

Herndon's Unfinished Fight For A Small-Town Feel – Part 3

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by

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PART 3 OF THE 4-PART SERIES:

CHANGES MADE TO THE DMP DURING LISA MERKEL'S TERM AS MAYOR

Part 3 of the Series documents how (1) Number of Stories, (2) Building Heights, (3) Location Of Arts Related Uses, (4) The Architecture & Massing Of Structures, (5) The HPRB Review (of Future Proposals), and (6) the Public Realm changed during Lisa Merkel's first term as Mayor.

The Downtown Master Plan (DMP) was approved on February 22, 2011. The 2012-2014 Council approved the Pattern Book (a regulatory document to implement the DMP) and created a PD-TD district covering the entire downtown on January 29, 2013. The Council rezoned the then Town-owned properties on May 27, 2014. Part 3 examines:

- Whether the 2012-2014 Town Council's actions were consistent with the directive of the Downtown Master Plan to develop a Pattern Book and create a PD-TD district that would, "... align with **the form, height and density** prescribed by the DMP (Illustrative Plan: Option A)", and
- Whether 2012-2014 Town Council faithfully used the principles of the much-heralded Form-Based Code to implement the Vision of our community for the downtown.

It can be reasonably concluded that a **sea-change** took place between 2012 and 2014. It appears that (1) the DMP was effectively dismantled and (2) the controversies surrounding the Diamond Hotel were completely ignored.

1. CHANGES IN THE NUMBER OF STORIES

a. Under DMP

The DMP, approved in 2011, had adopted the concept of **3-stories max for commercial and mixed-use** buildings and **4 stories max for residential** structures (See [Part 2](http://herndonopinion.com/2016/01/11/herndons-unfinished-fight-for-a-small-town-feel-part-2/) of the Series for details - <http://herndonopinion.com/2016/01/11/herndons-unfinished-fight-for-a-small-town-feel-part-2/>). It was generally understood that commercial and mixed-use buildings were supposed to form a continuous commercial and entertainment district along Elden and Station streets. Residential buildings were located in different sections of Center, Monroe and Jefferson Streets and within the Pine Street Shopping Center. ([Exhibit 8 – DMP as approved](https://jspalaha.files.wordpress.com/2016/01/exhibit-8-dmp-as-approved.pdf) - <https://jspalaha.files.wordpress.com/2016/01/exhibit-8-dmp-as-approved.pdf>).

b. Under the Pattern Book

The Pattern Book, however, changed the mixed-use concept to allow residential use on upper floors. On page 14, it states that, “Upper floor office and residential uses will be permitted in these buildings.” On page 45, the Pattern Book defines mixed-use buildings more accurately and expansively. It says, “This building type will accommodate various retail, restaurant, service, or office use on the ground floor with **apartments** and offices on upper floors. **Mixed-use buildings will range in height from two to four stories.**” (Emphasis Added).¹

Where did this 4-story mixed-use concept come from? The DMP, and, all related and readily available documents contain no discussion of it. Clearly, someone, a builder(s) or a stakeholder(s), working behind the scenes, successfully advocated its use after the approval of the DMP in 2011. Similarly, there was never any discussion of “two to four” stories during the DMP deliberations. There is also no discussion of “two to four” stories in any background documents supporting the Pattern Book. For instance, there is no discussion of when the Town might permit two, three or four story buildings. As it stands now, if offices and/or apartments are built on the upper floors, it would be possible for a builder to build 4-story mixed-use buildings by right.

The height of the Art Center, an institutional building, was not specified in the DMP. The design of the original (2003) art center was based on a 2-story concept and it is that concept that was supposed to be codified in the DMP. However, less than two months after the DMP was approved, the Herndon Foundation for the Cultural Arts, aided actively by the town staff, and working behind the scenes, had advocated a 4-story Art Center. This advocacy appears to be the start of the sea-change that took place during the 2012-2014 Town Council.

c. After the Rezoning

The Town rezoned its own properties in May 2014, but the rezoning action was rather unusual. It specified the “proffers” that a future (and yet unknown) developer would have to provide after purchasing the properties.² The Proffers state that, (1) “Structures incorporating residential uses (*on any floor*) shall not exceed 4 stories above grade. (The phrase “on any floor” has been added for the sake of clarification.), and, that “...Structures with upper floors dedicated to commercial and professional uses shall not exceed 3 stories above grade...” The phrase “shall not exceed” does not have much meaning in this context. It is obvious that if residential use is added to an upper floor, then the structure would be permitted have 4 stories.

¹ It appears that there was some confusion about the phrase “apartment and offices” because on Page 19 of the Pattern Book, the illustration indicates the use as “apartment or offices.”

² Generally, local governments can ask developers to mitigate the ill-effects of their developments on the community. While proffers are supposed to be provided voluntarily by developers, local governments often ask or even require developers to provide them. This action by the Town, notwithstanding its language, has arguably, nothing to do with any “ill-effects of any future development. In fact, it is designed to ensure that developers can build an extra-story in all mixed-use structures.

2. CHANGES IN BUILDING HEIGHTS

a. Under the DMP

The DMP did not specify the height of the buildings. As discussed in Part 2 of this series, three story buildings would have been 35 ft to 40 ft tall and 4 story residential buildings would have been, at best, 45' tall.

b. Under the Pattern Book

The Pattern Book set the height of the Mixed-use and Multi-family buildings at up-to 50' without giving any justification in the staff reports and other publicly available documents. **Note that the heights of the parapet wall, decorative feature and structures to access the roof top were not included in this limit.** Such features were permitted to be as tall as 14 ft. Therefore, it is reasonable to assume that some of the future downtown buildings would be as tall 64' under the mandates of the Pattern Book.

Where did the 50' max come from? The record suggests that by April 2011 (2 months after the approval of the DMP and around the time it was working closely with the Herndon Foundation for the Cultural Arts), the staff was actively considering a max height of 50'³. (Take a look [Herndon Politics: Backroom Deals...](http://herndonopinion.com/2015/09/25/herndon-politics-backroom-deals-cost-residents-million/) <http://herndonopinion.com/2015/09/25/herndon-politics-backroom-deals-cost-residents-million/>). As shown in the attached [Exhibit 7. Building Height diagram](https://jpalaha.files.wordpress.com/2016/01/exhibit-7-building-height-diagram.pdf) (<https://jpalaha.files.wordpress.com/2016/01/exhibit-7-building-height-diagram.pdf>) dated April 25, 2011 , the town staff tried to justify the 50' height by assigning 16'-20', 12'-14' and 12'-14' heights to the first, second and third floors respectively, but found it difficult to do so.

Any justification for the 50' height for 3 story buildings would have been inconsistent with the town staff's 2009 expectation that "the 3-story concept would set the maximum height at 40 ft " (see discussion of the RFP in Part 2). It would also be inconsistent with what is already on the ground or is being built. It is very difficult to find 3-story mixed-use buildings that are taller than 35 ft. New mixed-use buildings being built near the forthcoming Metro station in Ashburn, VA, **first floor** heights vary between 10' and 15' and **upper floors** are usually 10' high. Accordingly, the staff could have justified the 50' max height only by first increasing the number of stories from 3 to 4. It did not hurt that this decision was also consistent with the desire of the Herndon Foundation for the Cultural Arts to build a 4-story Art Center.

³ Herndon Foundation for the Cultural Arts had already worked behind the scenes to propose a 4-story Art Center in April 2011. Many people in Herndon have long believed that a "free" center cannot be built without granting developers high densities (view the [Free Art Center](#) article). 50' max was inconsistent with the "3-story max for commercial and mixed-use" concept inherent the DMP. Note that by an email on October 3, 2011 (6 months after the approval of the DMP and 4 months after discussion about the Art Center with the Herndon Foundation) the staff had directed the consultants to "...drop the "6 stories max" category in favor of just 3 stories max for commercial and mixed use and 4 stories max for residential". It had not reached the decision about the max. heights for mixed used buildings, yet. The then-Mayor, Steve DeBenedittis, was still in the office and would have strongly objected to the potential change. He was not aware of the behind the scene attempts to change building heights, though.

c. After the Rezoning of Town-Owned Lands

Even though the Pattern Book was a “regulatory” document, it did not vest any development rights in future property owners. The Town had always planned to rezone the downtown properties after creating the PD-TD district and approving the associated Pattern Book. Rezoning, prior to selling the land to a developer, according to the town, would allow it to “control” the development by specifying proffers developers would have to offer. However, the rezoning-in-advance would also allow developers to develop the properties by right, avoid often contentious public hearings associated with rezoning actions, pay smaller proffers, and presumably reduce regulatory delays.

The rezoning also provided the Town Council another opportunity to help developers increase building heights in the following ways:

(i) Further Increase in Max. Height

It increased the permissible heights of the buildings by 4 feet. In other words, the maximum height (at the parapet base level) could now be 54’ rather than 50’. If the parapet, decorative features and other structures that provide access to the roof are included in the measurement of the height, **the maximum height could be 68’**.

During the public hearing, Mayor Merkel justified the increased height by retorting that, “*she has met with many developers who have stated that a few extra feet would be good for the town.*” She seems to have forgotten or not cared that (1) the proposed 49’ high Diamond Hotel had caused great controversy in 2008 and delayed the approval of the hotel by 9 months and (2) the master planning process, in the first place, was initiated to avoid problems associated with tall buildings and large building masses. *No one mentioned the fact that building heights had increased not from 50’ to 54’, but from as low as 25’ to 54’.* (See Section d below)

(ii) Redefining English Basements and Effectively Increasing Building Heights

The rezoning modified the definition of English Basement by stating that up to 2/3rd of the basement could be above-ground **and** still not be counted as a story. Accordingly, a 12’ tall basement would not be counted as a story even if 8’ of it was above-ground. This means a 4-story, 46’ high building can now be built up to a height of 54’, if it includes a 12’ high English basement. The topic of English Basement had never come up for discussion during the TC deliberations prior to July 1, 2012.

(iii) Stacked Townhouses and Constructive Increase in Building Heights

The DMP shows that “regular” townhouses were slated to be built along the section of Center Street between Elden and Vine Streets. It would have been rather difficult to build 40’ tall “regular” townhouses (Fortnightly townhouses, for example, are only 30’ tall). During the development of the DMP, there was no mention of Stacked Townhouses. They somehow appeared at the rezoning stage. Stacked Townhouses are characterized by 2-story townhouses stacked on top of 2-story townhouses. With 10’ high floors, stacked townhouses would to be about 40’ tall, and, unlike regular 3-story townhouses, they would end up using 100% of the 40 ft height permitted under the DMP. The town staff

even tried to increase the height to 41 ft during the 2015 rezoning deliberations. ⁴

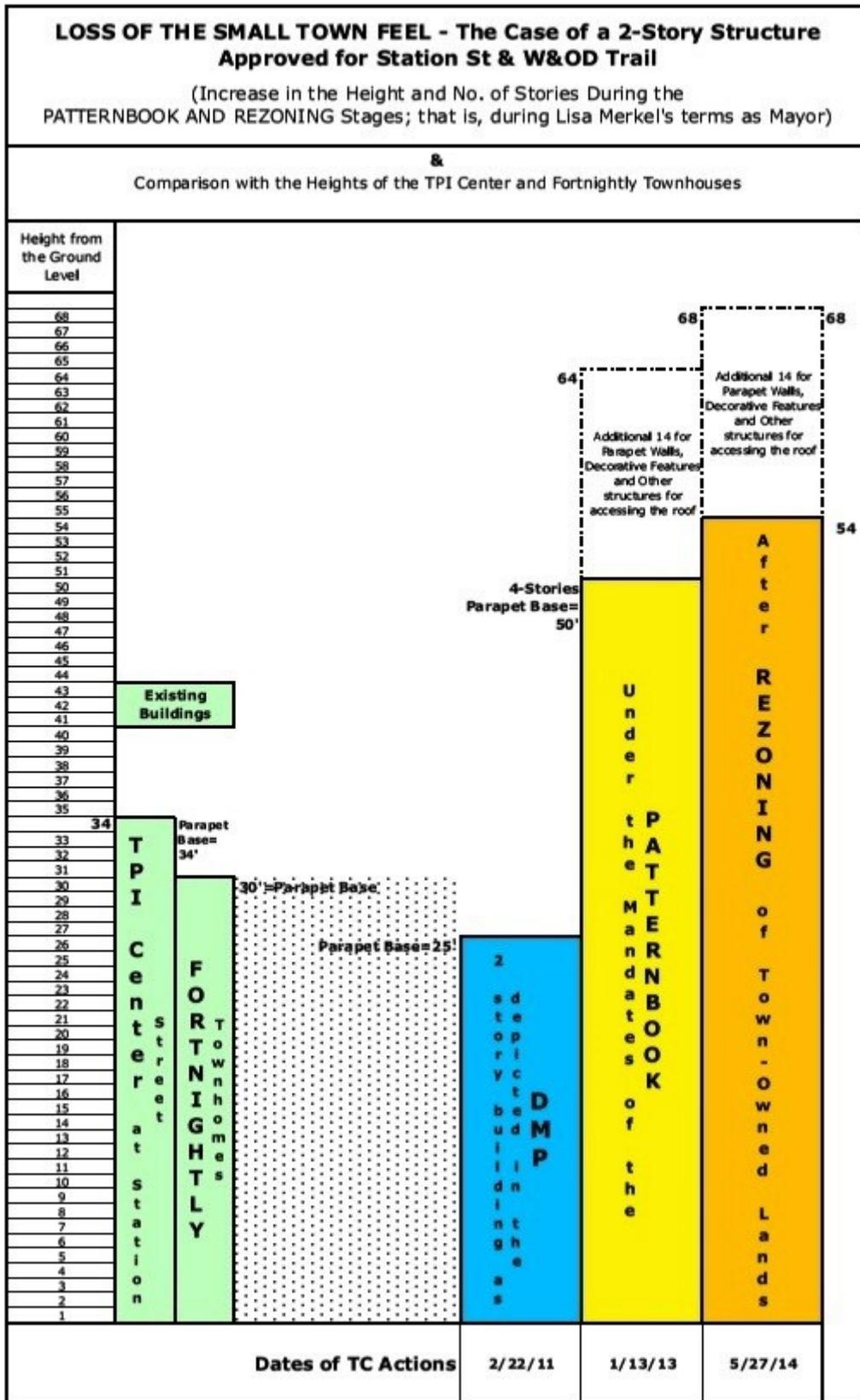
d. Net Increase in Permitted Heights

In summary, depending on the type of the building, the 2012-2014 Town Council increased the building heights in the downtown buildings by 9' to 29' over the implicit heights of the DMP as shown the following table.

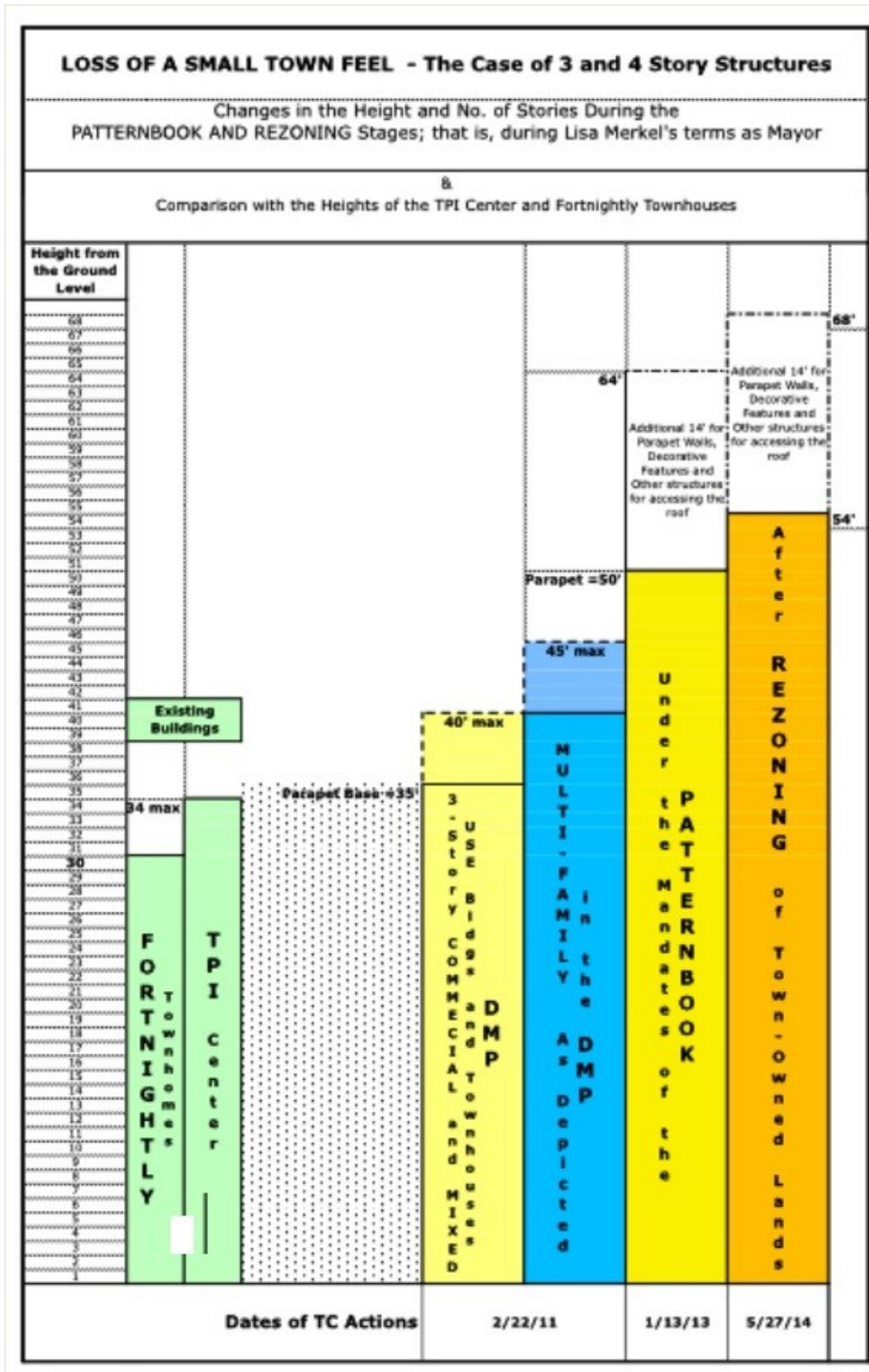
Structure Type	Likely Height Under DMP	Approved Heights (2012-2014 TC)	Net Increase (2012-2014 TC)
2-story	25'	54'	29'
3-Story	35'-40'	54'	14'-19'
4-Story	40'-45'	54'	9'-14'

If one considers 3-story buildings for making comparisons, **the 2012-2014 Council increased downtown building heights by 35% to 54%**. These calculations, of course, do not include the additional 14' reserved for parapet walls, etc. approved by the same Council. The graphical representations of these changes are given in the following diagrams

⁴ Thus, they would generate more economic value than the 3-story townhouses and probably induce a developer to contribute more money towards building a "Free" Art Center.



Loss of Small Town Feel: Case of 2 Story structures



Loss of Small Town Feel: Case of 3, 4 Story structures

The diagrams also show that future downtown buildings would be taller than the **Fortnightly Townhouses** and **the TPI Center** by 24' and 20' respectively. Change in heights and number of stories was also accompanied by substantial changes in permitted uses at the Center Street, Elden Street, Station Street and W&OD Trail Block (Blocks D & E of the DMP) as discussed in the next section.

3. CHANGES IN THE LOCATION OF ARTS RELATED USES

The two rezoning actions, on May 27, 2014, and September 8, 2015, enabled the Town to make the following substantial changes to the location of permissible uses (See [Exhibit 4- Land Uses After Rezoning of Town-Owned Lands 2014](https://jspalaha.files.wordpress.com/2016/01/exhibit-4-land-uses-after-rezoning-of-town-owned-lands-2014.pdf) - <https://jspalaha.files.wordpress.com/2016/01/exhibit-4-land-uses-after-rezoning-of-town-owned-lands-2014.pdf> for a tabular summary of the permissible uses):

- Changed the use of Block E (the Arts Space property) from Arts uses to multi-family residential and accessory uses.
- Mandated the incorporation of Art facilities, and retail and restaurant uses on **ground floors** along Station Street.⁵ **This means the Art Center could be moved to this location, if necessary.**
- Mandated multi-family residential uses on the upper floors of any structure along W&OD Trail; however, commercial and professional offices were also permitted. Accordingly, structures at this location could be 4-story high.⁶
- Allowed **Hotel use** at the corner of Elden and Center Streets (on Blocks 27A and 26). However, it also permitted **Arts facilities**, retail and restaurant uses, multi-family units and associated accessory uses, and commercial and professional offices. This means that the Art Center could be moved to this location, if necessary or a hotel could be built here. The two rezoning actions thus provided the option to locate the Art Center on Station Street or on Elden Street.
- Allowed the construction of **stacked townhouses** on Block 29 and part of Block 27A in spite of the fact there is no mention of stacked townhomes in 2011. The DMP had contemplated the use of blocks 20C, Block 29 and part of Block 27A for townhouses. The 2014 rezoning action changed the use on Block 20C from Town houses to multi-family residential and increased the height of the structure to 54' (rather than 40').

In spite of these rather monumental changes, changes that essentially rewrote the entire DMP, none of the councilmembers asked any major questions, or raised any objections, or made any motions to change the new proposals in 2013, 2014, or 2015. In 2013, when the Pattern Book as approved, no councilmembers asked questions about the 50' max height. Councilmember Waddell has suggested that they (the staff) had slipped this major change stealthily by him (and others) and that he would have objected if he had been made aware of it by the staff. However, as is often the case, the work session

⁵ The proffers statement stated that, "Any structure abutting the Station Street right-of-way, including structured parking, **shall** incorporate one or more of the following ground floor uses: arts facilities including art galleries, studios, classroom space for performing arts and visual arts and performance space; retail and restaurant uses."

⁶ The proffers statement also said, "Upper floor uses **shall** consist of multi-family residential and accessory uses, or commercial and professional office uses." This means the structures along W&OD trail could be as tall as 4-stories.

and the public hearings, managed by the staff, had dealt with far less important issues. In 2014, during the rezoning hearing, Councilmembers Hutchison and Waddell objected to the building height being raised from 50' to 54', but, as discussed earlier, the Mayor limited the discussion by retorting that many developers thought an additional 4' would be good for the town. Obviously, she thinks that it is perfectly acceptable to let developers be the arbiters of public interest.

Except for this objection, the discussion had essentially focused on Neon signs in the newly created PD-TD district and the Town Manager's authority to set the costs of public parking on a yearly basis! In 2015, all councilmembers, except I, approved the proposed resolution. I objected to the increase in number of stories and heights of buildings and the future urbanization of the downtown.

4. CHANGES IN THE ARCHITECTURE & MASSING OF STRUCTURES

a. Under the DMP

The illustrations in the DMP generally conformed to the 3-story max for commercial and mixed use structure and 4-story max concept and to the historical architecture. (View [Sample Perspectives DMP - https://jspalaha.files.wordpress.com/2016/01/sample-perspectives-dmp.pdf](https://jspalaha.files.wordpress.com/2016/01/sample-perspectives-dmp.pdf))

b. Under the Pattern Book

The architecture of the buildings as shown in various photographs and drawings did not change much under the mandates of the Pattern Book; however, the massing of the buildings did, because the maximum height of the buildings was changed to 50' (at the base of the Parapet) and to 54' during the rezoning.

c. After the Rezoning

New downtown buildings, if built in conformance with the Rezoning actions, would **not** conform to the illustrations prepared and approved for the DMP. Instead, their heights and masses would be identical to those of the Diamond Hotel as shown in the following table.

Location/Structure	Size of the Visual Mass ⁷
Diamond Hotel	–
Monroe Street	220'x50'
Lynn Street (or the Back Alley)	250'x60'
Downtown After Rezoning	–
Arts Space Lot (West Side)	230'x(54' to 68')
Arts Space Lot (South Side)	200'x(54' to 68')
W&OD trail and Station Street Combined	275'x(54' to 68')
Center Street	300'x(54' to 68')
Future Bldg. in the Downtown	Similar to that of Rezoned Properties

The [Building Heights](https://jspalaha.files.wordpress.com/2016/01/building-heights.pdf) (<https://jspalaha.files.wordpress.com/2016/01/building-heights.pdf>) and the [Land Use or Frontage](https://jspalaha.files.wordpress.com/2016/01/land-use-or-frontage.pdf) (<https://jspalaha.files.wordpress.com/2016/01/land-use-or-frontage.pdf>) map show that,

⁷ The heights of 50' and 54' do not include up-to-14' tall structures above the parapet base.

eventually, such heights and masses would dominate Herndon skyline along many downtown streets including Jackson Street, Lynn Street, Elden & Monroe Streets at the Pine Shopping center, and Pine, Center, Station and Spring streets. **In other words, the downtown would be transformed into an urbanized enclave.**

The Town also provided new illustrations, given in [Exhibit A](#), (<https://jspalaha.files.wordpress.com/2016/01/exhibit-a.pdf>) to guide the decisions pertaining to the massing, architecture and design of the buildings and the quality of materials. Notice that these illustrations are completely different than prepared for the DMP. The masses of most, if not all, of these buildings appear to be bigger, larger and heavier than that of the Diamond Hotel. You be the judge.

The minutes of the meetings in 2014 (when the height and massing issues should have been raised) show that none of the councilmembers asked any relevant and appropriate questions, especially if we consider the fact that the height and mass issues had derailed the Diamond hotel. Illustrative perspectives from the DMP had been transferred over to the Pattern Book, but there was no discussion of how developers could use them, if at all. There was little or no discussion of how incompatibilities between the perspectives of the DMP and those of Exhibit A, if any, were to be resolved. The staff simply had not developed the relevant information and presented it to the council. It is obvious that the Mayor or anybody else had not asked them to do so.

5. CHANGES IN THE NATURE OF HPRB REVIEW

a. Under the DMP

The Town Council, in 2011, required the staff to “...present the approved DMP... and the zoning changes... to the Heritage Preservation Review Board and the Architectural Review Board for their consideration and comment, with future incorporation into the historic heritage and building design process.” The 2010-2012 council did not limit the HPRB and ARB reviews in any way.

b. After the Rezoning

The rezoning restricted the ways in which the HPRB could review any proposed development. Proffers approved as a part of the 2014 and 2015 rezonings state that;

“...The HPRB shall use the Downtown Pattern Book, **as well as the exhibits submitted with these proffers as guidance** when determining the appropriateness of the architecture of the Development ...” (Emphasis Added)

“... [Exhibit A](#), consisting of photographs and drawings of other projects, ...demonstrates **the level-of-detail and massing** that is generally appropriate for the Development.

The 2014 rezoning resolution, it appears, has handicapped the HPRB by strongly suggesting that Exhibit A is the dominant governing document. The timing of the HPRB review also affects its ability to require changes to a proposed design. It appears that the HPRB would conduct its review after the Town has spent months negotiating a finance, design and build contract. It is not clear how it would possibly be able to object to the unacceptable architecture or unacceptable massing of the structures, if the Town Council has already negotiated the heights and number of stories and the financing of the Art Center? It appears that, as in 2008, the HPRB would really not have much say, if at all? The question

that has not been answered yet, is, “**Will the architecture, heights and massing presented in Exhibit A be acceptable to the public that originally did not accept the Diamond Hotel?**”

The second question is, “With all the changes discussed above, how did the 2012-2014 Town Council change the nature of our public gathering places? The following section addresses this question.

6. CHANGES IN PUBLIC REALM

One of the primary objectives of Form Based Codes is to make sure that the character of public spaces, as envisioned in the DMP, is realized through the implementation of the plan. In our case, public realm depends on the character of open spaces and the quality of streetscapes. Both the Pattern Book and the Rezoning Actions paid a lot of attention to streetscapes; therefore, this part of public realm remained essentially identical to that discussed in the DMP. However, four distinct changes redefined the open space substantially as discussed below:

(i) Increase in Building Heights

The best way to describe the change is to show how the view of the 2-story structure located the Station Street and W&OD Corner would change if a 4-story building is built at this location. Under the terms of the DMP, the public would have seen this view – [Exhibit 2b](#).

(<https://jspalaha.files.wordpress.com/2016/01/exhibit-2b-2-story-sketch.pdf>) After the rezoning, the public would see a different view – [Exhibit 2](#). (<https://jspalaha.files.wordpress.com/2016/01/exhibit-2-station-and-wod-trail-view-copy.pdf>) The feel of the space, naturally, would be “poles apart”. Similar difference in the feel of the space would be apparent along most streets in an urbanized downtown.

(ii) Relocation of Uses

The change in location of the Art Center and associated uses to Station Street (or to the Ashwell Property on Elden Street) and use of upper floors for multifamily residences would bring very different crowds to the Station Street & W&OD trail area than retail, commercial and office spaces at the same location. Thus, the nature of this gathering place would now be quite different than that under the DMP.

(iii) Weak Specification of Open Space at the Station Street/W&OD Corner

The size and shape of **all** open spaces surrounding the structure at this corner articulate the public areas (click [Exhibit 6- Public Realm](#) to view - <https://jspalaha.files.wordpress.com/2016/01/exhibit-6-public-realm.pdf>) During the rezoning, the town did not do nearly enough to codify this open space. It required that, “The Applicant will construct an area of public open space at the northeast corner of the Property...” It did not specify the size, shape and nature of the space in any detail.

The rezoning also required that “The Applicant shall design the open space area **in a manner that incorporates it into the overall design of the Development...**” This requirement essentially negated one of the primary objectives of Form-Based Codes, which is to ensure that *the future buildings conform to the open space (as defined in the DMP) rather than the other way around*. Through this requirement, the Town gave developers considerable flexibility for designing their buildings, but rendered the character of any future open space very uncertain.

The proffers also stated that, “...The pedestrian access **may** consist of dedicated pedestrian walkways, plazas, pedestrian friendly shared use space or any combination of the three...” This is, at best, a weak

requirement; it does not codify what was depicted in the DMP. For instance, it does not mandate that “...the pedestrian access **shall** consist of dedicated pedestrian walkways...” or that these spaces shall be of certain shape or size, or, **shall** contain specific streetscapes or that the building setbacks **shall** be made larger under certain conditions etc. Consequently, it is not obvious how the public spaces shown in the Pattern Book would be realized.

(iv) Weak Specification of Open Space At the Former Ashwell Property

A small culvert runs through the south-east portion of the property. Therefore, the area above the culvert had to be kept open. The Pattern Book and the Rezoning actions mandated that 11,000 sq. ft of the space had be dedicated to open space, *but that it could be shifted around*; Consequently, the open space as envisioned in the DMP, more likely than not, will not materialize. The DMP also envisioned a restaurant in the northwest part of this plaza like open space; however, the staff during recent the TC discussions did not discuss if developers would even be required to build a restaurant at this location.

In short, it is highly uncertain that the public realm as envisioned by the DMP and approved by our residents in 2011 will become a reality or that public gathering places would function in accordance with the public’s expectations.

In Summary, the 2012-2014 Town Council’s actions were inconsistent with the directive of the Downtown Master Plan. It did not develop a Pattern Book and create a PD-TD district that would, “... align with **the form, height and density** prescribed by the DMP (Illustrative Plan: Option A)”. It also did not retain even a semblance of **consistency as to the placement of buildings**, parking, public streets and spaces, much less retain **particularly stringent consistency** as to the façade massing and height of structures and the architectural character and quality of development...” as mandated by the DMP. Its actions would permit developers to build buildings that would be significantly taller and more massive than the Diamond Hotel and turn the downtown into an urban enclave.