

**Appendix H: Correspondence from
Clarksburg Town Center Advisory Committee**

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DAVID W. BROWN

October 23, 2008

Debra Daniel, Esq.
Associate General Counsel
Maryland-National Capital Park
and Planning Commission
Office of General Counsel
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: **Clarksburg Town Center – Compliance Program**

Dear Debra:

This letter responds for the record to the September 26, 2008 letter of Kurt W. Fischer, Esq., counsel for NNPII-Clarksburg, LLC (“Newland”). Written with reference to the extension of Project Plan Amendment No. 91994004B for the Clarksburg Town Center. The Fischer letter purports to be a helpful correction of my “inaccurate” and “unfair” description of arbitration proceedings before Arbitrator Howe as well as a protest of the “unconscionable and irresponsible” “accusations” I assertedly made in my September 18, 2008 Testimony before the Board.

Mr. Fischer disdains providing “an extended point-by-point refutation” of my Testimony, implying that such is readily producible. The reality is that my Testimony is a matter-of-fact, fully-documented narrative of past events about which there can be no dispute. This does not stop Mr. Fischer from doing precisely what he accuses me of doing: filling his letter with inaccurate, unfair, unconscionable and irresponsible accusations against CTCAC and me. Unlike Mr. Fischer’s free-form argument, heavily dependent on mischaracterizing what I said, I will respond, point-by-point to exactly what Mr. Fischer has claimed.

1. CTCAC Did Not Surrender Its Site Plan Violation Claims In Exchange For A Mutable “Concept Plan”

No less than 14 times in his 4-page letter, Mr. Fischer uses the term or phrase “concept”, “conceptual” or “concept plan”. The purpose is to recharacterize what CTCAC agreed to in the Settlement Agreement, and what the Board approved in the Compliance Program as Newland site plan violation remediation obligations. As to the design of the retail center – which all understand and agree is the heart and soul of the Settlement Agreement and Compliance Program – Mr. Fischer asserts that it “was agreed

Debra Daniel, Esq.
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upon as a concept only.” Fischer Letter at 2. Presumably the point is that nothing was fixed; all the details were subject to change in the drawing up of engineered plans.

This is a false picture of the CTCAC-Newland Settlement Agreement and an equally false picture of the Board’s Compliance Program. Paragraph 1 of the Development Terms from the Settlement Agreement contains explicit “comments and clarifications” of the Torti Mediation Plan that was to be the basis for engineered plans. Exhibit 1. There is, for example, nothing “conceptual only” about “60’ depth of the retail along the grocery building.” ¶1.3. Nor was it a “concept only” that Blocks 3 and 5 would have a parking structure, ¶1.c, ¶1.e., while Block 4 would have “[s]urface parking only.” ¶1.d. These are express terms of the Settlement Agreement. These terms elevate the Torti Mediation Plan from merely an illustration of what could be built into an agreement to build according to the express terms set forth. By contrast, ¶1.a. references Settlement Agreement exhibits that are clearly referred to as conceptual sketch plans for implementation of the paved plaza at the library site.

More fundamentally, in (a) entering into a Settlement Agreement with Newland in April 2006, (b) negotiating a highly detailed, 12-page (single spaced) “Description of Major Elements Making Up Plan of Compliance,” over the ensuing month; and (c) affirmatively supporting the Compliance Program presented by the staff to the Board in June 2006 that obviated all adjudicated and unadjudicated site plan violations, fines and penalties, CTCAC was not agreeing to merely a “concept” of what was to ensue for Town Center development, one that Newland was free to modify if it saw fit to do so. Indeed, CTCAC sought and obtained detailed precision on what was to come. It did so out of concern over prior Newland conduct of sub rosa modifying of approved plans to suit its own convenience – i.e., the very violations that ultimately led to development of the Compliance Program.

2. The Arbitration Resulted In Rejection Of Newland’s Claim of Entitlement to Modify Plans Based on Market Conditions

The Fischer letter implies that the Arbitrator accepted Newland’s representations and claims regarding alleged market-based rejection of proposals to build the retail core in accordance with the Compliance Program. This is not so. As detailed in my Testimony (at 12), the Arbitrator **rejected** this as a basis for any changes to the submitted plans, because the Settlement Agreement did not provide Newland the freedom to make unilateral changes based on its perception of market conditions at some later point than the time the Agreement was entered into. As CTCAC made clear in arbitration, in mediation CTCAC was forced to limit its agenda by what Newland claimed it could afford and what its consultants said was market feasible. Given those circumstances,

CTCAC was not about to give Newland a market-related "escape clause" from the commitments in the Settlement Agreement.

3. Newland's Undocumented Representations About Market Rejection of the Retail Core Are Disputed

When Newland sought in arbitration to justify retail core changes based on alleged market rejection of the plan approved in the Compliance Program, it disclosed selected information regarding its efforts to solicit retail core developers. Given the rejection by the Arbitrator of market conditions as a basis for changes, what the real market conditions were was disputed and was not adjudicated. The representations in the Fischer letter on this subject are undocumented. To CTCAC's knowledge, Newland has not sought to substantiate them on this record. There is therefore no consensus between Newland and CTCAC on any of the following points (Fischer letter at 2):

- That the retail core, as originally agreed to has become unacceptable to the market and is not commercially viable;
- That Town Center is a "remote, suburban location;"
- That Mr. Gibbs recommended and Newland implemented "only those changes to the retail plan necessary to make it viable from a retail industry perspective."

Particularly noteworthy in this dispute is that although it was understood by CTCAC and the staff in recommending approval of the Compliance Program that Newland would be expending millions of dollars to provide structured parking in Blocks 3 and 5 of the retail core, when Newland solicited retail core developer interest in 2007, the RFP it sent out stated that providing these structures would be a retail developer cost. Hence, the statement in the Fischer letter that "[i]n the RFP, Newland described the proposed retail center in virtually the precise formulation set forth in the concept plan contained in the Settlement Agreement and the Program of Compliance," is a deceptive half-truth. Perhaps in Newland's lexicon, however, all the time and energy Newland devoted in mediation in 2006 to convincing CTCAC and the Mediator that the cost of structured parking that Newland would incur precluded addressing other CTCAC mediation goals was not really about a real financial obligation, but merely a "concept" of one.

4. The Arbitration Was About Plan Consistency With the Settlement Agreement, Not the Compliance Program

The Fischer letter disputes the analysis in my Testimony (at 13-14) that the Arbitrator did not rule on whether the plans before her were consistent with the Compliance Program. Mr. Fischer argues that the plans would not be before the Board if this were not so. Fischer Letter 4. Mr. Fischer has it backwards: there would be no need for the plans to be before the board if the Arbitrator had already ruled them in accord with the Compliance Program. The Arbitrator understood that her job, as expressly provided in ¶11 of the Business Terms in the Settlement Agreement, Exhibit 2, was to assess compliance with the Settlement Agreement, which Agreement is the one and only source of her power as an arbitrator.¹

Mr. Fischer also implies that there is no difference between the terms of the Settlement Agreement and the Compliance Program, and that the Arbitrator relied on the latter. The reality is that the Compliance Program, though consistent with the Settlement Agreement, is considerably more detailed. And if there are instances where she looked beyond the Settlement Agreement to decide matters, there are just as many instances where she refused to do so. Ultimately, however, what is important is not the Arbitrator's inconsistent approach to the plans, but rather that there is no question that this Board retains full and unfettered discretion to determine what constitutes compliance with the Compliance Program. Nothing was decided by the Arbitrator except what plans Newland could submit to the Board notwithstanding CTCAC's lack of approval.

5. CTCAC Rejects Newland's Characterizations of My Testimony in Relation to the Arbitration

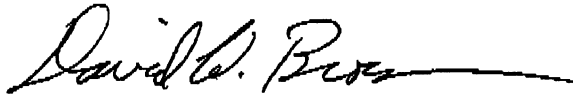
Mr. Fischer attacks my Testimony as "unconscionable and irresponsible" in terms of my description of the arbitration proceedings. My testimony is not grounded in what Mr. Fischer claims are "pejorative suggestions" of how those proceedings were conducted; I described exactly how they were conducted on critical points. I also included copies of court-filed pleadings that amplify the Testimony. As a member of the Maryland bar, I have an ethical obligation to ensure that no pleadings I file in a Maryland court are in bad faith or are otherwise "unconscionable and irresponsible." I reject the implication that I have not been faithful to those standards.

¹ Mandl v. Biley, 159 Md. App. 64, 858 A.2d 508, 519 (2004) ("[A]n arbitrator derives his power from the arbitration agreement itself.... The parties delineate the extent of the arbitrator's authority by the scope of their agreement to arbitrate.")

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Associate General Counsel
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Mr. Fischer's self-serving claims that the Arbitrator's rulings were "thoughtful and based on settled law" are merely his view of results favorable to his client. Those results are not final because they are in litigation.² In the end, Mr. Fischer supports his point of view not with anything that occurred in the arbitration, but with a reference to a very preliminary scheduling discussion more than two months before the arbitration, which took place at a time when CTCAC naively believed that a May arbitration would not even be necessary. In fact, the May 14th arbitration date was cast in stone by the arbitrator, at the suggestion of Mr. Fischer, on March 12, 2008.

Sincerely yours,



David W. Brown

cc: Rose Krasnow, MNCPPC
Robert Kronenberg, MNCPPC
Kurt Fischer, Esq.

² Newland has sought judicial confirmation of the Arbitrator's rulings on site plans, while CTCAC has sought to have her rulings vacated. The matter remains unresolved in Blatimore County Circuit Court, Civil Action No. 03-C:08:5371. See Attachments 12 and 13 to my Testimony. Finality comes with judicial confirmation of the award, which will not happen until CTCAC's petition to vacate is adjudicated. See §3-227(b) & (c), Courts & Jud. Proc. Art., Md. Ann. Code; 1 J. Grenig, Alternate Dispute Resolution §24:40 (3d Ed. 2005); 6 C.J.S. §178 at 246.

~~WMA~~

Newland Communities

MASTER

**CLARKSBURG TOWN CENTER
DEVELOPMENT TERMS**

1. **Retail Center** - Design Concept to be based on the Torti-April 3, 2006 Mediation Plan (Exhibit "A" - the "Plan") with the following additional comments and clarifications:
 - a. Block 1 - The land (graded to surrounding road system) for the library and related parking structure will be dedicated to the County, but all construction costs will be the responsibility of the County. Newland will work with CTCAC to encourage appropriate design, funding and scheduling and together will provide to the County a short list of architects to ensure a design that is in keeping with the Plan of Compliance. The walkways between the buildings shown on the Plan are acceptable. The "live/works" in Blocks 1 and 2 of the Plan will be sold as single units. The paver plaza at the Library site will include a fountain with seat wall, conceptually in accordance with either of the attached sketch plans (Exhibits "B-1" and Exhibit "B-2").
 - b. Block 2 - Deleting road through the town square in favor of a walkway is acceptable, as is adjacent road realignment, as long as consistent with fire code requirements. The Market Building will be a 2000 sf roofed open-air structure, single-story, with a "janitor/storage closet" (with sink), with water/sewer and electrical connections. See attached sketch plans (Exhibits "B-1" and "B-2").
 - c. Block 3 - The rounded 1-story retail/restaurant space with residential over is acceptable. The space will be single story retail with 2 residential stories above. A kiosk will be located at the NW corner of Block 3. The revised parking structure entrances shown on the revised Plan (Exhibit "A") are acceptable if grade conditions permit.
 - d. Block 4 - Subject to the "retail option" as set forth in the Plan, this block will be built substantially in accordance with the Plan (the townhouse units on the southeast side will be flex residential which will allow the owners to utilize the first floor for retail/office use without further parking requirements). Surface parking only. Newland agrees to a "retail option" such that Newland will defer its decision on retail versus residential until such time as Newland can assess market and cost conditions impacting such decision, which assessment will be made no earlier than 7/1/07. Prior to making this decision, Newland shall consult with CTCAC and give it a reasonable opportunity to submit data and analysis.
 - e. Block 5 - Newland agrees to 60' depth of the retail along the grocery building at General Store Drive and the subsequent reduction of the grocery footprint to approximately 51,000 sf, together with the ability to have a mezzanine to bring the total leaseable sf not to exceed 65,000. The loading dock area will

Replaces all previous offers

be located as close to the rear of the building as grades will allow. Liner residential adjacent to grocery store and residential units on southwest side of parking structure will be developed as flex residential space.

11. Binding Arbitration.

- The parties to this Mediation Settlement Agreement understand that, if the Planning Board approves the Plan of Compliance as set forth in this Mediation Settlement Agreement, Newland, with and after consultation with CTCAC, Bozzuto and the other builders will be required to submit revised project and site plans and other applications for regulatory approvals and Bozzuto will submit the Bozzuto Site Plan Amendment to implement the Plan of Compliance. If any dispute shall arise between any of the parties to this agreement regarding whether the project plan, site plan, the Bozzuto Site Plan Amendment or other application for regulatory approval is consistent with this Mediation Settlement Agreement or any other matter, the dispute shall be subject to binding arbitration before the Honorable Barbara K. Howe. A party seeking to arbitrate a dispute before Judge Howe shall invoke arbitration by sending written notice to the Judge and all other parties. Judge Howe shall decide the proceedings to be followed to resolve the dispute. All parties shall have the right to submit matters in writing and present oral argument prior to Judge Howe rendering a decision. Furthermore, all other disputes that arise out of this Mediation Settlement Agreement shall be subject to binding arbitration before Judge Howe. The parties to any such arbitration shall be responsible for their own attorneys' fees and the costs and expenses of all other professionals and consultants. If Judge Howe is not available for any reason, Judge Howard Chasanow shall serve as the arbitrator.
- The parties to this Mediation Settlement Agreement stipulate that, in the event of a breach of this Agreement, the non-breaching party shall have the right to injunctive relief and specific performance, without regard to whether there is an adequate remedy at law. Each party shall also have the right to claim damages for breach of this Agreement. Pursuant to the arbitration provision set forth above, Judge Howe shall determine both liability and the appropriate remedy or remedies.

Exhibit 2

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DAVID W. BROWN

October 23, 2008

Via Email and Regular Mail
royce.hanson@mncppc-mc.org

Royce Hanson, Chairman
Maryland National Capital Park
& Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Re: **Clarksburg Town Center - Road Improvements -
Compliance Program for Project Plan Amendment;
Preliminary Plan Amendment; and Site Plan Amendment**

Dear Chairman Hanson:

I am responding on behalf of approximately 100 individual homeowners in Clarksburg Town Center ("CTC") to the letter from Steve Kaufman, Esq. and Todd Brown, Esq. of October 13, 2008, regarding construction of road improvements required in connection with CTC development under the August 2006 approved Compliance Program.

Of particular concern to my clients is the statement in the letter (p.3) that "the sale of [development district bonds] to fund such construction has not yet been authorized by the County Council and the status and timely implementation of construction of these improvements to be so funded will affect [Newland's] ability to begin those projects in a timely manner." On behalf of my clients, I urge the Board to refrain from establishing any linkage whatsoever between development district funding of transportation-related infrastructure and infrastructure completion obligations required by the Board earlier in its CTC project approvals.¹

¹ As the Board is surely aware, a controversy arose over CTC development district financing with the publication of a report by the Clarksburg Town Center Advisory Committee, Inc. ("CTCAC") in March 2007. Despite the fact that I represent CTCAC as well as CTC individual homeowners, this letter is written only on behalf of my individual homeowner clients.

Royce Hanson, Chairman
October 23, 2008
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While the Board will be the final arbiter of what transportation-related infrastructure was required of the predecessor to Newland in prior plan approvals, there can be no doubt from the record of approvals that none of those requirements was in any way conditioned upon securing development district financing, whether for commencement, continuation or completion of any of them. Indeed, those infrastructure obligations were imposed during the 1990's, whereas a development district was not created for CTC until March 2003. Hence, in any decision by the Board on phasing of transportation-related infrastructure, the Board should make it unmistakably clear to Newland that any requirements it is imposing, including phasing obligations, are entirely separate and independent from whatever Newland is finally able to accomplish, if anything, in shifting the cost of its obligations to CTC homeowners through the development district financing device.²

Sincerely yours,



David W. Brown

cc: David Lieb, Esq., Office of General Counsel, MNCPPC

² To be distinguished from Board-imposed infrastructure obligations are other infrastructure obligations Newland might someday undertake in a CTC development district, particularly if the current CTC development district is modified by the County Council along the lines suggested by the County Executive in January 2008. That is a possible future event with no immediate relevance to the amended plan approval issues before the Board.

MCP-Chairman

From: Joy Johnson [joy@knopf-brown.com]
Sent: Wednesday, September 17, 2008 2:50 PM
To: MCP-Chairman; MCP-Chairman
Cc: 'David W. Brown'
Subject: Testimony Submission of David Brown for Hearing on 9 18 08
Attachments: David Brown Testimony Clarksburg Hearing 9 18 08.pdf

RECEIVED
SEP 17 2008

OFFICE OF THE CHAIRMAN
THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Dear Chairman Hanson:

Please find attached David Brown's testimony for the hearing regarding Clarksburg Town Center (Agenda item no. 6) scheduled on September 18, 2008. Please include this testimony with attachments in the record and confirm receipt.

Sincerely yours,

Joy Johnson
Office Administrator

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**TESTIMONY OF DAVID W. BROWN
ON BEHALF OF THE
CLARKSBURG TOWN CENTER ADVISORY COMMITTEE, INC.
ON THE
EXTENSION OF
PROJECT PLAN AMENDMENT NO. 91994004B**

September 18, 2008

Mr. Chairman and Members of the Commission:

I am David W. Brown, of Knopf & Brown, counsel for the Clarksburg Town Center Advisory Committee, Inc. ("CTCAC"). I am here today on behalf of CTCAC to express CTCAC's support for the 90-day extension of the Clarksburg Town Center Project Plan Amendment. CTCAC's support of the extension is unqualified, even though CTCAC is aware that some in the Town Center community have informed the staff that they are against giving Newland any more extensions. Explaining why CTCAC favors the extension when there is community sentiment against it is not a simple task, but I believe this Board should know the details, particularly since they are pertinent to three questions you may have right now: Why has it taken so long to get plans before the Board -- almost two years longer than originally anticipated? Is a 90-day extension adequate? What exactly does the Board expect to happen during the extension period to ready all plans for final Board action?

Background to the Compliance Program

I need to detail the historical background leading to today, but not just because only one of you was, as Secretary of State Dean Acheson put it, "Present at the Creation" of the events leading to the approval of the Compliance Program in the summer of 2006. More importantly, understanding what has transpired is critical to informed decisions you will soon be facing.

In July 2005, the Board found Newland and the Town Center builders in violation of certified site plans with respect to building height limits, front yard setbacks and construction of amenities, all as claimed by CTCAC. Board Staff Report 3 (June 1, 2006). Stop work orders were issued for the whole of the Town Center, and there was a public crisis of confidence in Board site plan adjudications generally, with which I believe you are all quite familiar. By November 2005, many other Newland/builder violation claims put forth by CTCAC still remained to be adjudicated, while progress on review and approval of other plans in other areas of the County was, to put it mildly, lagging. At the urging of top County elected officials, and with this Board's consent, CTCAC agreed to the suspension of scheduled Board hearings on site plan violations and enter into mediation with Newland and the builders. The idea was to see if a forward-looking effort to agree on changes to the Town Center site plans would serve to remediate violations.

Mediation began in January 2006, under Baltimore County Circuit Court Judge Barbara Kerr Howe, and concluded with a Settlement Agreement signed on April 6, 2006. Although one of CTCAC's mediation goals was to require some of the excessively high structures already built to be brought down a peg or two, it rather quickly became apparent that CTCAC was not going to be able to achieve both this goal and the more important goal of bringing to the community a significant redesign of the retail core, compared to what had been proposed by Newland but not yet reviewed by the Board. More simply put, if we wanted agreement on more money to be spent improving the Town Center, the message was clear: put it into new structures, not redoing existing ones. And that is how it came to be that most of the mediation was devoted to the design

and economic considerations associated with a significantly changed plan for the retail core.

At the risk of oversimplification, I will briefly describe the Settlement Agreement and its relationship to the Plan of Compliance the parties submitted to the Board as envisioned by the Settlement Agreement. The Settlement Agreement, now a matter of public record, is in multiple parts. One is the "Development Terms," consisting of 8 single-spaced pages prescribing terms for future development of the Town Center, supplemented by multiple exhibits. In keeping with the focus of the mediation, it is most detailed in its block-by-block description of what is to be in the retail core on the west side. Another key part is the "Business Points," which requires the parties to submit an agreed upon "Plan of Compliance" for review and approval by the Board, on the understanding that absent Board approval of the Plan, there would be no settlement. In the Business Points, the parties agreed that Board approval of the Plan of Compliance would have to mean that (a) Newland and the builders were exonerated of all findings made or that could have been made in the suspended violation hearings, (b) dwelling units already built were "grandfathered," and (c) the Plan of Compliance would govern all future approvals of Town Center project plans and site plans. Id. ¶ 3. CTCAC agreed to testify in support of the Plan of Compliance before the Board, and to thereafter offer "particularized support to the extent consistent with this Settlement Agreement and all matters relating to the Plan of Compliance and Plan Amendment process." Id. ¶ 5. Two other points proved to be quite important. First, Newland was required to obtain CTCAC's approval of amended site plans implementing the Plan of Compliance. Id. ¶ 4. Second, Judge Howe was selected as the arbitrator for binding arbitration of any dispute

arising from implementation of the Agreement, with each side to the dispute “responsible for their own attorney’s fees and the costs and expenses of all other professionals and consultants.” Id. ¶ 11.

The Plan of Compliance envisioned by the Settlement Agreement was prepared by the parties in the weeks following execution of the Agreement, and submitted to the Board with a cover letter from Newland attorneys on May 3, 2006. Attachment 1. The cover letter, approved by CTCAC, describes the attached Plan and explains its relationship to the Settlement Agreement as follows:

This Plan of Compliance was prepared in detailed collaboration with and is assented to by Newland Communities, Clarksburg Town Center Advisory Committee (“CTCAC”), and each of the builders within the Town Center. . . .

The Plan of Compliance is also being submitted in furtherance of the mediated settlement agreement reached among the parties.

The Plan of Compliance consists of a comprehensive set of baseline plans, a detailed narrative description of proposed modifications to the baseline plans, . . . and supporting exhibits depicting the proposed modifications. It is anticipated that in the event the Staff recommends and the Planning Board approves the Plan of Compliance, detailed amendments to the existing Project Plan, Preliminary Plan and Site Plan approvals will be prepared consistent with the Plan of Compliance and submitted for review by Staff and action by the Planning Board.

Id. at 1. The attached narrative referenced in the letter, entitled “Major Elements Making Up Plan of Compliance,” is a 12-page single-space document that amplifies on the Development Terms while utilizing most of the Development Terms’ Exhibits. Its exact wording was extensively negotiated by the parties during the four weeks between execution of the Settlement Agreement and submission of the Plan of Compliance.

On June 1, 2006, the staff issued its report recommending approval of the Plan of Compliance. On June 15, 2006, the Board conducted a hearing and, on motion of Commissioner Robinson, voted 4-0 (Commissioner Bryant absent) to approve the Plan with certain modifications. On August 17, 2006, the Board adopted a Resolution approving the Plan with the modifications that were voted upon at the hearing, which it described as the "Compliance Program." Attachment 2. The Resolution expressly defines the elements, terms and conditions of the Compliance Program. Id. § 3. The Resolution provides that the parties -- Newland, the builders and CTCAC -- "voluntarily consented and agreed to the various elements, terms and conditions expressed herein for purposes of the Compliance Program." Id. The Resolution includes four Board findings. Finding 4.1 deals with grandfathering. Finding 4.2 is a public interest finding, grounded in the Board's belief that completion of the Compliance Program will provide "substantial enhancements to community amenities and facilities planned for [Town Center]." Id. at 6. Finding 4.3 is the Board's assessment that completion of the Compliance Program is a lawful and appropriate alternative to fines and penalties, and that "implementation of the Compliance Program will remediate and resolve all Violations." Id. Finding 4.4 is geared to public safety approval of street network modifications. Id. In accordance with the Findings, the Board ordered "the Respondents to comply strictly with each of the elements, terms, and conditions of the Compliance Program. Id. The Board recognized that the Compliance Program had to be translated into detailed, engineered plans that may require modifications, but correspondingly assured the Respondents that, barring modifications required by law or unforeseen physical project conditions, the Board "intends to require only such modifications that are

reasonably consistent with the Compliance Program.” Id. at 7. The Board instructed the staff “to undertake all reasonable measures to detect and report to the Board the Respondents’ compliance and non-compliance as the applicable case may be.” Id. at 6. Lastly, the Board expressly reserved its authority to pass judgment on amendments to the project plan, preliminary plan or site plans that are intended to implement the Compliance Program. It did so as follows:

Subject only to such unforeseen [physical] project conditions, applicable law and regulations, express terms of this Resolution and the Compliance Program, the Board expressly reserves all lawful discretion to consider, approve, approve subject to conditions or disapprove any such future application according to the law and merits presented at the time.

Id. at 7.

Background to the Submission Delays

The Board’s approval of the Compliance Program triggered a 3-stage plan approval process that began right away, as the parties had agreed. Id. at 4. Stage 1 was the immediate lifting of stop work orders on 78 units that were unfinished at the time stop work orders were issued in 2005. Stage 2 was the approval of a revised site plan for Sections 2D and GG and three Bozzuto condos, to allow completion of 118 units. That was submitted and approved in 2007, and this work is well underway. Stage 3 is the submission of a revised project plan, preliminary plan and site plans for the entire Town Center Project. The Compliance Program directed that this submission be made by October 26, 2006, and required the entire Project to be completed by June 15, 2010. Id. at 5. Since then, the project completion deadline has not changed, but various deadlines have been extended in increments to today, with another 90-day extension sought.

The original deadline of October 2006 was Newland's proposal; CTCAC was hopeful the date would be met. On September 20, 2006, without objection from CTCAC, Newland requested an extension of the preliminary plan, as well as the time to submit new plans, to April 26, 2007. Newland's explanation was that "additional time would be needed to assemble and retain the necessary consultants and to design and prepare the submissions required..." Attachment 3 at 3. In keeping with this, it was not until January 2007 that CTCAC first saw large-scale drawings of the site plan amendments, at the offices of Torti, Gallas and Partners, Inc. CTCAC was very encouraged by these drawings and, from CTCAC's perspective, giving Newland more time was fine if it meant getting the plans right. The Torti January plans ripened into a full set of engineered plans submitted to the Board in April 2007, in keeping with the extension you granted. In the meantime, again without CTCAC objection, Newland sought and obtained a 12-month extension of the preliminary plan to April 26, 2008. Attachment 4.

Newland's April 2007 plans were the subject of full and complete DRC review and comment during the period from April to July 2007. CTCAC participated in that process, offering its own comments on the DRC comments, often in harmony with Newland comments, in furtherance of the goal of prompt review and approval of the plans. Staff scheduled the matter for Board hearing on September 27, 2007, but Newland requested a 90-day continuance. Attachment 5. CTCAC did not object, and before the end of that 90-day period, all issues regarding the Stage 2 plans had been resolved and the Stage 2 plans had been approved by the Board. Newland requested another 90-day continuance, i.e., until March 26, 2008, which also happened to be the 12-year APFO

approval expiration date. Attachment 6. Newland explained that additional time was needed to “fully respond[] to agency comments.” Id. at 1.

Before the Board formally acted on this request, Newland submitted a revised request on February 15, 2008. Attachment 7. Newland sought a six-year extension of the APF approval and a 120-day extension of the review period. At that time, CTCAC was unaware Newland intended to make major revisions to plans that had been under scrutiny for the better part of a year. In emphasizing community review of filed plans as a key component of the need for more time to finalize plans, Newland likewise did not alert the Board to the possibility of major plan revisions. Newland’s extension request, reviewed and approved by CTCAC, described the ongoing review of the April 2007 filed plans in the following terms:

Since the approval of the Compliance Program, the Applicant and the Clarksburg Town Center Advisory Committee, Inc. (“CTCAC”) have worked continuously to revise the plans for the Town Center consistent with the intent of the Compliance Program and the requirements of County agencies such as MCDPS and MCDPWT. To this end, plans have been submitted to MNCPPC and other agencies to amend the existing Project Plan and Preliminary Plan approvals and for approval of a new overall site plan for the project. A lengthy Development Review Committee (DRC) meeting was held and subsequent meetings with senior county officials, Councilmembers and the County Executive have occurred in an effort to resolve a number of complex technical and policy issues associated with the revised plans. Continued efforts in this regard are needed to assure the plans to be considered by the Board have been thoroughly vetted and modified as appropriate to meet all requirements of the regulating agencies to assure the “buildability” of the revised design from a regulatory perspective.

As the Board will recall, the Town Center, and the mixed-use Core in particular, incorporate a uniquely urban design in what was until recently a rural setting. The introduction

of mixed-use buildings, live/work units, concealed parking facilities, strong building relationships to the street, and a number of non-standard right-of-way sections is needed to fulfill the vision set forth in the Compliance Program. However, these design elements create a unique set of technical and public policy issues. Moreover, the multiple agency review process in Montgomery County creates the need for extensive coordination among regulatory staff to minimize regulatory conflicts and to address these complex issues. This has taken considerable time.

It is also important to remember the Project was shut down completely while various site plan and permitting issues were being investigated and while stop work order(s) issued by the County remained in effect. As the Board will also recall, its approval of the Compliance Program was the culmination of extensive efforts by MNCPPC staff, County agency staff, CTCAC, the Applicant and the Board itself. The Compliance Program and the pending applications provide the means to complete the project.

* * *

As detailed above, the Applicant has undertaken extensive efforts to prepare final plan amendments in accordance with the Compliance Program. These efforts included the preparation and processing of the Interim Site Plan Amendments which have now been approved. In addition, the level of coordination among citizen groups, county agencies, MNCPPC staff and the Applicant has been significantly greater than typically encountered given the complexities of the project's redesign and the thoroughness with which the community has been evaluating all aspects of the project to assure its successful implementation. The significant, unusual and unanticipated nature of events have substantially impaired the Applicant's ability to validate the Plan. Moreover, exceptional hardship will result to the Applicant if the validity period is not extended, particularly considering the efforts undertaken by the Applicant and others to implement the Compliance Program.

Attachment 7 at 1-2,6.

CTCAC's endorsement of this request was predicated on the understanding that all that was left to be done was some fine-tuning on the April 2007 plans that had already

been, in Newland's words, subjected to "extensive coordination among regulatory staff to minimize regulatory conflicts and address complex issues." When I use the phrase "fine-tuning," I mean something very specific and pivotal. CTCAC's review of the April 2007 plans during May – July 2007 was careful and complete, and revealed, from CTCAC's perspective at least, **no fundamental problems with Newland's implementation of its obligations under the Compliance Program in the April 2007 plans.** There were, to be sure, minor problems yet to be worked out, but nothing that CTCAC felt could not be achieved with one productive day of mediation, or, on a worse-case scenario, a day of arbitration.

By March 20, 2008, when the extension request came before you, CTCAC had agreed to a mediation session with Newland later that month. Mediation unlike arbitration, meant plan changes only by agreement, and CTCAC's mediation goal was to avoid arbitration over the minor details in the April 2007 plans that had not yet been worked out with Newland, particularly in the area of the rec center/pool complex. By then, CTCAC had just become aware of Newland's desire to make changes in the retail core, but CTCAC was extremely skeptical that it would be convinced in mediation to agree to major changes in the retail core. The Compliance Program design had been extensively worked out over many months in mediation in 2006 with the advice of a large number of planning and marketing consultants. In addition, CTCAC and Newland were advised by staff, both before and during the hearing on the extension request, that if no new plans emerged from mediation, the staff was prepared to process the April 2007 plans through the Board review process without further delay. The Board granted a 180-day extension on March 20th, due to expire today.

Events Following Board Approval of the APF Extension

What happened after that affects all three questions I posed at the outset of my testimony. The mediation session took place as planned in late March, but there was no mutual agreement to anything. Shortly thereafter, on April 11, 2008, Newland submitted to CTCAC, for the first time, engineered site plans for a substantially revised retail core that, among many other changes, eliminated the parking structure in Block 3 and replaced in with much-expanded surface parking. In the mediation, Newland learned that these changes were unacceptable to CTCAC, so Newland invoked arbitration under the Newland-CTCAC Settlement Agreement, seeking, in relation to the new plans, a ruling from Arbitrator Howe that (1) “the amended plans...are as close in scope and configuration to the concept plan in the Settlement Agreement as can be achieved, given the requirements of potential commercial tenants in the center;” (2) alternatively, that the “Settlement Agreement is impossible of performance and must therefore be rescinded because the precise form and configuration of the retail center in the Settlement Agreement cannot be developed or leased for the designated uses;” and (3) alternatively, on the grounds set forth in (2), that the Settlement Agreement must be rescinded as “the product of a mutual mistake of fact.” Attachment 8. CTCAC opposed these claims in arbitration on April 21, 2008 and prevailed on all three claims, in a Decision issued by Arbitrator Howe on April 29, 2008. Attachment 9. She found no merit under Maryland law in the alternate legal claims of impossibility and mistake of fact. Id. at 8-9. As to the main claim, she found that the amended plan “removes features that were included after a lengthy negotiated settlement discussion held over many hours.... [I]t is not the plan that was bargained for and specifically agreed to between these parties.” Id. at 7-8. In

response to Newland's claim that it could not find a builder willing to build the retail center as agreed to, Arbitrator Howe ruled that the Settlement Agreement does not contain a provision allowing Newland to adjust its commitments according to its post-agreement perception of market realities. As she put it, "Newland wishes to add a new and different term to the Settlement Agreement," one which "cannot be implied into an unambiguous agreement." Id.

CTCAC's arbitration victory was short-lived. Newland moved for reconsideration, reiterating a claim from the arbitration that CTCAC had acted unreasonably in refusing to agree to changes in the plans for the retail core. CTCAC argued that it could not be forced to agree to a changed deal on which economic concerns had been fully vetted and impacted the original agreement. But in a ruling issued on May 9, 2008, Arbitrator Howe granted in part Newland's reconsideration request. Attachment 10. I have read this Ruling a hundred times and still cannot fathom why she did what she did, so please do not ask me to explain it. She ordered that Newland make some changes to the retail core plans that she specified in her ruling, resulting in plans Newland could submit for final plan arbitration on May 14, 2008 – plans neither side had originally sponsored for arbitration. Id. at 3-4. That date was the pre-established date for the final site plan arbitration, set by her so as to facilitate meeting the staff-imposed plan submission deadline of May 19, 2008. On the same day the Ruling was issued, CTCAC asked the Arbitrator to vacate it as unlawful under applicable Maryland law. Our claim was, and is, that once an arbitrator issues a final decision, he or she may not thereafter reconsider it, except in very limited circumstances not present in this case. This was

opposed by Newland, and on May 12th, the Arbitrator advised CTCAC by email that her reconsideration ruling would stand.

Between May 9th and May 14th, Newland worked on revising the retail core site plans as specified by the Arbitrator's May 9th Ruling. Newland brought the revised retail core plans to the arbitration session, held in the offices of Newland counsel, DLA Piper, in Baltimore County, starting at 9:23 am on May 14th. The arbitration began with a CTCAC motion for a continuance on five grounds, the lead ground being that arbitration was premature because CTCAC had not had an opportunity to review the newly minted, still unseen retail core plans, and a brief arbitration recess would be insufficient for such purpose. The motion was denied. Arbitrator Howe also rejected a 10-specification CTCAC motion for recusal on the basis of partiality and misconduct, made under the applicable standards of the Maryland Uniform Arbitration Act. Arbitration proceeded thereafter, sheet-by-sheet through site plans, landscape plans, and various other plans, with two interruptions, lasting until 1:44 am on May 15th. One interruption was for a 45-minute lunch break. The other interruption occurred around 7:00 pm when the revised retail core site plans came up for ruling. I renewed CTCAC's motion for a continuance, so that CTCAC could review the still unseen new retail core plans with its consultants. Instead, the Arbitrator gave CTCAC a 45-minute break to review the plans. Following this break, the Arbitrator considered CTCAC's objections to the retail core plans, overruled them, and approved the plans as consistent with the Settlement Agreement.

There has been some misinformation about this particular ruling, particularly in how Newland has represented it to the public. Newland has stated, or lead

Town Center residents to believe, that Arbitrator Howe made a ruling that the revised retail core plans complied with your Compliance Program. She did not so rule. Her exact words as to the retail core sheets (WS- 6,7,8 & 9) were as follows:

“[T]hose sheets as currently drawn are consistent with the settlement agreement and are specifically adopted as the site plan for the blocks that are shown on those documents.”

Attachment 11. Tr. 510-11 (May 145, 2008). At no point in the arbitration did Arbitrator Howe state or imply that she viewed it as her job to decide whether the site plans she was reviewing for submission to the Board actually complied with your Compliance Program. Indeed, the parties understand that any such ruling would have been beyond the scope of the arbitration authority the parties agreed to give her, or could agree to give her, in the Settlement Agreement, which is the only source of her authority in this case.

Of course, in a 16-hour arbitration, plans for the retail core were not the only plans addressed. When all was said and done, the arbitrator made rulings on over a hundred plan sheets, many of which were not objected to at all by CTCAC. There were also plans where CTCAC objections were upheld, and others where CTCAC objections were overruled. The arbitrator required all plan adjustments to be effectuated by the morning of May 19th, giving CTCAC a few hours in one business day to ensure that all adjustments ordered in arbitration were in fact reflected on the plans before submission to the Board at close of business on May 19th. CTCAC officers were not available that day due to work commitments, and quite understandably refused to delegate the task of vetting the plans to me. But even if they had been free, they would not have attempted the vetting in the time allowed, and so the plans submitted to the Board on May 19th were

not reviewed by CTCAC for compliance with the Arbitrator's hundred or so sheet-by-sheet rulings.

What is the current legal status of the April and May 2008 site plan arbitrations, you may wonder. CTCAC has filed a petition in Baltimore County Circuit Court to vacate both the reconsidered April decision and the May sheet-by-sheet rulings. Attachment 12. It sets forth CTCAC's legal claims in detail. Newland has responded by filing a counterclaim seeking confirmation of the May arbitration results. Attachment 13. There has been no ruling by the Court on the merits. The case had to be filed in Baltimore County because that is the County where the arbitration took place. CTCAC requested that the case be transferred to Montgomery County on the grounds that Arbitrator Howe is a sitting judge in the Baltimore Court, making it inappropriate for her colleagues on that bench to sit in judgment of her actions. The Court denied the transfer without explanation, after Newland claimed that the Court had no authority to order it.

What is the effect of the lawsuit on the arbitration results? In CTCAC's view, Maryland law clearly establishes that if the arbitration decision is challenged in court, the decision is not final unless and until the court confirms it. Newland disagrees, for still unexplained reasons, but I will spare you the details. The lawsuit is beside the point here, because CTCAC has not used the lawsuit to prevent Newland from presenting to you any plans, including the specific sheets CTCAC claims were improperly approved in arbitration. If there is anything CTCAC and Newland agree on about where things stand, it is this: (a) the Circuit Court petition will become moot if this Board rules on the Newland plans before the Court makes a ruling on the merits, and (b) this Board has full

authority to do just that – decide for itself, without regard to arbitration decisions or lawsuits, what constitutes fulfillment of the Compliance Program by Newland.

Since the May submission of plans to staff by Newland, there has been a complete “re-do” of DRC comments, geared to the revised plans, completed in August. Newland filed its responses to the DRC comments with staff on September 5, 2008, and some additional plans with staff this week, on September 15th. CTCAC is still trying to come up to speed on this. About all I can say for now is that some DRC comments were oriented toward having Newland revise the plans to more closely resemble the plans vetted by DRC last year, and in those instances the Newland responses for the most part appear to be a rejection of such revisions. Unlike the situation in the summer of 2007, CTCAC has not independently participated in commenting on the DRC comments. In fact, when I inquired of Newland counsel regarding CTCAC’s right to participate, the answer was, essentially, if you don’t have anything good to say, say nothing, and, when the hearing takes place, CTCAC is obliged to voice its unqualified support for whatever Newland has done in response to DRC. Attachment 14. I read the attached response from Newland counsel as a threat to take legal action against CTCAC and me if CTCAC makes comments and Newland’s plans are not approved.

Three Questions

Returning to the three questions I asked at the beginning, first, why has it taken so long for plans to get before you? I hope I have provided you helpful detail on what has happened and when. I will add only that despite repeated efforts by Newland to blame CTCAC for the delay, CTCAC rejects these claims. CTCAC is just as interested as Newland, if not more, in accelerated completion of the long-delayed and much-sought-

after west side of the Town Center. And that is why CTCAC supports the extension request. After all the work CTCAC has done, it does not want to see the Compliance Program unravel completely by denial of the extension if the additional time can be used productively, to produce plans that comply with the Compliance Program.

Second, is 90 days enough of an extension? This is a matter for your judgment, keeping in mind what the staff must do, given that it has received a number of responses from Newland that are not receptive to some key DRC comments. Staff has not indicated any desire for guidance from the Board at this juncture, but that does not mean it would not be welcomed or that the public interest would not be served by providing it under the unique circumstances of this case. For example, the ordinary situation is one of processing site plan amendments against conventional legal and technical standards. But here, the amended plans are supposed to be in fulfillment of a highly specific, detailed Compliance Program. In evaluating site plans and recommendations for changes in those plans from professional staff, whether at the County or at the Board, against Newland responses, what is the significance of this? In CTCAC's view the answer is found in the Compliance Program, which directs the staff "to undertake all reasonable measures to detect and report to the Board the Respondents' compliance and non-compliance [with the Compliance Program] as the case may be." Attachment 2 at 6. Also, given that Newland invoked full DRC review of submitted plans in 2007, by what standard does the Board expect DRC to evaluate all of Newland's unilateral changes to those plans a year later? Were reviewing staff obliged to simply ignore that earlier Newland had a different conception of what was required to fulfill the

terms of the Compliance Program, or could staff rely on the original submission and require reversion to it when it seems appropriate to do so?

The third question I have is exactly what does the Board expect to happen during the extension period? This, of course, is directly tied to the question of what precisely is to be decided by the Board at the end of the period, as I have already detailed. One thing that the Board may expect to happen in the coming weeks that may not happen is any meaningful CTCAC input into the process. CTCAC would like to be involved, but not at the risk of being embroiled in additional legal actions initiated by Newland that it simply cannot afford. CTCAC cannot afford to pay me, owes Arbitrator Howe about \$15,000 for its share of her arbitration fees, and several thousand dollars in court reporter and transcript costs that it also cannot pay. My clients are not just working as Board-endorsed guardians of the public interest for free, they are obliged to pay handsomely for the privilege of doing so, even if I forego charging them a nickel for the seemingly endless rounds of arbitration they have had to endure. Maybe that's what I deserve for letting my clients agree to what proved to be financially burdensome settlement terms. Perhaps a failure of imagination on my part about what CTCAC would be subjected to after the Board approved the Compliance Program. But on top of this, Newland has waged a vigorous campaign soliciting support for its latest plans from Town Center residents understandably anxious for closure and development. Newland, after accepting exoneration for site plan violations via the Compliance Program, now adroitly tries to turn the tables by laying blame for delay at the feet of my client and accusing its officers of unlawful conduct. These are claims CTCAC has categorically rejected, even to the

point of threatening legal action against defamatory statements by Newland's corporate counsel. Again, I will spare you the details.

Whether or not CTCAC is involved in the finalization of plans over the next three months, it is far from clear, to me at least, how current pending differences between staff and Newland over the plans are going to get resolved during the extension period, or even if they are to be resolved at all. And at least as of today, I cannot reassure you that CTCAC's future role will resemble its past role as an active partner in this process. Newland offers CTCAC the choice of either uncritical Newland cheerleader or silent bystander. CTCAC does not welcome either option, and is still evaluating its legal rights and obligations. What you need to know now, however, is that when the extension you grant today comes to an end, one possibility is that CTCAC may reluctantly conclude that its interests are best served by acceding to Newland's conception of our role.

In conclusion, the purpose of this statement is to explain in proper context CTCAC's unconditional support for the 90-day extension request sought by Newland, by providing factual information regarding what actions CTCAC has taken over the past three or so years in relation to Town Center plans. Please do not interpret my remarks as in support of or in opposition to amended Town Center plans that ultimately may be before you. Those plans, still in flux, have not reached you yet, and CTCAC has made no decision on what, if anything, it will have to say to you regarding those plans when they are before you. Given that uncertainty however, I ask that this testimony, complete with all Attachments, be made a part of the decisional record in the plan amendment hearing to follow.

ATTACHMENT 1

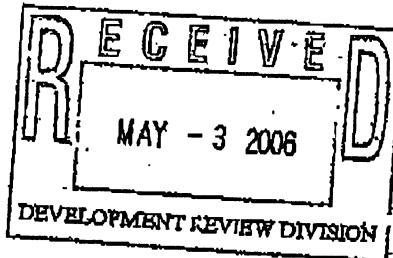
LINOWES
AND BLOCHER LLP
ATTORNEYS AT LAW

May 3, 2006

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By Hand Delivery

Ms. Rose Krasnow
Maryland-National Capital
Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910



Re: Clarksburg Town Center – Submission of Plan of Compliance

Dear Ms. Krasnow:

On behalf of Newland Communities LLC and NNPII – Clarksburg LLC (collectively, “Newland Communities”) and in accordance with the Planning Board’s direction, the purpose of this letter is to submit for Staff review a proposed Plan of Compliance for the Clarksburg Town Center development. This Plan of Compliance was prepared in detailed collaboration with and is assented to by Newland Communities, Clarksburg Town Center Advisory Committee (“CTCAC”), and each of the builders within the Town Center (i.e., Bozzuto Homes, Miller and Smith, Craftstar Homes, Porten Companies, and NV Homes).

The Plan of Compliance is also being submitted in furtherance of the mediated settlement agreement reached among the parties.

The Plan of Compliance consists of a comprehensive set of baseline plans, a detailed narrative description of proposed modifications to the baseline plans, including a detailed description of the intended effect of the Plan of Compliance, and supporting exhibits depicting the proposed modifications. It is anticipated that in the event the Staff recommends and the Planning Board approves the Plan of Compliance, detailed amendments to the existing Project Plan, Preliminary Plan and Site Plan approvals will be prepared consistent with the Plan of Compliance and submitted for review by Staff and action by the Planning Board.

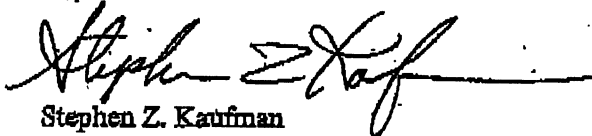
LINOWES
AND **BLOCHER LLP**
ATTORNEYS AT LAW

Ms. Rose Krasnow
May 3, 2006
Page 2

We have enclosed three (3) complete copies of the proposed Plan of Compliance with the above identified exhibits. If additional copies of the Plan of Compliance or any of its component parts are needed, please contact us.

Sincerely,

LINOWES AND BLOCHER LLP



Stephen Z. Kaufman



Todd D. Brown

cc: (w/o enclosures):
Planning Board Members
Hon. Barbara Keir Howe
Mr. Douglas Delano
Martha Guy, Esq.
Sharon Koplan, Esq.
David Brown, Esq.
Robert Brewer, Esq.
Timothy Dugan, Esq.
Barbara Sears, Esq.
Scott Wallace, Esq.
Ms. Nanci Porten

#606039 v1

M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppa.org

Date of Mailing: AUG 17 2006

MCPB No. 06-20

**RESOLUTION OF
MONTGOMERY COUNTY PLANNING BOARD**

PROJECT: Compliance Program: Clarksburg Town Center

PROJECT PLAN NO: 9-94004

SITE PLAN NO: 8-98001; 8-02014

DATE OF HEARING: June 15, 2006

RESPONDENTS: Newland Communities, LLC and NNPII-Clarksburg, LLC
Bozzuto Homes, Inc., BA Clarksburg, LLC and
BA Clarksburg Two, LLC
Craftstar Homes, Inc. and its LLC affiliates
Miller and Smith at Clarksburg, LLC
NVR, Inc., t/a NV Homes
PCI Clarksburg LLC

COMPLAINANT: Clarksburg Town Center Advisory Committee

RESOLUTION OF THE PLANNING BOARD: APPROVAL OF THE STAFF RECOMMENDATIONS WITH MODIFICATIONS. A motion to approve with certain modifications was made by Commissioner Robinson, seconded by Commissioner Wellington, and carried by unanimous vote (4-0) in the affirmative; Chairman Berlage, and Commissioners Perdue, Robinson, and Wellington voting in the affirmative, with Commissioner Bryant being absent for the vote.

§1. EFFECTIVE DATE

The effective date of this written resolution (the "Resolution") is the date this document is mailed to all parties of record. Any party entitled by law to make an administrative appeal must initiate the appeal within thirty days of the date of this Resolution according to the procedural rules for judicial review of administrative decisions under applicable law and the Maryland Rules of Court.

§2. PURPOSE AND NATURE OF RESOLUTION: APPROVAL OF COMPLIANCE PROGRAM

The purpose of this Resolution is to memorialize the decision of the Montgomery County Planning Board (the "Board") to approve a certain Plan of Compliance (the "Compliance Program") in the matters heard upon and including those elements, terms and conditions as set forth herein. This Resolution is adopted pursuant to the authority of the Board to enforce the elements, terms and conditions of its previous actions in this matter, in accordance with the enabling provisions of Article 28 of the Annotated Code of Maryland at Section 7-116(h) and the implementing provisions of Section 59-D-3.6 of the Montgomery County Zoning Ordinance.

The terms and conditions of the Compliance Program approved by this Resolution are intended by the Board as remedial measures that shall be legally required in order to address certain violations (such violations both found or known to be alleged as of the effective date of this Resolution) (collectively, the "Violations") with respect to the Project Plan, various site plans and certain amendments thereto, whether or not those site plans and amendments were approved under lawful authority to do so.

The elements, terms and conditions of the Compliance Program approved under this Resolution are the result of a voluntary mediation and negotiation process undertaken by and on behalf of the Complainant and Respondents; and, as expressed in this Resolution, such elements, terms and conditions of the Compliance Program shall be deemed and constitute the knowing and voluntary proffer of the Respondents tendered for the purpose of settling and disposing of the Violations in accordance with the lawful authority of the Board.

The Respondents have acknowledged that the Compliance Program set forth in this Resolution shall be given effect in lieu of any proposed amendment previously filed but approval of which remains pending as of the effective date hereof (collectively, the "Pending Amendments"). The Pending Amendments are enumerated as follows:

- That certain proposed amendment to the subject Project Plan filed on May 9, 2005;
- That certain proposed amendment pertaining to Section 1A4 of Site Plan No. 8-98001 filed on June 22, 2004; and
- That certain proposed site plan pertaining to the retail area shown on Site Plan No. 8-04034 filed on June 3, 2004.

Because said pending amendments are inconsistent with certain elements, terms, conditions of the Compliance Program, the Respondents have voluntarily agreed to withdraw each and every of the Pending Amendments and, upon issuance of this Resolution, such withdrawal of those Pending Amendments by Respondents shall be

deemed approved by the Board. Hereafter, the Board shall deem the Pending Amendments withdrawn, a legal nullity and of no further force or effect with respect to the project.

§3. COMPOSITION (ELEMENTS, TERMS AND CONDITIONS) OF THE COMPLIANCE PROGRAM

For the purpose of this Resolution, the Compliance Program consists of the Staff Recommendations, Board Modifications, Certain Deadlines, and Certain Waivers described in this section.

A. Staff Recommendations. As set forth in the staff report issued by memorandum dated June 1, 2006, executed by John Carter and Rose Krasnow (the "Staff Report"), and as presented during the Board's hearing on June 15, 2006, the Compliance Program consists of and expressly incorporates by reference each of the elements, terms, and conditions as contained in the following documents:

1. The following Exhibits:
 - a) Applicant's Exhibit 1 — Units/Lots to be released at the time of Plan of Compliance approval ("Attachment 1" hereto)
 - b) Applicant's Exhibit 2 — Plan of Compliance Parking Exhibit ("Attachment 2" hereto)
 - c) Staff's Exhibit 1 — Units/Lots to be released at time of Plan of Compliance (bluelined) ("Attachment 3" hereto)
2. The staff report, without attachments, dated June 1, 2006 (pages 1-16) ("Staff Report") and circle pages 17-91 attached to the Staff Report, but excluding Section "S" on circle pages 29-30 titled "Outcome/Effect of Plan of Compliance" (collectively, "Attachment 4" hereto);
3. Staff's handout at the June 15, 2006 hearing ("Attachment 5" hereto) which consists of a one-page addition of paragraph 4 ("Status of the Plan of Compliance") to the Staff Report ("June 15, 2006 Errata");
4. First Stage Development Standards Clarksburg Town Center ("Attachment 6" hereto), consisting of Table 1: Manor House Building 7 and 9 (Multi-Family Units), and Table 2: Proposed Development Standards from Exhibit R of the Plan of Compliance, June 30, 2006.

B. Board Modifications. The Compliance Program also includes and expressly incorporates by reference each of the following elements, terms, and conditions:

1. **Future Review Process.** - The Compliance Program proposes certain amendments to the approved Project Plan and the certified Site Plans as

indicated in the "Description of Major Elements Making Up the Plan of Compliance," and the "Plan of Compliance Design Concepts" (see attached Staff Report). The future approvals include the interim review of Site Plan amendments for Sections 2D, and GG and for Manor House Buildings 10, 11 and 12, to be followed by the review of the overall modified Project Plan, Preliminary Plan, the existing Site Plans, and a new Site Plan for the retail core, as described in the phasing discussion below.

2. **Phasing and Next Steps** -- As a condition of the Compliance Program, the Board approved the following phasing of development:

- a. **First Stage: Begin Construction - Construction** - At the current time, stop work orders imposed voluntarily, by or on behalf of the Planning Board are in place in certain designated areas of the community. The Planning Board declares that said stop work orders shall be dissolved, and does hereby dissolve those orders, so as to authorize Respondents to proceed with the first stage of the development with respect to the 78 Units/Lots enumerated on "Attachment 6" hereto; provided, that Respondents shall proceed and construct each and every such Unit/Lot in strict compliance with any building permit or other governmental approval for their construction as may be issued and applicable thereto. Construction of Stringtown Road between MD 355 and Overlook Park Drive, and Clarksburg Road between MD 355 and Spire Street can also continue in this First Stage.
- b. **Second Stage: Approval of a Revised Site Plan for Section 2D and GG** - The Respondents must apply for an amendment to the October 14, 2004 Certified Phase II Site Plan for the remaining portions of Sections 2D and GG, as well as the Site Plan for Manor House Buildings 10, 11 and 12. Construction of these units will only proceed if and when the Planning Board approves these Site Plans amendments. It is understood that the Respondents may apply for these amendments before any other amendment applications to the Project Plan, Preliminary Plan, or Site Plans for the entire development are submitted for approval.
- c. **Third Stage: Approval of a Revised Project Plan, Preliminary Plan and Site Plans** - The approved overall Project Plan, Preliminary Plan, and Site Plans will need to be revised, and a new site plan for the retail core will need to be approved before the remaining development in the Clarksburg Town Center will be able to proceed. This step is intended to incorporate all of the elements of the Compliance Program into an amended overall Project Plan, Preliminary Plan, and the newly approved or amended Site Plans. A new phasing plan for the entire development will also be included as part of this third stage review.

C. Certain Deadlines. The Project Plan, Preliminary Plan, Site Plan amendments and new Site Plan to be submitted for approval must reflect the elements of this Compliance Program and must be submitted before October 26, 2006. These plans must also include an amended Phasing Plan for the entire development, including all facilities and amenities. The entire project must be completed by June 15, 2010 unless the Planning Board approves an extension.

D. Certain Waivers. By their attendance and respective proffers expressed in connection with the several Planning Board proceedings convened to consider the matters addressed in this Resolution, and as subsequently confirmed by the written and oral binding representations of their respective legal counsels, Respondents and Complainant consented and conceded to the jurisdiction of the Board for the purpose of the taking of this action. Respondents and Complainant further voluntarily consented and agreed to the various elements, terms and conditions expressed herein for purposes of the Compliance Program, and knowingly waived any and all right to appeal or contest the action taken by the Board hereunder, and thereby agreed to be estopped from contesting any portion of the Compliance Program, or asserting any compensable damage or cost by way of any cause of action against the Board related in any way to the matters resolved herein. It is expressly understood, however, that the aforesaid waiver does not apply to, or in any way impair, waive or otherwise affect (I) any parties' right to defend an appeal of this action filed by persons other than Respondents or Complainant; (II) any parties' appeal rights and/or cause(s) of action that might accrue with respect to any future action taken by the Board, other governmental agency or individual including, without limitation, any action concerning subsequent Project Plan, Preliminary Plan and/or Site Plan applications, including any amendment(s) thereto, and further including any subsequent permitting and development processes related thereto, which are intended to implement the Compliance Program. The waivers expressed under this Section 3(d) are considered by the Planning Board to be a material predicate and inducement for the issuance of this Resolution.

§4. FORMAL DISPOSITION OF THE VIOLATIONS AND RELATED FINDINGS

FINDING 4.1: The Board finds that the public interest will be served by "grandfathering" (holding harmless) all dwelling units that are already constructed, under contract by, and/or occupied by innocent third-party purchasers, as of June 15, 2006 (the "Grandfathered Units"); provided, however, that the Grandfathered Units do not include any unit for which a contract was entered into after November 23, 2005, the date by which all stop work orders had been issued. The Board finds that the purpose and scope of such grandfathering by the Board is to remediate and resolve all findings of Violations as to the Grandfathered Units.

In accordance with Finding 4.1, the Board hereby orders that each of the Grandfathered Units that was the subject of any Violation shall be, and hereby is, deemed to be constructed and occupied in compliance with the County Zoning Ordinance notwithstanding such Violation, provided that nothing under this order or Resolution shall be construed to cure any violation of the Zoning Ordinance that either (a) is not grounded within the lawful jurisdiction of the Planning Board or (b) is not directly related to the Violations that fall within the scope of this Resolution.

FINDING 4.2: In accordance with the recommendations of staff, the Board finds that the public interest will be served by completion of the Compliance Program according to its terms because it provides substantial enhancements to community amenities and facilities planned for the area designated as the Clarksburg Town Center project and Montgomery County as a whole.

FINDING 4.3: In accordance with the recommendations of staff, the Board finds that, subject to its completion according to its terms and in accordance with this Resolution, the Compliance Program constitutes a lawful and appropriate alternative to imposing fines or monetary penalties in accordance with Section 59-D-3.6 (a)(4) of the Montgomery County Zoning Ordinance. The Board is persuaded that implementation of the Compliance Program will remediate and resolve all Violations.

FINDING 4.4: In accordance with the recommendations of staff, the Board finds that the modifications to the street network approved by the Fire Marshal of Montgomery County for purposes of public safety are in the public interest and are, therefore, incorporated into the approved Compliance Program.

In accordance with Findings 4.2, 4.3 and 4.4, the Board hereby orders the Respondents to comply strictly with each of the elements, terms and conditions of the Compliance Program and expressed otherwise under this Resolution. The Board further instructs the Planning Staff to undertake all reasonable measures to detect and report to the Board the Respondents' compliance and non-compliance as the applicable case may be.

§5. PLANNING BOARD AUTHORITY EXPRESSLY RESERVED

Except as expressly provided in this Resolution, nothing provided in this Resolution is intended, nor shall it be construed, to cede, relinquish or otherwise impair the discretion, authority or jurisdiction of the Board to consider any future applications, plans or approvals pertaining to the project according to the terms of this Resolution, law and merits applicable. Without limiting the generality of the foregoing, it is understood that the Respondents shall be required in the future to obtain Board approval for one or more amendments to the Project Plan, Preliminary Plan, and Site Plans relating to the project.

The Planning Board recognizes that the Compliance Program is conceptual in nature, and that additional review of more detailed plans may involve modifications. Except as otherwise required by or relating to physical project conditions unforeseen by the Board, or applicable law (including the requirements of the Montgomery County Zoning Ordinance, Subdivision Regulations, or other legal requirements applicable to any future Board action pertaining to the project), the Planning Board intends to require only such modifications that are reasonably consistent with the Compliance Program. Subject only to such unforeseen project conditions, applicable law and regulations, express terms of this Resolution and the Compliance Program, the Board expressly reserves all lawful discretion to consider, approve, approve subject to conditions or disapprove any such future application according to the law and merits presented at the time. Further, the Board expressly retains jurisdiction to consider and act upon any violation in the future that is unrelated to the Violations resolved according to the terms of this Resolution, alleged on the basis of this Resolution, or any act or omission by the Respondents (their successors or assigns) that accrues after the effective date hereof.

CONCLUSION

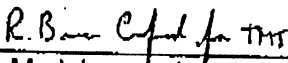
The Planning Board accordingly approves this Resolution according to elements, terms, and conditions stated above.

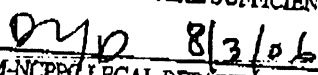
* * * * *

At its regular meeting, held on Thursday, August 3, 2006, in Silver Spring, Maryland, the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, with Motion by Commissioner Robinson, seconded by Commissioner Perdue, by vote of 4 to 1, with Commissioners Berlage, Robinson, Perdue and Bryant voting in favor and Commissioner Wellington opposed, ADOPTED the above Resolution which constitutes the final decision of the Planning Board and memorializes the Board's findings of fact and conclusions of law for this Resolution.

Adopted by the Planning Board this 3rd day of August 2006.


Derrick P. Berlage
Chair, Montgomery County Planning Board

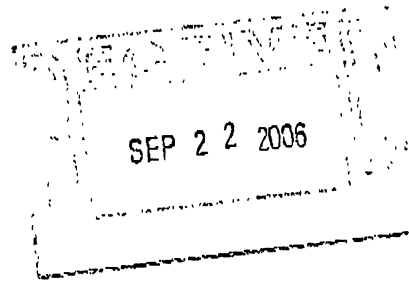

Trudye M. Johnson, Executive Director

APPROVED AS TO LEGAL SUFFICIENCY

M-NCPPC LEGAL DEPARTMENT

Attachments

1. Applicant's Exhibit 1: Units/Lots to be Released (see MNCPPC file for large exhibit)
2. Applicant's Exhibit 2: Parking Exhibit (see MNCPPC file for large exhibit)
3. Staff's Exhibit 1: Units/Lots to be Released (blue-lined) (see MNCPPC file for large exhibit)
4. Staff Report, dated June 1, 2006 (pages 1-16) and circle pages 17-91, excluding Section "S" on circle pages 29-30
5. June 15, 2006 Errata
6. First Stage: Development Standards (Table 1 and Table 2)

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September 20, 2006

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Hon. Royce Hanson, Chair
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8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Clarksburg Town Center – Request for Extension of Preliminary Plan and Compliance Program Staging

Dear Mr. Hanson and Members of the Planning Board:

On behalf of Newland Communities LLC and NNPII -Clarksburg LLC (collectively, "Newland Communities"), this letter requests an interim 6-month extension of Preliminary Plan No. 119950420 (formerly 1-95042) ("Preliminary Plan") and a 6-month extension of time to file the Preliminary Plan, Project Plan and Site Plan applications required by the Third Stage of the Clarksburg Town Center Compliance Program ("Compliance Program"). This request would establish April 26, 2007 as the interim expiration date of the Preliminary Plan and the outside date for filing the Compliance Program applications.

Preliminary Plan Extension

At its meeting on June 8, 2006, the Planning Board approved an interim extension of the Preliminary Plan until October 26, 2006. The extension was the most recent in a series of Preliminary Plan extensions the Board had approved to maintain the *status quo* of the project while it addressed site plan issues concerning the Town Center. The Board granted the extension until October 26, 2006 to provide Newland Communities with sufficient time to seek approval of the Compliance Program and to submit project, preliminary and site plan amendments and a new site plan for the retail area within the Town Center. A further extension of the Preliminary Plan is needed to provide sufficient time for the Planning Board to consider the plan amendments, once filed, and for Newland Communities to record the remaining subdivision plats for the project. Accordingly, this letter requests a 6-month interim extension of the Preliminary Plan until April 26, 2007. This interim extension will continue to maintain the *status quo* until the Board considers the overall plan amendments to be submitted as a part of the Compliance Program.

Hon. Royce Hanson, Chair
and Members of the Montgomery
County Planning Board
September 20, 2006
Page 2

Compliance Program

After many months of hearings and a mediated settlement among the private parties, on August 3, 2006, the Planning Board adopted a Resolution approving a Compliance Program for the Town Center. The Compliance Program establishes a three stage development program for completion of the Town Center. In the First Stage, effective immediately, the Planning Board dissolved its existing stop work orders for 78 units/lots and authorized construction of such units/lots to proceed. The Second Stage ("Second Stage") requires Newland Communities to file an interim site plan amendment for Sections 2D, GG and the Bozzuto Manor House buildings. The Third Stage ("Third Stage") requires Newland Communities to file amendments to the overall Project Plan, Preliminary Plan and Site Plans for the entire Town Center, including a new site plan for the mixed-use retail area.

Efforts Moving Forward

Since adoption of the Compliance Program on August 3, 2006 (mailed on August 17, 2006), Newland Communities has worked diligently to identify and retained several consulting firms (including two civil engineering firms and two landscape architecture firms) to design the new mixed-use retail area and to prepare the Second and Third Stage applications required by the Compliance Program. Since August 3, 2006, Newland Communities has also worked with each of the builders within the Town Center and the Clarksburg Town Center Advisory Committee ("CTCAC") to finalize the site plan amendment applications for the Second Stage. Newland Communities filed the Second Stage applications with the Planning Board on September 18, 2006 (designated Site Plan Review Nos. 81998001 I and 82002014 D).

Since August 3, 2006, Newland Communities has also identified a new Town Architect consultant for the project. The Town Architect will work with the parties to prepare development design guidelines that will apply throughout the remaining portions of the Town Center. In addition, Newland Communities and CTCAC have consulted with one another on various design issues and have jointly met with MNCPPC Parks Department representatives concerning Piedmont Woods Park and with representatives of MNCPPC, the Montgomery County Department of Transportation and the Montgomery County Department of Permitting Services to discuss a number of issues concerning the project. All of this took considerable time.

Hon. Royce Hanson, Chair
and Members of the Montgomery
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September 20, 2006
Page 3

Extension Requests

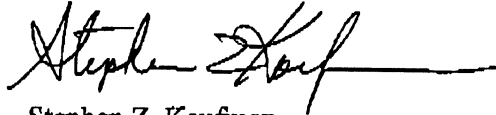
As a consequence of the above activity, it became apparent to Newland Communities, the builders and CTCAC that additional time would be needed to assemble and retain the necessary consultants and to design and prepare the submissions required for the Third Stage of the Compliance Program. Newland Communities has discussed this matter with CTCAC and believes the parties are in agreement that a 6-month extension of time is appropriate. The 6-month extension (until April 26, 2007) should be sufficient to allow the new areas of the Town Center to be thoughtfully designed and for the required amendments to the Project Plan, Preliminary Plan and Site Plans, along with a new site plan for the retail area, to be prepared and filed.

Accordingly, this letter requests an interim 6-month extension of the October 26, 2006 expiration of the Preliminary Plan and a 6-month extension of the October 26, 2006 deadline for filing the Third Stage Project Plan, Preliminary Plan and Site Plan applications. As noted above, we suggest that as a part of the anticipated Preliminary Plan amendment (to be filed as a part of the Third Stage), the Board should consider extending the Preliminary Plan validity period as necessary to provide sufficient time for Newland Communities to validate any approval granted by the Board through the recordation of subdivision plats for the remainder of the project.

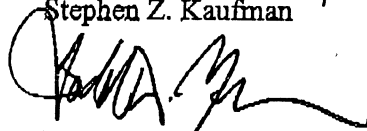
Thank you for your consideration.

Sincerely,

LINOWES AND BLOCHER LLP



Stephen Z. Kaufman



Todd D. Brown

Hon. Royce Hanson, Chair
and Members of the Montgomery
County Planning Board
September 20, 2006
Page 4

cc: Mr. Robert Ditthardt
Mr. Douglas Delano
David Brown, Esq.
Timothy Dugan, Esq.
Charles Stuart, Esq.
Scott Wallace, Esq.
Barbara Sears, Esq.
Ms. Nanci Porten
Ms. Rose Krasnow
Ms. Catherine Conlon

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March 9, 2007

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By Falcon Overnight

Dr. Royce Hanson, Chair
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County Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Clarksburg Town Center – Request for Extension of Preliminary Plan

Dear Dr. Hanson and Members of the Planning Board:

On behalf of Newland Communities LLC and NNP II-Clarksburg LLC (collectively, “Newland Communities”), this letter requests a twelve (12)-month extension of the Clarksburg Town Center preliminary plan (Preliminary Plan No. 119950420 -- formerly 1-95042) (“Preliminary Plan”).

On October 12, 2006, the Planning Board granted Newland Communities’ request for an extension of the Preliminary Plan and filing date for the Third Stage of the Clarksburg Town Center Compliance Program (“Third Stage”) until April 26, 2007. At that time the Board indicated the Preliminary Plan Amendment to be filed as a part of the Third Stage would determine what additional extension of the Preliminary Plan validity period would be necessary to complete the Town Center project. Newland Communities anticipates filing the Third Stage application materials on or before April 26, 2007.

The requested Preliminary Plan extension is required to provide enough time for Park and Planning staff and other regulatory agencies to review the Project Plan Amendment, Preliminary Plan Amendment and Site Plan applications comprising the Third Stage and for the Planning Board to consider and act on the applications, including a determination of what additional extension of the Preliminary Plan will be needed to complete the project. The application materials will be extensive and will take considerable time to review. Therefore, to minimize the need for any additional extension of the Preliminary Plan prior to the Planning Board acting on the Preliminary Plan Amendment and other Third Stage application materials, Newland Communities requests a twelve (12)-month extension at this time. The Planning Board will still need to determine what additional extension of the Preliminary Plan will be needed to complete the project.

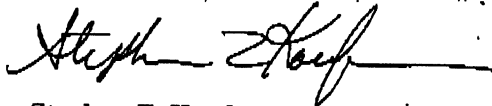
Dr. Royce Hanson, Chair
and Members of the Montgomery
County Planning Board
March 9, 2007
Page 2

The requested Preliminary Plan extension will also allow permits to be issued for any remaining dwelling units within the First Stage of the Compliance Program and for dwelling units within the Second Stage of the Compliance Program in the event the Board approves pending interim site plan amendments 819998001I and 82002014D. In this regard, it is critical to Newland Communities, each of the builders and the Town Center community for construction activities within Town Center to continue without interruption so the community can be completed as quickly as possible. We also believe it is important for construction activities to continue during the Third Stage review process to minimize community concerns that would almost certainly arise if construction activities ceased during this period.

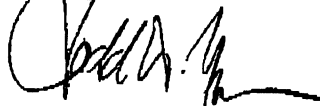
Thank you for your consideration.

Sincerely,

LINOWES AND BLOCHER LLP



Stephen Z. Kaufman



Todd D. Brown

cc: Ms. Rose Krasnow
Ms. Cathy Conlon
Mr. Douglas Delano
Mr. Robert Ditthardt
Ms. Amy Presley

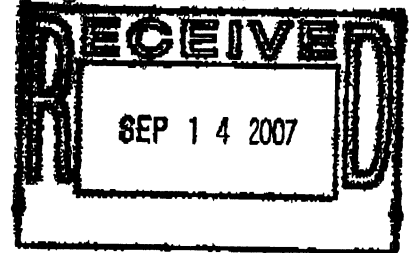
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September 13, 2007

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By Hand Delivery

Dr. Royce Hanson, Chair
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8787 Georgia Avenue
Silver Spring, Maryland 20910



Re: Clarksburg Town Center – Project Plan Amendment No. 91994004B – Request for Continuance

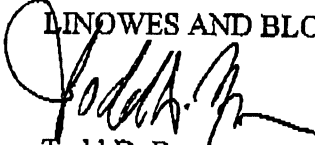
Dear Dr. Hanson and Members of the Planning Board:

On behalf of the Applicant, NNPII Clarksburg, LLC, the purpose of this letter is to request a 90-day continuance of the September 27, 2007 Planning Board hearing on the above-referenced Project Plan Amendment. This requested continuance of the Project Plan Amendment notwithstanding, the Applicant understands the Board will still consider interim site plan amendments for Clarksburg Town Center (82002014D and 81998001I) on September 27, 2007.

The Applicant requests a continuance with respect to the Project Plan Amendment to respond to agency comments for this complex project. Further, although the Applicant is requesting a 90-day extension, additional time may be needed to complete the agency review process and to make any necessary adjustments to the plan. We will keep the Board advised in this regard. We do not believe the requested continuance will constitute prejudice or undue hardship to any interested party.

Thank you for your consideration.

Very truly yours,

LINOWES AND BLOCHER LLP

Todd D. Brown

cc: Mr. Robert Kronenberg
Ms. Rose Krasnow
Mr. Robert Ditthardt
Mr. Douglas Delano
David Brown, Esq.
Stephen Z. Kaufman, Esq.

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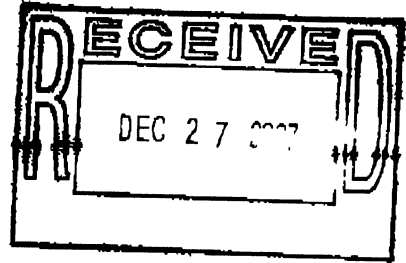
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December 21, 2007

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By Hand Delivery

Dr. Royce Hanson, Chair
and Members of the Montgomery County
Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910



Re: Clarksburg Town Center – Project Plan Amendment No. 91994004B – Request for Continuance

Dear Dr. Hanson and Members of the Planning Board:

On behalf of the Applicant, NNPII Clarksburg, LLC, the purpose of this letter is to request an additional continuance of the Project Plan review period for the Clarksburg Town Center Project Plan Amendment No. 91994004B.¹ The Applicant requests a continuance of the Project Plan review period from on or about December 27, 2007 to March 26, 2008, to provide adequate time to address comments received from the various agencies reviewing the project and to modify the previously submitted plans as appropriate. The Applicant requests the extension until March 26, 2008 to correspond with the current extension of the Preliminary Plan and APFO validity period for the Clarksburg Town Center Preliminary Plan (No. 119950420).

At its December 13, 2007 meeting, the Planning Board considered and approved the Interim Site Plan Amendment for the Town Center (Nos. 81998001I and 82002014D). As discussed at the hearing, although the Planning Board initially was scheduled to consider the Interim Site Plan Amendment on September 27, 2007, additional time was required to finalize the Amendment. This resulted in an approximate 2-month delay. Although the Applicant continued to work on the overall plan amendments for the Town Center during this time, the additional time required to finalize the Interim Site Plan Amendment created a modest delay in fully responding to agency comments concerning the pending Project Plan Amendment. Accordingly, some additional review time is needed for the Project Plan Amendment.

¹ Section 59-D-2.2 of the Zoning Ordinance requires the Planning Board to hold a public hearing on each project plan application not later than 90 days after its filing, unless the Board extends this timeframe.

Dr. Royce Hanson, Chair
and Members of the Montgomery County
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December 21, 2007
Page 2

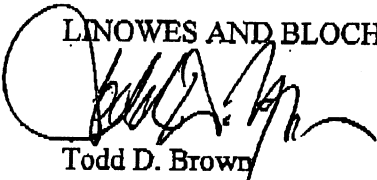
As noted above and at the December 13, 2007 hearing on the Interim Site Plan Amendment, the Clarksburg Town Center Preliminary Plan will remain valid until March 26, 2008. As noted in Staff's April 13, 2007 memorandum concerning the extension of the Preliminary Plan, the Project's APFO approval will also expire March 26, 2008. As Staff further noted, a determination of adequate public facilities will be included in the review of the pending Preliminary Plan Amendment, and future Planning Board action on the Amendment will then determine new validity periods for both the Preliminary Plan and the Adequate Public Facilities determination. It therefore makes sense to extend the Project Plan Amendment review period until March 26, 2008 so that all reviews can be completed by that date if feasible.

For the above reasons, and to minimize the number of validity periods/expiration dates associated with the various plan reviews, the Applicant requests an extension of the Project Plan review until March 26, 2008.

Thank you for your consideration.

Very truly yours,

LINOWES AND BLOCHER LLP


Todd D. Brown

cc: Mr. Robert Kronenberg
Ms. Rose Krasnow
Mr. Robert Ditthardt
Mr. Douglas Delano
David Brown, Esq.
Stephen Z. Kaufman, Esq.

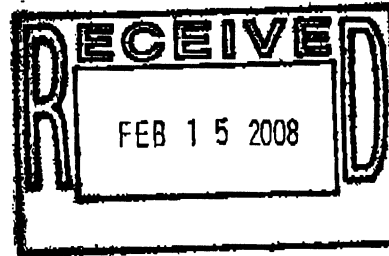
LINOWES
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February 15, 2008

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By Hand Delivery

Dr. Royce Hanson, Chair
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Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910



Re: Clarksburg Town Center -- Request for Extension of Adequate Public Facilities
Determination, Preliminary Plan Validity Period and Project Plan Review Period

Dear Dr. Hanson and Members of the Planning Board:

On behalf of the Applicant, NNPII -- Clarksburg LLC, the purpose of this letter is to request a six-year extension of the adequate public facilities approval for the Clarksburg Town Center development, a three-year extension of the Preliminary Plan validity period and a 120-day extension of the Project Plan review period. The project's APF determination and the Preliminary Plan validity period are scheduled to expire on March 26, 2008. A previous request to extend the Project Plan review period is pending and is superseded by this request.

Background

As the Board is aware, the Town Center is a mixed-use project containing residential, commercial and public use spaces. The mixed-use Core of the project was the subject of considerable discussion during the formation and approval of the Clarksburg Town Center Compliance Program ("Compliance Program"). Development of the redesigned Core is dependant on the Board's approval of pending Project Plan Amendment (91994004B), Preliminary Plan Amendment (11995042B) and Site Plan Application (820070220). Completion of the project, including the mixed-use Core, is also dependant on the extension of the adequate public facilities approval.

Since the approval of the Compliance Program, the Applicant and the Clarksburg Town Center Advisory Committee, Inc. ("CTCAC") have worked continuously to revise the plans for the Town Center consistent with the intent of the Compliance Program and the requirements of County agencies such as MCDPS and MCDPWT. To this end, plans have been submitted to MNCPPC and other agencies to amend the existing Project Plan and Preliminary Plan approvals

Dr. Royce Hanson, Chair
and Members of the Montgomery County
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Page 2

and for approval of a new overall site plan for the project. A lengthy Development Review Committee (DRC) meeting was held and subsequent meetings with senior county officials, Councilmembers and the County Executive have occurred in an effort to resolve a number of complex technical and policy issues associated with the revised plans. Continued efforts in this regard are needed to assure the plans to be considered by the Board have been thoroughly vetted and modified as appropriate to meet all requirements of the regulating agencies to assure the "buildability" of the revised design from a regulatory perspective.

As the Board will recall, the Town Center, and the mixed-use Core in particular, incorporate a uniquely urban design in what was until recently a rural setting. The introduction of mixed-use buildings, live/work units, concealed parking facilities, strong building relationships to the street, and a number of non-standard right-of-way sections is needed to fulfill the vision set forth in the Compliance Program. However, these design elements create a unique set of technical and public policy issues. Moreover, the multiple agency review process in Montgomery County creates the need for extensive coordination among regulatory staff to minimize regulatory conflicts and to address these complex issues. This has taken considerable time.

It is also important to remember the Project was shut down completely while various site plan and permitting issues were being investigated and while stop work order(s) issued by the County remained in effect. As the Board will also recall, its approval of the Compliance Program was the culmination of extensive efforts by MNCPPC staff, County agency staff, CTCAC, the Applicant and the Board itself. The Compliance Program and the pending applications provide the means to complete the project.

Since the Compliance Program was approved, the Applicant has continued to pursue road completions within the community, including final asphalt lifts. The Applicant has also made interim enhancements to Murphy's Grove Pond and continued to construct stormwater management facilities serving the community. As discussed in greater detail below, the First and Second Stages of the Compliance Program have also been approved, including the Interim Site Plan Amendments. Certified site plans and subdivision plats are being prepared for submission, review and ultimate recordation (for plats). Once these steps are completed, building permits can be issued for units within the Interim Site Plan amendment areas. Completion of these areas will leave only the mixed-use Core to be completed.

Dr. Royce Hanson, Chair
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Extension of APF

The Planning Board approved the Town Center Preliminary Plan (11995042, formerly 1-95042) by its Opinion dated March 26, 1996. Pursuant to Section 50-20(c)(3)(A) of the Montgomery County Code, a determination of adequate public facilities is timely and remains valid for 12 years after the date of preliminary plan approval for any plan approved on or after July 25, 1989, but before October 19, 1999. Accordingly, the Town Center APF determination will remain valid until March 26, 2008.

Pursuant to Section 50-20(c)(5) of the Subdivision Regulations, the Planning Board is authorized to extend a determination of adequate public facilities for a preliminary plan of subdivision for nonresidential development beyond the applicable validity period if:¹

- (A) at least 40% of the approved development has been built;
- (B) all of the infrastructure required by the conditions of the original preliminary plan approval have been constructed, or payments for its construction have been made; and
- (C) the development is an "active" project.

In this case, the original Preliminary Plan authorized 1,300 dwellings and 250,000 square feet of nonresidential uses. As detailed on Attachment 1, the approved development is comprised of 2,850,000 total square feet based on the size of an average single-family detached home, townhome and multi-family unit and the amount of nonresidential development approved by the Board. To date, 753 dwellings have been constructed comprising 1,603,000 total square feet, based on the same average unit sizes. Therefore, 56% of the approved development has been constructed, and the first criterion set forth above is satisfied.

Second, the approved preliminary plan required the following phasing in relation to specified road improvements:

- (a) The first 44 dwelling units without any off-site road improvements.

¹ Nonresidential development includes any project that is not exclusively residential.

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- (b) After the 44th building permit, the developer must start reconstruction of the southbound right turn lane along MD 355 at MD 121 to provide a "free flowing" movement
- (c) After the 400th building permit, the developer has two options:
 - 1) Construction of A-260 [Stringtown Road] from MD 355 to the southern access road of the commercial site (commercial access road between A-260 and P-5) and construction of P-5 across the stream valley into the residential area north of stream valley; or
 - 2) Construction of A-260 from MD 355 to the northern access road of the residential development and construction of a northbound right-turn lane along MD 355 at A-260 should be included in this phase.
- (d) After the 800th building permit, the developer must start construction of remaining section of A-260 to A-305 [Snowden Farm Parkway], and intersection improvements at MD 355 and MD 121 to construct eastbound & westbound left-turn lanes along MD 121.
- (e) Construction of A-305 [Snowden Farm Parkway] from A-260 [Stringtown Road] to MD 121 must begin when the developer starts building any of the residential units on blocks 11, 12, 13, and the northern half of block 10.

To date, fewer than 800 building permits have been issued, and all road improvements required by the original Preliminary Plan approval to be constructed by this stage of the development have been constructed as follows:

- (a) the southbound right-turn lane along MD 355 (Frederick Road) at MD 121 (Clarksburg Road) to provide "free flowing" movement;
- (b) two lanes of A-260 (Stringtown Road) from MD 355 (Frederick Road) to the southern access road of the commercial site;

Dr. Royce Hanson, Chair
and Members of the Montgomery County
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Page 5

- (c) northbound right-turn lane along MD 355 (Frederick Road) at A-260 (Stringtown Road);
- (d) A-305 (Snowden Farm Parkway) from A-260 (Stringtown Road) to approximately 390 feet south of MD 121 (Clarksburg Road); and
- (e) eastbound left-thru lane along MD 121 (Clarksburg Road) at MD 355 (Frederick Road).

All infrastructure improvements have been constructed that were required for the existing level of development by the conditions of the original Preliminary Plan approval. Thus, the second criterion above is also satisfied. Although additional infrastructure must be constructed after release of the 800th building permit, such construction is not required at this time by the conditions of the original Preliminary Plan approval. Considering the unique phasing of the road improvements required by the original Preliminary Plan Opinion, it would be incongruous to interpret Section 50-25(c)(5)(B) to require the Applicant to have already constructed improvements that are not yet required by the Preliminary Plan approval in order to extend the APF determination. To the contrary, extension of the APF will allow the project to proceed which will include construction of all infrastructure required to support the remaining stages of the development. The remaining off-site road improvements and intended construction sequence are identified on Attachment 2.

Third, the development is an "active" project. Occupancy permits have been issued and/or final inspections passed for in excess of 10 percent of the project within the past 4 years. As the Board is aware, the project was placed on hold for a period of time in 2006 while the Board considered and approved the Compliance Program. However, the project was an active site until that point with housing and infrastructure construction ongoing. In addition, the First and Second Stages of the Compliance Program have now also been approved, including the Interim Site Plan Amendment. Lastly, the Project Plan, Preliminary Plan and Site Plan applications comprising the Third Stage of the Compliance Program have also been filed. Final adjustments to the Third Stage plans are being made to reflect input from CTCAC and to address agency comments. Final submission of the revised Project Plan and Preliminary Plan amendment drawings is anticipated within 90 days. Final submission of the revised overall Site Plan is anticipated within 60 days after Board action at its hearing on the Preliminary Plan and Project Plan amendments.

Dr. Royce Hanson, Chair
and Members of the Montgomery County
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Page 6

With respect to the APF extension, we also emphasize that the transportation impacts associated with the pending plan amendments, including the redesigned mixed-use Core, are *less* than the transportation impacts associated with the original Project Plan and Preliminary Plan approval. As indicated in the transportation impact analysis filed with the Preliminary Plan Amendment, the amended Preliminary Plan will generate approximately 8 percent *fewer* trips in the AM peak hour and approximately 3 percent *fewer* trips in the PM peak hour.

Lastly, we note the Montgomery County Council specifically exempted Clarksburg development from the new Growth Policy. In Resolution No. 16-376, adopted November 13, 2007, the County Council provided: *"This resolution does not apply to any amendment or extension of a preliminary plan of subdivision in the Clarksburg policy area that was approved before this resolution took effect if the amendment or extension does not increase the amount of housing units or non-residential development previously approved."*

For the foregoing reasons, the Applicant requests a six-year extension of the APF determination.

Extension of Preliminary Plan Validity

The Preliminary Plan validity period is also scheduled to expire on March 26, 2008. As detailed above, the Applicant has undertaken extensive efforts to prepare final plan amendments in accordance with the Compliance Program. These efforts included the preparation and processing of the Interim Site Plan Amendments which have now been approved. In addition, the level of coordination among citizen groups, county agencies, MNCPPC staff and the Applicant has been significantly greater than typically encountered given the complexities of the project's redesign and the thoroughness with which the community has been evaluating all aspects of the project to assure its successful implementation. The significant, unusual and unanticipated nature of events have substantially impaired the Applicant's ability to validate the Plan. Moreover, exceptional hardship will result to the Applicant if the validity period is not extended, particularly considering the efforts undertaken by the Applicant and others to implement the Compliance Program.

The requested three-year extension of the Preliminary Plan validity period is believed to be the minimum time sufficient to allow all pending plan amendments and the final site plan to be considered and acted on by the Board, for certified site plans to be prepared, reviewed and approved, and for all remaining subdivision plats to be prepared, reviewed and recorded.

Dr. Royce Hanson, Chair
and Members of the Montgomery County
Planning Board
February 15, 2008
Page 7

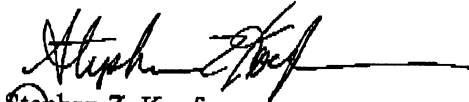
Extension of Project Plan Review Period

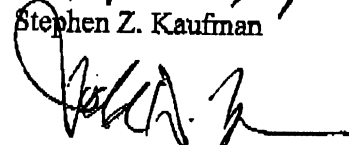
By our letter dated December 21, 2007, we requested an extension of the Project Plan review period until March 26, 2008 to coincide with the expiration dates of the Preliminary Plan validity period and the APF determination. At that time, we anticipated Board action on the Project Plan Amendment, Preliminary Plan Amendment and overall Site Plan before March 26, 2008 and a concurrent determination of new validity periods for both the Preliminary Plan and the APF. However, as indicated above, some limited additional time is needed to finalize modifications to the pending Project Plan Amendment to address agency and community comments and to prepare the Amendment for the Board's consideration. Therefore, a limited 120-day extension of the Project Plan review period is requested. This limited (and hopefully final) extension will not result in any prejudice to the parties.

Thank you for your consideration.

Sincerely,

LINOWES AND BLOCHER LLP


Stephen Z. Kaufman


Todd D. Brown

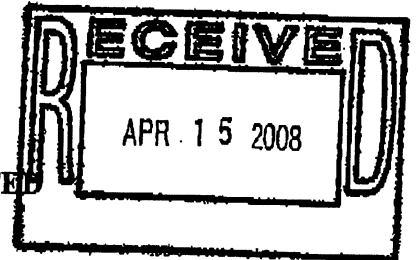
cc: Mr. Douglas Delano
Mr. Robert Ditthardt
Ms. Rose Krasnow
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April 14, 2008



**ELECTRONIC MAIL AND
CERTIFIED OVERNIGHT MAIL – RETURN RECEIPT REQUESTED**

The Honorable Barbara K. Howe
8 Hampshire Woods Ct.
Towson, Maryland 21204

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Counsel for NVR, Inc. t/a NV Homes
and Craftstar Homes, Inc.

Re: Notice of Arbitration Under the April 6, 2006
Comprehensive Settlement Agreement

Dear Judge Howe, Ms. Porten and Counsel:

I write pursuant to § 3-213(a) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, to give formal notice of the time and place designated by the Honorable Barbara K. Howe for the arbitration hearing under the Settlement Agreement.

The hearing will be held at the offices of DLA Piper, 6225 Smith Avenue, Baltimore, Maryland 21209 beginning at 8:30 AM and will be transcribed by a court reporter.

Pursuant to ¶ 11 of the Business Terms of the Settlement Agreement, NNP II – Clarksburg, LLC (“Newland”) gives notice that it will assert the following claims:



The Honorable Barbara K. Howe
David W. Brown, Esquire
Thomas C. Dame, Esquire
Timothy Dugan, Esquire
Nanci Porten
April 14, 2008
Page 2

(1) A claim for a declaratory ruling that revisions to the Clarksburg Town Center ("CTC") retail center shown on the amended site plans provided to the Clarksburg Town Center Advisory Committee, Inc. ("CTCAC") on April 11, 2008 are consistent with the Settlement Agreement because the plans, as revised, are as close in scope and configuration to the concept plan in the Settlement Agreement as can be achieved, given the requirements of potential commercial tenants of the center;

(2) An alternative claim that, if the Arbitrator rules that the revised plans are inconsistent with the Settlement Agreement, the Settlement Agreement is impossible of performance and must therefore be rescinded because the precise form and configuration of the retail center in the Settlement Agreement cannot be developed or leased for the designated retail uses;

(3) An alternative claim that, if the Arbitrator rules that the revised plans for the retail center are inconsistent with the Settlement Agreement, the Settlement Agreement was the product of a mutual mistake of fact and must, therefore, be rescinded, because the precise form and configuration of the retail center in the Settlement Agreement cannot be developed or leased for the designated retail uses;

(4) A claim, pursuant to ¶ 15 of the Development Terms of the Settlement Agreement, for a ruling in which the Arbitrator establishes the landscape/hardscape features to be included in the revised site plans;

(5) A claim for a ruling by the Arbitrator which establishes the revised project plan and site plans which may be submitted to the Montgomery County Planning Board on May 19, 2008; and

(6) An injunction requiring all parties to support before the Planning Board, and in all other proceedings of whatever nature, the revised project plan and site plans approved by the Arbitrator at the April 21, 2008 hearing.

Newland acknowledges that the revised site plans delivered to CTCAC are inconsistent with the Settlement Agreement in two respects:

(1) The pool/recreation center plan has deleted the lap pool and replaced it with a fitness center and other amenities. These changes were developed by Newland's architects (at Newland expense) at the request of CTCAC; and



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(2) The nature and configuration of uses on Lots 5 and 6 and the distribution of MPDUs in the CTC have been revised pursuant to an agreement between CTCAC and Bozzuto Homes, Inc.

If CTCAC does not agree to these two changes, Newland will consent to an order by the Arbitrator requiring Newland to replace these plans with plans that comply with the Settlement Agreement.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Kurt Johnson', written in a cursive style.

KJF/afp

IN THE MATTER OF NNPII-CLARKSBURG LLC
And CLARKSBURG TOWN CENTER ADVISORY
COMMITTEE, INC.

DECISION

On Monday April 21 2008 the above matter came on for an arbitration hearing before me. The session was held at the offices of DLA Piper. Kurt Fischer and Stephen Z. Kaufman were present as the attorneys for the Claimant, NNPII-Clarksburg LLC ("Newland"). Clarksburg Town Center Advisory Committee, Inc, the Respondent, ("CTCAC") was represented by David W. Brown. On April 14 2008 a formal notice of the time and place designated by me for the arbitration hearing was served on the Respondent.

Pursuant to paragraph 11 of the Business Terms of the Settlement Agreement of the parties, Newland asserted claims that were to be the subject of the hearing (See Attachment 1: letter dated April 14, 2008) At the hearing only claims 1, 2 and 3 were pursued and the others were reserved for future determination.

FINDINGS OF FACT

The Settlement Agreement dated April 6 2006 was accepted into evidence as Claimant's Exhibit 1. It includes the Business Points and the Development Terms and attached Exhibit A-P, as well as other documents not relevant to this arbitration hearing.

Claimant's Exhibit 2 was accepted into evidence and is the Resolution of the Montgomery County Planning Board which was mailed on August 17, 2006. The purpose of the Resolution was to memorialize the decision of the Planning Board that approved a Plan of Compliance that was intended to remediate and address some violations with respect to Clarksburg Town Center. The Compliance Program consisted of the Staff Recommendations, Board Modifications, Certain Deadlines, and Certain Waives as were described in the document with particularity. Of particular relevance to this arbitration hearing, is "Third Stage: Approval of a Revised Project Plan, preliminary Plan and Site Plans" contained on page Four. In Section 4 "Formal Disposition of the Violations and Related Findings", particularly relevant here is the last paragraph, which orders Newland to comply strictly each of the elements terms and conditions of the Compliance program and as was expressed otherwise in the Resolution. The Planning Board appropriately reserved to itself the authority going forward to approve all future submissions of amendments to the Project Plan, Preliminary Plan and Site Plans. It also recognized the Compliance Program to be "conceptual in nature and that additional review of more detailed plans may involve modifications". Attachment 5 is a June 15, 2006 Errata page. That page states that the Plan of Compliance includes the concepts presented in the written description along with the conceptual drawings, and the comments and modifications made by staff on Page 1 and 2 of the staff report. These comments were intended and did replace the entire Section "S Outcome of this Plan of Compliance". Exhibit R was also revised. There was a requirement that the revised plans that would reflect the elements of the Plan of Compliance were required to be submitted by October

26, 2006. That date was extended by the Planning Board several times and the new deadline is in September 2008.

Significant here is the document entitled "Development Terms" which is a part of Claimant's Exhibit 1. There are 8 pages which outline terms for future development of the Clarksburg Town Center. Pages A-P, the conceptual drawings are attached to it. Paragraph 1 of the Development Terms adopts the "Torti Plan" which is dated April 3rd 2006 as the design for the Retail Center. Exhibit A is attached to the development terms and is called the "Torti April 3, 2006 Mediation Plan". Importantly, in the agreed Business Points at paragraph 4 it is stated that the exhibits to the development terms for CTC provide a guide for purposes of determining the financial commitment of the Developer and the general, conceptual agreements regarding design". This paragraph was essential to all parties to the agreement because engineering plans had not been designed and all of the problems with topography and precise layout could not be defined with sufficient particularity. Some items however were clear and not subject to deletion but only to being drawn with precision: for example, in Block 3 and Block 5, there is a "parking structure" in each block. There was no discussion or notion at that time about the possible deletion of either garage. All that remained to be done with respect to each of them was that they needed to be designed with precision to fit the site and the manner of ingress and egress determined with relation to the slopes on the property itself.

Not to give proper relevance to the attachments to the Settlement Agreement would negate them and would destroy the entire purpose of the settlement which was mediated by and between all parties. Hour upon hour was spent on details so that

Newland, the builders who signed the agreement and CTCAC would have an agreement going forward that was specific enough to be enforceable.

There is no term in the any part of the Settlement Agreement which permits a change in the conceptual plans to remove or change any part of it dependent on "market changes".

Newland sent out a Request for Proposal in the summer of 2007. (Claimant's Exhibit 6). Claimant's Exhibit 7 is a list of those to whom it was sent for response. The response was "poor" according to Douglas C. Delano, Vice President of Operations. Based on its perceptions of the responses received, Newland decided to retain a nationally known expert in neo-urban or TND design named Robert Gibbs. Mr. Gibbs was to determine based on market studies and other data what type of center should be built on this site. He performed an analysis of the amount and types of retailers that may be supportable in a commercial center on this site. Claimant's Exhibit 23 contains his findings. Various charts are contained in Claimant's Exhibit 24. Mr. Gibbs analysis resulted in a recommendation that a "super neighborhood center" be built at this location rather than a "lifestyle center" as designed by Mr. Torti. Mr. Gibbs had been instructed to make alterations to the Torti-April 3, 2006 Mediation Plan (Exhibit "A") which is Claimant's Exhibit 25 in as minimal a manner as could accomplish what he found to be supportable. The "Site Plan/Gibbs Concept" is Claimant's Exhibit 25. It is a conceptual drawing, not an engineered design. Mr. Gibbs testified that he only dealt with the retail core portion and not the designs for any other part of Clarksburg Town Center. His design removes both garages, and instead draws a parking structure in Block 5 having two levels, and a surface parking lot in Block 3. He also designed a new parking plan

that added significant numbers of "nose-in" parking spaces and some additional parallel parking. Some street widths had to be modified to accommodate his parking plan. He did not especially deal with what would happen with the effect of all of these parking changes on the "bike trail" provided for in the Torti plan. Mr. Robert Ditthardt testified about Claimant's Exhibit 28 and the resulting parking with the Gibbs changes in place. He testified that 61 additional spaces would be provided in the Gibbs Plan vs. the Torti Plan.

David S. Weber of Gutschick, Little & Weber, P.A (GSW). testified. His company prepared detailed engineered site plans after being furnished with an Auto-CAD prepared by Mr. Gibbs. Plans prepared by GSW dated April 11 2008 were introduced into evidence as Respondent's Exhibit 14 and purport to represent the recommendations of Mr. Gibbs. Respondent's Exhibit 15 is a set of plans dated April 2007 which were also prepared by GSW and submitted by Newland to Montgomery County without the approval of CTCAC as is required under the Settlement Agreement. Newland stated that these plans were "Place Holder" plans only and were never intended to be the final site plans for the project. Deficiencies on the April 11, 2008 plans were pointed out. For example, the symbol for "special paving" was left blank in the box on WS1. Mr. Gibbs said that the omission was inadvertent. Mr. Weber was asked about moving the bike path and he testified that the bike path had to move, in part, because of the addition of the diagonal parking spaces (T. 400-403).

Mr. Gibbs testified (T 361) that he "did not change the unit type" on the north side of Block 5. He only removed the name of the unit type and reserved the area for residential, and because he is not a residential architect, he did not specify the unit type.

However, on Respondent's Exhibit 14, the courtyard type homes have been replaced as liner town homes as though this was done based on the Gibbs recommendation.

Respondent's Exhibit 5 was admitted into evidence and is attached hereto. Ms. Kim Shiley testified about the differences between the Plan of Compliance and Respondent's Exhibit 14 in great detail.

Ms. Amy Presley also testified for Respondent. She testified that CTCAC has not given final approval plans to Newland because has never been presented with a full set of plans for the entire Clarksburg Town Center. Particularly with respect to the pool/recreation center, CTCAC has not been given a site plan to approve. Although there have been discussions held for a re-design of that area, a specific drawing has not been provided that has been agreed by the parties. Because their approval must be obtained on all site plans as a total plan, CTCAC has never been able to approve a set of site plans as a complete set has never been provided.

DECISION

The basic law of contracts as stated in Mr. Fischer's Pre-Hearing Memorandum as General Principles of Contract Construction (Pre-Hearing Memorandum at pages 16 and 17) is certainly the law that applies here. The law that Mr. Brown cites is also correct in that modification of a contract requires mutual assent of the parties, even if the party who wishes to modify the contract determines that for one reason or another, the deal made then is not the deal that would be made today because circumstances have changed. The Settlement Agreement and all of its inclusions was an agreement on development terms that were extremely specific that were intended to define the future construction of the major elements of the Town Center, and in particular, the build out of the retail core.

Newland negotiated with CTCAC and various builders to achieve what is a remarkable document given the personalities of all of the parties and the acrimony which existed before it was signed, and which continues today between CTCAC and Newland. The level of distrust of Newland exhibited by CTCAC is unmistakable. I make no finding on whose fault that may be. The language of the contract, however, is not ambiguous and under Maryland law it will be afforded the effect of its plain meaning in light of the context within which it is employed. "It is a fundamental rule of contract construction that the entire contract, and each and all of its parts and provisions must be given meaning, and force and effect, if that can consistently and reasonably be done. An interpretation which gives reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable". *Orkin v. Jacobson*, 274 Md. 124, 130 (1975) (quoting Am. Jur. 2d *Contracts* Section 259 (1964)). Newland wishes to add a new and different term to the Settlement Agreement. Instead of its plain language, Newland wishes to add a provision that would make the Torti-April 3 Plan viable when looking at market realities. While this language may attempt to add a common sense provision to the Agreement, it is not contained in the Agreement itself and cannot be implied into an unambiguous agreement. Newland says that it cannot build the Center nor find a builder who is interested in building it according to the Torti-April 3 Plan. If that is true, and it may subsequently be found so, then the Center will not be built. It is as simple as that. I agree with Newland that the Gibbs Plan is a valiant attempt to develop a plan that is comparable to the Torti-April 3 Plan. But it cannot be substituted because it removes features that were included after a lengthy negotiated settlement discussion held over many hours. It may be perceived by many to be a

superior plan, but it is not the plan that was bargained for and specifically agreed to between these parties.

The declaratory relief requested is, therefore, denied.

An alternative claim is requested by Newland. I have ruled that the revised plans are inconsistent with the Settlement Agreement. Newland requests a ruling that the Settlement Agreement is impossible of performance and must be rescinded because the precise form and configuration of the retail center in the Settlement Agreement cannot be developed or leased for the designated retail uses. This claim is also denied. Within the exhibits introduced into evidence is Exhibit 11. Under the portion labeled "Financial Requirements, Legal Document, & Deal Structure is a statement concerning "Deal Structure". The statement on its face is a statement of interest in developing this Town Center under the Torti-April3 Plan either as a joint venture or as an outright purchase. Nothing in the testimony shows that there was any follow-up of this response to the RFP. I cannot find, therefore, as requested, that it is impossible to perform the Settlement Agreement.

An alternative claim is also requested that if I rule that the revised plans for the retail center are inconsistent with the Settlement Agreement, that the Settlement Agreement was the product of a mutual mistake of fact, and must, therefore, be rescinded, because the precise form and configuration of the retail center in the Settlement Agreement cannot be developed or leased for the designated retail uses. There cannot be a finding that there is a "mutual mistake" here because CTCAC has a belief, grounded in the response to the RFP cited above, that it can be developed as agreed. Mutual mistakes, in addition, must concern past or present facts, not unexpected

facts that occur later, and after a document is signed by the parties. 17A Am. Jur. 2d *Contracts* Section 202 at 210 (2004) (Footnotes omitted). The request for rescission on this basis is also denied.

A revised project plan and site plans are to be drawn that are consistent with the Torti-April 3 Plan concepts. CTCAC is to have an ability to review them and to have an ability to approve a full and complete set of plans for the entire Clarksburg Town Center, both the East and West sides and all that is in between. If the Site plans are accurate, CTCAC is required to approve them because their approval cannot be unreasonably withheld.

On May 2, 2008 an arbitration session will be held and at that time all of the landscape/hardscape features will be designated and will be included on the revised site plans.

Unless CTCAC has approved the revised project plan and site plans before May 14, 2008, then on May 14, 2008 the revised project plan and site plans will be reviewed in an arbitration session to be held at the offices of DLA Piper in Baltimore MD beginning at 9 a.m. and I will establish on that date the project plan and site plans which will be submitted to the Montgomery County Planning Board on May 19, 2008. As previously agreed by the parties, all parties will support the revised project plan and the site plans which I approve, in all other proceedings of whatever nature which are conducted in the future.

April 29 2008

Barbara Kerr Howe

IN THE MATTER OF NNPII-CLARKSBURG LLC
And CLARKSBURG TOWN CENTER ADVISORY
COMMITTEE, INC.

RULING

On May 2, 2008 NNPII-Clarksburg LLC (Newland) filed a Motion for Reconsideration of my decision dated April 29, 2008 to which Clarksburg Town Center Advisory Committee, Inc. (CTCAC) filed a response on May 2, 2008. A Reply to the Opposition was filed by Newland on May 6, 2008.

In the decision of April 29, 2008 the declaratory relief requested by Newland was denied. My decision directs Newland to prepare a revised project plan and site plans that are consistent with the Torti-April 3 Plan concepts. There has been an on-going debate between the parties about the final site plans. Of particular note is the dispute over the construction of garages in Blocks 3 and 5. I have read again the language in the Plan of Compliance which was approved by the Planning Board concerning the garage in Block 3 and it is ambiguous. At page 19 it states that "Block 3 will be built around one, 2 to 3 level parking structure depending on the topography" and on page 23, at B.4. it states that it will be "... constructed around a 1-2 parking structure". Both of those conflicting statements supposedly originate from the Torti-April 3 Plan concepts. How can Newland draw site plans consistent with the Torti-April 3 Plan concepts and at the same time be in compliance with what has been approved by the Planning Board? It is impossible to do so.

Under Section 4 of the Business Points of the Settlement Agreement Newland is required to prepare final site plans to implement the conceptual agreements of the parties and to obtain CTCAC's approval. The Torti Plan and its attachments are to be a "guide" going forward to reflect the "general conceptual agreements" of the parties. There was to be a cooperative effort between these parties each acting in good faith, as the final plans were drawn. Newland was charged with the responsibility to prepare site plans and CTCAC was to act in good faith to approve them. There is language in Section 4 referenced above that CTCAC will not unreasonably withhold their approval.

Site plans have been prepared several times. The Planning Board has plans which were filed in April 2007. The current dispute revolves around the April 2007 site plans and the site plans submitted to CTCAC for approval in April 2008. If the parties cannot agree on the final Site Plans, arbitration provisions of the Settlement Agreement control the process for approval of what is ultimately submitted to the Planning Board for approval.

Newland has requested the relief requested by them to use the "Gibbs Plan dated April 11, 2008" be granted on several grounds: (1) that it is consistent with the agreement of the parties and (2) that CTCAC has withheld its consent in a manner that is not reasonable and in good faith. They allege that it is unreasonable to refuse to grant consent solely to extract a monetary concession. There is testimony in the record that is contradictory. Mr. Douglas Delano testified that Mrs. Amy Presley told him when they had a meeting about the revisions to the Site Plans and Mr. Gibbs' proposals in February 2008 that she wanted Newland to pay monies directly CTCAC out of the landscape budget so that their principals could be paid back for all of the work they have done for

the community. Mrs. Presley testified that she was making a request at that time for money to go to the HOA so that it could use the monies in the community, and that any other discussion that ensued later about payments of money "migrated" after that conversation. It matters not under the law to whom the money was to be paid. If the monies were demanded and were to be in exchange for an approval of a Site Plan, it is an unlawful request. Also in this case is the fact that CTCAC did not articulate specific reasons why the Gibbs recommendations would have a detrimental impact on the community or the retail core. It is true that a list of deficiencies was provided and was in fact incorporated in my original decision but the list is without explanations of any detrimental effects. That exhibit however pointed out certain items that had been contained in earlier plans and which were no longer shown.

On May 14, 2008 when the arbitration session is conducted the following items are to be submitted for approval, change or substitution if agreed, or revision after my rulings:

The April 2007 plans that have been filed with the Planning Board;

The April 11, 2008 plans which must contain the following changes and additional items: (1) a data table and index Sheets and a legend for "special paving" (2) the 355 connection shown as an aligned intersection (3) the bike path exact location and in sufficient detail so that it can be determined if it is in the stream buffer (4) the Library without change from the April 2007 plans and a restoration of the 3 live/work units (5) precise measurements of the retail depths (6) a removal of the liner townhomes and in their place, the courtyard style homes indicated on the April 2007 plans in the area

behind the grocery store (7) a deletion of any changes not specifically required by the revisions of Mr. Gibbs.

I am making a determination here that CTCAC has withheld its approval of plans submitted to it in an unreasonable manner to the extent that it has refused to approve plans submitted to it for approval that did not have the entire Site Plan shown for all of CTC but Newland is not entitled to the declaratory relief requested to have the April 11 2008 site plans containing the Gibbs recommendations for revision of the Clarksburg Town Center.

The Motion for Reconsideration is granted in part and denied in part consistent with this Ruling. The question for the arbitration hearing on May 12, 2008 is whether or not Site Plans are consistent with the Settlement Agreement. If the parties cannot agree, I will make a determination of what Site Plan is to be submitted consistent with my role assigned under the Settlement Agreement.

1 - - - - - X
2 NNP II - CLARKSBURG LLC, :
3 Claimant, : BEFORE THE
4 v. : HONORABLE
5 CLARKSBURG TOWN CENTER : BARBARA K. HOWE,
6 ADVISORY COMMITTEE, INC., : ARBITRATOR
7 Respondents. :

8 - - - - - X

9 **COMPLETE TRANSCRIPT PREPARED AT THE REQUEST**
10 **OF DLA PIPER**

11 Baltimore, Maryland
12 Wednesday, May 14, 2008

13 Arbitration hearing in the above-entitled
14 matter, taken at the law office of DLA Piper US,
15 LLP, 6225 Smith Avenue, Baltimore, Maryland, at
16 9:23 a.m., Wednesday, May 14, 2008, and the
17 proceedings being taken down by Stenotype and
18 audio tape recording by PAUL A. GASPAROTTI, and
19 transcribed under his direction.

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1 and we're still willing to talk about these
2 various changes to Block 4 and to Block 5 in
3 every conceivable way to make it work for them,
4 Including the 200 spaces on the upper level.

5 The only real objection I heard to our
6 proposal was that we didn't want them to go 30
7 feet into the stream buffer and we were willing
8 to a 10-foot shift, and now they're saying that
9 it's not going to go into the stream buffer, and
10 I guess my reaction to that is well, if they need
11 to go 30 feet and they can get away with it
12 because it's not going to be in the stream
13 buffer, it's not going to be any skin off our
14 noses as long as the regulators go for it.

15 But that's where we are. We're trying
16 to make this thing work. We're not trying to
17 bring this thing to a screeching litigation call,
18 but we are entitled to our deal, which is a
19 parking structure in Block 3.

20 MS. SHILEY: And based on the 2007
21 Torti plan I've looked at the parking spaces

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Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

09:22PM 1 settlement agreement and are specifically adopted
09:28PM 2 as the site plan for the blocks that are shown on
09:29PM 3 those documents. They have been marked as Joint
09:29PM 4 Exhibit 12, which is received into evidence.

09:29PM 5 All right. Now, what do we have left to
09:29PM 6 get through?

09:29PM 7 MR. D. BROWN: Are there some specific
09:29PM 8 objections to those sheets 6 through 9 that she
09:29PM 9 hasn't ruled on yet?

09:29PM 10 MS. PRESLEY: Yes. You're contradicting
09:29PM 11 your own prior ruling because there's no bike
09:29PM 12 path shown on --

09:29PM 13 ARBITRATOR HOWE: Well, wait, let me
09:29PM 14 amend what I've said, because I've indicated on
09:29PM 15 every single document where the bike path is
09:29PM 16 shown and it's not shown adjacent to Overlook
09:29PM 17 Park Drive, it must be drawn as it is shown
09:29PM 18 adjacent to Overlook Park Drive. I already made
09:29PM 19 that ruling and made it with respect to every
09:29PM 20 sheet that goes in.

09:29PM 21 MS. PRESLEY: You also made a ruling

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1 around Block 3 and there's over 70 of them there,
2 with the Overlook Park parallel parking along
3 that side.

4 ARBITRATOR HOWE: Okay. So it's 254 in
5 the parking structure and --

6 MS. SHILEY: The drawing of May 14, 2008
7 has no structure in Block 3. It has surface
8 parking, one level.

9 MR. FISCHER: Your Honor, one point
10 (inaudible) is that the planning board did
11 provide for two or three levels of parking in
12 Block 5 that we did provide.

13 ARBITRATOR HOWE: Yes, I know.

14 MR. D. BROWN: Not a problem.

15 ARBITRATOR HOWE: This is how I'm going
16 to rule.

17 (Stenotype resumed.)

09:29PM 18 ARBITRATOR HOWE: We have on the table
09:29PM 19 the May 14th, 2008 plans which are sheets WS-6,
09:29PM 20 7, 8 and 9, and my ruling is that those sheets as
09:29PM 21 currently drawn are consistent with the

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Baltimore, Maryland

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09:29PM 1 prior and you did not change that either in your
09:29PM 2 reconsideration about the depth of store fronts.

09:29PM 3 ARBITRATOR HOWE: I've been told that
09:29PM 4 they're 60 feet.

09:29PM 5 MS. SHILEY: They're not. They're less
09:29PM 6 than 40, they're 42 feet. It will kill the
09:29PM 7 retail,

09:29PM 8 ARBITRATOR HOWE: Stop, stop, stop. The
09:29PM 9 settlement agreement only requires a 60-foot
09:29PM 10 depth along General Store Drive, that's where the
09:29PM 11 requirement is. This plan is consistent with
09:29PM 12 that.

09:29PM 13 MS. SHILEY: Because the Torti plan on
09:29PM 14 that drawing and the talk and everything during
09:29PM 15 that time was everything else would be no less
09:29PM 16 than 50 feet. You're going to kill the retail
09:29PM 17 because as the retailers will tell you, 40 feet
09:29PM 18 is, you're going to kill what can be put in
09:29PM 19 place.

09:29PM 20 MS. PRESLEY: John Eisen said that, had
09:29PM 21 we been able to get him to testify --

CRC-Salomon

Baltimore, Maryland

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IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY MARYLAND

Clarksburg Town Center Advisory Committee, Inc. :
c/o Amy Presley, President :
23506 Sugar View Drive :
Clarksburg, Maryland 20871 :

Petitioner,

v.

Civil Action No. 03-C:08:5371

NNPII-Clarksburg, LLC
160 Greentree Drive
Suite 101
Dover, Delaware 21201

Registered Agent:
National Registered Agents, Inc. of Md.
Second Floor
826 Park Avenue
Baltimore, Maryland 21201

Respondent.

AMENDED PETITION TO VACATE ARBITRATION AWARDS

Clarksburg Town Center Advisory Committee, Inc., through undersigned counsel,
files this Amended Petition to Vacate Arbitration Awards and alleges as follows:

NATURE OF THE CASE

1. This Petition is filed under the Maryland Uniform Arbitration Act, Courts and Judicial Proc. Art., § 3-201 *et seq.*, Md. Code Ann. ("Act"), to vacate an interim and a final arbitration award. Vacatur of the interim award is sought on the grounds it was an improper reconsideration of the merits of an earlier interim award. Vacatur of the final award is sought on the grounds, *inter alia*, that it was tainted by, and the product of, the challenged interim award.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to Courts and Judicial Proc. Art. § 1-501 and §§ 3-202, 3-208 and 3-224 of the Act. Venue is proper in this Court pursuant to § 6-201(a), Courts and Judicial Proc. Art. and §§ 3-203(b)(2) and 3-208(b)(2) of the Act, in that the respondent carries on a regular business in, or has a place of business in, Montgomery County.

PARTIES

3. Petitioner is the Clarksburg Town Center Advisory Committee, Inc. ("CTCAC"), a Maryland non-stock corporation in good standing. CTCAC was formed and is operated by a group of Montgomery County homeowners who reside in Clarksburg, Maryland. For the past several years, CTCAC has had a special, unique role, described more particularly below, in the regulatory approval process at the Montgomery County Planning Board ("Board") for plans to complete the Clarksburg Town Center Project by its developer, respondent NNPII-Clarksburg, LLC.

4. Respondent NNPII-Clarksburg, LLC is a Delaware limited liability company with its principal office in Dover, Delaware. Respondent is owned or controlled by Newland Communities, Inc., a real estate development corporation headquartered in San Diego, California that develops residential properties in many parts of the United States. Hereafter, respondent is referred to as "Newland."

BACKGROUND FACTS

5. In 2004, CTCAC members, recent purchasers of homes in the developing Clarksburg Town Center Project ("CTC"), began investigating the process that led to Board approval of site plans for Newland and its predecessor in interest. These site plans

allowed Newland and its predecessor to develop and sell to various builders residential lots in CTC for development. By mid-2005, over 700 homes in CTC had been built and sold to individuals, including CTCAC members, under these plans. Left to be built and sold were another 500 or so residences and the retail/commercial area they surround.

6. The CTCAC investigation led to charges filed by CTCAC with the Board, alleging widespread unapproved changes between approved site plans and what was actually built, in terms of unit types, locations and configurations. CTCAC also brought to the Board's attention hundreds of violations of height and setback limits in already constructed and sold homes. Also documented were failures to provide amenities and moderately priced dwellings on schedule, shortfalls in green space, as well as many other violations. Adjudication of these claims by the Board in the second half of 2005 led to orders to stop work in CTC, followed by Board-approved or staff-recommended fines amounting to several million dollars, an unprecedented amount in Board history, even as more alleged violations remained to be adjudicated.

7. These events were the subject of intense public interest and prompted a number of reactions by the County Council and the Planning Board. New site plan projects were temporarily suspended; existing site plan developments were investigated for compliance with site plan requirements; and there were extensive efforts at reformation of existing site plan approval and enforcement procedures. Equally significantly, the prolonged CTC adjudications before the Board, as well as the Board's own inward examination of its plan approval process, and the concerns of elected officials and the public about the integrity and thoroughness of that process, all had slowed the Board's development approval "pipeline" nearly to a halt by November 2005.

8. Under intense pressure from the Council and other affected parties, CTCAC agreed in December 2005 to halt its pursuit of violation adjudications in favor of participation in mediation, in which CTCAC would act as a representative of the public to bring closure to the investigative process with negotiated, forward-looking remedies that would allow construction of the CTC to resume. The immediate effect was to remove the CTC site plan violation proceedings from the Board's docket and lessen the flow of adverse publicity that had rained down on public officials and the development community.

9. The mediation began in January 2006, under the supervision of agreed-upon mediator the Honorable Barbara Kerr Howe, who serves on the Baltimore County Circuit Court. The participants understood that for the mediation to be successful, the results of mediation would have to ameliorate the violations with changes to the previously approved plans. They also envisioned that the violation hearing process would be replaced with a settlement that would be submitted to the Board for approval, such that development of the CTC could be restarted under the revised plans.

10. The mediation took place over many days during January – April 2006, and concluded on April 6, 2006 with a Settlement Agreement, signed by CTCAC, Newland and the CTC builders. The mediation took place entirely in Montgomery County, as did the drafting and execution of the Settlement Agreement arising from the mediation.

11. The Settlement Agreement is lengthy and detailed. Its principal focus is on descriptions, in words and exhibits, of how then-unbuilt areas of CTC would be completed. A particular concern of CTCAC was ensuring that the unbuilt

retail/commercial area would be superior in design, configuration and functionality to the one that had been previously planned by Newland. With the assistance of world-renown planners and architects, consulting for Newland and CTCAC alike, detailed terms of a drastically reconfigured retail core, with mixed retail/residential use, were agreed to. Much time and attention was devoted to addressing Newland's concerns about cost and marketability of the plan ultimately agreed to. Market factors, however, are not mentioned in the Settlement Agreement as a basis for modification of plans for the unbuilt retail core area.

12. The Settlement Agreement expressly contemplated translation of its agreed terms into a "Plan of Compliance," to be presented to the Board for approval as the product of the mediation. Newland, with the advice and consent of CTCAC, presented the Plan of Compliance to the Board in May 2006 and the Board approved it the following month, with minor modifications that were not of significant concern to any party. As expressly contemplated in the Settlement Agreement, the Board's approval included exoneration of all existing or potential liability for Newland or its builders, in relation to financial responsibility for site plan violations or Board fines, either adjudicated, unadjudicated, or that could be adjudicated.

13. Since that time, the parties to the Settlement Agreement have been working to implement the Plan of Compliance. Pursuant to the Settlement Agreement, Newland was thereafter obliged to seek CTCAC approval of site plans and related documents implementing the Plan of Compliance. That process, though underway for a lengthy period, is not yet completed.

14. The Settlement Agreement has multiple parts, one of which is the "Business Points." In relevant part, paragraph 11 of the Business Points reads as follows:

If any dispute shall arise between any of the parties to this agreement regarding whether the project plan, site plan, the Bozzuto Site Plan Amendment or other application for regulatory approval is consistent with this Settlement Agreement or any other matter, the dispute shall be subject to binding arbitration before the Honorable Barbara K. Howe. A party seeking to arbitrate a dispute before Judge Howe shall invoke arbitration by sending written notice to the Judge and all other parties. Judge Howe shall decide the proceedings to be followed to resolve the dispute. All parties shall have the right to submit matters in writing and present oral argument prior to Judge Howe rendering a decision. Furthermore, all other disputes that arise out of this Settlement Agreement shall be subject to binding arbitration before Judge Howe. The parties to any such arbitration shall be responsible for their own attorneys' fees and the costs and expenses of all other professionals and consultants. If Judge Howe is not available for any reason, Judge Howard Chasanow shall serve as the arbitrator.

15. Since the execution of the Settlement Agreement, arbitration thereunder has been invoked numerous times. In connection with these proceedings, both CTCAC and Newland have claimed that the arbitrations are governed by the Act and have proceeded accordingly. Judge Howe has been the arbitrator in all instances. Judge Howe has never expressed any disagreement with the parties' claims that their arbitrations pursuant to the Settlement Agreement are governed by the Act.

PETITION TO VACATE INTERIM ARBITRATION AWARD

16. Petitioner repeats and realleges, as if set forth herein in full, paragraphs 1-15 of this Petition.

17. On April 14, 2008, Newland invoked arbitration on six claims under the Settlement Agreement. On April 21, 2008, Judge Howe conducted arbitration on three of those claims, delineated by Newland as follows:

- (1) A claim for a declaratory ruling that revisions to the Clarksburg Town Center ("CTC") retail center shown on the amended site plans provided to [CTCAC] on April 11, 2008 are consistent with the Settlement Agreement because the plans, as revised, are as close in scope and configuration to the concept plan in the Settlement Agreement as can be achieved, given the requirements of potential commercial tenants of the center;
- (2) An alternative claim that, if the Arbitrator rules that the revised plans are inconsistent with the Settlement Agreement, the Settlement Agreement is impossible of performance and must therefore be rescinded because the precise form and configuration of the retail center in the Settlement Agreement cannot be developed or leased for the designated retail uses;
- (3) An alternative claim that, if the Arbitrator rules that the revised plans for the retail center are inconsistent with the Settlement Agreement, the Settlement Agreement was the product of mutual mistake of fact and must therefore be rescinded, because the precise form and configuration of the retail center in the Settlement Agreement cannot be developed or leased for the designated retail uses....

18. As part of the April 21st arbitration, both Newland and CTCAC submitted detailed legal memoranda outlining their respective positions on these arbitration issues. The hearing on the arbitration, which included sworn, transcribed witness testimony, took place over the period from 8:30 a.m. to past midnight on that date.

19. The crux of the arbitration was whether Newland could submit for a scheduled final arbitration on May 14, 2008 new plans -- the April 11, 2008 plans

referenced in claim (1) – even though the new plans were materially different from what was agreed to in the Settlement Agreement. Newland sought approval to rely on the new plans in the May 14th arbitration, based on a claim that existing marketplace factors made the mediated plan economically or practically infeasible, and a claim that it had made only the minimum needed changes to the earlier plans. CTCAC's position was that plans Newland provisionally submitted to the Board in April 2007 should be the focus of the May 14th arbitration because Newland had no right to submit plans that constituted a material change to the terms of the Settlement Agreement.

20. On April 29, 2008, the Arbitrator issued her Decision, a 9-page document that made findings of fact and conclusions of law. The Decision, attached as Exhibit 1, ruled conclusively and finally on all three of the foregoing Newland claims. The Decision rejected all three claims. On Newland claim (1), the Decision agreed with the position of CTCAC in the arbitration. Also in conformance with CTCAC's position, the Decision required Newland to submit for the May 14th arbitration site plans that were consistent with what the parties agreed to in mediation.

21. Following issuance of the Decision, on May 2, 2008, Newland filed a detailed written motion for reconsideration, attached as Exhibit 2. The motion requested a changed decision as to Newland claim (1) only. Restating legal arguments made in its pre-hearing memorandum and during the arbitration itself, Newland claimed that the existing record and the applicable legal standards justified its reliance on the April 11, 2008 plans as consistent with the Settlement Agreement.

22. CTCAC filed a written opposition to the motion on May 5, 2008, attached as Exhibit 3, claiming that it contained no new facts, evidence or argument warranting

any change in the Decision. Newland reiterated its claims in a Reply Memorandum filed on May 6, 2008, attached as Exhibit 4.

23. On May 9, 2008, the Arbitrator issued a decision on the Newland motion for reconsideration, denominated "Ruling," attached as Exhibit 5. The Ruling granted in part Newland's motion for reconsideration. The Ruling revisited the merits of matters ruled upon in the Decision and effectively reversed the earlier Decision in part, by ordering that, with some specified changes, the April 11th 2008 site plans could be considered further in subsequent arbitration scheduled for May 14, 2008. The Arbitrator also left on the arbitration table for May 14th the plans submitted to the Board in 2007, so that now two sets of plans are within the purview of the forthcoming arbitration – the April 2007 plans and the April 2008 plans.

24. On May 9, 2008, CTCAC filed with the Arbitrator a "Motion to Vacate Reconsideration Ruling." The Motion, attached as Exhibit 6, detailed why the Ruling was lacking in merit, both procedurally and substantively. The gravamen of the Motion, however, was that the Arbitrator, under the *functus officio* doctrine, as well as the Act, had no authority to modify or correct the Decision by revisiting the merits. Respondent Newland filed an opposition to the Motion on May 12, 2008, attached as Exhibit 7. CTCAC filed a brief reply shortly thereafter, attached as Exhibit 8.

25. On May 12, 2008, the Arbitrator issued a ruling declining to change her Ruling of May 9, 2008. The May 12th ruling, attached as Exhibit 9, also requires that the arbitration previously scheduled for May 14th is to go forward on the basis of the May 9th Ruling, i.e., on two sets of plans – the April 2007 plans and the April 2008 plans.

26. Under § 3-222 (c) of the Act, the Arbitrator may modify or correct an award only in the extremely limited circumstances therein described. These include clarification of the award [(c)(2)] or to correct an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award [(c)(1), referencing § 3-223 (b)(1)]. In addition, so long as it does not affect the merits of the decision upon the issues submitted, the Arbitrator may correct an award on a matter not submitted for arbitration or an imperfection in a matter of form [(c)(1), referencing § 3-223 (b)(2),(3)].

27. In addition, under Maryland law, which has adopted the doctrine of *functus officio* in relation to arbitration awards, an arbitrator may not revisit the merits of an award after it has been issued.

28. The Ruling issued by the Arbitrator violates the doctrine of *functus officio*. The Ruling revisits the merits of the Decision after it was issued. There is no exception to the doctrine of *functus officio* that is applicable to the reconsideration request or the Ruling, including, but not limited to, (a) correction of a mistake of the face of the award; (b) incompleteness of the award; or (c) clarification of an ambiguity about completeness of the award.

29. The Ruling issued by the Arbitrator violates § 3-222 (c) of the Act and the doctrine of *functus officio*. The Ruling does not clarify, and does not purport to be a clarification of, the Decision. The Ruling does not correct, or purport to correct, an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award. The Ruling does not correct, or purport to correct, the Decision on account of its making an award on a matter not submitted to

arbitration. The Ruling does not correct, or purport to correct, an imperfection in a matter of form not affecting the merits of the controversy.

30. The Ruling was sought by respondent, who opposed petitioner's motion to vacate the Ruling. Accordingly, there exists a live, ongoing controversy between the parties as to the validity of the Ruling that is ripe for adjudication by the Court. The Arbitrator is not a necessary party for such adjudication.

PETITION TO VACATE FINAL ARBITRATION AWARD

31. Petitioner repeats and alleges, as if set forth herein in full, paragraphs 1-30 of this Petition.

32. Petitioner, as ancillary relief in this action, sought a stay of the final arbitration hearing scheduled for May 14, 2008. On May 13, 2008, Judge Levitz, serving as Chambers Judge, denied the stay on the grounds that "this is not a matter that the chamber Judge could intelligently rule upon."

33. Accordingly, the unstayed final arbitration took place on May 14, 2008, extending into the early morning hours of May 15, 2008.

34. The final arbitration award consisted of a series of rulings on development plans submitted by Newland in accordance with the Arbitrator's May 9, 2008 Ruling. A copy of the transcript record of the rulings constituting the final award has been filed in this action by Newland in support of its Counterclaim for Confirmation of Arbitration Award.

35. At the outset of the May 14-15, 2008 arbitration, petitioners moved for postponement of the arbitration, and the Arbitrator denied the motion. The grounds for postponement included the following:

a. Arbitration was premature because Newland could not demand arbitration regarding plans it had not given CTCAC an opportunity to review prior to commencement of the arbitration, and a brief recess of the arbitration for such review was improper and inadequate;

b. The Arbitrator lacked jurisdiction to arbitrate plans that had been excluded from arbitration by the Arbitrator's April 29, 2008 Decision, only to be improperly revived in her May 9, 2008 Ruling, as recounted in the Motion to Stay Arbitration filed in this Action;

c. CTCAC had not had adequate time to review and respond to plans for which Newland sought the Arbitrator's approval, in violation of petitioner's due process rights under the Act;

d. There was no agreement to arbitrate the plans before the Arbitrator, because the agreement to arbitrate did not extend to plans materially different from what the Plan of Compliance required; and

e. There should be no rulings on the plans revived by the May 9, 2008 Ruling until the legal challenge to that Ruling was resolved, given the potential for the Ruling to infect the Arbitrator's final decision on the revived plans.

36. Following denial of postponement, petitioner moved for recusal of the Arbitrator under §3-224(b)(2) of the Act, on the basis of evident partiality and misconduct prejudicing petitioner's rights. Ten grounds for recusal were stated, and recusal was denied. The recusal grounds may be summarized as follows:

a. Notes. The Arbitrator conducted arbitrations without reference to, or allowing CTCAC reference to, her "copious notes" from the mediation, which she

represented, would be available to clear up any questions or uncertainty about what the developer and builders had committed to. This commitment was the major inducement to CTCAC to sign a settlement agreement that was not made as specific in several areas as CTCAC entreated the mediator/arbitrator to make it. Its repudiation undermines the validity of what was agreed to.

b. Arbitration Timing. The Arbitrator expressed concern, and took actions in fulfillment of that concern, regarding completion of arbitration in relation to the developer's off/on desire for meeting certain time goals for submission of plans to the Planning Board. Arbitration timing is a concern between the parties, not one for the Arbitrator to wield against one party in favor of the other, unless there is evidence of unreasonable delay in responding, and there is no such evidence.

c. Concern About Finances. Even while decisions at the conclusion of an arbitration were pending, the Arbitrator expressed concern to CTCAC that the developer was losing \$30 million on the CTC Project. Whether this "fact" is true or not, and CTCAC believes it to be wildly overblown, it has no place in the arbitration process, even subliminally in the mind of the Arbitrator.

d. Raising Issues Sua Sponte. The May 9, 2008 Ruling suddenly found a lack of clarity in the Settlement Agreement regarding how many levels of parking were called for in the Block 3 parking structure. Neither side had claimed lack of clarity was a problem: there was no question two structured levels were called for. The only question was whether it was acceptable to change the requirement to one level surface parking.

e. Venue of Arbitration Hearings. The proper county for arbitration hearings was the county where the parties reside and/or do business, and where the locus of the dispute and the land are: Montgomery County. Yet hearings were repeatedly held in Baltimore County, over CTCAC's objections as to inconvenience. The only convenience was to the Arbitrator and the other side's lead arbitration attorney. This imposition required CTCAC to file its judicial challenge to the May 9, 2008 Ruling in Baltimore County, just because the Arbitrator insisted on a close-to-home place for arbitration.

f. Inappropriate Interjection of Views Into Dispute Resolution Process. Arbitration is supposed to be a voluntary submission of a dispute to a binding decisional authority. It is not a process where either side surrenders its judgment to the neutral to propose a different decision neither side proposed. Newland sought to arbitrate an April 2008 plan instead of the submitted April 2007 plan, as finalized. After that effort was thwarted by the arbitration Decision of April 29, 2008, the Arbitrator responded to a request to reconsider her Decision with her May 9, 2008 Ruling that a third plan be brought to the arbitration table – the April 2008 plan with arbitrator-designated changes. This action sent a clear signal to the parties as to what the Arbitrator would regard as an appropriate settlement paradigm. That may be an appropriate role for a settlement judge, or a mediator, but it was improper for the Arbitrator.

g. Deprivation of Due Process. With *ad hoc*, undisclosed rules, some arbitrations have proceeded informally, with all parties participating. Others proceeded on a question/answer format with only CTCAC's counsel allowed to ask questions, even

over the clients' strong protest and CTCAC counsel's request for help from his client, based on the plea that he needed that help.

h. Denial of Postponements. CTCAC requests for postponements were routinely denied, despite acknowledged lack of submission materials from Newland, and obvious lack of adequate preparation time, typically out of improper concern for external timetables. Those concerns also precipitated unreasonably long hearing days, the most recent example at that time being April 21, 2008, which ran 16 hours, from 8:30 a.m. to past midnight, and past the time CTCAC could present a meaningful opposition case with witnesses. The hearing date was "preserved" by the extraordinary Arbitrator action of post-midnight delivery to CTCAC of materials that Newland failed to furnish in advance of the hearing.

i. Refusal to Hear Evidence. CTCAC sought to subpoena the Montgomery County Planning Board staff director of development review to provide material, relevant evidence, and the Arbitrator denied issuance of a subpoena for her.

37. After denial of CTCAC's preliminary motions, the Arbitrator proceeded to consider the plans submitted by Newland for CTC. The hearing commenced at 9:23 a.m. and concluded at 1:44 a.m. on May 15, 2008. There was no dinner break.

38. After the arbitration had been ongoing for over nine hours, the next plans scheduled to be reviewed were those CTCAC had never seen before. CTCAC moved for an adjournment of the proceedings at that point. The Arbitrator denied the motion. Instead, she granted a 40-minute recess to review the new plans, in the expectation that any objections CTCAC had to the new plans could be presented in the arbitration immediately thereafter.

39. The 40-minute recess did not provide CTCAC any, let alone adequate, opportunity to consult with the land planners and other experts that had been assisting CTCAC since January 2006 – the outset of the mediation that led to the Settlement Agreement. Nor did the recess provide CTCAC adequate opportunity to use its own, more limited skill and experience at deciphering engineered plans, so as to present an informed critique of the new plans.

40. Despite the oppressive circumstances, CTCAC presented the Arbitrator with numerous objections to the newly seen plans after the recess.

41. Before deciding whether to accept or reject the new plans, i.e., the Arbitrator's sole function in relation to the plans, the Arbitrator instead took on the role of mediator, effectively forcing CTCAC to present for Newland's consideration an offer detailing plan changes it would accept and those it would not accept, as a proposed consensus substitute for a ruling on the new plans from the Arbitrator. CTCAC felt obliged to make such an offer, which was briefly considered by Newland and rejected. Immediately thereafter, the Arbitrator overruled CTCAC objections to the newly submitted plans and approved them.

42. The plan review and approval process continued on into the evening, concluding at 12:45 a.m. on May 15, 2008. At that point, CTCAC was obliged to present on its list of arbitration issues, knowing that any adjournment request would be denied.

43. CTCAC presented five instances of violation of the Settlement Agreement by Newland. In each case, the Arbitrator evaded or ignored CTCAC's request for a ruling that Newland had violated the Settlement Agreement. There was therefore no definitive resolution on any of CTCAC's claims.

44. A copy of the final arbitration award of May 15, 2008, consisting of a partial transcript of the arbitration proceedings, was delivered to petitioner on May 17, 2008, ("Final Award").

45. The Final Award violates the Act and is subject to vacatur under §3-224(b) of the Act on numerous grounds.

46. The Final Award should be vacated because it was the product of evident partiality by the Arbitrator, as set forth in §3-224(b)(2) of the Act.

47. The Final Award should be vacated because it was the product of misconduct by the Arbitrator, prejudicing the rights of CTCAC, a party to the arbitration, as set forth in §3-224(b)(2) of the Act.

48. The Final Award should be vacated because the Arbitrator exceeded her powers in numerous ways detailed above, as set forth in §3-224(b)(3) of the Act. These reasons include, but are not limited to, the fact that the Final Award was tainted by, and was in part the product of, the May 9, 2008 Ruling, issued in violation of the Act and the *functus officio* doctrine, as set forth in paragraph 28-29 above.

49. The Final Award should be vacated (a) because the Arbitrator refused to postpone the hearing at the outset despite sufficient cause being shown for the postponement, and (b) because the Arbitrator unreasonably refused to adjourn the hearing after nine hours of hearing, as set forth in §3-224(b)(4) of the Act.

50. The Final Award should be vacated because there was no agreement to arbitrate a number of the plans that were arbitrated over petitioner's objections, as set forth in §3-224(b)(5) of the Act.

WHEREFORE, petitioner prays that:

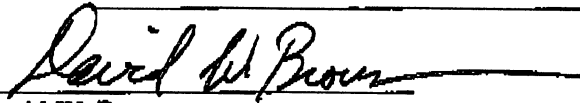
1. The Court enter judgment in favor of petitioner vacating the May 9, 2008 Ruling by the Arbitrator, Exhibit 5; and declaring the Ruling invalid and of no force or effect; and declaring that the April 29, 2008 Decision by the Arbitrator, Exhibit 1, is valid and in full force and effect;

2. The Court enter judgment in favor of petitioner vacating the May 15, 2008 Final Award and declaring the Final Award invalid and of no force or effect;

3. The Court grant petitioner the costs of suit; and

4. The Court grant such other, further or different relief as the case may require and that the Court may deem just and proper under the circumstances.

Respectfully submitted,



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Attorneys for Petitioner

June 12, 2008

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

CLARKSBURG TOWN CENTER
ADVISORY COMMITTEE, INC.

Petitioner / Counter-Respondent

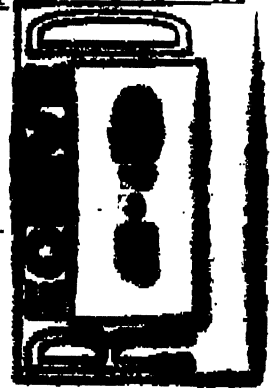
v.

NNP II – CLARKSBURG, LLC

Respondent / Counter-Petitioner

Civil Action No.

03-C-08-5371



**ANSWER TO PETITION TO VACATE
ARBITRATION AWARD AND COUNTERCLAIM
FOR CONFIRMATION OF ARBITRATION AWARD**

NNP II – Clarksburg LLC (“Newland”), pursuant to §§ 3-224 and 3-227 of the Courts & Judicial Proceedings Article of the Annotated Code of Maryland and Maryland Rules 15-101, 2-232 and 2-331, hereby (1) answers the Petition to Vacate Arbitration Award (the “Petition to Vacate”) filed by Clarksburg Town Center Advisory Committee, Inc. (“CTCAC”), and (2) petitions this Court for an order confirming the May 15, 2008 final Arbitration Award issued by the Honorable Barbara K. Howe, Arbitrator. In support of its answer and petition, Newland states:

ANSWER TO PETITION TO VACATE

1. The averments in ¶ 1 constitute legal conclusions to which no answer is required.
2. Newland admits that this Court has jurisdiction over this action under §§ 3-202, 3-224, and 3-227 of the Courts & Judicial Proceedings Article and that venue is proper in this Court under § 3-203 of the Courts & Judicial Proceedings Article.

3. Newland is without knowledge of information to form a belief as to the truth of the averments in the first sentence of this paragraph. Newland admits the averments in the second sentence and denies those in the third sentence of this paragraph.

4. Newland admits that it is a Delaware limited liability company with its principal place of business in San Diego, California. Newland denies the averments in the second sentence and admits those in the third sentence of this paragraph.

5. Admits.

6. Newland admits that the Montgomery County Planning Board ("Planning Board") found limited site plan violations in the Clarksburg Town Center ("CTC") and that limited stop work orders were imposed. Newland denies the remaining averments in this paragraph.

7. Newland admits that site plan violations in the CTC received publicity and denies the remaining averments in this paragraph.

8. Newland admits that the parties agreed to mediation before Judge Howe and is without sufficient knowledge or information to form a belief as to the truth of the remaining averments in this paragraph.

9. Newland admits that mediation before Judge Howe began in January 2006 and that the parties sought to reach a settlement agreement regarding alleged site plan violations. Newland is without sufficient knowledge or information to form a belief as to the truth of the remaining averments in this paragraph.

10. Newland admits that the mediation took place during January through April 2006 and concluded on April 6, 2006 with a comprehensive settlement agreement. Newland admits that the mediation took place in Montgomery County and that the execution of the settlement agreement took place in Montgomery County. Newland

denies the remaining averments in this paragraph.

11. Newland admits that the parties executed an April 6, 2006 comprehensive settlement agreement ("Settlement Agreement") and submits that the document speaks for itself. A copy of the Settlement Agreement is attached as Exhibit A.

12. Newland admits that the Planning Board approved a Program of Compliance for the CTC and submits that the program speaks for itself. A copy of the Program of Compliance is attached as Exhibit B.

13. In response to the averments in the first sentence of this paragraph, Newland admits that the parties to the Settlement Agreement worked to implement the Program of Compliance. In response to the averments second sentence of this paragraph, Newland submits that the Settlement Agreement speaks for itself. Newland admits the averments in the third sentence of this paragraph.

14. Admits.

15. Admits.

16. Admits.

17. Admits.

18. Denies.

19. Newland admits that the Arbitrator issued an April 29, 2008 interlocutory decision which is attached as Exhibit 1 to the Petition to Vacate and submits that the document speaks for itself. Newland denies the remaining averments in this paragraph.

20. Newland admits that it filed a Motion for Reconsideration which is attached as Exhibit 2 to the Petition to Vacate and submits that the document speaks for itself. Newland denies the remaining averments in this paragraph.

21. Newland admits that CTCAC filed an Opposition to Motion for Reconsideration and that Newland filed a Reply Memorandum which are attached to the Petition to Vacate as Exhibits 3 and 4, respectively. Newland submits that these documents speak for themselves.

22. Newland admits that on May 9, 2008, the Arbitrator issued a further interlocutory decision in which she clarified certain matters stated in her April 29, 2008 opinion and addressed additional issues not addressed in the earlier opinion. Newland admits that the Arbitrator's May 9, 2008 Ruling is attached to the Petition to Vacate as Exhibit 5 and submits that the document speaks for itself. The Arbitrator issued a final Decision on May 15, 2008.

23. Newland admits that CTCAC filed a Motion to Vacate Reconsideration Ruling, Newland filed an opposition to that motion, and CTCAC filed a reply memorandum which are attached to the Petition to Vacate as Exhibits 6, 7, and 8, respectively. Newland submits that these documents speak for themselves.

24. Newland admits that on May 12, 2008, the Arbitrator denied CTCAC's Motion to Vacate the Arbitrator's Ruling of May 9, 2008. A copy of the May 12, 2008 Order is attached to the Petition to Vacate as Exhibit 9. Newland submits that the document speaks for itself.

25. Newland repeats and realleges, as if fully set forth herein, its responses to paragraphs 1 through 24 of the petition.

26. This paragraph sets forth legal conclusions to which no answer is required.

27. This paragraph sets forth legal conclusions to which no answer is required.

28. Denies.

29. Denies

30. Admits.

DEFENSES

1. Waiver.
2. Estoppel.
3. The Petition to Vacate fails to state a claim upon which relief can be granted.
4. The Petition to Vacate is without merit, as a matter of law, because CTCAC fails to challenge the final Arbitration Award issued on May 15, 2008.

COUNTERCLAIM FOR CONFIRMATION OF ARBITRATION AWARD

1. On May 15, 2008, Judge Howe issued a final Arbitration Award, pursuant to § 11 of the Business Points of the Settlement Agreement, approving a project plan and site plans to be submitted to the Planning Board to implement the Program of Compliance previously approved by the Planning Board. A copy of the Settlement Agreement is attached hereto as Exhibit A. Prior to issuance of the final Arbitration Award on May 15, 2008, Judge Howe issued numerous interlocutory rulings relating to the contents of the project plan, site plans, and the completion of the landscaping enhancement process set forth in § 15 of the Development Terms of the Settlement Agreement. The landscaping process determined the landscaping features that would be shown on the site plans submitted to the Planning Board. A copy of the complete Record of Arbitration Proceedings has been filed contemporaneously with this Answer to Petition to Vacate Arbitration Award and Counterclaim for Confirmation of Arbitration Award.

2. The arbitration proceedings before Judge Howe were authorized by § 11 of the Business Points of the Settlement Agreement and were governed by the Maryland Uniform Arbitration Act, §§ 3-201 – 3-234 of the Courts & Judicial Proceedings Article.

3. The final Arbitration Award and interlocutory rulings of Judge Howe, as Arbitrator, were entirely lawful and within her jurisdiction as Arbitrator.

4. There is no basis in law or fact for the vacation or modification of the Arbitration Award.

WHEREFORE, Newland requests this Honorable Court to issue an Order:

A. Confirming the May 15, 2008 final Arbitration Award, and other interlocutory rulings of the Arbitrator, pursuant to § 3-227 of the Courts & Judicial Proceedings Article;

B. Denying the Petition to Vacate Arbitration Award filed by CTCAC; and

C. Granting such further relief to Newland as may be just and necessary, including the payment of Newland's reasonable costs, including attorneys' fees.

Respectfully submitted,

Kurt J. Fischer

Kurt J. Fischer

Melissa L. Mackiewicz

DLA PIPER US LLP
6225 Smith Avenue
Baltimore, Maryland 21209-3600
(410) 580-3000
(410) 580-3001 facsimile

Counsel for NNP II – Clarksburg LLC

To: kurt.fischer@dlapiper.com
From: "David W. Brown" <brown@knopf-brown.com>
Subject: DRC Comments Binder
Cc: skaufman@linowes-law.com, bkhowe@verizon.net, bkhowe@blackberry.net,
lfantle@aol.com, Shileykim@aol.com, timdearros@comcast.net
Bcc:
Attached:

Kurt and Judge Howe:

I today received a large binder from Steve and Todd with many drawings and exhibits, accompanied by an 8-page single, spaced letter to Rose Krasnow. This was Newland's response to the DRC Comments, submitted to Rose last Friday. As you know, CTCAC was not consulted before this submittal on its particulars, and I am seeing all of this for the first time today. The same is true for my client. Recently, Kurt suggested to me that there was nothing left for CTCAC to do at this point other than voice its support before the Board on the plans Judge Howe approved on May 14th, thereby seeming to imply that if CTCAC responded in any way to this submission (other than unqualified endorsement of everything done or said by Newland) CTCAC would be in violation of the Settlement Agreement and subject to legal reprisal from Newland if the May 14th plans were not approved by the Board.

CTCAC has no intention of violating the Settlement Agreement, and therefore needs to know whether it is Newland's position that anything other than silence or unqualified approval by CTCAC to last Friday's submission to Rose Krasnow would violate the Settlement Agreement. If that is not Newland's position, then CTCAC needs to know, in light of there having been no consultation with CTCAC prior to submittal, precisely what constraints Newland believes the Settlement Agreement imposes on a responsive submission by CTCAC. If there is agreement on this point, there will be no need for arbitration on this matter, and CTCAC would like to resolve it without invoking arbitration.

Dave Brown

X-Spam-Flag: NO
X-Envelope-From: kurt.fischer@dlapiper.com
X-IronPort-AV: E=McAfee;i="5100,188,5379"; a="10055133"
Subject: RE: DRC Comments Binder
Date: Tue, 9 Sep 2008 14:05:52 -0400
X-MS-Has-Attach:
X-MS-TNEF-Correlator:
Thread-Topic: DRC Comments Binder
Thread-Index: AckR3PS74VTQvZ3BRP+/eZ1gUrdLPAAxS2+A
From: "Fischer, Kurt" <kurt.fischer@dlapiper.com>
To: "David W. Brown" <brown@knopf-brown.com>
Cc: <skaufman@linowes-law.com>, <bkhowe@verizon.net>, <bkhowe@blackberry.net>, <bkhowe@bellatlantic.net>
X-OriginalArrivalTime: 09 Sep 2008 18:05:53.0708 (UTC) FILETIME=[B3329EC0:01C912A6]
X-MMR: 0
X-MIME-Autoconverted: from quoted-printable to 8bit by mail365c25.carrierzone.com id m89f5tXl005006
X-Antivirus: Scanned by F-Prot Antivirus (<http://www.f-prot.com>)

Dave, I have a conference call scheduled for this afternoon with the Newland folks to discuss your analysis of the status of the landscaping issue.

As I have indicated to you in the past, I am very concerned that CTCAC has been violating the Settlement Agreement and Judge Howe's explicit direction to you and Steve Kaufman by opposing the site plans approved by Judge Howe in conversations with the staff and with third parties. I have personal knowledge of Kim Shiley vociferously opposing the plans in a conversation with two residents at the residents' meeting that I attended in Clarksburg. This action by Ms. Shiley may be the tip of the iceberg in light of your argument to Judge Howe that CTCAC has a right to oppose the plans as a result of, among other things, the pending petition to vacate arbitration award.

From Newland's perspective, an arbitration proceeding on the question whether CTCAC has violated the Settlement Agreement by such conduct is not ripe until the Planning Board acts on the plans approved by Judge Howe. If the Board approves the plans, this matter will be at an end. If, however, the Board does not approve the plans, CTCAC's conduct will be in issue. Newland has expressly reserved all rights and remedies in this event. Certainly, Newland's rights would include taking prehearing discovery from third parties on CTCAC's conduct.

In my view, CTCAC should have no communications with staff other than to support the plans as approved by Judge Howe. If I were a CTCAC official, I would not want to hold any such conversations unless a Newland representative were present.

Kurt J Fischer
Partner

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-----Original Message-----

From: David W. Brown [<mailto:brown@knopf-brown.com>]

Sent: Monday, September 08, 2008 1:59 PM

To: Fischer, Kurt

Cc: skaufman@linowes-law.com; bkhowe@verizon.net; bkhowe@blackberry.net; lfantle@aol.com; Shileykim@aol.com; timdearros@comcast.net

Subject: DRC Comments Binder

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Dave Brown

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communication in error, please contact the sender by reply email and destroy all copies of the original message. To contact our email administrator directly, send to postmaster@dlapiper.com

Thank you.

**Clarksburg Town Center
Recreation Center / Pool Complex Improvements
Revised Program
2/15/08**

Overview

The Compliance Plan as approved by the Planning Board dictated the addition of an indoor, heated pool building (with bathroom/changing rooms, etc). This feature was intended to offset the loss of a pool on the West Side and to assist in meeting the overall recreational requirements of the project (which the Planning Staff had noted in prior Staff Reports as being insufficient). The accepted Compliance Plan described the additional feature, along with the added 1200sq. ft. community building and the additional 800sq. ft. concessions building. The indoor heated pool feature was presented to the Board, and noted in the Staff Report, as a two million dollar facility. The costing of this feature played a role in the Board's consideration and acceptance of the Compliance Plan as sufficient to offset any "violations" and to provide for needed recreational amenities.

Post approval of the Compliance Plan, CTCAC and Newland reviewed some alternatives to the originally proposed indoor-heated pool option. Most recently, based on potential issues raised concerning health issues and maintenance of an indoor pool facility, Newland presented (115/08) an alternate proposal.

CTCAC's commentary on the proposed revised program is provided below, via comments embedded into the details list submitted to CTCAC by Newland last week. Please note that CTCAC comments should be viewed from the intended context:

- These are consensus CTCAC proposals, but they are not demands. CTCAC wants and expects to work cooperatively with Newland under the "two heads are better than one" principle to produce a final plan that is superior to either of our independent concepts for improvement. This cannot be done any other way than in the give-and-take of meetings where adequate time is budgeted to reach consensus
- CTCAC's goal is to ensure plan approval by the Board and acceptance by the existing Town Center residents. Based on the Settlement Agreement and Plan of Compliance, they are expecting a heated indoor lap pool (which staff valued at \$2 Million); a 1200 square foot civic building (which staff valued at \$180,000); and an 800-square foot community use building (which staff valued at \$120,000). If the lap pool is eliminated, it is going to be necessary to represent to the Board that it has been replaced with amenities that can be described as of roughly equivalent value. In doing this, CTCAC does not think it would be in Newland's interest to discount staff estimates of the value added by Newland.
- It is not CTCAC's intent to engage in a process similar to that of the landscaping process, requiring professionally derived cost estimates and agreement as to precise dollar amounts. Rather, we anticipate a process of reasonably equivalent tradeoffs.
- The Board will be looking for adequacy of recreation facilities independent of any other, more global assessment. In view of this, CTCAC understands that it will be necessary to resolve this area independent of the larger task of resolving all site plan issues in all areas.

**Clarksburg Town Center
Recreation Center / Pool Complex Improvements
Revised Program
2/15/08**

- Occupancy limits to accommodate 150 people standing, 80 people seated at round tables or in chairs on stadium seating (this could be accomplished with collapsible risers; there isn't room for true stadium seating and collapsible risers would allow for more flexible use of the space.
- Durable Hardwood flooring (nothing soft like oak) – engineered wood or synthetic Pergo is acceptable; The goal here is for durability and ease of maintenance.
- Interior finishes on the upper level to be compatible with & comparable to existing Resident's Club conference rooms, manager's office, and foyer. (Ensure NO dropped ceilings or other structures that impact the windows.)
- Installation of acoustic Sound Baffles (The acoustics in the room can be greatly enhanced by installing www.soundproofing.org or similar).
- Kitchen cabinets & appliances on the upper level comparable to existing catering kitchen plus smooth top /induction heat free-standing electric range with built in oven,, microwave, commercial grade ice maker,, refrigerator/freezer, dual sink with purified water dispenser, garbage disposal, dishwasher, popcorn maker, commercial coffee maker, hot water dispenser for tea/hot chocolate, and sufficient counter space to accommodate food preparation; suggested counter material would be Silestone or comparable antimicrobial material (stainless steel?).
- Other equipment required by Montgomery County health and fire codes
- FFE to include six (6) 6-foot folding rectangular tables and six (6) 60" round tables with table caddies, and eighty (80) padded folding chairs with folding chair caddy. 6-9 stadium risers 4 x 8.
Example of tables:
http://www.costco.com/Common/Search.aspx?whse=BC&topnav=&search=lifetime&N=0&Ntt=lifetime&cm_re=1_en- -Top Left Nav- -Top search&lang=en-US
- Audio-video system to include ceiling-mounted projector, drop-down screen, wall or ceiling mounted speakers, and black-out shades and drapes. What about soundproofing, especially on Clarks Crossing Dr side? Will it be sufficient to have residential-type here, as will not/should not (presumably) have loud sounds anyhow, since it's a small space. If we are addressing soundproofing, the downstairs area must be treated, too, as well as the other sides/exposures of building, as all are in reasonable proximity to residential, although CCD is the closest. (This might be as simple as wooden blinds and upgraded windows.)

**Clarksburg Town Center
Recreation Center / Pool Complex Improvements
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Fitness Room Expansion

- Expand to accommodate one additional row of equipment, including two (2) additional pieces to be selected by the Pool and Rec Committee. .

Site Constraints

- Required handicapped van parking space for the pool level **Where?**
 - Turnaround land for drop-off and pick-up off of roadway **Where?**
 - 20 foot unobstructed fire lane for fire trucks accessing Siamese connection and fire hydrant. **Where?**
 - Parking along access fire lane requires an additional 16-foot width. **Where?**
 - Required unobstructed ambulance access to pool deck – 12 feet wide
 - Gas line runs parallel to PUE approximately 10' inside the pool property. Does this prevent expansion of shade structure, fence or landscaping
 - Storm water management quantity and quality structure is used for the neighborhood to the north and higher than the pool. Storm water management easement includes an 18" reinforced concrete drainage pipe
 - Prior to submission, formally confirm setbacks and offsets for all housing and adjacent property in order to confirm applicability of proposed uses throughout site.
- Note:--If for any reason modifications to proposed plan are required by the County, Newland shall provide CTCAC with prompt notice of the need for modification, and negotiated, agreed upon resubmission of the revised plan.

Building setback requirement

If closer than 30 feet to another structure – a 2-hour exterior wall rating is required for the assembly (Civic building), recreation (shaded area and dining deck) and mercantile (Shop) structures. Any roof will also be required to have a rated structure and rated roofing materials.

Building Code

Use: Community Center – A-2 Assembly (Banquet Hall)

Fire resistance Rating:

Type 3B - 2 hr bearing walls

Use Separation A to M - 2 hour

Height & Area – A-2 Type 3B – 2 story – 9,500 SF

A-4 – Type 3B 2 story – 9,500 SF

Means of Egress: Occupancy greater than 50 – 2 required

Bathroom Fixtures: A-2 Occupancy – 1 WC per 75 per gender

1 Lav. per 200 per gender

1 Water fountain

1 Jan. sink

OTHER CONSIDERATIONS

- Outdoor movie screen and projector (approximately \$20,000)

http://www.outdoor-movies.com/outdoor_movie_systems.html

- Added movement equipment at tot lots and lot above pool; Replacement of 1-2 tot lots with swings or addition of swings
- Block H – Complete the landscaping/hardscaping of the “triangle park” within Block H