdivision staff
3 approved, not record making it a recorded special separate
4 subdivision lot, but simply taking acreage equivalent to two
5 acres, not as a separate lot, and leasing that and putting
6 the care home up on it. So you could take a care home, put
7 it on one lot, lease the adjoining lot, and you can have a
8 care home on less than two acres. I don't want to get in too
9 much more specifics. The point I'm trying to make is that
10 there are ways to accomplish a special exception use, even
11 applying the normal resubdivision criteria. The point that I
12 must stress, however, is that property owners rely on the
13 subdivision in which they buy homes. They're entitled to
14 rely on that. And to have a situation where they can
15 suddenly find lots combined and a bigger project going up,
16 is contrary to this resubdivision criteria, and contrary to
17 its purpose.

18 Now for those who are troubled, which is legitimately so,
19 with a clash, possibly, between what the Board of Appeals
20 might be doing on this project and what this resubdivision
21 code calls for, not to worry. Section 50-38 provides for
22 waiver. You have the authority to waive in an appropriate
23 case. It makes it flexible. You can waive the normal
24 resubdivision rules. That's why it's there. This Board

1 recommended legislation making that waiver more user
2 friendly. Use it. You go on a case-by-case basis and see
3 whether a waiver is appropriate. Not some flat policy
4 decision to ignore the law. The law in its wisdom said we
5 have these rules, maybe in certain cases they cause a
6 hardship, there's a problem, then we have a waiver. I find
7 it most curious that the staff's report does not address
8 waiver at all. That is your out, so to speak, in difficult
9 cases. If the waiver criteria are met, you grant the waiver
10 from the resubdivision criteria, not negate the plain
11 provisions of the law.

12 Finally, we are told that the reason why we have to
13 ignore the law, when I say ignore, I'm talking at the
14 subdivision definition that seems to clearly apply, clearly
15 provides for its application. We are told ignore it because
16 you've always ignored it. First, I don't buy that a valid
17 excuse. If you made a mistake, now is the time to correct
18 it. If you disagree with what the law is, ask the Council to
19 change it. Don't just ignore its plain provision. But more
20 importantly, I challenge the concept that this is
21 longstanding practice. I think the record does not support
22 that. And let me explain.

23 First, longstanding administrative policy under the law
24 means that you as an institution had the issue before you,

1 addressed it, and made a recent decision. As I understand
2 it, to the extent that you have been assembling lots for
3 special exceptions and not applying the resubdivision
4 criteria, in no case did someone come forward and object and
5 raise the arguments we are raising. So the Board, to the
6 extent it was done, did it sort of by default, so to speak.
7 When no one objects, where everyone's in agreement, and I
8 know some of those cases cited by the staff, I worked on. We
9 had agreement with the citizens. That's when you usually
10 grant a waiver and usually say everything's okay. No one
11 came in and said the arguments we are raising, you can't do
12 it, it's contrary to law. So, you really haven't addressed
13 this as a determined policy matter. Now you're doing it.
14 It's appropriate. But now that your law's been called to
15 your attention, we hope you correct it.

16 Now the staff report advises that 16 cases they've sited
17 of subdivision assemblage, apparently, it's some kind of
18 assemblage where they, you did not apply resubdivision
19 criteria. I have a list, it's an informal list, it may be
20 unfair to use this list. It was obtained from your staff.
21 There were 25 items on it. Apparently 9 of them were
22 stricken because they found it wasn't applicable. For
23 example, they have items on it that involve the CBD zones. I
24 don't understand what application that has on this issue

1 where you're not in the residential zone. But most
2 importantly, take a look at what you've done since 1996.

3 Why did I pick 1996? That is the year the Lee decision
4 came down. And Lee told this Board, read your statute and
5 apply it. What did you do after that came down? One of the
6 things you did, according to the list that Malcolm gave us,
7 is you did allow a resubdivision, and did not apply the
8 resubdivision criteria. But, you did it by waiver. And
9 that's what I'm asking that you do. I'm referring to the
10 subdivision 1-96111, it was a subdivision for a private
11 house, which is on the list that staff gave us. It was a
12 variation, a resubdivision. You did it by waiver. That's
13 what we're asking you do. You apply the waiver criteria if
14 you think it's appropriate. By the way, when you apply the
15 waiver criteria, one of those criteria that you can't do it
16 any other way but that have a waiver. And with certain
17 special exceptions, as I have outlined, there are ways that
18 you can do the special exception without granting a
19 resubdivision at all. So in those cases, waiver would not be
20 appropriate. But, I'm not getting into all the waiver
21 criteria. I'm just trying to point out to the Board that
22 there is an institution you have in your own law to handle
23 situations that are difficult. And you do it on a case-by-
24 case basis. And you see if the waiver criterion are met.

1 Now I have analyzed this, and I've only found since 1996
2 one case in which there was a special exception which
3 involved a amalgamation of lots and you didn't apply the
4 resubdivision criterion. That is a precedent. There's no
5 question about it. And as you go back further on this list,
6 there are all sorts of examples given, including things that
7 are listed. They're really re-zonings. I don't have time to
8 go through every one of these things. But there are only a
9 handful of special exceptions which involved amalgamating
10 lots in which the resubdivision criteria were not applied.
11 Some of those involved existing special exceptions where
12 they were modified. And I would think that that's, nobody
13 objected to that. It was sort of like an automatic waiver.

14 So, the bottom line that I'm trying to get to is, I don't
15 think there is longstanding precedent of reasoned
16 determination by this Board to avoid the law, we're making a
17 policy judgment on that. I think it did spring up to some
18 degree. Now that it's been brought to your attention, you
19 need to apply the law. And that's what we're asking. We feel
20 certain that it would not prevent special exception uses; in
21 appropriate cases, you will provide a waiver. You will grant
22 the waiver. In other cases, you will not. If it turns out
23 that too many special exceptions cannot pass muster, no
24 doubt you will go to the County and ask that the subdivision

1 ordinance be amended to make some kind of provision. But the
2 citizens plead with this Board not to abandon your
3 responsibility under the subdivision code, and to transfer
4 it, in effect, to the Board of Appeals. The Board of Appeals
5 has numerous responsibilities of their own. One of them is
6 not the subdivision code. That is clearly placed in your
7 jurisdiction.

8 And I would just like to close by again calling your
9 attention to the definition of subdivision. The division or
10 assemblage of a lot, tract, or parcel into one or more lots.
11 And it goes on to say that it does not include partition for
12 exclusively agriculture land, that's the only exclusion. And
13 it goes on to say a resubdivision is a subdivision.
14 Therefore, when you have a special exception or assemblage,
15 you are to apply the resubdivision criteria of 50-29(b)(2).
16 The law is clear. The fact that you may have overlooked it
17 to date provides you an opportunity to not overlook it any
18 more. Thank you very much.

19 CHAIRMAN HUSSMANN: Thank you. I found the list. Next
20 speaker is Robert Lavell.

21 MR. ROBERT J. LAVELL, LOGAN DRIVE, POTOMAC: I'm Bob
22 Lavell. I've been a citizen of Montgomery County for
23 approximately 50 years. It seems to me when you separate the
24 wheat from the chaff, it comes down to this hearing is to

1 help you decide whether to continue to ignore clearly stated
2 regulations, or to finally abide by them. I was outraged
3 when I learned of your common practice of ignoring some
4 inconvenient regulations. I am doubly outraged to find that
5 you have the gall to hold a public hearing on whether to
6 continue this illegal practice. How do you think I would be
7 treated if I were to choose to ignore some laws or
8 regulations I find inconvenient, such as speed limits on
9 495. You know, 65 miles an hour would be more to my liking.
10 Well, how about the income tax? You know, I think I'd go
11 much more for 10 percent than what we have. Do you think I
12 could get away with a public hearing to help me decide
13 whether it would be okay to continue to pick and choose
14 those laws I find convenient to obey? I am here tonight to
15 let you know how your cavalier attitude to following the law
16 affects me. And I'm sure many other citizens, when they find
17 out about your actions. I am so outraged that I am almost,
18 but not quite, speechless. [LAUGHTER] I yield the rest of my
19 time to Cary.

20 CHAIRMAN HUSSMANN: Cary Slater? So he can use your time
21 then. The next speaker is Judith Anderson.

22 MS. JUDITH ANDERSON ON BEHALF OF MR. JOHN ROBINSON,
23 PRESIDENT, ALLIED CIVIC GROUP: Good evening. My name is
24 Judith Anderson. I live at 2001 Westchester Drive in

1 Wheaton. And I am representing John Robinson, president of
2 Allied Civic Group. I am second vice president for Allied
3 Civic. Mr. Robinson submitted to you a letter dated April
4 21. I will not read the entire letter. I will extrapolate
5 specific statements and summarize my own feelings at the
6 conclusion of my testimony. At issue here are important
7 procedural safeguards that are intended to ensure that
8 master plan requirements that are vested in the Planning
9 Board are protected. It is a basic premise of the County's
10 land use statutes and procedures that neighbors and
11 neighborhoods are permitted to rely on the basic land use
12 designations unless proper procedures are followed. These
13 statutes and procedures will be eviscerated if the Planning
14 Board determines that the granting of the special exemption
15 permits the applicant to avoid the County's statutory
16 subdivision requirement. The impact will be particularly
17 severe because of the Mossburg case, making it difficult to
18 deny special exceptions. It may be argued that the
19 application of these procedures will be burdensome for
20 businesses that are familiar with the ease with which prior
21 cases have been accepted. But the purpose of the procedures
22 is to protect all interests in the difficult cases, and
23 adoption of a policy of not applying the requirements in all
24 instances waives the protection of the subdivision

1 procedures. Failure to have applied the procedures in the
2 past should not be used as a device to avoid the difficult
3 cases in the present. And to deny citizens the separate
4 review of master plan and land use issues that the County
5 land use statute clearly intends.

6 The Planning Board's authority is independent of the
7 Board of Special Appeals. And with all due regard to the
8 Special Appeals Board, the Planning Board has often been
9 more attuned to the specific requirements of the master
10 plans and the intentions of those plans regarding specific
11 parcels and lots. This duality and independence should be
12 and must be maintained. Communities have few checks and
13 balances left to them. And if, if you give up your authority
14 on these types of matters, it is gone forever. And to what?
15 To what will people turn for procedural safeguards to
16 protect their communities in subdivision cases? Thank you.

17 VICE CHAIRMAN RICHARDSON: Thank you. So your issue is the
18 master plan issue from the standpoint of the holders of the
19 master plan. And you're feeling that the Board of Appeals,
20 number one doesn't have ultimate authority for the master
21 plans. And number two, doesn't seem to be interpreting it
22 correctly.

23 MS. ANDERSON: That's right.

24 VICE CHAIRMAN RICHARDSON: As opposed to some of the legal

1 issues that Mr. Knopf is raising.

2 MS. ANDERSON: Oh. Well we support, of course, the legal
3 issues that were raised by Mr. Knopf as well.

4 VICE CHAIRMAN RICHARDSON: Yep. Thank you.

5 MS. ANDERSON: And I think that Mr. Robinson has addressed
6 them more fully in his letter. I'm not an attorney, so I
7 haven't

8 VICE CHAIRMAN RICHARDSON: No, I understand.

9 MS. ANDERSON: Okay.

10 VICE CHAIRMAN RICHARDSON: Thank you.

11 MS. ANDERSON: You're quite welcome.

12 CHAIRMAN HUSSMANN: Robert Cope.

13 MR. ROBERT L. COPE, CHAIR, CITIZENS COORDINATING

14 COMMITTEE FOR FRIENDSHIP HEIGHTS: Good evening. My name is
15 Robert Cope. I guess I'm always outraged, but never
16 speechless. So,

17 CHAIRMAN HUSSMANN: We haven't seen you for a while.

18 [LAUGHTER]

19 MR. COPE: Less outraged than before, I guess. My name is
20 Bob Cope. I'm chair of the Citizens Coordinating Committee
21 on Friendship Heights. I represent about, our Coordinating
22 Committee represents about 15 citizens associations in the
23 down-county area, inside the beltway, basically in 20815 and
24 20816. What I wanted to talk about tonight is, and sort of

1 to go a little bit further than what Norm said, and that is
2 to talk about statutory construction. Statutory construction
3 has clearly changed in the last 10 years. If you went back
4 20 years, what your staff said may have been bought by a
5 court in this country. It will not be bought any more. The
6 courts clearly say you must look to the statute. There's
7 three statutes, there're three codes I want to mention. If
8 you looked at 50.1, it says a subdivision is an assemblage,
9 and a resubdivision is a subdivision. What that means to me
10 is, a resubdivision is a subdivision, is an assemblage. If A
11 equals B equals C, then my daughter who's in sixth grade
12 told me it doesn't go that A equals B minus C. So, you can't
13 take assemblage out of the definition.

14 You then go down to the resubdivision provision, which is
15 50-29(b)(2), resubdivision. We're talking about
16 resubdivision. What does it say about resubdivisions? Now
17 remember 59.1 says a resubdivision is an assemblage. The
18 code says a resubdivision is an assemblage. And if you read
19 that, it says lots on plat for the resubdivision of any lot,
20 tract, or parcel of land that is part of an existing
21 subdivision previously recorded in a plat book shall be of
22 the same character as the street frontage, alignment, and
23 size. That goes on, but it says size. So when you're dealing
24 with assemblage, and you're dealing, which is a

1 resubdivision, it has to be the same size. And I thought
2 Norm made a good point when he said if this was a 10-acre
3 lot and they were trying to come in with a 5-acre lot, there
4 wouldn't be an argument. Well if you look at 50-1, there
5 shouldn't be an argument to begin with.

6 Finally, 50-38, which is what Norm referred to, deals
7 with waivers. So, if you take these two pieces of paper home
8 with you, or put them up on a shelf, this is what you deal
9 with. You deal with 50.1. You deal with 50.29, and you deal
10 with 50.38. Everything else is gobbledygook. The law is
11 there. The law is for this Board to apply. The law is not
12 there for the Board of Appeals to apply. The County Council
13 has placed you all on this Board. They've given you a
14 statute to interpret. And, what I'm saying is, get away from
15 the weeds and the chaff or whatever. Look at the code. The
16 code is clear. Everything else misleads you. Everything else
17 misguides you. And everything else would lead you to clear
18 reversal by any court in this country. Thank you very much.

19 CHAIRMAN HUSSMANN: Thank you. Cary Lamari.

20 MR. CARY LAMARI, BAILEYS LANE, SILVER SPRING: How you
21 doing today? Good to see you. Mr. Bryant, I want to say one
22 thing. I didn't ask you to recuse yourself. I want you to
23 keep me straight here tonight. But I will say one thing so
24 that there's no appearance of impropriety or ex parte. There

1 is a Board member here. I'm in the middle of the case right
2 now, I have to ask him to leave. [LAUGHTER] What can I say?
3 I've asked you. All right. Now that, the letter I gave you,
4 I'd like you to read it. That's not what, I'm gonna go ahead
5 and speak to you tonight about. I'm gonna try to talk to you
6 if I can, cause it seems to me if, my practice has always
7 been to read these testimonies to you, and I wonder if they
8 really sink in.

9 VICE CHAIRMAN RICHARDSON: Well, we always listen to you,
10 we always do.

11 MR. LAMARI: I hope so. I think what this is all about is
12 faith and trust. Not in just the laymen process, but in the
13 democratic process. Okay. And it's a benefit that I'm not a
14 lawyer here tonight because I'm not gonna speak about
15 Chapter 50 or, I'm gonna speak about Section 59, but not
16 Chapter 50. I think this agency was created in 1927, the bi-
17 county agency by the general assembly. I think in their
18 wisdom, they created you separate and apart from the
19 District Council. Then they created, I think, the Regional
20 District Act which created the District Council. The
21 District Council then created Section 59, which gives the
22 powers to the Board of Appeals. Now, am I straight so far
23 Mr. Bryant?

24 COMMISSIONER BRYANT: I think so.

1 MR. LAMARI: Okay. Now, the assumption here. Now, there
2 was a friend of mine that passed away a couple of years ago.
3 Clyde Hayman. I don't know if you remember him. Clyde was a
4 dear friend of mine. He told me in the land use process, you
5 win if you know how to play the game. And you have to know
6 who the parties are that play the game. One of the parties
7 is the Board of Appeals. Another party is the Planning
8 Board, and a big party are the land use attorneys and the
9 land planners. Now they, I want to get to them in a second.
10 Section 59 you, first of all, there has to be an assumption
11 here that the players don't know what the rules are. And I
12 think that's a bad assumption. Because in 59-G 1.21,
13 condition No. 8, paragraph 4, boy is this complicated. It
14 says nothing herein, and that's what the Board of Appeals
15 has to deal with. That gives them the right to ship off
16 subdivision review to the Planning Board. And they do that
17 quite often. But it says, nothing in here is construed as
18 relieving the applicant from the necessity of complying with
19 all requirements for obtaining a building permit, or any
20 other authorization for approval required by law. It goes on
21 to other things, but that leads me to believe that the
22 players know that they have to deal with Chapter 50 and all
23 these other rules.

24 And that goes back to what I said earlier about faith and

1 trust in the democratic process. Y'all are part of the
2 democratic process. Y'all govern the land use issues. Part
3 of, you were created, your power was given to you from the
4 General Assembly to create what are called checks and
5 balances. And I'm hoping that you use those checks and
6 balances to be fair to everybody. The land use person and
7 the citizens. I think that's, you know, I don't know if I
8 need any more time. I think I've said it all. What do you
9 think, Mr. Bryant?

10 COMMISSIONER BRYANT: I think you ought to finish. No,
11 seriously, I agree, you've said it all.

12 MR. LAMARI: Well, I mean, I think that's it. The players
13 know the rules. The rules are there for all of us to play
14 with. And y'all have to just administrate, administer the
15 game. So, don't try to, you know, circumvent by saying the
16 resubdivision criteria, we can waive them for people who get
17 approved by, get special exception approval. Because that's
18 not necessary. You know, they know how to play the game.
19 Keep the rules intact. That's all.

20 CHAIRMAN HUSSMANN: Thank you. Timothy Dugan.

21 MR. TIMOTHY DUGAN, ATTORNEY, WILKES, ARTIS, HEDRICK &
22 LANE: Good evening. My name is Tim Dugan. I'm here this
23 evening to encourage the Board to maintain its longstanding
24 policy with respect to the resubdivision criteria. I have

1 submitted to the Board, I believe, two letters which explain
2 the reasons why we think that's a good policy. I think I
3 have three minutes up here this evening. I think we're here
4 this evening to talk about 50-29(b)(2), and I think one of
5 the most telling reasons why, apart from all of the
6 discussion that you've heard this evening that makes this
7 inappropriate to apply to the consolidation of lots and in
8 particular with respect to the application of special
9 exception use is that, one of the conditions is that it is
10 to be found that the particular use is suitable for
11 residential purposes. That's 59-B(2). But I think everyone
12 would agree that you have to read 50-29(a) as well. 50-29(a)
13 says in essence that a subdivision is to be appropriate for
14 the use contemplated in that subdivision. And we would
15 maintain that the subdivision that they're referring to is
16 the subdivision for the use that is being planned. And
17 therefore, in the case of a special exception, that
18 subdivision that relates to that use is the one that's to be
19 analyzed.

20 Now if you have a single-family home subdivision, the
21 intended use for that subdivision is what I just said,
22 obviously. And therefore, in that particular instance, I
23 think you do look at 59, 50-29(b)(2), and in that instance
24 you would follow the seven criteria. I would be more than

1 happy to answer a lot of other questions if the Board has
2 any. Otherwise I would ask you to read the letters that we
3 have submitted on this subject matter.

4 COMMISSIONER BRYANT: Would you just do this since you
5 have a little more time. I was, ah, would you say something
6 about how you said that the Mossburg case applies to this?

7 MR. DUGAN: There was an element in the Mossburg case
8 which had to do with, well let me just check. If you're
9 referring to my, the letter dated April 14.

10 COMMISSIONER BRYANT: Right.

11 MR. DUGAN: Maybe I need, I may need to flip to that.

12 COMMISSIONER BRYANT: Yeah that was a five, 15 page
13 letter, so I understand.

14 MR. DUGAN: I don't know that I recall it right off the
15 top of my head. Let's see if I can find it.

16 [UNIDENTIFIED] Page 13, is that the section you're
17 looking at?

18 COMMISSIONER BRYANT: Um huh.

19 MR. DUGAN: Page 13 where we were discussing the
20 uniformity rule, and there's a quotation from the Montgomery
21 County Circuit Court, and what the point being made by the
22 judge for the Circuit Court was that, and I'll just read it.
23 The court said use of property under special exception
24 process is one that already has been predetermined on the

1 original zoning classification. It then proceeds to say
2 that, it quotes from the Board of Appeals opinion that the
3 Board observes the following in its opinion on page 11. The
4 power and duty of tailoring land use to meet social needs is
5 vested exclusively in the County Council. And then beyond
6 that, it said in the case of Mossburg, the Court of Special
7 Appeals indicated that the County Council in its legitimate
8 regulation of private property has the power to create
9 special exceptions for desirable uses of property, and that
10 it would also have the power to prohibit or eliminate such
11 uses, so long as it did not take away all viable use of the
12 property. And it says nonetheless, well the next sentence
13 says, the awesome power to make policy concerning the use of
14 private property does not carry with it the power to tell
15 the Board of Appeals how to decide its cases. And then it
16 goes from there. So, I hope that answers your question.

17 COMMISSIONER BRYANT: All right. Thank you.

18 CHAIRMAN HUSSMANN: Thank you. Phil Perrine.

19 MR. PHILIP E. PERRINE, PERRINE PLANNING AND ZONING, INC.:
20 Thank you, Mr. Chairman. My name is Phil Perrine, and I'm a
21 land planner. I am also a resident of Montgomery County
22 since 1972, and a past member of the Planning Commission
23 staff. I'm a past president of the Montgomery County Chamber
24 of Commerce, and I spent about the last 17 years in my

1 professional career trying to assist people in getting
2 subdivisions approved and getting special exceptions
3 approved as a land planner. Those special exceptions include
4 private schools, daycare facilities, medical clinics, and
5 recreation facilities, among other things, in residential
6 neighborhoods. With that I'd like to say that it's my
7 opinion that the subdivision, or the resubdivision section
8 should be used only to regulate the subdivision of existing,
9 recorded single-family residential lots into smaller
10 residential lots. I believe that the original intent of this
11 section was to preclude the creation of residential lots
12 that, while complying with minimum zoning standards, would
13 be smaller, narrower, of a different shape or of a different
14 orientation than existing than existing lots within a
15 subdivision. The 1934 subdivision regulations includes a
16 section that was entitled residential subdivisions special
17 requirements. And that included language which is very
18 similar to the current resubdivision section of the
19 subdivision regulations. And the intent of that regulation
20 was to avoid the subdivision of large lots into small lots
21 that would be out of character with the remainder of the
22 subdivision. Obviously, a homeowner could buy more than one
23 lot, two or three or four lots, and have a home site that's
24 larger than the average lot size in its subdivision. But it

1 was to preclude the creation of a smaller lot. Residential
2 zones include many permitted and special exception uses that
3 require a land area well in excess of the single-family lot
4 size. These uses, such as private schools, recreation or
5 swim clubs, daycare, medical offices, et cetera, are
6 necessary or appropriate within a single-family community,
7 assuming they meet established development criteria or are
8 approved by the Board of Appeals.

9 The County Council may rezone land, including recorded
10 lots, to avoid intense residential use, such as townhouses,
11 or to a larger, something that requires a larger lot, such
12 as to commercial use. The County zoning laws empower the
13 County Council and the Board of Appeals to determine whether
14 rezoning and special exception approvals are appropriate
15 within the existing subdivision. Use of the resubdivision
16 section by the Planning Board to usurp the prerogative of
17 the County Council and the Board of appeals would cause
18 great disruption to the development process. Considerable
19 money, energy, and effort are expended in reliance upon the
20 approval of a rezoning or a special exception. Land
21 development commitments should be made by the landowner and
22 by the County government alike in a coordinated fashion. The
23 use of the resubdivision section by the Planning Board to
24 broadly regulate land use would turn the development

1 approval process on its head. And the resubdivision
2 regulations should be restricted to the review of the
3 division of residential lots into smaller lots. Thank you
4 for letting me go on there. I'll just say that if there's a
5 problem here, Norman Knopf is right. It ought to be
6 corrected. An assemblage should not be resubdivided. I
7 don't think that was the intent in 1985 when it was created.
8 I think an assemblage is a subdivision. It should meet all
9 the regulations. But, it should not be a resubdivision.
10 Thank you very much.

11 CHAIRMAN HUSSMANN: Thank you. C.O. North.

12 MR. C.O. NORTH, PRESIDENT, WEST MONTGOMERY COUNTY
13 CITIZENS ASSOCIATION: Good evening. My name is C.O. North,
14 and I'm president of the West Montgomery County Citizens
15 Association. We appreciate this opportunity to speak out
16 concerning this issue tonight. Although I must tell you it
17 has been difficult describing this debate in advance to
18 others. First, we tried to seriously discuss it at the
19 monthly meeting of our Association last week. But in the
20 context of the citizens group, which has seen many of its
21 land use protections watered down in recent years to the
22 clear detriment of our part of the County, the incredulity
23 in the crowd made it difficult to explain that you were
24 seriously going to debate whether or not you intended to

1 follow the laws concerning subdivisions in the future. Our
2 members could not believe that a responsible government body
3 would even consider putting on record a policy of
4 systematically ignoring a body of law which defines your job
5 and your duty to the rest of us. But perhaps, it's a
6 generational thing. When I explained the issue to my middle
7 school daughters and several of their friends, all of whom
8 have had the best civics classes we offer, but who
9 unfortunately have grown up in a time when the political
10 system resembles Alice in Wonderland, they had no problem at
11 all believing that government officials could choose for
12 themselves which laws and regulations to actually enforce,
13 and which group of citizens they can thereby benefit.

14 We have heard all the heartrending concerns about a
15 developer who, if not granted a subdivision, might be unable
16 to use some property it would like to buy as extensively as
17 he would like. Well that's interesting, but the laws which
18 we want enforced had been on the books in black and white
19 for years. With all of these fancy lawyers, we cannot
20 believe that they did not make rational decisions based on
21 the range of likely outcome from the various proceedings to
22 which their plans would be subjected, including the need to
23 gain a resubdivision of the property, if they wanted to
24 build as large a project as they designed. No businessman

1 would make, would or should take those kinds of outcome for
2 granted, and I do not believe for a minute that their
3 financial plans fail to take these risks into account. And
4 in any event, the project is a speculation based on the
5 future returns that they building what they have designed
6 based on investments that they have yet to make.

7 But what about the rest of us? Who unlike the speculative
8 developer already have made our investments in this
9 community, and have spent our lives and our pocketbooks
10 building it? We, too, made these investments after
11 calculating the odds that change will occur, but we look to
12 the laws on the books to describe the range of change which
13 might occur. Many of us, before buying into an area, have
14 come, have done just the homework a careful, rational buyer
15 would think necessary. We have reviewed the master plan, the
16 zoning maps, the zoning and subdivision ordinances. We have
17 talked to planners and government officials. But nobody ever
18 explained that the master plan might be ruled general
19 guidance only. And nobody warned that those pages and pages
20 would seem to prohibit special exceptions which might harm
21 the community might not actually be enforced. And certainly
22 nobody explained that very clear language protecting
23 neighborhoods from incompatible subdivisions or
24 resubdivisions might actually be ignored as a matter of

1 policy by the one body charged with enforcing it. And that's
2 what you're debating tonight. Why do the rights of a
3 speculative developer who is not part of our community
4 outweigh the rights of all of us who are here already? How
5 is it that a special exception use, if it happens to gain
6 Board of Appeals approval, could then expect to accomplish
7 its subdivision which a conforming user simply wanting to
8 create a bigger lot would be denied. My kid's right. It is
9 Alice in Wonderland. You cannot pick and choose which parts
10 of the law defining your responsibilities you feel like
11 working on. If you want a different assignment, then try to
12 change the law and let us work through the political process
13 with its checks and balances to change those definitions.
14 You cannot just change them yourself because you feel like
15 it, or because you discovered that previous Boards have
16 failed to act correctly in the past on one or two occasions.

17 I don't want to take much more of time, but because he
18 could not be here tonight, I wish to read into the record a
19 letter from William S. Green, recently retired from the
20 Board of Appeals. Mr. Green offers, it seems to me,
21 compelling logic on the need for you to stand firm in your
22 role as the ultimate authority on subdivision issues. West
23 Montgomery completely supports his views on this subject.
24 And then I've submitted a copy of Mr. Green's letter. He

1 says the proceedings before this Board this evening involve
2 another facet of the infamous Mossburg case. It is for this
3 sole reason that I submit this statement, having previously
4 proceeded to a state of blissful retirement. Because the
5 hearing this evening pertains to future rules of general
6 applicability, not to any particular case, I feel that it is
7 appropriate for me to comment, although as the record shows,
8 I was a member in the Board of Appeals when the residents of
9 Great Falls, one of the bones of contention before you, was
10 granted. I voted against the grant. Prior to the Mossburg
11 decision, one of the general criteria for granting a special
12 exception was that the proposal was quote in harmony with
13 the general character of the neighborhood considering
14 design, scale, traffic, and parking conditions. Given the
15 statement of law, it is a sustainable argument that the
16 grand special exception obviated to a great degree the need
17 for an independent Planning Board review of the subdivision
18 ordinance. This may account for the past practice of the
19 Planning Board of rubber stamping previous special exception
20 cases. While this is not a strong argument, it may
21 nevertheless have served as a justification for not
22 exercising the clearly mandated function. The Mossburg
23 decision drastically changed the state of affairs. Now the
24 Board of Appeals is no longer required to make a finding of

1 local compatibility under the enumerated criteria or any
2 other criteria. In Mossburg, the Court of Special Appeals
3 unilaterally reversed the local compatibility requirement of
4 the ordinance and substituted for it a comparative
5 compatibility standard. Thus, the standard is no longer the
6 local impact, but a comparison with the impact elsewhere in
7 the zone. The Board of Appeals no longer has to find that
8 the proposal will be in harmony with the general character
9 of the neighborhood. Thus, the justification, no matter how
10 tenuous, for deferring the Planning Board's function to the
11 Board of Appeals no longer exists. The removal of the local
12 impact consideration for this special exception process, and
13 the proposed deference to the Planning Board of, by the
14 Planning Board to the Board of Appeals in the subdivision
15 process, will result in a complete removal of any control of
16 local development impact in special exception cases. This
17 will be especially true in cases requiring the consolidation
18 of two or more lots.

19 While the Court of Special Appeals may have engaged in
20 the fancy that the County Council has considered local
21 impact when legislating that the proposed use be classed as
22 a special exception, it cannot be argued by any flight of
23 imagination that the Council considered every lot or cluster
24 of lots in the County as to aligning the size, shape, width,

1 area, and suitability for residential use as required by the
2 subdivision regulations. For this reason, I submit that the
3 Planning Board must independently consider the legislatively
4 mandated subdivision factors in connection with the
5 effectuation of a special exception after the grant of the
6 special exception. Respectfully submitted, William S. Green.
7 Thank you very much.

8 CHAIRMAN HUSSMANN: Peggy Dennis.

9 MS. PEGGY DENNIS, FAWSETT ROAD, POTOMAC: For the record,
10 my name is Peggy Dennis. I live at 11115 Fawsett Road in
11 Potomac, and I'd just like to share some thoughts which may
12 be summations on why you, from this point forward, should
13 require adherence to the resubdivision criteria in special
14 exception cases requiring the assemblage of lots. First,
15 because as many people have pointed out, it is the law. The
16 regulation is simple and straight forward. It does not
17 exempt special exceptions. It does not exempt non-
18 residential uses, even if sanctioned as special exceptions.
19 Its intent is clearly to preserve the character and
20 stability of existing subdivisions and neighborhoods.
21 Second, it's been argued that developers put time and money
22 into projects and have a right to see them approved, that to
23 apply the resubdivision regulations now is detrimental to
24 their investments. Well, how about us homeowners? A home is

1 the single largest financial investment that families and
2 individuals make. Most of us choose our homes mainly because
3 of the location and the desirability of the neighborhood.
4 Most put considerable time, effort, and money into
5 maintaining and improving their homes. We do this with the
6 expectation that our neighborhoods will retain their
7 attractive character, or even improve. Stability ensures
8 that our homes will be sound investments. Do the homeowners
9 of this County, and there are hundreds of thousands of them,
10 have fewer or less rights than developers? Third, the
11 argument has been made that requiring special exceptions to
12 comply with the resubdivision criteria would virtually
13 exclude them from most residential zones. The statistics
14 speak for themselves. The great majority of special
15 exceptions require no assemblage of lots in the first place.
16 Those which do require a lot of a certain minimum size
17 should find a lot of the appropriate size in a sensible
18 location, or seek a location where the use is allowable by
19 right. Fourth, to ignore the law will promote the opposite
20 of smart growth and rational land use planning. Smart growth
21 and the restraint of sprawl require intelligent land use
22 planning. The large institutions listed under the service
23 category of special exceptions should logically be located
24 in core or corridor areas where there are adequate public

1 facilities and public demand to support them. Just because
2 the code allows quote care homes unquote, as an example, in
3 residential zones does not mean that any and all residential
4 zones are appropriate locations for very large domiciliary
5 care institutions. Mr. Green has very aptly pointed out the
6 negative effects of the Mossburg decision on land use in his
7 letter. The Mossburg decision leaves the Board of Appeals
8 virtually required to approve every special exception
9 application without regard to impact on the local
10 neighborhood. Even the best planning cannot be effective
11 without some controls or tools. The resubdivision section of
12 the regulations is one of the very few legal tools you have
13 to restrain inappropriate development. To forswear its use
14 now will tip the scales even further in favor of developers
15 and against the interests of homeowners and rational land
16 use. No matter what the rationale for not implementing the
17 resubdivision provisions in the past, I leave you with one
18 very brief thought, which I think most of you would agree
19 with: To err, to forgive is divine. To persist in erring is
20 unforgivable.

21 CHAIRMAN HUSSMANN: Thank you. Don Meyer.

22 MS. DENNIS: Don Meyer could not make it back. He had
23 another meeting and was here earlier, but he hasn't returned
24 back.

1 CHAIRMAN HUSSMANN: Okay. Thank you. George Barnes.

2 MR. GEORGE A. BARNES, GLEN ROAD, POTOMAC: Thank you, Mr.
3 Chairman. Members of the Board. I'm addressing you tonight
4 as an individual. I have, and I'm doing that because I would
5 like to reiterate to you the fact that I have gone to
6 considerable trouble as a private citizen to comply with the
7 subdivision regulations. I feel that in subdividing my
8 family's property, we spent a great deal of money, a great
9 deal of time and trouble in complying with the subdivision
10 regulations. I would expect everybody who has any use at all
11 in this County, who is subject to the law, to come before
12 you and comply with the regulations. And I have, I'd say in
13 my two terms as president of West Montgomery, two terms as
14 zoning chairman of West Montgomery, I have attended many
15 special exception hearings for that organization. We have
16 been actively prohibited from raising subdivision issues at
17 the Board of Appeals. The former chairman, Judith Hyman, has
18 said to us and to other private citizens when people bring
19 up a subdivision issue before the Board of Appeals, you may
20 not bring that issue up here. That is the providence of the
21 Planning Board. And they will take it up themselves. So we
22 have been prohibited from raising subdivision issues at the
23 Board of Appeals. Compatibility, all the other issues that
24 are in the zoning ordinances that deal with special

1 exceptions, they'll deal with. But they do not deal with
2 subdivision issues. And we have not been able to raise them.
3 So, I would say to you that it absolutely is your
4 responsibility. And I think it's been demonstrated very
5 clearly by Mr. Knopf and others that the law does say that
6 an assemblage is a subdivision. And a subdivision is a
7 resubdivision. So, I would urge you to discharge your
8 responsibility under the subdivision regulations and deal
9 with that issue in all cases of special exceptions because
10 the Board of Appeals does not do that. Thank you.

11 VICE CHAIRMAN RICHARDSON: George, let me if I could, ask
12 you a question. Obviously, you have deep feelings about all
13 the special exceptions that you have encountered. And it
14 seems to be a growing concern when you see a report that
15 came out from fellow citizens groups to the County Council
16 and so forth. So, I think that needs to be addressed. I mean
17 it's only fair. A lot of people think that closer scrutiny
18 should be given to this whole issue of the Mossburg and
19 other cases. Is this the way to do it? Does this solve, from
20 the standpoint of your long term interest in curing any
21 special exception, I guess, uh, conflicts, is this a
22 holistic approach to come into grips with those?

23 MR. BARNES: Actually, no, it's not Mr. Richardson. I
24 think that the whole, the problem with special exceptions

1 and the Board of Appeals is a whole separate issue here. The
2 Board of Appeals does not deal with the subdivision
3 regulations. That, this is hole, something entirely
4 different. You all have jurisdiction over the subdivision
5 regulations. This is not just one facet of a problem with
6 Board of Appeals. The Board of Appeals problems are a
7 legion, but they do not deal with subdivision issues. That's
8 for you to deal with. And you're saying in this case, and
9 obviously have in the past, you know because it didn't
10 happen, that, I mean you're debating whether you should
11 apply the subdivision regulations. But it's not part and
12 parcel of anything that's going on [INAUDIBLE]

13 VICE CHAIRMAN RICHARDSON: Okay. Thank you sir.

14 CHAIRMAN HUSSMANN: Al Blumberg.

15 MR. ALFRED S. BLUMBERG, III, LAND PLANNER, GREENHORNE &
16 O'MARA, INC.: Good evening, Mr. Chairman. Members of the
17 Board. For the record, my name is Al Blumberg. I'm a land
18 planner with Greenhorne & O'Mara, and I'm here tonight not
19 representing anyone but myself as an interested participant
20 in the game, as Mr. Lamari expressed it. I review proposed
21 text amendments and I have to be able to represent to my
22 clients what's going on in the County, and I just wanted to
23 appear before you tonight and mention a few things. I've
24 already submitted a letter into the record. But, I wanted to

1 just say that as part of my review, and part of my daily
2 business activities, I appear before the Planning Board on
3 subdivision items. I've appeared before the Board of Appeals
4 on special exceptions, and so I have seen both sides in
5 action. And, the thing that bothered me about the proposed
6 text amendment really did have to do with the special
7 exception, its impact on special exceptions. As I see it,
8 the special, the Board of Appeals acts on special exceptions
9 as a land use issue. And they have to take into account the
10 master plan, the neighborhood compatibility, and all of
11 those issues. And they make a determination on the land use.
12 And they do take into account the recommendations of the
13 Planning Board, which virtually every special exception is
14 presented to the Planning Board, and the Planning Board
15 makes a recommendation to the Board of Appeals. And they
16 certainly take that recommendation into account, along with
17 a technical staff report. When I appear before the Board of
18 Appeals, I have to discuss the issues that were addressed by
19 the technical staff and discuss how those issues were
20 addressed by the Planning Board. So, I try to represent to
21 the Board of Appeals the Planning Board's concerns, as well
22 as the concerns of other agencies that review the special
23 exceptions. And finally, if the Board of Appeals makes a
24 land use recommendation and they, taking into account all of

1 the other agencies opinions and recommendations, make the
2 land use decision. I think it's the same thing that Phil
3 Perrine was saying earlier. That the land use decision has
4 to take into account all of the same issues that the
5 Planning Board takes into consideration when they're
6 considering a subdivision. So I don't see that there's any
7 confliction between those two, the two decisions. And I
8 think that the County Council has given to the Board of
9 Appeals that decision making responsibility for the land
10 uses that require special exceptions. I've spelled out in
11 my, in my letter the fact that my reading, and I'm not an
12 attorney, but my reading of the language of this section on
13 resubdivision talks about the residential uses. The phrase
14 is that, resubdivided lots quote shall be in the same
15 character as to suitability for residential use as other
16 lots in the existing block. Seems to me, that's a pretty
17 specific reference to residential uses. And as you know,
18 probably 99 percent, 95 percent of all special exceptions
19 are non-residential in character. So I think there's a
20 differentiation between the residential uses referred to in
21 resubdivision language in the zoning ordinance, or excuse
22 me, in subdivision regulations, and the, um, I lost my train
23 of thought there. I'm losing my voice in a hurry, too. But
24 there's a difference, I think, between the residential for

1 resubdivision and the non-residential uses of special
2 exceptions. Thank you very much.

3 CHAIRMAN HUSSMANN: Thank you. Richard Kauffinger.

4 MR. RICHARD KAUFFINGER, MONTGOMERY COUNTY CIVIC
5 FEDERATION: Good evening. My name is Richard Kauffinger, and
6 I'm appearing here on behalf of the Montgomery County Civic
7 Federation. The Civic Federation has upon thorough review
8 and study of this subdivision issue pertaining to the
9 assemblage of lots, strongly feels that the language of the
10 law expressed in Section 50-29(b)(2) is imminently clear.
11 And that is, lots on a plat of subdivision shall be of the
12 same character as the street frontage, alignment, size,
13 shape, width, area, and suitability for residential use of
14 its other lots within the existing block, neighborhood, and
15 subdivision. I'll try and come back to the residential use
16 issue, but the failure of the Planning Board to apply these
17 criteria for years does not make it right. And the law
18 should be followed until and if legislation is enacted by
19 the County Council to change the meaning and intent of this
20 section. On page 2 of the report, the staff had it right
21 when they said that subdivision criteria, and I quote,
22 provide important protections to the existing neighborhood.
23 And I might add the existing residential neighborhood. This
24 is the goal of the zoning ordinance, to protect the public

1 interest. Section 50-29(b)(2) was important in 1985, but
2 it's far more important today. Residents across the County
3 are left unprotected from drastic adverse impacts to their
4 neighborhoods as a result of buildings that take place on
5 aggregated lots, usually under, as a result of special
6 exceptions. And although the staff tries to sway opinion by
7 referring to churches and so-called service uses, they don't
8 fully explain the range of impacts. For example, in my area
9 of the County disaggregation of property, excuse me, through
10 subdivision has also applied to special exceptions for
11 commercial enterprise, a golf driving range, and a 93,000-
12 square foot building for an athletic club. Both in a
13 residential neighborhood. Could anything be more grossly
14 unfair to the current residents of the neighborhood? Of
15 course, the staff claims that the post special exception
16 uses has been, and I quote, has been analyzed from the
17 standpoint of compatibility with other nearby uses by the
18 staff, your Board of Appeals prior to the Planning Board
19 review. They go on further and state staff believes the
20 application of the subdivision could be construed as
21 subjecting the holder of a special exception to an
22 additional compatibility test. I differ on this view. That,
23 and the reason for it is, I'll take as an example the
24 special exception request for the 93,000 square foot

1 athletic building which also includes 240 parking spaces.
2 The staff and the Planning Board, as you recall, recommended
3 denial based on compatibility. This case is now before the
4 Board of Appeals, and it appears that the recommendation is
5 falling on deaf ears. But more importantly, the Board of
6 Appeals is now guided on a Schultz versus Pritts and the
7 interpretation of the Mossburg case. These two cases
8 effectively remove the compatibility issue as a matter of
9 law in the special exception process. And I'd just like to
10 read that again, what Judge Davidson had penned in the
11 Schultz versus Pritts case. And I quote, the appropriate
12 standard to be used in determining whether a requested
13 special exception use would have an adverse effect and
14 therefore should be denied is whether there are facts and
15 circumstances that show that the particular use proposed at
16 the particular location proposed would have an adverse
17 affect above and beyond those inherently associated with the
18 special exception use, irrespective of its location in the
19 zone. This language has been interpreted and applied in
20 Mossburg case and in other decisions to say that the
21 presumption can only, of compatibility and, uh, can only be
22 overcome by showing their particular use proposed at the
23 particular location proposed with any adverse affect
24 [INAUDIBLE] that would incur it in the same zone anywhere

1 else in the County. The burden of proof shifts to the
2 opposition to show that adverse impact for the proposed
3 projects are greater than at this location and other
4 locations in the zone. As a result, the only applicable
5 compatibility test may be the test applied by the Planning
6 Board at the time of subdivision after the completion of the
7 special exception process. I would urge that the Planning
8 Board correct its error in its practice and follow the
9 language and intent of the subdivision that is currently in
10 our zoning ordinance. Thank you.

11 CHAIRMAN HUSSMANN: Thank you. That was the last speaker.
12 Start however, I would suggest we kind of go around and see
13 where we individually are, starting wherever somebody wants
14 to start.

15 COMMISSIONER Perdue: I'll start. I see two issues in this
16 that have been conflated. Sometimes. So the way that I
17 started thinking about this was to first address the
18 question of does this language apply to assemblages, leaving
19 aside special exceptions. So, imagine a case that's entirely
20 residential that involves an assemblage. And that brings us
21 to the definition sections. The definition sections seem
22 clear that assemblages are covered. That a subdivision
23 includes assemblages, and a subdivision is a resubdivision.
24 It also seems clear to me that this was not, that the

1 particular issue we're talking about was not contemplated at
2 the time that definition was put in. So, we have language
3 that seems to apply. A history that suggests it wasn't
4 thought about, this problem wasn't thought about. It strikes
5 me that there might be reasons why one would treat, again
6 talking only about assemblies of residential land, one might
7 treat assemblages differently from breaking apart, that they
8 have different implications. But for me, the interpretive
9 question is one of the extent to which we should be governed
10 by the definition versus the history of what the purpose for
11 the, the reason why it was, the definition was changed and
12 subsequent practice. At the moment, my inclination is to say
13 we probably should be governed by the language, although I
14 don't share the view that every court in the country would
15 take that position. Courts differ on how you ought to
16 approach statutory construction. But, for me that's one
17 piece. What do we do when you're talking about assemblage of
18 an entirely residential case. Does it include assemblage or
19 not?

20 Then there is a second piece. And that's, and to think
21 about the second piece, I want to put aside assemblage and
22 imagine that we had a case that was a division. Where we
23 don't get into this problem of assemblage. Suppose we had a
24 division and a special exception, which is possible. We

1 could have a lot that was to be divided, and there's a
2 special exception for non-residential use. Now the question
3 is not, it's not whether this statute applies, it's which
4 provision applies. Because B talks about what to do, the
5 additional, the subdivision requirements for residential
6 lots, and C talks about the criteria for non-residential
7 lots. So, to me it isn't the question of do we apply this,
8 it's which one do we apply when we have a special exception
9 for non-residential use. And there, it's trying to figure
10 out where it's, the language refers to residential lots, is
11 that a residential lot as zoned or as used. And I'm still
12 trying to sort that out.

13 COMMISSIONER HOLMES: Can you see long, Wendy, can you
14 read that

15 COMMISSIONER PERDUE: It's not long. It says, the title is
16 non-residential lots: Depth and width of lots reversed or
17 laid out for commercial and industrial purposes shall be
18 adequate for the off-street service and parking requirements
19 needed by the type of use and development.

20 CHAIRMAN HUSSMANN: Where are you in the section?

21 COMMISSIONER BRYANT: Page 28.

22 COMMISSIONER PERDUE: At page 28. It's. So we have B,
23 29(b) is additional requirements for residential lots, and
24 then C is commercial lots. That appears to be the way the

1 universe is divided. Into residential lots and commercial.
2 lots. Maybe there's something else that's neither
3 residential or commercial. I'm not sure about that. So I,
4 that's as far as I've gotten trying to sort out the pieces
5 on it.

6 COMMISSIONER BRYANT: As part of your sorting, what did it
7 mean to you with your legal background when it talks in
8 terms of needed by the type of use and development proposed.

9 COMMISSIONER PERDUE: Looking over at A.

10 COMMISSIONER BRYANT: Looking at the end of C.

11 COMMISSIONER PERDUE: Oh, I'm sorry, looking at the end of
12 C.

13 COMMISSIONER BRYANT: Which is the same thing as A.

14 COMMISSIONER PERDUE: Yeah, parking [inaudible]. By the
15 type of use, well presumably some commercial and industrial
16 purposes need more off-street service and parking than
17 others. It seems to direct us to take into account the kind
18 of commercial use that would be contemplated.

19 COMMISSIONER BRYANT: And the same thing applies to the
20 residential, too. Is that not true? That same point?

21 COMMISSIONER PERDUE: Well, let's see. We have a, the
22 residential in B(2), it says suitability for residential
23 use. It's clearly a criteria that we're supposed to take
24 into account.

1 COMMISSIONER BRYANT: Okay. Are we going in order?

2 COMMISSIONER PERDUE: That's simply where I'm, these are
3 the pieces that I'm working on.

4
5 CHAIRMAN HUSSMANN: Do you want to be next?

6 COMMISSIONER BRYANT: I don't want to be next, I want to
7 go home and not have to make a decision. Let me tell you.
8 Well, I've read the staff memo. I was in total agreement
9 with it. It made sense to me. And, I'm going to be quite
10 frank. I did not have a copy of the subdivision regs in
11 front of me. And while presenting, people made reference, I
12 looked subdivision document and I'm also thinking about my
13 previous role on the Board of Appeals, and how does this
14 conflict. Well, I've come to a couple conclusions. First of
15 all, in terms of what the regs, what in fact the subdivision
16 regs say, or the one that says is essentially that the role
17 I'm playing now, I have the power. It's telling me that I
18 have the power. I try to look at it and, from various
19 angles, and it kept smacking me. It says, you have the
20 power. And, um, I said, dag. I have the power. Now, what
21 does this mean I'm supposed to do with this power? And how
22 does that, again, relate to my old role as I understood my
23 old role as it related to the interaction with us, etcetera.
24 And I've come to the conclusion that we have the power, but

1 we still, we're not taking anything away from the Board of
2 Appeals. Because of this. When I was on the Board of
3 Appeals, we made decisions and we put conditions that we
4 said is subject to, and the subject to in many instances,
5 always required a review of some sort by Planning Board
6 staff. So we didn't compromise our power as members of the
7 Board of Appeals, by sending something back to the Planning
8 Board and the staff for its approval. That was part of the
9 conditioning. What I'm thinking now is that although this is
10 telling me that I am empowered, that it still is not taking
11 anything away from the Board of Appeals. That that's a
12 separate and distinct action, and a separate and distinct
13 behavior that they're responsible for. And once they make
14 their decision and they condition it and it comes back to
15 me, I have to determine, ok, you said that this is, has been
16 approved. It's my responsibility now to implement that
17 approval. So therefore, when I look at this document or
18 subdivision and resubdivision, I'm looking at it from the
19 perspective of how do I implement what has been handed down
20 to me by the Board of Appeals. Now from that standpoint,
21 from a policy standpoint, I believe that for the last 16, 17
22 years or whatever the case may be, that a practice
23 developed. And that as a result of the development of this
24 practice, it made good sense. It worked and there was

1 silence, as the staff said, when it came to, with the
2 specifics of that particular practice. I'm under the
3 impression that we have to give serious consideration to
4 whether or not the way we practiced before is the way we
5 should continue to practice. However, in saying that, and
6 I'm not trying to influence anything later on that I'm not
7 going to be a part of. However, saying that, the reality is
8 that if I practice something until April 23, 1996, and I
9 change that practice, will that practice, the changing of
10 that practice begins on April 24, 1996, because that's
11 history. Everything that's occurred up to that point. So all
12 that's a long way of saying that, and let me make a
13 correction. Many of the speakers said they can't believe
14 that we're discussing should be apply the law. I don't, I
15 didn't think that's what were discussing. I thought we were
16 discussing the policy implications of how we interpreted
17 that particular segment of the law. And so with that idea in
18 mind, I'm under the impression that the application of how
19 we interpreted it before was short, and we need to make an
20 adjustment in terms of how we interpret that. Does that make
21 sense?

22 VICE CHAIRMAN RICHARDSON: Allison, let me ask you. I mean
23 because you're really the authority here.

24 COMMISSIONER BRYANT: No, I'm not.

1 VICE CHAIRMAN RICHARDSON: Well, I mean authority from the
2 standpoint of having an experiential base on the Board of
3 Appeals.

4 COMMISSIONER BRYANT: Right.

5 VICE CHAIRMAN RICHARDSON: None of us, I don't think have
6 had that experience. So, you had the power when you were on
7 the Board of Appeals.

8 COMMISSIONER BRYANT: Yes, I did.

9 VICE CHAIRMAN RICHARDSON: You had the power. And, what
10 I'm hearing from a lot of people is that recommendations
11 from the Board when to the Board of Appeals on the
12 controversial cases, and they weren't supported for one
13 reason or the other. And it leads me to the specifics of
14 some of the legal ramifications that relate to Mossburg and
15 the feeling by Mr. Green and others that you're in a box
16 from a standpoint of exercising that power as previously it
17 had been exercised.

18 COMMISSIONER BRYANT: Yes.

19 VICE CHAIRMAN RICHARDSON: And as the Planning Board had
20 interpreted from the standpoint of master plan
21 interpretations and recommended to you to interpret it.

22 COMMISSIONER BRYANT: Well, you are right. Because during
23 that period of time I was on the Board of Appeals, the
24 thinking had to be changed because of Mossburg. Different

1 than the way we were proceeding. At least the way I was
2 proceeding, which was the burden of proof when it came to
3 certain things. I guess Mr. Green said it best when he
4 talked about local compatibility versus comparative
5 compatibility. That definitely occurred as a result of
6 Mossburg. And that changed my way of thinking. And quite
7 frankly, when it came to the questions of resubdivision, I
8 turned that over to the Planning Board, essentially. Because
9 the fact that based on the information I was working with,
10 that was not within my purview. So therefore, I never had to
11 deal with it. And when I made decisions, I made decisions
12 based on the fact that anything regarding subdivision was
13 going to occur down here and not up there.

14 VICE CHAIRMAN RICHARDSON: Well, I guess my concern is
15 that we would expect that our recommendations from the
16 standpoint of, ah, local compatibility is really the key
17 issue for me. And anything that I've ever done on this
18 Board, you're really trying to, and it's interpretive. It
19 can be subjective. It can be weighed in one direction or the
20 other based on what you're hearing, what your personal
21 experiences are, and what the evidence is and so on and so
22 forth. But that issue of local compatibility is very, very
23 important. And it's unique, and you have to apply it in each
24 and every circumstance. So, I guess what I'm hearing from

1 you was, and what Mr. Green is saying, that it was not
2 applied.

3 COMMISSIONER BRYANT: Towards the, from Mossburg on, it
4 changed, in terms of how that was applied.

5 VICE CHAIRMAN RICHARDSON: Okay. So is it that, that
6 seems to me to be the place from a standpoint of making
7 substantive changes to a weakness in what is universally
8 appreciated from a standpoint of neighborhood concerns and
9 feelings of weakness in the program, and so on and so forth.
10 Isn't that the systemic approach from the standpoint of any
11 changes in legislation or whatever is needed to fix that?

12 COMMISSIONER BRYANT: I believe very, very wholeheartedly
13 that that is a critical key element. And in fact, that is
14 consistent with the Chairman's comments to Mr. Leggett,
15 about the fact that that's the area that needs to be further
16 investigated. Yes, so I agree with that. Yes.

17 COMMISSIONER HOLMES: Well, I have some different
18 concerns. If in its infinite wisdom the Council approves a
19 special exception for a particular area, then those things
20 that accompany that particular special exception as far as
21 the minimum amount of land, what have you, that goes along
22 with it, I think that goes along with that particular
23 approval by the Council making this a special exception.
24 Okay. Having said that, if we look at the two different

1 things that was the basis for my question to you, Joe,
2 earlier. When we look at subdivision or resubdivision in the
3 sense that I'm talking about it for the residential areas,
4 we're looking at lot sizes, frontages, and things like this.
5 So we're not duplicating what happens at the Board of
6 Appeals because they're looking at a compatibility in terms
7 of traffic, in terms of size, what have you. So, I don't
8 think there's a duplication of effort. Where I have a
9 concern is that we say there is a subdivision, and then
10 there is a resubdivision. A resubdivision is a subdivision.
11 Okay. And I don't have any problem with that. But, the
12 definition and then the basis for granting a resubdivision
13 then has in it for residential uses. The special exception
14 is to put other things into the residential area. So
15 therefore, to me, and I'll ask the legal folk if they want
16 to jump into this, it does not apply. The resubdivision does
17 not apply. Now, somebody tell me where that thinking is
18 wrong.

19 MS. DEBRA DANIEL, LEGAL COUNSEL TO THE BOARD: I believe
20 that the interpretation does lie, as Wendy pointed out, as
21 Commissioner Perdue has pointed out, in whether or not you
22 want to interpret the subdivision regulations 50-29(b)(2),
23 (b), actually, where it says additional requirements for
24 residential lots. Whether you want to interpret that as

1 whether those requirements apply to a residential use, or
2 whether it's residentially zoned land. So, that's where the
3 interpretation comes in. And if, in fact, you find that it's
4 residential use, then you would find that if the special
5 exception was not a residential use, then it wouldn't apply
6 in that instance.

7 COMMISSIONER HOLMES: But by its definition, at least 90
8 to 95 percent of the special exceptions would not be
9 residential because it's putting an exception into a
10 residential area.

11 MS. DANIEL: Correct.

12 COMMISSIONER HOLMES: So therefore, that doesn't, uh, that
13 to me doesn't cause you to have any other kind of discussion
14 about that.

15 COMMISSIONER BRYANT: Except that.

16 MR. LOEHR: I think that is relevant

17 COMMISSIONER HOLMES: Go ahead. Let him.

18 COMMISSIONER BRYANT: Except that if, in fact, you look at
19 the grid, the matrix, for what's permitted, under special
20 exception conditions, then there is the assumption that even
21 though this area is a residential use, that this particular
22 use is still by definition compatible with it in a
23 residential area.

24 COMMISSIONER HOLMES: Compatible in terms of what the

1 Board of Appeals looks at. Traffic, its size, its bulk, uh,
2 those kind of things. Compatible, compatibility as far as we
3 would look at subdivision would be in terms of frontage, in
4 terms of lot size, and things of that nature.

5 MR. LOEHR: That's right, and I think what Debra said
6 supports that position. If you say that this applies to
7 residential uses, then you eliminate the applicability to
8 special exceptions because they're not residential uses. If
9 you say it applies to residential zoning, then you would
10 have to treat, you would have to apply it to a special
11 exception. And then, you'd have this

12 COMMISSIONER HOLMES: Where does it say zoning?

13 MR. LOEHR: It doesn't. That's why this is an issue that
14 you, this is really where, one of the things you have to
15 decide. What you're interpreting is whether it is.

16 COMMISSIONER HOLMES: Everybody is telling me I ought to
17 read the language.

18 MR. LOEHR: Well, but this case, I think Commissioner
19 Perdue pointed out that this case, the language isn't clear.

20 COMMISSIONER HOLMES: It says. It's clear to me. It says
21 residence.

22 MR. LOEHR: It says residential lots.

23 COMMISSIONER HOLMES: Ok, well, residential lots.

24 MR. LOEHR: Is that a lot that's zoned residential, or is

1 that a lot that's being, is it a lot that's being used for a
2 residential purpose? Because if it's zoned, if it applies to
3 the lots that are zoned residential, then you do get into
4 this problem no, almost no special exception is gonna pass
5 the test because it's not suitable for residential use. And
6 that's the inconsistency in the argument.

7 COMMISSIONER PERDUE: Well, it's

8 CHAIRMAN HUSSMANN: Let's not all debate, here. I mean I
9 have a bunch of points, and I want to get mine out before
10 everybody gets their points.

11 COMMISSIONER HOLMES: And I appreciate that, Mr. Chairman.
12 But we still haven't gotten to the end of my point.

13 CHAIRMAN HUSSMANN: Right. So I want you to keep going
14 with your point, but not everybody should jump in and have a
15 general discussion here.

16 COMMISSIONER HOLMES: Well, I'll stop and we, go ahead and
17 let's listen to yours, and then we'll

18 CHAIRMAN HUSSMANN: I want you to go ahead. I wasn't
19 trying to stop that at all. [INAUDIBLE]

20 COMMISSIONER HOLMES: I just lost my train of thought.

21 CHAIRMAN HUSSMANN: I'm sure I'll say enough that you will
22 find it. I guess I have about 10 points, but starting with,
23 what's before us, a policy, or a law or a standard? And I
24 think that almost by definition, you can't have a policy or

1 a standard that's contrary to the law. And so, I'm starting
2 to at least try to sort out my point of view, as each of us
3 are in our own ways, the law. And I think the key issue when
4 you look at the law is that paragraph that begins with, at
5 the top, B, additional requirements for residential lots.
6 And in my opinion, there, this provision (b)(2) makes no
7 sense unless it applies, not to the use that somebody wants
8 to put to a piece of property, but to the lot previously
9 created from residential purposes. I think this law was
10 established to protect communities and neighborhoods. And to
11 give people, some of the testimony have said, who've already
12 invested most of their life to a piece of property, some
13 confidence that when they're in a plat of subdivision that
14 the future of that subdivision will be reasonably conformed
15 to the size, shape, alignment, width, area and suitability
16 for residential use of subdivisions. Which has been noted,
17 and I think is clear to all of us, I hope, that a
18 resubdivision is a subdivision, and the law is very clear
19 that an assemblage is a subdivision. So from my point of
20 view, I start right there, this section. [APPLAUSE] I'm not
21 looking for that; I'll lose my train of thought. This
22 section makes no sense unless it is meant to apply to
23 residential lots previously created in a community designed
24 to protect the people who have invested their, most of their

1 life savings and assets in that neighborhood. And there is
2 no language in here whatever. I think the thought that, well
3 it was meant to apply to when you make things smaller. I
4 mean there's no language in here whatsoever about that. And
5 when we say now it wasn't meant to apply to a special
6 exceptions, there's not only no language in here, but in
7 fact, where an exception exists, it's explicit. It says it
8 doesn't apply to agriculture. And when you start thinking,
9 I'm not a lawyer, but in statutory construction, start
10 making a list of things that are excluded, you start
11 omitting everything else. If it meant to say it didn't apply
12 to special exceptions, it would say so. And that's not in
13 here anywhere. And so when I read that resubdivision of
14 residential lots, it's talking about the lot that already
15 exists. Created for residential purposes. Otherwise, this
16 thing has no meaning whatsoever, as I see it, if you can
17 pick and choose which category you want to put it into. The
18 part about non-residential lots says it's gotta be big
19 enough o accommodate the function. Now, I don't think this
20 view of this obviates the Board of Appeals or the ability of
21 people who are in the business of providing essential
22 services in our community to seek and find property in our
23 county in every one of these zones that meets the criteria
24 of the zone. Or the standards for the special exception. It

1 just means that if you're going to go into a neighborhood,
2 you know, that there's special rules that apply. That Lee
3 case, I think that this interpretative condition of this
4 section over time, I guess, is probably a thing that gives
5 me pause. Except, I think we have been loose in interpreting
6 this language along the way. Not just because of Mossburg.
7 And I think the court clearly said, I'm reading the language
8 here, it says the Planning Board shall apply the criteria.
9 And, I read that as being, you know, not an option. It says
10 we shall apply these criteria. And the discussion that well,
11 in 1985, we didn't expect or intend this, I don't think,
12 number one, in 1985 we had any idea that we'd be looking at
13 the kind of structures we're looking at today. So I don't
14 think it was even a thought dealt with or not. But you don't
15 decide, well I'm not gonna apply the law because I don't
16 think they intended to apply it when they approved it. The
17 law stands the way it is. You know, until it gets changed.
18 And if somebody wants to change it because it's having
19 unintended consequences, you know, that's what councils are
20 for. I think that this issue of whether or not we're
21 interfering with the Board of Appeals, number one, it's very
22 clear in 50-5 that this is our jurisdiction. It's not just
23 something we can do. It's our responsibility to do it. So, I
24 have, I don't find any concern there, that uh, and I'm sort

1 of, I guess, shored up by that. In fact, the practice of the
2 Board of Appeals has been to say that's not their
3 jurisdiction. Go talk to the Planning Board. They deal with
4 these things. So, it is our responsibility to deal with
5 these things. I agree with, I guess, the point, although
6 it's not the reason why we should interpret this one way or
7 another, but the effect of interpreting this today is to
8 remove the only real protection that our communities have in
9 the world of special exceptions out there, and then the laws
10 if they've been reinterpreted and instructed by the courts.
11 So, I'm not prone to be loose some more. I think that we
12 need to read literally what this law says and apply it. And
13 if our Council wants to change it, or we want to change it,
14 or the Board of Appeals wants to change it, or the
15 applicants want to change it, there's a process for doing
16 that. And so, my circular thinking, I guess, comes back to,
17 I guess, my main point, I think this additional requirement
18 for residential lots, resubdivision, means if you've got a
19 residential lot and you want to resubdivide it, here's the
20 criteria. And I think the court says we shall apply these
21 criteria, and not whether or not we wish to apply these
22 criteria. And if it meant to say that it's, from Wendy's
23 point that, well do we use two, (b)(2) or C as the criteria,
24 well the law intends that you, it's either this or that. The

1 law says that it's, you know, it tells us often in the
2 structure of the zoning ordinance and the subdivision
3 regulations where you find either this or that. This doesn't
4 say that. I think all of these criteria apply.

5 COMMISSIONER HOLMES: Let me, say a couple of things here.
6 I would agree with you, Mr. Chairman that the subdivision
7 provisions are the purview of the Board. And I don't think,
8 as I said before, that we in carrying out that
9 responsibility are getting in the hair or duplicating the
10 effort of the Board of Appeals. But if you're gonna tell me
11 that the law says that, if it's gonna specifically say
12 something, then it didn't specifically say special
13 exceptions. So there's nothing in there that says that
14 applies to a special exception. So we've gotta have some
15 parallel thinking here. Now, what I, but the other point you
16 make I think is a good point. What we're here tonight is to
17 talk about policy. And I think what we're finding is that as
18 written, these regulations are, I won't say convoluted, but
19 they are of such a nature that we can't right now where it
20 should be. So we, I think, as part of this policy thing and
21 the reason we're doing this is to now, do we want to go back
22 to the Council and say, here are some of the things we need
23 to have put in the regulation. But if you're going to say it
24 doesn't specifically say one thing, it doesn't specifically

1 say the other, then I, you know, I can't buy that. But, I do
2 think that something is wrong with the writings and the
3 directions we're getting out of here that all five of us, I
4 think, in some way are interpreting it a little bit
5 different.

6 COMMISSIONER BRYANT: May I assist you with one thing. You
7 were talking before about a lot, and I think that Charlie
8 talked in terms of whether that we're talking about the use
9 or the zone. I don't know how, I think that this might be
10 helpful, and that's the definition under Article 59(a) in
11 the zoning ordinance, and it says that a lot is a parcel of
12 land occupied or to be occupied, et cetera, et cetera, et
13 cetera, but the key point for me is that it says for a lot
14 in the zone in which such a lot is situated. Meaning you
15 cannot separate the zone from the lot and the lot from the
16 zone.

17 COMMISSIONER HOLMES: I'm not sure I follow what you're
18 saying.

19 COMMISSIONER BRYANT: 59(a), those definitions.

20 CHAIRMAN HUSSMANN: Well, there are lots of parcels that
21 are in a zone that are not in a lot.

22 COMMISSIONER BRYANT: But there's, you can't have a lot
23 that's not in a zone.

24 CHAIRMAN HUSSMANN: Correct. But you have lots of zones

1 that don't include lots.

2 COMMISSIONER BRYANT: Correct. But, you cannot have a lot
3 without it being in a zone. So therefore, from my
4 standpoint, going back to what Charlie was saying, it has to
5 be our community.

6 UNIDENTIFIED: No, I was just [inaudible] reasoning was.

7 COMMISSIONER BRYANT: From my standpoint, what that
8 suggests is that subdivisoning does apply. Resubdivision
9 does apply to the lot as its use, as well as its zone. And
10 that's the implication behind that. So you can't separate
11 the two is what I'm suggesting.

12 CHAIRMAN HUSSMANN: So, it does apply to special
13 exception?

14 COMMISSIONER BRYANT: I'm saying that the subdivision does
15 apply to special exceptions as I understood what I read. It
16 does apply.

17 CHAIRMAN HUSSMANN: I think that's the

18 COMMISSIONER HOLMES: How could you ever, how could have a
19 special, how could you have a special exception? Special
20 exception by its very nature says it's different. And you're
21 talking about another use. You're not talking about a
22 residential area. And I'm asking these questions. Not coming
23 to any conclusion, but it just, something doesn't seem to
24 balance here when you talk that way.

1 COMMISSIONER PERDUE: Well, it seems to me that one might,
2 looking at (b) (2), not, I think I'm in agreement with the
3 Chairman and with what else has been said concerning our
4 role with respect to the Board of Appeals. We have our own
5 authority, and we apply our own authority. And I agree, and
6 I indicated before, I agree that this applies to
7 aggregations. Putting together of lots, not just splitting
8 apart. That brings us to, what is this language. If you look
9 at (b) (2), what do we have to consider? Well, we have to
10 consider these quite specific things about street frontage
11 and alignment and size and shape. They're very specific, and
12 Lee says you have to go through each of them. So we would
13 look at this newly created lot and look at its size and
14 shape. And we would look at its suitability for residential
15 use. Now, the lot, if we focus on zoning, not use, what it
16 says is, will the new lot be suitable for residential use?
17 With respect to a splitting part, we're making it smaller,
18 it may be that the new lot will not be suitable for
19 residential use because it's gonna be in a ditch or
20 someplace where you couldn't, you just couldn't build. And
21 so we would find that it was not suitable for residential
22 use, aside from the shape. We have the shape and size, and
23 then the new lot must be suitable for residential use. It's
24 not, is it compatible with residential use? It's not, is it

1 gonna be used for residential use? It says, will the new lot
2 be suitable for residential use? Now, that would not
3 preclude a special exception. All it asks you was, it asks
4 you about the lot. Is the lot suitable for residential use?

5 VICE CHAIRMAN RICHARDSON: What lot is not suitable for
6 residential use?

7 COMMISSIONER PERDUE: One that's got a river running
8 through it.

9 COMMISSIONER BRYANT: Or one that's too small.

10 COMMISSIONER PERDUE: One that's too small.

11 COMMISSIONER BRYANT: Could generally then mean less than
12 5,000 square feet.

13 VICE CHAIRMAN RICHARDSON: I guess I'm having trouble. If
14 a Board of Appeals sent us back any other use besides
15 residential, is that what you're going to interpret? You're
16 gonna look at the layout and say that it's suitable for
17 residential use, and imagine in your mind that it's gonna
18 have a house on it.

19 CHAIRMAN HUSSMANN: Well, I think that

20 VICE CHAIRMAN RICHARDSON: Well, I'm trying to get her to,
21 I'm trying to

22 COMMISSIONER PERDUE: Where you are combining two
23 residential lots, if you are combining, each of which is
24 suitable for residential use, you're combining. We have two

1 situations. One, you're breaking them apart. You have one
2 lot that as a full lot was suitable for residential use.
3 That's how it got set up the first way. But now you want to
4 split it in half. The classic subdivision. Making smaller.
5 It seems to me it's quite plausible that one of the, one or
6 both of those pieces would not be suitable for residential
7 use. It would be too small. It would be in a, you cut off an
8 environmentally sensitive area where you're not allowed to
9 build. There would be other reasons why a lot that is cut in
10 half may become unsuitable for residential use. And that's a
11 criteria. Is it gonna be suitable for residential use. Now,
12 it's harder to figure out what that criteria means when
13 you're putting two lots together that were separately
14 suitable for residential use and are now one lot. Would you
15 ever have a case that it was not suitable for residential
16 use? If it meant, we have the other criteria—size, shape,
17 all of that compatibility—would you ever find one that was
18 not suitable for residential use when it was put together?

19 COMMISSIONER HOLMES: In that zone, though. And in that
20 neighborhood. That's where the compare, compatibility comes
21 here. And that's when you

22 COMMISSIONER PERDUE: Well, we have compatibility to size,
23 shape, width, area, street frontage, all of those specific
24 criteria.

1 COMMISSIONER HOLMES: Okay.

2 COMMISSIONER PERDUE: And in addition, suitability for
3 residential use. Again, in making one smaller, you could
4 have a case where the lot is the right shape and size, but
5 for topographic reasons, or other reasons, it was not
6 suitable for residential use.

7 CHAIRMAN HUSSMANN: Which is consistent with the whole
8 idea, the whole idea of special exceptions is that you're
9 not changing the character of the neighborhood. And, uh

10 VICE CHAIRMAN RICHARDSON: I agree, character, Bill.
11 Character and compatibility.

12 CHAIRMAN HUSSMANN: I'm saying this provision doesn't
13 disturb me in terms of suitability for residential use.
14 Because the whole idea is that you don't come in the name of
15 the special exception and get an exception for a use at a
16 given location within an area previously subdivided for
17 residential purposes and destroy the character of that lot
18 for future residential development. There's always, I guess,
19 ought to always be the ability to get back to residential
20 when you're in the middle of a neighborhood. You can go off
21 into a hundred acre, you know, R-90, R-60, R-70, whatever
22 zone you want, and you can take your two-acre lot and you
23 can record it for this purposes and you don't affect anybody
24 other than yourself. But when you're gonna go into the

1 neighborhood, where people have invested everything they've
2 got, and you want to take two lots in the middle of that
3 neighborhood and, ah, makes no sense to me that the rules
4 are meant to say, well if you're gonna do something little
5 here, we've got all these criteria. But if you're gonna do
6 something big, the criteria don't apply. That makes no sense
7 to me.

8 COMMISSIONER HOLMES: Let's back up and say, what are we
9 trying to get to tonight as a solution? What are we trying
10 to do? We know now that the language is so convoluted to me,
11 and to, we all have a different opinion, and we're coming
12 at. So what we want to do is to look at the language and the
13 direction that we're giving to the Board of Appeals and to
14 the Planning Board and make that language and make those
15 provisions of such a nature that we can follow them. And
16 that we can follow them with some specificity. So,

17 CHAIRMAN HUSSMANN: I think the issues are two. Does it
18 apply to special exceptions, and does it apply to assembly?

19 COMMISSIONER PERDUE: I guess I would say that I agree
20 that the issue is, does it apply to assembly. The more
21 specific interpretive question for me is not does it apply
22 to special exceptions, because there's nothing that would
23 say it doesn't. It's, does residential lots mean lots that
24 are to be used for residence, or does it refer to the

1 zoning?

2 VICE CHAIRMAN RICHARDSON: The old lot or the new lot?

3 COMMISSIONER PERDUE: Does it apply to the zoning, or does
4 it apply to the proposed use? Because we have two

5 CHAIRMAN HUSSMANN: I agree with you on that. To me, my,
6 where I part ways with whomever about the interpretation of
7 this is that, it's just starting from this B additional
8 requirements for residential lots, and the only way it makes
9 sense for me to interpret that is to apply it to lots that
10 exist. Because why else would it be in there?

11 COMMISSIONER HOLMES: To do anything with anything, it has
12 to exist.

13 CHAIRMAN HUSSMANN: No.

14 COMMISSIONER HOLMES: Well, if it doesn't exist, Bill, you
15 can't do anything with it.

16 CHAIRMAN HUSSMANN: That's right. So it's not an issue.
17 It's only when you resubdivide a residential lot that exists
18 that these criteria apply. Otherwise, it doesn't apply at
19 all. You go to all these other paragraphs

20 COMMISSIONER HOLMES: The very nature of the fact that
21 you're saying that you're going into a neighborhood and have
22 a special exception says that something exists in there that
23 you're making an exception to.

24 CHAIRMAN HUSSMANN: For the zoning.

1 COMMISSIONER HOLMES: You're not doing, you're not
2 changing the zoning. You've already said here's the zone,
3 and here are things that are allowed as a special exception.
4 To that particular, to the permitted items in there.

5 CHAIRMAN HUSSMANN: The ones that are applicable. In a
6 residential community are the ones that meet these criteria.

7 MR. LOEHR: But I think that section is clearly, in my
8 mind is clearly talking about the proposed lots, not the
9 existing lots. It says additional requirements for
10 residential lots, but if you look at the resubdivision
11 section, it says lots on a plat for the resubdivision of any
12 lot, tract, or is part of an existing subdivision, so it's
13 clearly referring to the proposed lot.

14 CHAIRMAN HUSSMANN: No, it says that it's part of an
15 existing subdivision.

16 MR. LOEHR: But it's talking about the requirements for
17 the new lots. It says lots on a plat for the resubdivision.
18 That means lots on the preliminary plan that is before you,
19 the proposed lots are what is being referenced in (b) (2). And
20 I think that the title of B also refers to proposed lots. I
21 mean, all these requirements are dealing with proposed lots.
22 I guess just one other further complication from staff

23 CHAIRMAN HUSSMANN: But if it only applies to the proposed
24 lots, why would the resubdivision criteria apply to

1 anything?

2 COMMISSIONER PERDUE: The new lots have to meet the same,
3 we know the existing lot is the right size. It's already
4 existing. It's the new ones have to be the right shape and
5 the right size. And the new lots must be suitable to
6 residential use. Must be suitable. But I understand your
7 point to be, given the zoning and given that it, regardless
8 of the special exception could revert to its zoned use,
9 which would be residential, then the suitability requirement
10 is not irrelevant when there's a special exception because
11 you're saying even, regardless of the, whatever the special
12 exception is, it must remain appropriate for its zoned use.
13 Which is, it's zoned residential. So it doesn't make it, to
14 respond to your concern, it doesn't, the suitability
15 requirement isn't inconsistent with special exceptions.
16 Because it's saying this is zoned for residential. When you
17 make a new lot, it's gonna still be zoned for residential.

18 COMMISSIONER HOLMES: That's right. And if you went back,
19 if you for some reason wanted then to go back to the same
20 size, then you would go in to the resubdivision for this
21 thing, or a subdivision. You know. We're saying one and the
22 same. So, I think that that all of us are good intended, and
23 I'll make my statement again then I'll shut up. We are
24 sitting here and have five different interpretations

1 somehow. Which to me says that the systemic problem is the
2 regulation. And what we ought to be doing is trying to find
3 out how we can make the regulation explicit that protects
4 our responsibilities and assures that we are not in any way
5 usurping the responsibilities of the Board of Appeals. How
6 do you do that? You can't do that here with this, but I
7 don't see, I think you could argue with me till hell freezes
8 over if you want to, and you wouldn't make me see all the
9 points of anybody on this Board about that.

10 COMMISSIONER BRYANT: I hope hell freezes over by 10:30.

11 COMMISSIONER PERDUE: But we have two problems. One is,
12 everybody agrees this is unclear, and it ought to be made
13 clear. But then we have the problem of what does it mean
14 until it it's made clear.

15 MR. LOEHR: I guess from staff, we want to know what do
16 you want it to say? And then

17 COMMISSIONER HOLMES: Exactly. What is it that we're
18 trying, what are we trying to do? Are we trying to say these
19 are our responsibilities, and this is the way a special
20 exception should go through the system? I think that's what
21 we're trying to say. And who has, then, the responsibility
22 for doing what? And that's what this thing ought to say. And
23 right now it doesn't say clear enough. It may say it. At
24 some time, somebody must have understood it. If we're doing

1 something wrong, that doesn't say that we, if we decide
2 that, that doesn't mean that we have to continue it.

3 VICE CHAIRMAN RICHARDSON: But it says, and it has been
4 interpreted for a number of years a certain way. And I've
5 gotta ask myself what are we trying to fix, and that, much
6 of what we're trying to fix, I think, relates to some of the
7 things you've said, Bill, from a standpoint of protection of
8 neighborhoods. And none of us disagree with that. Either the
9 large infill development, the consolidation of lots from a
10 standpoint of larger nursing and daycare situations. Some of
11 the track things that we've seen. That seems to me to be
12 where the rubber meets the road. That seems to me to be, in
13 the context of these special exceptions, where we're feeling
14 more pain as our community gets more developed. All right,
15 we're running out of land. There seems to be a broad, I
16 guess, feelings among people in the community, the civic
17 people and so forth, that the Board of Appeals and the
18 special exception process is not working. That to me is
19 systemic, and that needs to be fixed and addressed. And I'm
20 not sure that moving these words around is gonna do that.
21 It's gonna take an awful lot more work, and it's gonna take
22 from the standpoint of, you know, looking maybe it's the
23 date that the nursing homes... maybe that's what has to be
24 looked at. Maybe that's where the bigger problem is. Or

1 maybe it's, you know, large facilities over a certain size.
2 Maybe that's gotta be looked at. But ultimately, to me, the
3 Board of Appeals isn't exercising, doesn't seem to me to be
4 exercising their proper authority. That's why I asked
5 Allison those questions. Will it be in harmony with the
6 general character of the neighborhood, and they are trying
7 to do that, I guess. But we disagree with it. So what we're
8 doing is coming in the back door, at least the way we've
9 interpreted it in the past, and saying, well ultimately,
10 we're gonna decide the issue, and this is the best way to do
11 it.

12 CHAIRMAN HUSSMANN: At least, I thought I heard at some
13 point along the way it was, it seemed to be a majority, I'm
14 not sure, but that, first of all that the subdivision
15 authority is ours to exercise.

16 COMMISSIONER HOLMES: I agree.

17 VICE CHAIRMAN RICHARDSON: Yes.

18 COMMISSIONER PERDUE: I agree with that.

19 CHAIRMAN HUSSMANN: So whatever it says, whatever the
20 rules are, whatever the process is. Sooner or later you come
21 here, and we're not governed by what the Board of Appeals
22 did or didn't do. Because it's clear from even the testimony
23 out there that the Board of Appeals did not even try to do
24 it. They view our authority, although I read in their

1 letter, you know, that they say that it doesn't apply to, I
2 read their letter and it said it doesn't apply to assembly.
3 The law says very clearly, it does apply to assembly. That's
4 not a question. Then, you know, and I see some heads shaking
5 out here, but if you want to just read it, it says
6 resubdivision includes assembly of recorded lots or parts
7 thereof, and a resubdivision is a subdivision. That's not
8 unclear at all. You know, that you know, whether you are
9 dividing or adding, that subdivision process is required. I
10 view it that we're responsible for subdivision,
11 independently of the Board. And Section 50-5 says that as
12 well. And the other authorities cite it. So that's ours to
13 do. Now, I guess when it comes to, what do we do when we get
14 a subdivision before us that we're, this paragraph is at
15 issue. I guess we haven't sorted out amongst ourselves. The
16 only thing I can get, say in terms of consensus is that we
17 agree that we have to do something.

18 COMMISSIONER PERDUE: But it seems to me it has limited
19 what we, we actually narrowed what the interpretative
20 disagreement is. It's not about our relationship to the
21 Board of Special Appeals. It's not about whether it applies
22 to assemblages or doesn't apply to assemblages. We seem to
23 be in agreement that at least, not sure where you are,
24 Davis, on this, but

1 VICE CHAIRMAN RICHARDSON: I'm trying to think, can we
2 have assemblages at all. I mean from a standpoint of, can
3 assemblages occur that make anything bigger than what is
4 already there. Can it occur for a house? Let's say for
5 another house, will we have these lots? We had one today,
6 for instance, that added an out-lot. And I was thinking that
7 that isn't, that seemed to put it somewhere in between the
8 ones that are closer down to Falls Bridge Lane and the ones
9 in the other direction to Persimmon Tree Road, so you could,
10 you know. It's was halfway in between it, split the
11 difference, okay it would work. But I'm thinking in my mind,
12 can you assemble anything above what the norm is?

13 CHAIRMAN HUSSMANN: Sure.

14 VICE CHAIRMAN RICHARDSON: You can?

15 COMMISSIONER PERDUE: Well, I don't think you can.

16 COMMISSIONER BRYANT: He's saying sure, and you're saying
17 you can't.

18 COMMISSIONER PERDUE: Except by using the waiver.

19 MR. LOEHR: I think the waiver provision is not

20 COMMISSIONER PERDUE: Which is quite limited.

21 MR. LOEHR: It's very limited, and basically, the only
22 thing we'd be waiving it for is because of the size of the
23 lot, which is exactly the issue that we're dealing with. So
24 to me that would be totally inconsistent. But, I agree with

1 you. If the Board says that the resubdivision criteria apply
2 to assemblages, we have no choice but to turn down any
3 assemblage. We have no choice but to recommend that you turn
4 down any assemblage for, whether it be for a single-family
5 house, for a church, for special exception, for any use
6 where the new lot is bigger than the existing lots in the
7 neighborhood. That would be the outcome of the policy.

8 CHAIRMAN HUSSMANN: But if you're saying

9 MR. LOEHR: And that's why we believe it doesn't make
10 sense.

11 CHAIRMAN HUSSMANN: But if that's where you get to,
12 though. You've got to jump over this language that says that
13 a resubdivision is an assembly of lots and a resubdivision
14 is a subdivision. Now, how do you get beyond that? Other
15 than to say it wasn't intended to be that way.

16 VICE CHAIRMAN RICHARDSON: Well, it's gotta be cleaned up,
17 Bill, I don't know, but

18 MR. LOEHR: That's why I just said that the issue here is
19 not just how you interpret it, but what you want it to say.
20 It clearly was never the intent that it apply to
21 assemblages. I mean, I'll just state that as a fact. Because

22 CHAIRMAN HUSSMANN: But Charlie, how do you

23 MR. LOEHR: Because I wrote the language in 1985 that
24 changed the ordinance. At least I helped Dale Price write

1 it. And it was done solely for the purposes of dealing with
2 an APF problem, and it was never discussed that it should
3 apply to resubdivision.

4 CHAIRMAN HUSSMANN: What things are intended to do and
5 what they do are

6 MR. LOEHR: No, I'm not arguing about what it says, now.
7 I'm arguing about what the intent was. I said the intent,
8 when the resubdivision criteria, when this section was put
9 in the ordinance, the definition of subdivision did not even
10 include the assemblage of lots. So it was not the intent,
11 when the ordinance was written, that the resubdivision
12 criteria would apply to the assemblage of lots. In 1985 when
13 it was amended to say that a resubdivision is a subdivision,
14 it was not done for this intent, it was done for a
15 completely different intent. So, all I'm saying is that
16 there was never an intent that the resubdivision criteria
17 apply to the assemblages. If the Board agrees that that's
18 way the ordinance has to be interpreted now because of the
19 way it's written, then the question is, do you really want
20 to do that and turn down all these other applications that
21 we've just discussed, or do we need to do a text amendment
22 to change that? That's the bottom line from the staff
23 perspective.

24 CHAIRMAN HUSSMANN: I remember a course I took in public

1 policy once said that most often the results of public
2 policy are something totally different than what was
3 intended.

4 VICE CHAIRMAN RICHARDSON: Right. And this is a good
5 example.

6 CHAIRMAN HUSSMANN: But it's not intent that you regulate
7 from. You know, 'cause even if you went back to, uh, you may
8 have written it, but nine members of the County Council, or
9 seven at the time, approved it.

10 MR. LOEHR: Right. But if you look at the staff report, if
11 you look at the legislative history, there was nothing in
12 there about the resubdivision criteria.

13 CHAIRMAN HUSSMANN: But, you know, they may have thought,
14 well, and they didn't know Charlie wasn't too clear in this
15 thing.

16 MR. LOEHR: They've learned since then!

17 COMMISSIONER PERDUE: But it does seem to me that the
18 implications are that if you have a neighborhood of one-acre
19 lots, the relevant neighborhood is one-acre lots, and
20 someone wants to put two of them together, that does not
21 meet the same character as to street frontage, alignment,
22 size, shape, width, area. It probably meets suitability for
23 residential use, but it doesn't meet the others.

24 COMMISSIONER HOLMES: And therein lies the, ah another

1 problem. When you put a special exception into an area with
2 one-acre lots, and the special exception requires a greater
3 number of acres, where are you?

4 CHAIRMAN HUSSMANN: Then you have to go find a piece of
5 property where you've got two acres. Down the street.

6 COMMISSIONER HOLMES: What is the difference in the size?
7 It's two acres is two acres is two acres. And it's not going
8 to change anything.

9 COMMISSIONER PERDUE: You have to go find a neighborhood
10 of two-acre lots.

11 COMMISSIONER HOLMES: No. But, it has said in the
12 neighborhood that you're talking about. I'm saying because
13 we have one that says this special exception can be in this
14 particular area. And it causes you, then, to assemble a
15 greater number of acres than the average size in that
16 neighborhood. All I'm saying is that we've gotta be
17 consistent throughout, because otherwise you're putting
18 yourself into an untenable position. You can't get out of
19 it.

20 VICE CHAIRMAN RICHARDSON: We want to be there because
21 we've got the problem with the special exceptions, Art. I
22 mean that's what I'm seeing. I mean, really, it's an
23 overwhelming problem, and I think it's gotta be addressed,
24 and everybody's shaking their head. It's gotta be addressed

1 right front, front up. And to come in the back door. Really,
2 if you. From the standpoint of a property owner and not
3 necessarily a developer. Even property owners that have lots
4 of land. Mr. Barnes gave us example from one of his
5 developers. He has a right to expect predictable, clear cut
6 rules, expected procedures, and so do other people. And
7 that's where we're, in this particular case, we're coming in
8 the back door. We're not, we're not being consistent with
9 the way the rule has been applied in the past. It's not
10 being predictable, and it's really triggered by strong
11 disagreements, which we're one of the bodies that disagreed
12 with special exceptions. Certain special exceptions. And so
13 I would be hopeful that we should target, globally, the
14 problem with the special exceptions and try to get a fix
15 that looks at all of this. As opposed to changing what we've
16 been doing for the last 15 years. And some of the intent.
17 Maybe the language has got to be cleared out to say what I
18 guess Charlie intended it to say originally, but I don't
19 think that's gonna solve the problem, Bill.

20 CHAIRMAN HUSSMANN: Davis, do you think you read this, I
21 mean at the bottom of page 4, you can read that to say that
22 it doesn't include assembly of lots? How can, I mean, here
23 in the subdivision regulations, you know, how can you read

24 VICE CHAIRMAN RICHARDSON: For me the law, Bill, and

1 really, I'm not a lawyer. Okay. I'm not a lawyer. I'll tell
2 you this, though, that from the standpoint of precedents, it
3 seems an interpretation. Somebody that comes through that
4 door has every right to expect the same treatment and
5 interpretation that the previous person had. And we've been
6 doing that for 14 years based on one of the top-rated
7 planners that we have in Montgomery County. And his
8 recommendations to the County Council over a good number of
9 years. And for me, that's certainly important.

10 CHAIRMAN HUSSMANN: Me, too. But I can't ignore language
11 that's so plain that there's no ambiguity in it.

12 COMMISSIONER PERDUE: Just for the record, I want to be
13 clear that my interpretation is not driven by unhappiness
14 with special exceptions. That's not to say I don't have
15 unhappiness, but I'm not looking at this language saying I'm
16 unhappy, therefore I will read the language in a particular
17 way. I'm looking at the language and trying to figure out
18 what it means.

19 VICE CHAIRMAN RICHARDSON: And I appreciate that.

20 COMMISSIONER PERDUE: So, I just want

21 VICE CHAIRMAN RICHARDSON: Sure, I'm appreciative. But the
22 reality is, what is driving this is special exceptions.
23 That's what is driving this.

24 COMMISSIONER PERDUE: It's not driving me.

1 VICE CHAIRMAN RICHARDSON: The desire to protect our
2 communities. So that special exceptions are in harmony. All
3 the things that the Board of Appeals is charged with, will
4 be in harmony with the general character of the neighborhood
5 considering the population, density, design, scale. All
6 those things that they're charged with doing. And that's
7 where I've got strong feelings that it doesn't seem to me
8 always to have been applied properly is evidence based on
9 what a lot of people are saying that needs closer scrutiny
10 that it should be looked at holistically, and I agree with
11 it, based on what I've seen up here.

12 CHAIRMAN HUSSMANN: So I guess that the narrow question
13 comes down to one thing. Then I guess as I listen to
14 Charlie, is whether or not we view the subdivision
15 regulations to apply to the assemblage of lots.

16 MR. LOEHR: But I think, you asked whether there was any
17 ambiguity, Bill, and I think Commissioner Perdue said it
18 earlier. I think clearly if you read the language the way it
19 is, in a strictly residential case, you would have to say
20 that the resubdivision criteria apply. I think there is a
21 margin for interpretation in a non-residential case. And,
22 you know, that's what we've been going around and around on
23 in terms of the language in 50-29(a), and this, what they
24 mean by residential lots. But in spite of all that, you

1 know, the bottom line for us is still what do you want it to
2 say? And then we'll make it say that.

3 CHAIRMAN HUSSMANN: I mean, I personally want it to
4 protect existing communities, people who've bought into
5 recorded lots, and that they have a reasonable confidence
6 that over time, the bodies of government, whether it's
7 ourselves or the Board of Appeals, you know, they will
8 respect the conditions under which they bought their home.
9 That's where I am.

10 VICE CHAIRMAN RICHARDSON: And I agree with you, Bill. I
11 mean I think, I agree with that.

12 COMMISSIONER HOLMES: I think that's

13 VICE CHAIRMAN RICHARDSON: The question is how to there,
14 and at what level, how do you attack the problem?

15 COMMISSIONER HOLMES: That's our charge. And I would agree
16 with you that those are the primary things that we're
17 supposed to do. But, all I'm saying is the way that it's
18 written now and the various interpretations of it, we need
19 to have it somehow laid out in a little different way.
20 Fourteen years ago, if you wrote it, maybe it's time to
21 rewrite it.

22 MR. LOEHR: Then I guess what the Chairman said, I think
23 we all agree with. But the issue then goes back to where
24 Commissioner Richardson is. We all agree that we want to

1 protect the existing neighborhoods, but is that something we
2 should be doing through the resubdivision criteria, or is
3 that the charge of the Board of Appeals through the special
4 exception process. And if that's broken, is that what we
5 ought to be fixing? And we've all agreed we ought to be
6 fixing that. But if we fix that, and then we use this, are
7 we in fact subjecting people to double jeopardy?

8 COMMISSIONER HOLMES: Well I don't think, I certainly
9 don't want to subject them to double jeopardy. And I don't
10 think that we should do anything that would then usurp the
11 authority of the Board of Appeals. So anything that's
12 written should give us clear, should clearly delineate our
13 responsibilities and how we're to carry it out. And then,
14 let the Board of Appeals carry out their responsibilities. I
15 think they're two, and I think that they're set forth and
16 indicate two very separate sets of responsibilities.

17 COMMISSIONER BRYANT: Mr. Chair, it's 10:30. That means
18 hell has frozen. Where are we?

19 COMMISSIONER HOLMES: I'd like to apologize to the
20 audience for making that particular statement. That was not
21 a very professional statement, and I apologize for saying
22 that.

23 CHAIRMAN HUSSMANN: You feel the same way? I think, then,
24 the narrow issue as far as we can go is whether or not we

1 view, I guess in all the subdivisions before us, that the
2 assembly of lots is a requirement, is a, brings with it all
3 the review and standards at issue in the subdivision law.
4 That what will happen next is we get some coming before us,
5 and we'll probably agree to argue the subparagraphs as to
6 what they mean, but

7 COMMISSIONER BRYANT: Not if we [inaudible] form a
8 position, in terms of direction, because they need some
9 direction.

10 VICE CHAIRMAN RICHARDSON: but here's the problem, Bill.
11 We can vote on that, whether you, how we interpret
12 assemblage. That doesn't solve the problem. You're just
13 sending us spinning off into getting more problems, as far
14 as I'm concerned. Really. Because then we run into this
15 whole issue of how we read it on other cases if it comes
16 back to us. So it doesn't solve the problem, but, and
17 Charlie, you've heard the tenor and the basic discussion
18 from the standpoint of the Board. Do you have a
19 recommendation that can kind of make, so we can make some
20 progress on the language with some specific improvements
21 that we can make to this?

22 MR. LOEHR: No.

23 VICE CHAIRMAN RICHARDSON: You don't.

24 COMMISSIONER HOLMES: That's not the right answer,

1 Charlie.

2 MR. LOEHR: If I had, I would have made it long before
3 10:30. I'm sorry. I mean, our recommendation was that we go
4 back and amend this to say that the resubdivision criteria
5 do not apply to the assemblage of lots. That's the staff
6 recommendation.

7 CHAIRMAN HUSSMANN: But with that, you're interpreting
8 that right now, it says the contrary.

9 MR. LOEHR: Well we're saying that we need a text
10 amendment to make it clear. And regardless of the question
11 of how it's interpreted in the interim, I guess, if the
12 Board doesn't have a decision tonight, you'll to do it on a
13 case-by-case basis as they come before you until we can do a
14 text amendment.

15 CHAIRMAN HUSSMANN: Me, at least, I'm really personally
16 not where you are, because I think that just throws away all
17 these standards and protections for our community. And I
18 agree that we need to think through under what conditions in
19 established neighborhood where special exceptions should be
20 permissible. And, I have no problem with that. But, that's a
21 year's work. And so, or two, or three. You know, when we get
22 through each of these,

23 VICE CHAIRMAN RICHARDSON: Why is that a two year, three
24 years' work then? I just want to understand.

1 CHAIRMAN HUSSMANN: Because we're doing a lot of other
2 things. It's just my judgment. I don't know. But we need to
3 think it through. I mean there are clearly

4 VICE CHAIRMAN RICHARDSON: It doesn't seem to be a three-
5 year issue to me. It seems like it should be something that
6 should be a high priority. The civic, the groups have gone
7 in front of the Council to say it, that it should be a high
8 priority, and I don't see why it can't get some, uh, we
9 can't put some muscle behind it. If the best we can say is
10 it's three year off, and therefore we've got to make this
11 jerry-rigged situation

12 CHAIRMAN HUSSMANN: Okay. It's a six-month issue.

13 VICE CHAIRMAN RICHARDSON: We're gonna be in front of the
14 County Council next Tuesday, or whenever it is on this
15 report. Why can't we bring this up again?

16 CHAIRMAN HUSSMANN: This is a totally new issue. We
17 haven't even talked with them about this issue.

18 VICE CHAIRMAN RICHARDSON: This is part of the whole
19 special exception fabric, it seems to me, that needs to be
20 looked at.

21 CHAIRMAN HUSSMANN: And so in the meantime, do you
22 interpret this to say something different than what it says.
23 That leaves every residential community wide open, given
24 where we are, and the court cases that come down.

1 VICE CHAIRMAN RICHARDSON: Well, what I say to you is
2 that, from my standpoint, those protections are there.
3 They're not being utilized to the extent that a lot of us
4 would like. But they're there. And that's the weakness,
5 maybe, in the system.

6 COMMISSIONER PERDUE: The policy complication that I have,
7 it does strike me that the special exception cases present
8 different problems. And I don't know how to get at them. As
9 a policy matter, leave special exceptions aside. As a
10 policy, for the moment. The policy matter, we think that it
11 should be the case that if you have a neighborhood of one-
12 acre lots, someone who wants to build a house, wants to
13 assemble two of those lots and build a house that crosses
14 the line on a two-acre lot ought not be able to do that.
15 Again, leave special exceptions aside for the moment. It
16 strikes me that that's a somewhat different question than
17 splitting lots in half. Now, we may, looking at it we may
18 conclude that's, we don't want people to make two-acre
19 residential lots in one-acre neighborhoods. But, it's not

20 CHAIRMAN HUSSMANN: We have a debate like that going on
21 called mansionization.

22 COMMISSIONER PERDUE: That's exactly right. That's exactly
23 right. And within the County there are, within different
24 areas of the County, there are different views on that. So,

1 I view it as a complicated question to which the answer is
2 not immediately obvious to me. So we have that piece, and
3 then an overlay of special exceptions. That's why I think
4 it, I agree with you I don't know what the time limit is,
5 but it is complicated to try and sort those piece out. But,

6 CHAIRMAN HUSSMANN: What is your, in terms of doing it
7 fast, is your version of doing it fast. What do you have in
8 mind?

9 VICE CHAIRMAN RICHARDSON: Charlie, really, from the
10 standpoint of everything that's going on right now, given a
11 highest priority from the standpoint of the look at special
12 exceptions, some of the things that you've been dealing with
13 already, what would you think would be realistic?

14 MR. LOEHR: Well, we may be talking about two different
15 things here. What we were going to address in the short term
16 is the text amendment to counteract the Mossburg decision,
17 which solves a big part of the problem. That is something
18 that I think we can do in the next several months. But I
19 think what the chairman, I wrote it down when he said it,
20 under what conditions should special exceptions be
21 permissible in an established neighborhood? That's a
22 different question. I mean that is a much bigger piece of
23 work, because it involves setting a whole new set of
24 standards that would apply to all special exceptions across

1 the Board, and that's something that isn't in our work
2 program, and something else would have to be bumped if we
3 want to undertake a study like that.

4 VICE CHAIRMAN RICHARDSON: Well, let me just

5 MR. LOEHR: And I can't say right now how long that would
6 take.

7 VICE CHAIRMAN RICHARDSON: Well, maybe that can be
8 narrowed, because when I look at some of the examples you
9 gave, I mean the examples we gave in residential
10 communities, there seem to be certain categories, and you
11 have three examples, three different categories. The nursing
12 home, the care home seemed to be a big one. Elderly. Housing
13 for the elderly seemed to be a big one. There seemed to be
14 several categories that we see time in and time out that are
15 very contested, having high impacts on communities and so
16 forth. Wouldn't it make reasonable sense to try to look at
17 those types of uses?

18 MR. LOEHR: Right. And that is one of things that

19 CHAIRMAN HUSSMANN: Sports facilities, [inaudible] I mean
20 if you're gonna put a, whatever, in the middle of a
21 neighborhood. I mean there are a lot of, I mean I agree with
22 your, the point where you're taking it, that we could
23 probably set back collectively or individually come up with
24 a short list of problem special exceptions, where we need to

1 think through the conditions under which they would be
2 permissible in an established neighborhood.

3 VICE CHAIRMAN RICHARDSON: Yep. And with the Mossburg
4 situation, it would give more authority from a standpoint of
5 the local impacts that seem to be overlooked in recent, so
6 we would be making pretty good progress, I would think, on
7 these things.

8 CHAIRMAN HUSSMANN: So we could, I think, as a, staff
9 could advise us, and we can massage, but I think probably
10 come to a list. Here are the things we're worried about in
11 residential neighborhoods that seem to be at issue in our
12 recent past and probable future. We could do that. And we
13 could probably then sort out, well, under what conditions
14 would be encourage them or discourage them. You know a staff
15 can do that. That's not a hard piece of work. And to advise
16 the Council that that's a piece of work that is pressing, is
17 probably timely and appropriate. And I think we can all
18 agree on that. The question is how do you interpret this
19 between now and then.

20 COMMISSIONER BRYANT: And I'm under the impression that
21 what you just discussed is long term, and I believe short
22 term there is some awareness of a need to interpret the
23 language as it is written. At least it seems like the
24 majority is saying that. We need to interpret the language

1 as it's written, and it is written to suggest that as it
2 stands now, when it comes to anything being excluded, the
3 only thing that's excluded, in fact, is agricultural land.
4 Because that's what's written. That means everything else
5 falls into the purview of the resubdivision.

6 VICE CHAIRMAN RICHARDSON: Well, we have, we have
7 agreement on one side, I think. From the standpoint of the
8 holistic approach to try and fix the Mossburg, to look at
9 some of the more contentious and larger implications as it
10 affects communities of some of the special exceptions. And,
11 we'd like staff to draw up a recommendation that would look
12 at those two issues.

13 CHAIRMAN HUSSMANN: Yeah, we'll come up with an amendment
14 that will address that.

15 VICE CHAIRMAN RICHARDSON: Should we have a motion, Mr.
16 Chairman, on that particular issue, so that it moves forward
17 kind of officially?

18 CHAIRMAN HUSSMANN: Okay.

19 VICE CHAIRMAN RICHARDSON: I'll make that motion.

20 COMMISSIONER HOLMES: I'll second that motion.

21 CHAIRMAN HUSSMANN: All in favor, say aye.

22 COMMISSIONERS: Aye, aye, aye, aye.

23 VICE CHAIRMAN RICHARDSON: And I'll leave it to the
24 majority to make the recommendation on the interpretation of

1 the language.

2 COMMISSIONER BRYANT: I'm going to move, Mr. Chair, that
3 in terms of how do we apply the language of 50-29, yeah 50-
4 29, et cetera, all of the portions of that, in fact, we
5 redirect our interpretation of it and understand that
6 special exceptions, as well as everything else, falls under
7 this point when it comes to subdivision and resubdivision,
8 and the only thing that is excluded is what's specified, and
9 that's the way we will carry out the application of this
10 section until we come up with this additional language that
11 Charlie's been empowered to write, research, et cetera.

12 COMMISSIONER BRYANT: But, we're not gonna use the
13 resubdivision criteria to second-guess what's going on in
14 the Board of Appeals?

15 COMMISSIONER BRYANT: No, we're using the resubdivision
16 criteria to do what we're responsible for doing.

17 COMMISSIONER HOLMES: Okay.

18 CHAIRMAN HUSSMANN: I think it's our duty to advise the
19 Board of Appeals when we think there's a special exception
20 at issue. I mean, of consequence, so then when they are then
21 considering the land use implications, community impact of a
22 proposal, that they're not doing it oblivious to the fact
23 that, you know, our concerns remain at issue and have not
24 been resolved.

1 COMMISSIONER HOLMES: I agree with that.

2 COMMISSIONER BRYANT: Yes. And that's what we're supposed
3 to do.

4 CHAIRMAN HUSSMANN: And I think that process-wise, not
5 with the law-wise, process-wise we should be particularly
6 cognizant when something's not routine.

7 COMMISSIONER HOLMES: We put that in our recommendations
8 as to our concerns.

9 VICE CHAIRMAN RICHARDSON: Yes.

10 CHAIRMAN HUSSMANN: I think that would improve the process
11 so that we don't end up as often at conflicting places then.

12 COMMISSIONER BRYANT: That's a motion.

13 COMMISSIONER PERDUE: Can I try reframing it and see if
14 it's worth consistent. I mean I put it at somewhat more
15 technically just because

16 CHAIRMAN HUSSMANN: Well, they're two separate thoughts.

17 COMMISSIONER PERDUE: Yeah.

18 COMMISSIONER BRYANT: And I have no problem with that.

19 COMMISSIONER PERDUE: Well, I'll give it a try and see if
20 it's consistent. That it is the understanding of the Board
21 that the language of 50-29 applies, (1) that it applies to
22 assemblages, as well as divisions, and (2) that 29(b), which
23 refers to residential lots, refers to the lot, to the zoning
24 of the lot, not the intended use of the lot.

1 COMMISSIONER BRYANT: That's it?

2 COMMISSIONER PERDUE: That's it.

3 COMMISSIONER BRYANT: Why don't you make that motion.

4 COMMISSIONER PERDUE: I make that a motion.

5 COMMISSIONER BRYANT: Second.

6 VICE CHAIRMAN RICHARDSON: Under discussion, I guess I
7 disagree with it, because of the, it's not solving the
8 problem for me. Leaving the wording the same, and we can
9 make a motion here, but that motion won't carry through in
10 any changes in the language that would be more specific
11 under the interpretation that the Board would have to make.
12 And it can be understood, I guess, by the five of us for a
13 few months, if that would be your intent. But it doesn't
14 solve anything to me, and it spins off into the assemblage
15 problem, which is an even greater problem that needs to be
16 looked at, again, holistically, and maybe that doesn't have
17 to take two or three years, but I think it should be looked
18 at. So, I don't think you're solving the assemblage problem.
19 I think you're causing more complications under, at least
20 not being specific in the language in another direction. So,
21 for me, I disagree.

22 CHAIRMAN HUSSMANN: Any other views about that?

23 COMMISSIONER HOLMES: I'm just. I'm not sure I understand
24 what you're getting at. I don't understand. No, what Wendy's

1 proposal is.

2 COMMISSIONER PERDUE: I wanted to sort out two issues. One
3 was assemblage versus division.

4 COMMISSIONER HOLMES: Okay.

5 COMMISSIONER PERDUE: So, maybe we'll have to take it, we
6 can take them separately if that's helpful. That the
7 understanding of the Board is that the language as written,
8 that's as written, it can obviously be changed. But the
9 language as written applies to assemblages, as well as
10 divisions. The language as written for 29(b) and (c).

11 Although we haven't focused on (c). The second issue is,
12 aside from whether you're talking about assemblages or
13 divisions, aside from that, when (b) refers to residential
14 lots, and the criteria for residential lots, are you looking
15 at the lots as zoned, or are you looking at the intended
16 use? If you're looking at the lots as zoned, it doesn't
17 matter that there's a special exception. If it's zoned
18 residential, you'd be using (b), not (c). B is residential
19 lots, (c) is non-residential lots. You just look at the
20 zoning and see how it's zoned. Is that how you tell whether
21 to use (b) or (c), and I'm proposing that we say that you
22 look at the zoning. That that's our understanding of it now
23 and again that can be changed. That an alternative
24 interpretation of the language is that residential lots and

1 non-residential lots refers to the intended use as opposed
2 to the, um, how it's zoned. So my, now going back to the
3 pieces we had, the assemblage piece, and this piece is the
4 motion, is that we interpret, that our understanding of the
5 current language, and I'm not saying that that's what it
6 should be in the future, but our understanding of the
7 current language is that residential lots as described in
8 50-29(b) refers to the zoned use as opposed to the intended
9 use. It's that it's zoned residential.

10 CHAIRMAN HUSSMANN: Is there any other discussion of that
11 motion? All in favor of that motion, say aye.

12 COMMISSIONERS HUSSMAN, BRYANT, HOLMES, AND PERDUE: Aye,
13 aye, aye, aye.

14 CHAIRMAN HUSSMANN: All opposed.

15 VICE CHAIRMAN RICHARDSON: No.

16 COMMISSIONER BRYANT: Mr. Chair, I am going to recuse
17 myself from the next part of your discussion, which is the
18 application of this interpretation, in terms of timeframe.
19 Although, I'm so tired, I'll just sit here.

20 CHAIRMAN HUSSMANN: Well, what's the Board's sense of
21 that?

22 COMMISSIONER HOLMES: Well I think that someone said it,
23 that if we're doing something and we changing a longstanding
24 practice, that we ought to change it effective at the time

1 that we make that particular change, and anything that's
2 gone before should be grandfathered. That's my
3 recommendation.

4 CHAIRMAN HUSSMANN: Anything that's gone before would be
5 grandfathered.

6 COMMISSIONER HOLMES: I'm talking about that's there now.

7 CHAIRMAN HUSSMANN: The question comes down to things
8 pending. I think that clearly for something not pending this
9 would apply, so the narrow issue, I guess, is for things
10 pending.

11 COMMISSIONER HOLMES: Well, that's, I'm saying for those
12 things that have been introduced to us prior to us making a
13 change, I would suggest that they be grandfathered.

14 MS. DANIEL: Chairman Hussmann, does that mean that things
15 that have already been filed that have not yet been
16 introduced are not grandfathered? Or is it all applications
17 that have been filed to date that are grandfathered? Looking
18 for clarification.

19 COMMISSIONER HOLMES: Say that one again.

20 MS. DANIEL: Are we grandfathering all applications that
21 have been filed to date? Or just ones that have already,
22 ones that have been scheduled, or

23 COMMISSIONER HOLMES: I would say those that have been
24 scheduled, not the filing, because you're coming into the

1 process. That's the way I look at it. That's mine, I'm not
2 saying it's [INAUDIBLE]

3 VICE CHAIRMAN RICHARDSON: What do we do it whenever we
4 change regulations? I mean we better have a policy. We
5 change these things all the time. Obviously, this is. We
6 change and we have text amendments that change things. I
7 mean, what do we do?

8 MR. DAVIS: Well, it does vary. It depends upon the issue.
9 Sometimes it'll be grandfathered to things that have been
10 approved. Sometimes it's grandfathered to those things that
11 had been applied for by a certain date. I mean, it really
12 depends on the intent of the legislation.

13 COMMISSIONER PERDUE: My difficulty on the grandfathering
14 is that my view on the language is by looking at the
15 language, and so I am unsettled by the notion that we would
16 say this is what we think it means, but because for one
17 reason or another, we haven't been following what we think
18 it means, but we now say it means, we ought to, we can wink
19 and nod about the pending ones. It's, the nature of this
20 discussion has not been a policy discussion in the sense. We
21 had the discussion about what should the future look like.
22 And that clearly does raise issues of grandfathering. This
23 is, our discussion wasn't exactly that, and my motion wasn't
24 exactly a policy motion. Given all the arguments pro and con

1 about what this language means, and we all had different
2 understandings because it's not very clear, what do we as a
3 group come to think it means. Now that's harder to put
4 within the notions of what do we do when we change.

5 MS. DANIEL: If I may make a clarification. I think the
6 issue here is notice since the Planning Board has been
7 interpreting and applying the regulations a certain way, if
8 the Planning Board is now examining it, examining, you know,
9 the way they've been applying it, and determining that, in
10 fact, that they've been applying it, that they're now going
11 to apply it this way, a separate way, a different way, that
12 there should be some kind of notice to the applications that
13 have now been filed, and I think that's what this particular
14 discussion as to the effective date is going to.

15 CHAIRMAN HUSSMANN: What do you think about what has been
16 raised?

17 MS. DANIEL: I think that in order to provide adequate
18 notice to applicants, I think that the best way to do it
19 would be to grandfather those that have been filed to date.
20 And that way, you know, because applicants who may have
21 filed to this point have been relying on the way that these
22 regulations have been applied by the Planning Board up until
23 this point. And that goes to the notice issue.

24 CHAIRMAN HUSSMANN: I understand that to a point of view

1 of equity to applicants, but what about equity in
2 communities? I mean there are, unfortunately, I guess, in
3 this kind of case and most cases before us, two sides of
4 equity. And so, if we're, that side works for, you know, for
5 one side of the issue. And so what concerns me is that this
6 isn't like we had a standard, and we're gonna say now this
7 is the new standard. This is trying to, and I, at least for
8 the four years I've on here, we've never focused on this or
9 made a policy judgment about this. It's never been the Board
10 from, I don't think, has ever sort of written down what it
11 thinks.

12 COMMISSIONER HOLMES: But it became the policy because we
13 did nothing with it at that particular time, so

14 MS. DANIEL: I do believe that it is a Planning Board
15 decision to make. To effect a date. However, there is case
16 law out there, there is case law that supports the finding
17 that if the Planning Board, not Planning Board, but if an
18 agency has applied a certain regulation for a time certain
19 and that developers have expended funds and substantially
20 relied on that interpretation, that to change it without
21 notice in mid-stream can be interpreted as being arbitrary
22 and capricious.

23 CHAIRMAN HUSSMANN: But what if this Board in a certain
24 case did put the applicant on notice that this is an issue?

1 MS. DANIEL: It would depend at what point in time. If
2 they had already expended substantial funds in reliance on
3 the prior application of the, the old interpretation, then
4 there could be a problem. In addition there are cases that
5 support the finding that if in fact, it has been a lack of
6 enforcement of a particular section and not that it had been
7 interpreted a separate way, that that's a different type of
8 case. And in that instance, the Planning Board can go ahead
9 and make their, the determination that this interpretation
10 will be effective immediately. So I do believe it's the
11 decision of the Planning Board.

12 COMMISSIONER PERDUE: Well, that, your most recent
13 statement, I hesitate to suggest this, but it seems, the
14 staff memo focused on the question of interpretation, not on
15 the case law that you've now alluded to about what to do
16 given our current interpretation. Is it appropriate to get
17 more, ah, to get a staff memo that is more focused on that
18 particular issue, now that we know where we are. And I
19 hesitate to stretch this out, but I'm worrying about trying
20 to decide this at five to 11.

21 CHAIRMAN HUSSMANN: I mean, it looks like we're split on
22 that, I guess, as I see it, so I don't know if staff can go
23 away and sort out what you think are appropriate and
24 significant points of law that would have us move one way or

1 the other.

2 MS. DANIEL: It depends, I think, in this particular
3 instance, it depends on whether the Board feels that this is
4 a change of interpretation of this section, or whether it's
5 just, you're now enforcing this section where in the past
6 you haven't, just because, you know, it wasn't something
7 that was brought to your attention. If in fact, it's an
8 enforcement of a section that hasn't previously been noticed
9 or applied, then in that case, I believe that you could make
10 this interpretation effective immediately. If, in fact,
11 you're finding that you are changing your interpretation of
12 how it's been applied in the past, then I think that there's
13 a notice issue here. And that it should be somehow
14 grandfathered, certain cases should be somehow
15 grandfathered. So if the Board can make the determination
16 whether or not this is an enforcement of the regulation that
17 hasn't previously been enforced, or whether it's a change of
18 interpretation, I think that would solve the grandfathering
19 problem, at least part of the grandfathering problem.

20 CHAIRMAN HUSSMANN: Well, as I go back to the gentlemen
21 not participating, I guess the motion that was passed
22 regarding this section was, I think, based on reading it as
23 it is, and not based on interpreting in a different way as
24 previous application. And so I, at least I view the issue

1 before us in the first category, not the second.

2 COMMISSIONER PERDUE: Did we have, there weren't any prior
3 Board decisions, statements concerning this?

4 MS. DANIEL: Not that I'm aware of.

5 MR. DAVIS: No, the Board has never taken up this issue
6 other than it was pointed out earlier in one of the
7 residential consolidation of lots, there was a question
8 raised, this was one back in 1996, there was a question
9 raised as to whether the resub criteria applied, and the
10 applicant immediately asked for a waiver if it did, and it
11 was granted. And there wasn't any more discussion of it.

12 CHAIRMAN HUSSMANN: That sort of confirmed that one of the
13 points made earlier if you want to avoid the resubdivision
14 criteria, you go for a waiver rather than, and that's the
15 appropriate act of the Board, which is at issue with
16 anything before us right now, the Board can choose to waive
17 the criteria if it wants to under the provisions set forth
18 in the Ordinance. So I think this would be entirely
19 consistent with past practices.

20 MS. DANIEL: And I think that's a determination by the
21 Planning Board. The Planning Board needs to make a
22 determination whether it's an enforcement or an
23 interpretation, and then that would guide the Board in
24 whether or not to grandfather.

1 MR. DAVIS: Maybe I need to follow up a little bit more.
2 This case in 1996 was consolidation of lots. It was to
3 accommodate a house that was located over lot lines. And if
4 the Board remembers, when we did the minor subdivision
5 process, one of the actions by the Board was to allow these
6 assemblages of certain lots to allow for a house and not
7 apply the resubdivision criteria, and that was stated in the
8 minor subdivision law. So, I think the Board should be aware
9 of that.

10 COMMISSIONER PERDUE: Are there written records or written
11 decisions that we should look at in trying to sort this out?
12 You're describing what happened

13 MR. DAVIS: It may be helpful. This is a staff list that
14 we compiled for the Board in terms of trying to see how many
15 of these have come before the Board since 19_, we go back as
16 far as 1983. And, there were 16 cases that we identified,
17 and of those, only one, as I mentioned, was resubdivision to
18 assemble lots for a house. It was the only one that that was
19 raised, and that was in 1996.

20 COMMISSIONER PERDUE: Then I didn't understand your, you
21 were talking about

22 MR. DAVIS: Then there was legislation approved last year
23 creating a minor subdivision process. That's a process
24 whereby an individual would not have to go through the

1 preliminary plan process, just prepare a record plat. And
2 where you have two lots, combining them into one for
3 purposes of one house, you can do that through the minor
4 process. And the resubdivision criteria does not apply to
5 that.

6 VICE CHAIRMAN RICHARDSON: Well, we'll have to fix that
7 now, Joe, too. I mean, that gets thrown out the window with
8 everything else. That's my problem with all of this. We,
9 from the standpoint of assemblage, we've enacted tonight a
10 decision that is not based, although it's based on what some
11 view as a strict interpretation of what has always existed,
12 the law, it hasn't thought through all the implications to
13 what we do. And there are broad-based ramifications that all
14 this is gonna have. And that's one, right there. The
15 combination of lots for other residential uses that we would
16 have to approve is another. Other assemblies. And we've not
17 fixed it. Okay. And that's why I say we are spinning off in
18 other directions that aren't focused, and I don't think are
19 solving ultimately what we want to solve. Where do we stand,
20 we, um, I guess we'll have no decision, it sounds like, Mr.
21 Chairman, on this issue of grandfathering or not
22 grandfathering. What are the implications legally if we have
23 no decision? If we have a split decision on the Board,
24 that's no decision, really. One member's recused himself,

1 I'm sensing, I'm not a hundred percent sure, but if we have
2 a split vote on this, we have no decision. What's the
3 implications of that?

4 MS. DANIEL: We have currently, I believe we have at least
5 one case pending before you that this particular
6 interpretation or enforcement issue would be applicable, so
7 we would need some guidance as to whether or not this
8 interpretation or enforcement issue is to apply to this case
9 that's currently pending.

10 VICE CHAIRMAN RICHARDSON: And I guess what I'm saying is
11 we're going to have divided guidance. What happens then?

12 MS. DANIEL: Then it would have to be determined at the
13 time the case comes before you.

14 VICE CHAIRMAN RICHARDSON: I guess that's what's gonna
15 have to happen.

16 CHAIRMAN HUSSMANN: Are there any other points of view?

17 COMMISSIONER PERDUE: I'm just wondering whether it would
18 be helpful and, is there anything else you can bring us that
19 you think would help in this decision on what past practice
20 was? I know we have summary descriptions, but

21 MR. DAVIS: Well, I suppose we could provide the Board
22 with the summary sheet we have, but it really just
23 describes, identifies cases. It identifies that they were
24 consolidation of lots, and identifies the land use.

1 CHAIRMAN HUSSMANN: What about, at some point, I don't
2 even know the implications of this, so, but at some point
3 somebody thought an appropriate date for us to concern
4 ourselves with this issue is the date of the Mossburg
5 decision. I don't know what date that is, number one, and I
6 don't know how it affects anything else, number two. But it
7 seems to be a point in time when the policies at issue here
8 sort of put our community into a framework that is radically
9 different than, you know, the past.

10 COMMISSIONER PERDUE: Well I, just on that I want to
11 clarify that I think if what we, if this Board says our
12 interpretation of this provision is driven by Mossburg, then
13 that suggests this has been a change. That some other,
14 something else happened that changed our view. That, again,
15 I'll just state my view. Mossburg is not what's driving my
16 interpretation.

17 CHAIRMAN HUSSMANN: Mine either. I was just looking for a
18 date.

19 COMMISSIONER PERDUE: Well, because it's not what's
20 driving my interpretation, Mossburg is irrelevant for me in
21 thinking about what an appropriate date is.

22 CHAIRMAN HUSSMANN: Okay. Well that's, I mean, I agree
23 with your interpretation, but what we're doing is reading
24 the law as it's written and not changing the Board's

1 policies, because I don't see a policy, a Board policy. I
2 mean there are staff practices, but I don't see a Board
3 policy that says here's how this section will be applied in
4 our community.

5 COMMISSIONER HOLMES: Well, why wouldn't, you say a staff
6 practice. I think that's cutting hairs. We take the staff
7 recommendations and we take what the staff say, and we then
8 apply our own thought to it, and it comes out as policy, so
9 I can't split that hair.

10 VICE CHAIRMAN RICHARDSON: I think we've been following,
11 again, the history and the way that it's interpreted over
12 time to me has standing. And it's not to be treated lightly,
13 and I know that none of us did, but it's certainly a change
14 from what we've done before. And nobody can argue that it
15 isn't a change. We never done it before in the last 14 to 15
16 years and all of a sudden in the context of one case, were'
17 changing. Okay. For whatever reasons. Good and valid
18 reasons. And what really bothers me is we haven't solved the
19 problem. We haven't solved any problems. We're not showing
20 any

21 CHAIRMAN HUSSMANN: No, the only choice that's before us,
22 is which problem do we create?

23 VICE CHAIRMAN RICHARDSON: Well, I think we've created
24 even more than what we had before. And so, you know, as a

1 Board, we're looking at some of the problems. Ok, that we
2 think, universally, that we feel, that the community feels,
3 a lot of people feel. At least we're moving in a good
4 direction. From the standpoint of the ordinance here and the
5 wording here, we haven't solved anything. We've created even
6 more problems, and we're not even trying to clean up what
7 was there before. So, we're just saying, well, we didn't do
8 what we were supposed to do. We're gonna follow the other
9 language, and now we've got a whole host of new problems. So
10 that to me is not good leadership. All right? We're not
11 fixing this.

12 CHAIRMAN HUSSMANN: Well I think we, based on our
13 collective conversation, led by you, we decided to focus on
14 how to fix this. This isn't a problem created by anybody
15 sitting here. What's dealt with or not dealt with in this
16 law was in this law when every one of us came on the Board.
17 I don't think any one of us has their fingerprints on that.
18 So, and in fact, and none of us, at least in this group and
19 any that I've ever been with here, have ever looked at this
20 and interpreted it in any way. I think this is a first
21 interpretation of this section by this Board.

22 VICE CHAIRMAN RICHARDSON: I guess that's to say that

23 CHAIRMAN HUSSMANN: So, you know, I think that when you do
24 that, you can't say, well I think it says this tomorrow. It

1 either says it or it doesn't say it.

2 VICE CHAIRMAN RICHARDSON: Okay. But you have not fixed
3 the problem of these assemblages.

4 CHAIRMAN HUSSMANN: Oh, I agree with you.

5 VICE CHAIRMAN RICHARDSON: As this goes on, ok, is gonna
6 cause any more problems. The wording that you suggested here
7 under the residential uses, although three of you interpret
8 it a certain way, doesn't fix it for future Boards. You
9 haven't even suggested a recommendation to fix it for future
10 people

11 CHAIRMAN HUSSMANN: Yes we have. We've told staff to go do
12 a work program. To go do that.

13 VICE CHAIRMAN RICHARDSON: On the wording on this one?

14 CHAIRMAN HUSSMANN: In terms of how it then gets applied,
15 that's a separate question.

16 VICE CHAIRMAN RICHARDSON: Charlie, did you understand
17 that?

18 CHAIRMAN HUSSMANN: Yeah, we understood we're gonna do a
19 work program to fix this. You know, to sort out the public
20 policy in our County as to how these criteria apply in
21 neighborhoods. So then, the only remaining question is, once
22 we decide that, who's at risk, the community or the
23 applicant?

24 VICE CHAIRMAN RICHARDSON: Okay. I didn't understand that

1 in your motion, Charlie, is the third part of the special
2 exception review, the Mossburg case, and now which I missed,
3 I guess, maybe, and I apologize if I did, a review of the
4 language here, that specifically reaches the intent and
5 clears up the ambiguities as relates to assemblage and this
6 residential uses. The interpretation the three of you have
7 made tonight.

8 CHAIRMAN HUSSMANN: We would deal with that. We have to
9 deal with that. I mean we can't

10 VICE CHAIRMAN RICHARDSON: I didn't hear that, I'm sorry,
11 Bill, I didn't hear that in the motion.

12 CHAIRMAN HUSSMANN: for applicant's or the community, a
13 sense out of this, and we need to, for reasons of equity,
14 and everybody involved. But the narrow question is that when
15 we get down to its applicability, is the community at risk
16 or the applicant's at risk? I mean we can

17 VICE CHAIRMAN RICHARDSON: But applicants are community as
18 well, Bill.

19 CHAIRMAN HUSSMANN: I agree with that.

20 VICE CHAIRMAN RICHARDSON: You're saying it's an either
21 or. People that reside in communities are applicants as
22 well, and you can't just say that it's purely, and I
23 disagree with people that say that. Everybody in our
24 community are, all applicants are members of our community,

1 whether they're George Barnes, or my mother-in-law that
2 wanted to have a lot on her property that was as big as Mr.
3 Barnes', maybe, or the person down the street. All members,
4 ah applicants are members of the community, and we have to
5 try to balance those so that's where

6 CHAIRMAN HUSSMANN: So where's the community side of the
7 balance? The folks who aren't applicants, but who are also
8 members of the community. Where do they stand with this?

9 VICE CHAIRMAN RICHARDSON: Where is that balance? The
10 balance is in the procedures and the processes that we've
11 established in front of these bodies, in front of us, in
12 front of the Council, and in front of the Board of Appeals.
13 I think that's balanced and I think it's been a system that
14 has got some weaknesses and we should try to attack those
15 weaknesses, and I'm hopeful that we will. How do we resolve
16 the issue of the grandfathering? We take no recommendation I
17 guess.

18 CHAIRMAN HUSSMANN: Well it isn't an issue we can take
19 anyplace else, because in the end, I guess it either gets
20 resolved by us tonight or, you know, we've decided what our
21 policy is and the applications that are pending come
22 forward, and we sort it out then. [inaudible]

23 VICE CHAIRMAN RICHARDSON: I think that's all we can do.

24 COMMISSIONER PERDUE: I agree. I don't see any other

1 solution.

2 CHAIRMAN HUSSMANN: Okay. Well that's where we are.

3 There's no decision on that issue.

4 VICE CHAIRMAN RICHARDSON: Thanks everybody for coming
5 down.

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CERTIFICATION

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This is to certify that the attached proceedings before
The Maryland-National Capital Park and Planning Commission,
Montgomery County Planning Board, in the matter of the
Interpretation of the Subdivision Ordinance Resubdivision
Criteria, held in the auditorium at 8787 Georgia Avenue,
Silver Spring, Maryland, on Thursday, April 23, 1998, were
held as herein appears, and that this is a transcript from
the audiotape.

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Ellyn Dye
Technical Writer