

## Herndon's Unfinished Fight For A Small-Town Feel – Part 1

January 4, 2016

by

Jasbinder Singh

### **PART 1 OF THE 4-PART SERIES:**

### **THE DIAMOND HOTEL vs. FORTHCOMING DOWNTOWN DEVELOPMENT**

The 2008 rejection of the [Diamond Hotel](#) helps us understand Herndon's long and protracted fight over a small-town feel. The hotel's 49' **height and bulk** had created such great anguish for some citizens that it received its initial rejection by the then-Town Council. The developer had tested the community's resolve and failed. Shortly after the initial rejection, he reduced the height by only 5' and received approval from the weary council.

The 2008 fight should be a cautionary tale for the forthcoming development proposals that are likely to contain structures with higher heights and greater bulk than those of the Diamond Hotel.

**SOMEHOW, WE SEEM TO HAVE ENDED UP IN A WORSE SITUATION THAN IN 2008.**

This Part 1 of the 4-Part Series discusses the 2008 struggle that led to the development of a community's shared vision of the downtown in 2011

#### **1. APPLICABLE 2008 ZONING REGULATIONS**

The following applicable zoning regulations have been a matter of controversy ever since the Hotel was proposed in 2007 and disapproved on September 23, 2008.

**a. Increase in Intensity:** "The Town Council **may** ... increase the floor area ratio (FAR) up to 2.50 (from 2.0) ..." if the development meets a specified criteria. **(Emphasis added)**

The language of the regulation did not bind the Town Council to approve the hotel even if it had met the prescribed criteria. The regulation did not say the TC **shall** approve the higher FAR. The Council had a duty to make sure that the application of the criteria would overcome the effects of other deficiencies. The height of 49' created a more massive structure than a sizable population of the town was willing to accept. A FAR of less than 2.23 and greater than the by-right FAR of 2.0 could have been met only with a lower height. Therefore, the town council had the legal right to ask the developer to lower the hotel's height or take other actions to reduce its mass and bulk.

**b. Set Back at 30’:** The then-regulation stated, “At the right of way (ROW) line, no structure shall exceed 30’ in height and the height of the structure shall increase no more than one foot of additional height for each foot of horizontal distance from the ROW line.”

This part of the regulation was designed to ensure that the face of any structure would not be “flat”; however, the proposed hotel’s front elevation was “straight up”, up to the proposed height of 49’. There was no set back at the 30’ level. Even though the hotel may have met the technical requirements, it violated the spirit of the regulation. It presented a 50 ft high and 230 ft wide “flat” elevation to people standing on Monroe Street.

The back and side elevations were even worse. On the Pine Street side, the hotel overwhelmed the existing one or two story structures. In the back, the 65’x250’ façade was particularly noticeable. In a scale model of the building, the hotel appeared to overwhelm the downtown.

Supporters of the hotel still do not acknowledge these concerns, even after all these years.  
**The HPRB did.**

## 2. THE HERITAGE PRESERVATION REVIEW BOARD (HPRB) REVIEW

In its limited assessment covering the Elden, Monroe and Pine street elevations, the HPRB expressed the following concerns in April 2008:

- **Height:** “The height of the facades should be reduced...” “...The height concerns are most prevalent along Monroe Street and the north elevations facing Pine Street...”
- **Mass & Scale:** “A potentially **overwhelming** mass and scale are the general design concepts that are the areas of greatest concerns.” Its “...**contextual compatibility with the existing built environment** and neighboring historic resources have not yet been achieved ...” (Emphasis added)

The town council did not want to approve the project without a positive vote from the HPRB. Consequently the Board came under considerable pressure to change its recommendations. It provided another review in July even though there was limited agreement among its members. The majority agreed to move forward as long as the proffers do not prohibit the HPRB from achieving adjustments to building design if and when a future application for a Certificate of Appropriateness is presented. Their objections had not changed substantively. [1]

The Council rejected the 49’ high hotel by a vote of 4-3 on September 23<sup>rd</sup>, 2008. The applicant had tested the community’s resolve and failed. Shortly thereafter, he submitted another application after reducing the height by 5 feet. On November 11<sup>th</sup> the weary Town Council approved the revised proposal.

## AFTER A LONG AND BITTER FIGHT THAT HAD DIVIDED THE TOWN, THE TOWN HAD ACHIEVED A REDUCTION IN HEIGHT OF JUST 5 ft.

### 3. CALLS FOR DEVELOPING A DOWNTOWN MASTER PLAN

The intense “struggle” over the height and mass of structures generated calls for creating a Downtown Master Plan that would represent the community’s shared vision. During the August 12<sup>th</sup>, 2008 public hearing, Councilmember Tirrell renewed his call for a master plan for the downtown in order to “...overcome some of the issues that have developed which could be avoided in the future.” Councilmembers Waddell and Downer echoed Mr. Tirrell’s call.

By the end of 2009, the community had articulated its vision for the future of the downtown. In February 2011, the Town Council approved The Downtown Master Plan (DMP). The fight over height and mass of future downtown buildings had come to an end, or, so it appeared. A new town council took office on July 1, 2012. Slowly but surely, it began to make changes to the DMP. The following figure shows how the perspective of a 2-story retail structure, illustrated in the DMP and accepted by the public, is likely to change to a 4-story, up to 64’ high structure under the regulations enacted by the 2012-2014 town council.



Schematic diagram

( visit <https://jpalaha.files.wordpress.com/2016/01/exhibit-station-and-wod-trail-view.jpg> for zoom view)

In the light of the experience with the Diamond hotel, the changes made to the Downtown Master Plan by the 2012-2014 Town Council foretell future public fights over the height and mass of downtown buildings.

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[1] The HPRB never had another opportunity to take a look at changing the design, because the Hotel was never built. By the time the Town Council approved the hotel, the national financial markets had collapsed and the great recession had already begun. It wouldn't have been built even if the application had been approved 6-8 months earlier. *Regardless, the supporters of the hotel still blame the then-councilmembers for their apparent failure to bring new development to the town.*

## Herndon's Unfinished Fight For A Small-Town Feel – Part 2

January 11, 2016

by

Jasbinder Singh

### PART 2 OF THE 4-PART SERIES:

### COMMUNITY'S SHARED VISION OF THE FUTURE DOWNTOWN

With the Diamond Hotel problems behind it, the 2008-2010 Town Council set out to develop a downtown master plan. The objective was to develop a shared vision of the future downtown and avoid the height and mass issues that had beset the Hotel.

The downtown planning process was expected to be difficult, because the resolution of decades-old conflict, between those who wanted to maintain a small-town feel and those who wanted high densities, wasn't going to be easy. Consider the comments made by a member of the town staff before selecting the members of the Downtown Master Plan (DMP) Steering Committee:

*“We are setting up a situation where opposing forces have to duke it out right on the committee. That is a head-on approach and not easy or comfortable, but probably better than setting up a situation where months and months of work proceeds under a majority that wants significant redevelopment as per past plans, only to have the process then run head on into major opposition when the whole thing gets to the PC and/or the TC level for a decision...I suppose that Downer and others ... may end up being the ones who come out and oppose the final plan.”*

This Series shows that the conflict remained potent at each step of the development and implementation of the master plan.

#### 1. DEVELOPMENT OF THE RFP

In November 2008, the town staff had expected that the **high** density scenario “... would drop the downtown density a bit...”, but the final version of the Request for Proposal contained the following two scenarios<sup>1</sup>:

- **Create Master Plan A:** “... Create Master Plan A with a density based on a maximum floor area ratio (FAR) of 2.5. Retain the current height limit of 50' **as a general rule**, but reduce the height for all areas that are adjacent to residential uses...” (**Emphasis added**)
- **Create Master Plan B:** “This plan would reduce the height and density as compared to the density under existing zoning and compared to Master Plan A. For example, the configuration might be limited to a 3-story maximum for all structures. **Height may be**

**limited to 40 feet** throughout the downtown...FAR for development may be in the range of 1.0-1.5”<sup>ii</sup>

The staff had also asked the council to provide some guidance on defining the phrase “as a general rule” in the paragraph above. The council did not do so. Perhaps, it just wanted the public and/or the steering committee to establish the criteria.

The Town sent the RFP to firms specializing in “town-scale downtown development” and selected Urban Design Associates of Pittsburgh, PA to develop the Master Plan. One its first task was to work with the town staff, the community at large, and the stakeholders to help develop a consensus vision of the future of the downtown.

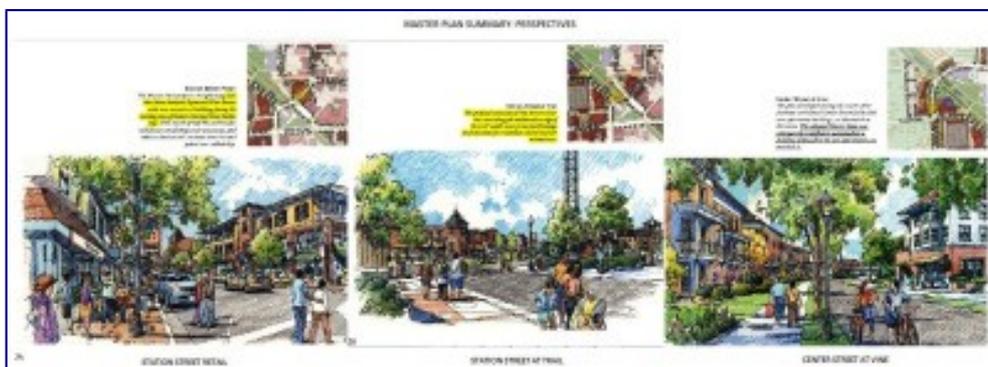
## 2. THE COMMUNITY ARTICULATES ITS VISION

**Vision** means a sort of “what I want to be when I grow up” unique outcome. *Great visions almost always center on what is special about a place.* Small towns and cities often focus on natural features or extraordinary social amenities, like strong arts and cultural communities, or foodie havens, or quaint main streets built for antiquing and local music. On October 7, 2009, the consultant, after meeting with town officials and several focus groups:

- held a “brain-storming and information-gathering” session with the community to understand its “**vision for the downtown**” and
- allowed the community “...to look over the shoulders of UDA designers and architects at work as they took what they had learned and brought it to life in a 3- dimensional representation of Herndon’s new and vibrant downtown.”

The Town’s promotional literature stated that the “**consultant’s final report would include drawings** ... that would allow a developer ... to know how the town envisions its future downtown development.” **(Emphasis Added)**

Through this public process, the Town created images of the future downtown. These images represented the community’s vision of the downtown.



Sample Perspectives DMP

(visit <https://jspalaha.files.wordpress.com/2016/01/sample-perspectives-dmp1.jpg> for zoom view)

The illustrations had lent a sense of vibrancy to the citizen's expectations of the future downtown. The staff, in one of the emails to the consultants, summarized this feeling by stating, " ...As the (newspaper) articles portray it, a couple of residents were "blown away" by the work. One of them has been active for a number of years and I've never known him to like anything, let alone be blown away. So there you have it..."

The illustrations were made a part of the draft Downtown Herndon Master Plan dated Dec. 10, 2009. For Herndon citizens, the DMP with the following "small town" characteristics was its vision:

- **"Just 3 stories max for commercial and mixed use, and 4 stories max for residential"**. In an Oct. 3, 2011 email (that is, 8 months after the approval of the DMP), the staff verified this concept by asking 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..."<sup>iii</sup>
- **A 2-story commercial and mixed-use building** along Station Street and W&OD trail, representing the view of a person standing near the Depot and looking at the back of the Subaru dealership. This building was supposed to become a significant part of a continuous commercial hub.<sup>iv</sup>

**NONE OF THE ILLUSTRATIONS HAD SHOWN ANYWHERE CLOSE TO 50 FT TALL BUILDINGS, OR, GIVEN THE IMPRESSION THAT THE FUTURE DOWNTOWN BLOCKS WOULD BE AS MASSIVE AS THE DIAMOND HOTEL.**

If anything, future buildings were expected to be only slightly taller than the tallest existing buildings in the downtown. The illustrations had two additional characteristics. They were:

- (1) classified into two Options, A and B, with B representing the lower density scenario, and
- (2) drawn to show how the open space would look and feel on different building blocks

The concept of using Floor Area Ratios (FARs) to define what could be built on a property sort of disappeared by using this approach. The requirement of the RFP to develop two options based on FAR was no longer valid or applicable. This meant the Town would use a relatively new concept in zoning – Form Based Code (see Part 4).

### **3. APPROVAL OF THE COMMUNITY'S VISION**

On February 22, 2011, the Town Council approved the high-density scenario (Illustrative Plan: Option A) of Downtown Master Plan. The preamble of the accompanying Resolution verified that the plan:

- "Was **the community vision** for future of downtown developed through a community based planning process",
- "Reflected **the community's preferred vision** for the future downtown..."

The resolution also articulated how the vision was to be implemented. It stated that the DMP "...

should be interpreted as a vision with flexibility where various land uses may be substituted at specific sites while retaining:

- **consistency as to the placement of buildings**, parking, public streets and spaces, and
- **particularly stringent consistency as to the façade massing and height of structures** and the architectural character and quality of development...” (Emphasis added)

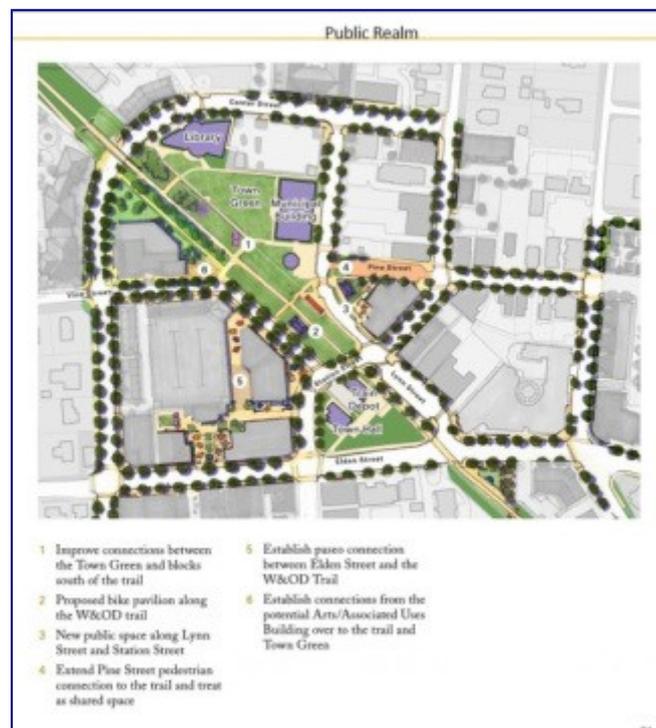
The Resolution also stated that, “...the DMP adopted February 22, 2011 shall govern with regard to **density and other features**...” (Emphasis added)

#### 4. CONVERSION OF COMMUNITY’S VISION TO FORM-BASED CODE

Form-Based Code was not even mentioned before the DMP was approved in February 2011. In fact, the staff did not say a word about it until June 2011, when it made a Power Point presentation to the TC. Even then, the staff did not articulate the basic concepts, and did not show how the concepts were related to the DMP.

**Form** means the quality of a neighborhood. It either provides for gathering places that **build social capital and local resilience**, or makes for a lonely, disconnected, nowhere. **Form-based codes** have been used to define the public realm, to create gathering places and to help reconnect people with each other. They define what might be considered a “home” <sup>v</sup>. DMP-defined new public places included:

- Walkable downtown with streetscapes
- Plaza like areas such as open spaces (1) within the former Ashwell property and (2) between the Depot and 2-story building described above (see the image below)



Public Realm

(visit <https://jspalaha.files.wordpress.com/2016/01/public-realm.jpg> for zoom view)

- Green space along the W&OD Trail, and
- Commercial spaces along Elden, Station, Monroe and other downtown streets.

In accordance with the principles of Form Based Coding, these public spaces were supposed to be codified in the regulatory schemes.

**THIS MEANS BUILDINGS ON DIFFERENT DOWNTOWN BLOCKS HAD TO CONFORM TO THE SPECIFIED PUBLIC SPACES AND NOT THE OTHER WAY AROUND.**

“Maximum Heights” of buildings also define public spaces and give them unique character. A downtown with 100’ tall buildings, for example, would have a very different feel than a downtown with 40’ tall buildings. A difference of 10’ or 15’ in height can have an enormous difference in the feel of the space. It is worth noting that the City of New York, during 1970s and 1980s, had successfully created public plazas in all parts of its downtown and midtown by locating new buildings farther away from the streets.

During the creation of the Vision, the community had seen the illustration of 2, 3 and 4-story perspectives. Most citizens had liked what they had seen and were excited about them. Without saying so explicitly, they had defined the “maximum heights” – one of the key precepts of Form-Based Codes. The illustrations of the future downtown had the look and feel of a small town:

- 3-story, 35’ (or so) tall structures would grace the downtown landscape.
- A 2-story, about 25’ tall structure would define the central retail center, and
- A couple of 4-story, 40-45 ft tall multi-family buildings might dot the center of the downtown

The concept of a maximum height of 50’ was never mentioned during the DMP approval process. The Vision and Form were supposed to be codified in a regulatory plan called the Pattern Book and the PD-TD district.

**THE TC HAD DIRECTED THE STAFF “...TO DEVELOP A PD-TD DISTRICT TO ALIGN WITH THE FORM, HEIGHT AND DENSITY PRESCRIBED BY THE DMP (Illustrative Plan: Option A).”**

The question is, “**Did the town comply with this and other TC directives or with principles of Form-Based Coding?** On June 5, 2012, the staff gave an update on the status of the preparation of the Pattern Book. The majority on newly elected Town Council, with Lisa Merkel as Mayor, was of a different mindset. The tone and substance of the decisions was about to change. The approval of significantly taller buildings such as the one shown below were in the offing.



(<https://jspalaha.files.wordpress.com/2016/01/exhibit-station-and-wod-trail-view.jpg>)

i The staff's focus on the FAR and "height of buildings" was misplaced for two reasons. **First**, the use of FAR makes a lot more sense if one wants to guide the development of individual lots than if one wants to develop a very large area (such as the downtown) where consolidation of lots might take place and where large open spaces benefitting the public might be created.

**Second**, the then prevalent zoning (PD-MU) had been in place for almost 20 years. In spite of permitting high density and 50' high buildings, it had not generated any significant development. The largest structure that was built under the PD-MU zoning was the TPI Center (at the corner of Station and Elden Streets). It was about 34 ft tall. In 2009, office condos that occupied the upper floors of the building went bankrupt. The then market rents for offices could not support new development (in spite of large parking subsidies provided by the Town – see my article on the shared parking program). Consequently, **"building height" was not and is still not a decisive factor that affects the financial viability of future developments in the downtown.** Attracting the right kind of business to the downtown is. Those who advocate taller developments do so because they have other objectives in mind (See, for example, the article on the "Free Art Center – A Wonderful Fantasy or What?")

ii This scenario was based on the notion of a "3-story downtown". The height was pegged at a 40-foot height limit, based on a possible but unrealistic concept of 16-20 foot retail 1st floor and two 10-12 foot floors above..."

iii Notice that the number of stories for institutional uses (the Art Center and the municipal garage) was not specified. Most important of all, "mixed-use" was not defined clearly in the DMP.

iv It is important to note that the Town staff was uncomfortable with the low heights of some of the buildings in some areas. In its August 30, 2009 Staff Report to the PC it had opined that, "...a 4-story multifamily building along Station Street and the W&OD Trail... would greatly increase the return to the town **compared to one-story retail use** as depicted in Option A." We believe the staff should have said "2-story building", because a 1-story building was never under consideration for this location. However, by expressing this concern, the staff had indirectly verified that the community had accepted only 2-story (not, 3 or 4-story) structures for this site.

v The material in this article has been gleaned largely from the documents provided on the <http://www.formbasedcode.org> website. In general, FBCs are applied in two ways: to a site to implement a development project or to several areas as part of a zoning code amendment or update. This second category someAriial involves reconfiguration of the zoning code to retain a set of conventional zones for "automobile-oriented suburban" patterns while adding form-based zones for "walkable-urban" patterns. This is called a hybrid code because it merges the conventional zoning and form-based zoning provisions under one cover, in one set of procedures.

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

January 18, 2016

by

Jasbinder Singh

### **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://jshalaha.files.wordpress.com/2016/01/exhibit-8-dmp-as-approved.pdf) - <https://jshalaha.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).<sup>1</sup>

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.<sup>2</sup> 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.

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<sup>1</sup> 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.”

<sup>2</sup> 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'<sup>3</sup>. ( 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.

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<sup>3</sup> 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 2/3<sup>rd</sup> 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. <sup>4</sup>

#### d. Net Increase in Permitted Heights

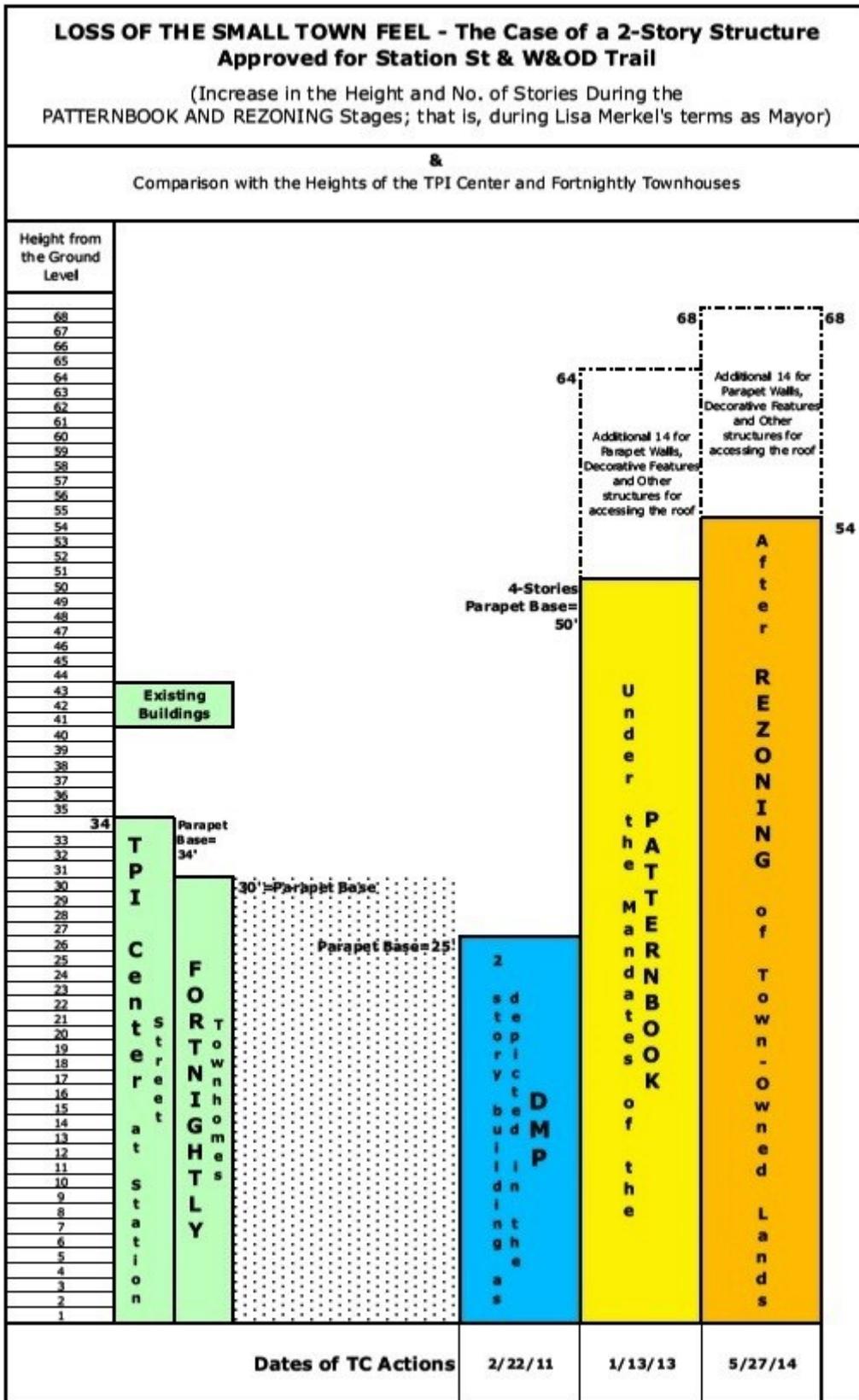
In summary, depending on the type of the building, the 2012-2014 Town Council increased the building heights in the downtown buildings by 9' to 29' over the implicit heights of the DMP as shown the following table.

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'

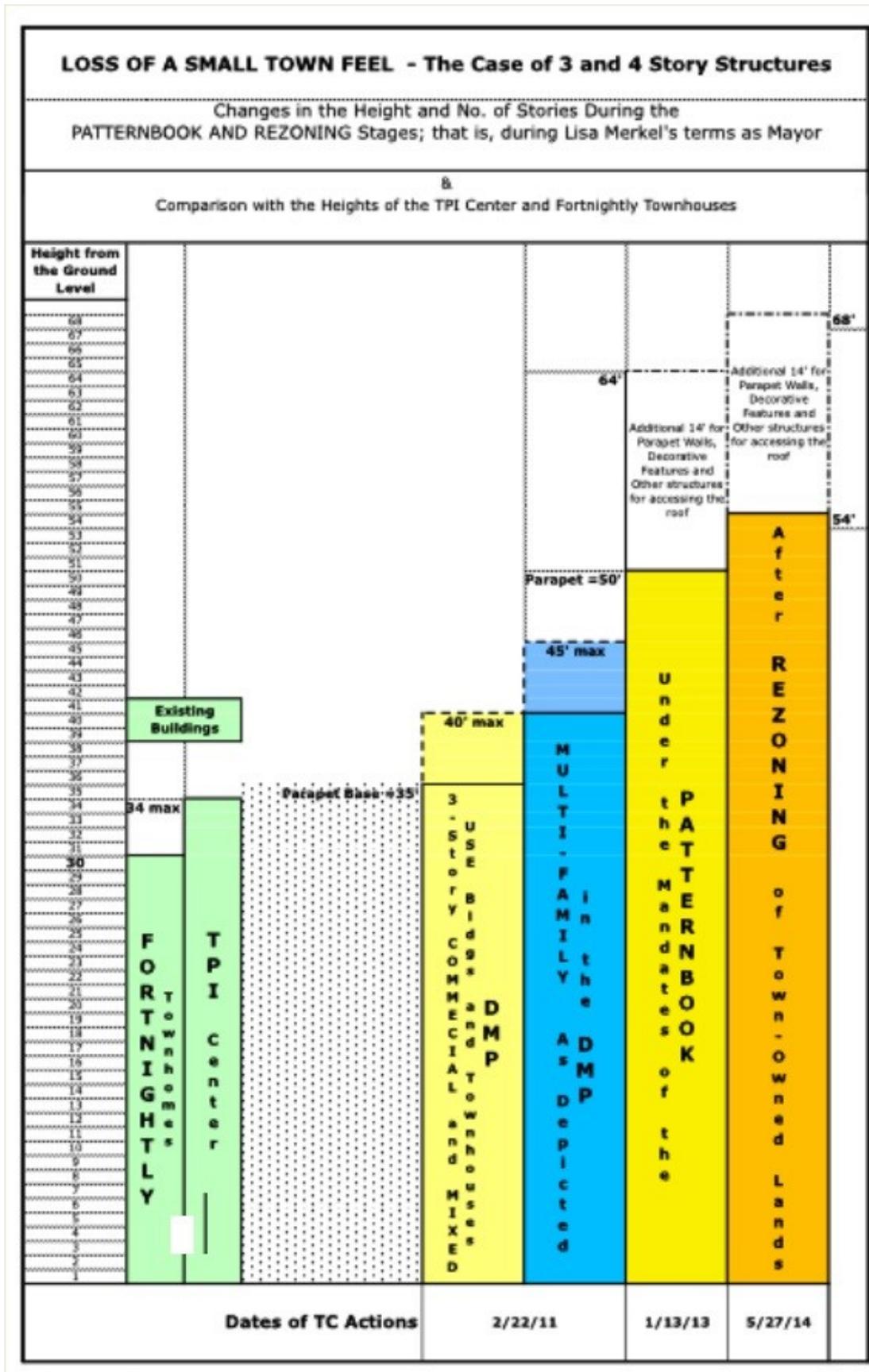
If one considers 3-story buildings for making comparisons, **the 2012-2014 Council increased downtown building heights by 35% to 54%**. These calculations, of course, do not include the additional 14' reserved for parapet walls, etc. approved by the same Council. The graphical representations of these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

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<sup>4</sup> 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.<sup>5</sup> **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.<sup>6</sup>
- 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

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<sup>5</sup> 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, studies, classroom space for performing arts and visual arts and performance space; retail and restaurant uses."

<sup>6</sup> 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 <sup>7</sup>
<b>Diamond Hotel</b>	–
Monroe Street	220'x50'
Lynn Street (or the Back Alley)	250'x60'
<b>Downtown After Rezoning</b>	–
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')
<b>Future Bldg. in the Downtown</b>	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,

<sup>7</sup> 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.

## **Herndon's Unfinished Fight For A Small-Town Feel – Part 4**

February 1, 2016

By

Jasbinder Singh

The author thanks former Councilmember Connie Hutchinson and Mayor Steve DeBenedittis for their valuable comments.

### **PART 4 OF THE SERIES: SUMMARY**

#### **PROLOGUE**

Long before I had thought about writing this article, I had come to sense that the DMP had changed substantially in Mayor Lisa Merkel's first term. When I made such an assertion in one of our meetings, Councilmember Grace Wolf had quickly stepped up to assert that they (their majority on the council) had made no changes to the DMP. Her tart response seemed to betray the truth. Two other "incidents" magnified my doubts:

- Several weeks later, when I stated that some developers were asserting that the DMP no longer mattered, the town staff avowed that the developers were wrong. The sharp come back had suggested an unusual discomfort with my statement..
- A short time later, I found that the two appraisals of the town-owned properties were based on development densities that were two to three times than those approved for the DMP.<sup>1</sup> It was hard to believe that the appraisers could be so wrong.

A few months later, I were to find out that Mayor Lisa Merkel, during much of her tenure, had claimed, sometimes very proudly, that **her** efforts to redevelop the downtown will create a "small-town feel". While some residents may have been swept away by her unbridled enthusiasm, others were suspicious and asked, "Isn't her claim nothing more than the sales pitch of a cheerleader?" Consequently, I decided to examine the details and write the 4-Part series.

In 2009 and 2010 the people of Herndon came together to create a shared vision of what they wanted their future downtown to be: Three story commercial and mixed-use buildings along the main streets, one or two 4-story residential apartment buildings and a 2-story commercial center on Station Street. Sketches were drawn to show the look and feel of this revived downtown, and the Townspeople were happy and excited to have their vision come to life in the form of a Downtown Master Plan and its illustrations.

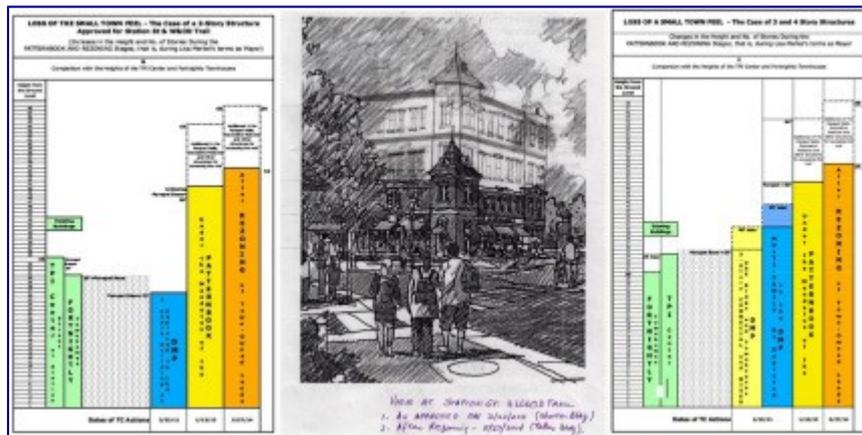
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<sup>1</sup> The two appraisals were based on independent determinations by the appraisers that between 200 and 300 residential apartment units in 4-story (54'-68') high buildings could be built on the town-owned downtown land.

Mayor Merkel and her supporters on the council started to make changes to the community's vision immediately after (some say, even before) taking office in 2012. They had made major changes by the time they produced the Pattern Book six months later. The changes were not so obvious to most people. Small changes to key definitions, or important words made big difference in what could be built in the downtown.

The rezoning actions in 2014 and 2015 increased building heights again, in more ways than one, changed the location of Arts facilities, redefined uses by floor in some locations, added sketches that reminded one of modern urban design, and hamstrung the HPRB by restricting its review. In place of 2 or 3-story buildings, developers would be able to build 4-story structures by right. Rather than mostly 30'- 40' tall buildings, one would see 54' to 68' tall buildings on practically all of the downtown streets. If you had thought the Diamond Hotel was massive, think again. If you think Fortnightly townhouses are too tall, think again. A denser "urban" enclave, instead of a quaint, cherished downtown with a small town feel, seems to be in the offing.

How and why did this happen? Parts 1-3 of this Series explain it all. There are good reasons to believe that the 2012-2014 Council increased the density to induce developers to build a "free" Art Center. Follow along and come to your own conclusions. The attached exhibits illustrate the changes rather decisively.



Now, as the Town gets ready to review development proposals that are likely to include four-story residential mixed-use buildings along the major streets and over much of the downtown, will the citizens step up to defend their original vision, or will they remain silent and let a short-sighted council allow higher density and taller buildings to change the landscape and feel of our downtown forever?

## THE REST OF THE STORY

The Planning Commission and the Town Council had at least 8 different opportunities to raise questions about the height or mass of future downtown buildings between July 2012 and June 2014. The record shows that the relevant concerns were raised only twice. The following exchange during the December 2012 public hearing of the PC is rather revealing:

**Chairman East:** “You know, the minute the public sees 64 feet, we are all going to be lynched. I mean, 50 feet was ... when the hotel came in at 50 feet, the place went nuts. Are we sure that we want to have a height limit of 64 feet in the Downtown? Is that what that discussion turned out to be? Now that you see the number, do you really want 64 feet?”

**Vice Chairman LeReche:** “I’m sure.”

**Commissioner Bettard:** “How many stories is that?”

**Vice Chairman LeReche:** “Mr. Chairman, I think the discussion from the work session was based on the total height allowed, and the 50 feet did not include penthouses. So, we want to put a maximum, and I think this is what we’re trying to do ... put a maximum height on some of the elements that could be an impact, visually, within the Downtown. So, I feel comfortable with the 64 feet, understanding that’s the maximum height to include sloped roofs, penthouses and the like.”

This was the extent of the discussion that took place that day. Note that Mr. East had objected not to a height of 64’ or even 50’, but to revealing that the maximum height was 64’. Perhaps, the word had reached the commissioners that the Mayor, town staff and the Town Manager had not only set the maximum height for a 4-story building at 50’ but had also added another 14 ‘ for parapet walls, other accessory structures and **penthouses** after talking with the builders.

***UNDER THIS SCHEME, A 4-STORY RESIDENTIAL BUILDING WOULD BECOME A 5-STORY BUILDING, EXCEPT THAT THE PENTHOUSE WOULD NOT BE COUNTED AS A STORY.***

Also notice that Mr. LeReche did not answer Ms. Bettard’s question. Perhaps, he did not want to reveal that they were approving 5-story buildings in some cases. There was no point for the PC to get into much discussion of height and mass of buildings. Sadly, such is the work of the Planning Commission in our town, often enough.

No one from the Mayor’s side – Melissa Jonas, Sheila Olem & Grace Wolf asked any questions about the height or the massing of the downtown buildings, even after the base height was increased from 50’ to 54’ during the rezoning in 2014. They were not going to risk Mayor Merkel’s wrath by asking questions.

A small Town Feel had been the defining issue for Councilmember Hutchinson and even for Councilmember Waddell for a very long time. How they were side stepped during the 2014 rezoning hearings is a matter that would be discussed in another blog post.