

LINOWES |
AND BLOCHER LLP
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February 10, 2005

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***By Facsimile
and Hand Delivery***

Ms. Wynn Witthans
Development Review
Maryland-National Capital Park
and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Clarksburg Town Center

Dear Ms. Witthans:

On behalf of the Applicant, NNPII-Clarksburg L.L.C. (formerly Terrabrook Clarksburg LLC), this letter discusses the proposed Clarksburg Town Center Project Plan Amendment and Village Center Site Plan and the relationship of the proposed commercial uses to the recommendations of the Clarksburg Master Plan and the approved Project Plan for the Clarksburg Town Center development.

Clarksburg Master Plan and Clarksburg Retail Study

The Project Plan Amendment and Village Center Site Plan are in accordance with the recommendations of the Clarksburg Master Plan and Clarksburg Retail Study. The Master Plan identifies the Town Center District, which extends from Comus Road south to Stringtown Road and from I-270 east to Piedmont Road, as a focal point for the planning area. The Town Center District includes the Clarksburg Historic District and is comprised of 635 acres. The Master Plan recommends residential, retail, and office uses within the Town Center and also indicates the importance of civic and public uses being concentrated there. The Master Plan further identifies important design features for development, including patterns of small blocks, the use of an interconnected system of streets, the preservation and enhancement of the historic district, street-orientation of buildings and the provision of open spaces.

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As shown on the proposed Project Plan Amendment and Site Plan submissions, the Village Center will be developed with 146,500 total square feet, including 112,000 square feet of retail uses, 14,500 square feet of retail/office uses, an approximately 20,000 square foot public library, and approximately 96 residential units located within a mixed-use building on Clarksburg Square Road. As you know, the Village Center design has undergone significant community and agency review and revision since the Site Plan application was filed in 2004. The revisions help integrate retail, office, civic and residential uses within the Village Center, all in accord with the Master Plan design feature recommendations. The revised design provides significant useable open space for the community, particularly in the Town Square, fully integrates the site for a new public library, creates a unique and attractive environment with an interconnected system of streets and walkways, and is characterized by street-facing buildings and attractive streetscapes that will encourage walking and community interaction.

In terms of commercial uses specifically, we acknowledge the Master Plan states up to 300,000 square feet are proposed.¹ However, the Master Plan also recognizes that this figure exceeds (nearly doubles) the findings of the 1991 Clarksburg Retail Study (“Retail Study”) that *up to* 152,500 square feet of neighborhood retail uses *could be supported* in the Town Center. Master Plan at 6; Retail Study at 3 (Attachment 1). The Master Plan states “A *maximum* square footage of the retail center is proposed (*up to* approximately 150,000 square feet ... the balance of proposed retail and office uses (70,000 to 105,000 square feet) is proposed to be located throughout the Town Center District and consists of infill retail within the historic district.” Master Plan at 46-47 (emphasis supplied).

To fully understand the Master Plan commercial recommendation, it is important to consider the underlying market research prepared by the Planning Commission. The 1991 Clarksburg Retail Study indicated a village center located on Stringtown Road (*i.e.*, within the Clarksburg Town Center development) could support *up to* 152,500 square feet of neighborhood retail uses. Attachment 1 at 3. This conclusion was based on a primary and secondary market of 7,086 households. Attachment 1 at 5. However, notations in the 1991 Retail Study obtained from MNCPPC indicate an April 7, 1993 revision to the Study and a 15% reduction in the anticipated Town Center market area to 6,000 households. Attachment 1 at 5. This reduction in market demand was reflected in Table 6 of the June 1994 Technical Appendix to the

¹ The Master Plan identifies a site within the Town Center District west of Rt. 355 as the major employment site for the Town Center District containing up to 470,000 square feet of employment uses.

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Master Plan (Attachment 2). **Table 6 correspondingly reduced the amount of retail that could be supported by the Town Center to 130,000 square feet.**²

Although its conclusions as to commercial development were later revised downward as noted above, even the original 1991 Retail Study stated “**we recommend a center size of less than 152,000 square feet for the Town Center.**” Attachment 1 at 3. The Retail Study further stated “just because there may be a need for 150,000 square feet of neighborhood convenience and shopping goods in the Town Center are[a] does not inherently mean it is feasible to locate all of this space in one center. Id. The Retail Study also stated that if less than 152,500 square feet was proposed (in the Master Plan), the difference (*i.e.*, between the proposed amount of retail and 152,500 s.f.) could be located elsewhere in the area. In other words, the Retail Study considered the Town Center market area (*i.e.*, 7,086 households) capable of supporting up to 152,500 square feet located throughout Town Center, including the Village Center, Historic District and near the future transit station. Id. ***The Retail Study recommended development of the Village Center itself with 120,000 square feet of uses, excluding government community uses (such as the anticipated public library).***

Attachment 1 at 4. The Retail Study also strongly cautioned against proposing too much professional office in the Clarksburg Village Centers, stating that professional office space usually comprises not more than 10% of the total center square footage. Attachment 1 at 10.³

Importantly, the Master Plan does not require development of the Village Center with 150,000 square feet of commercial uses or mandate a level of initial development not supported by the Planning Commission’s market research. Rather, we believe the County Council modified the Planning Board’s recommendation for a maximum 120,000 square foot Village Center to allow for future growth and expansion. Clearly, the Council’s inclusion of the words “up to 150,000 square feet” were intended to indicate a maximum potential density. As such, the Master Plan recommendation does not preclude initial development in accord with the Retail Study’s recommendation for a center comprised of 120,000 square feet. The Master Plan recommendation of ***up to*** 150,000 square feet also tacitly endorses the Retail Study’s

² Significantly, the Master Plan text was not revised to reflect the reduced commercial square footage identified in the Technical Appendix and 1993 revision to the Retail Study, but continued to state the Retail Study found that up to 153,000 square feet of neighborhood retail could be supported in Town Center. Master Plan at 46.

³ In the Planning Board (Final) Draft Master Plan, the Planning Board recommended the Town Center Village Center include ***up to*** approximately ***120,000 square feet*** of retail uses. Technical Appendix at 209.

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recommendation to allow for retail expansion in the future. In this regard, the Retail Study identified the number one additional factor to consider in planning retail centers as providing site acreage "large enough to allow for retail expansion in the future, should market conditions heighten." Attachment 1 at 9. In this regard, it is also critical to consider the Master Plan Vision of 6,000 households is not anticipated to be reached for 7-9 years if currently strong residential market conditions continue. As noted above, the Retail Study (and Planning Board Draft Master Plan) recommended a Village Center of only 120,000 square feet to serve over 7,000 households.

We also note the Master Plan Staging recommendations expressly deferred retail/commercial development in the Newcut Road and Cabin Branch Neighborhoods until **90,000** square feet of retail uses had been established in the Town Center. Master Plan at 190, 196. The Master Plan indicates establishment of this **90,000** square foot critical mass of retail is important to foster the development of the Town Center District as a community focal point early in the development of Clarksburg. Initial development of the Village Center with 146,500 square feet of retail, professional office space and the new library as proposed, is consistent with this Master Plan premise. Moreover, when the Master Plan recommendation to defer retail development in the Cabin Branch and Newcut Road Neighborhoods until 90,000 square feet of retail uses have been established in the Town Center is read in conjunction with the Master Plan's recommendation for **up to** 150,000 square feet of retail, it is evident the County Council anticipated initial development of the Village Center could occur with something less than 150,000 square feet of retail uses.

Clarksburg Town Center Project Plan ("Project Plan")

The Planning Board's 1995 Opinion approving the Project Plan authorized a maximum 150,000 square feet of retail uses and 100,000 square feet of office uses. The Village Center Site Plan proposes 112,000 square feet of retail and 34,500 square feet of retail/office uses (including the public library). The reduction in nonresidential development is attributable to two primary factors. First, when the Planning Board approved the Project Plan, the Village Center commercial area comprised 14.6 acres. As a consequence of stricter stormwater management regulation and other environmental considerations beyond the control of the Applicant, the developable land area for the Village Center today is only 12 acres. We also emphasize the Village Center site area is able to remain this large only because the Applicant, in working with interested community members and Staff, agreed to comprehensively review the approved Project Plan design. This comprehensive approach led to the proposed relocation of the library site, preservation of the Town Square as open space, and the incorporation into the Village Center of property designated for multi-family use on the

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approved Project Plan. Clearly, the reduction in land area directly impacts the amount of development that can be accommodated in the Village Center. Nevertheless, the proposed .28 FAR is still **more** dense than the .25 FAR assumed by the Retail Study for the Village Center. Attachment 1 at 10.

The second factor influencing the amount of retail and office development is the limited parking available for the Village Center and other uses within the project. When the Planning Board approved the Project Plan in 1995, the Board approved a waiver allowing the developer to utilize on-street parking to reduce the requirement for off-street parking. This accomplished two major planning objectives: (i) reducing impervious areas within the environmentally sensitive Clarksburg watershed; and (ii) providing on-street parking throughout the development to encourage pedestrian activity and to provide traffic calming on streets through the use of parallel parking. We also note with significance (and more than a little skepticism) that the approved Project Plan parking tabulations indicated only 30 parking spaces were required for 100,000 square feet of office development.

Consistent with the Project Plan approval and the approval of subsequent site plans within the project, the Village Center Site Plan utilizes on-street parking to help meet the parking needs of the development. Instead of the customary 5 on-site parking spaces per 1,000 square feet of retail uses, the Village Center on-site parking ratio for retail uses is about 4.11 spaces per 1,000 square feet or about 17% fewer spaces than typically required by Code (exclusive of the retail/office uses to be located in the mixed-use building). Additional anticipated parking demand is met through the use of on-street spaces in accordance with the previously approved parking waiver. Moreover, when the Applicant began discussions with the Department of Library Services about providing a site for a new public library within the project, we were advised that a minimum 120 parking spaces would be needed for the library. As the parties continued their discussions, including analysis of the parking constraints associated with the Village Center, the County reduced the desired number of parking spaces to 75 spaces, a ratio of less than 4 spaces per 1,000 square feet. Therefore, the development by the County of a library on the designated site is likely to further stress the limited parking supply.

Additionally, the Clarksburg Town Center development comprises about 267 acres of the 635-acre Town Center District. The Village Center itself comprises just over 12 acres, or about two percent of the Town Center District land area. When the Retail Study's initial conclusion that a market area containing 7,086 households could support up to 152,500 square feet of neighborhood retail is placed in context, the conclusion about the amount of retail that could be supported clearly refers not to development of the Village Center alone, but to the entire Town Center primary and secondary market area. As noted above, the Retail Study

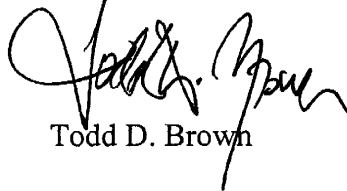
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indicated that if less than 152,500 square feet was proposed, the remaining retail could be located elsewhere in the area, including within the Historic District and near the future transit station. Attachment 1 at 3.

Lastly, based on a 2005 survey of uses within the Town Center District, there are approximately 22,000 square feet of existing nonresidential uses in the Town Center District located outside the limits of the Clarksburg Town Center development.⁴ There are also approximately 8.5 acres of commercial zoning in the Historic District itself. When the existing and potential future retail within the Town Center District are considered with the retail/office uses proposed in the Village Center and the 31,370 square feet of retail and office uses on Stringtown Road in the Clarksburg Highlands project, the result **exceeds** the **maximum** amount of retail found by the Retail Study to be supportable by the Town Center market area at full buildout (*i.e.*, 6,000 households/130,000 sf) as reflected in Table 6 of the Master Plan Technical Appendix (Attachment 2).

Sincerely,

LINOWES AND BLOCHER LLP



Todd D. Brown

TDB:cp

cc: Ms. Kim Ambrose
Ms. Rose Krasnow ✓
Mr. Michael Ma
Ms. Sue Edwards
Ms. Nellie Maskal
Mr. John Carter

⁴ This figure includes two home-based businesses, but does not include several outdoor uses or the approximately 99-acre private event facility at High Point Farm. The figure also does not include approximately 18,438 square feet of neighborhood retail and 12,932 square feet of office uses under construction as a part of the Clarksburg Highlands development on the south side of Stringtown Road.

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By Overnight Delivery

Hon. Derick Berlage, Chair
and Members of the Montgomery
County Planning Board
Maryland-National Capital Park
and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Clarksburg Town Center -- Building Height Compliance

Dear Chairman Berlage and Members of the Planning Board:

This office represents NNPII-Clarksburg L.L.C. (formerly Terrabrook Clarksburg LLC) (“Newland”). Newland is the master developer of the Clarksburg Town Center. This letter responds to the January 25, 2004 complaint filed by the Clarksburg Town Center Advisory Committee (“CTCAC”) concerning alleged building height violations within the development. Please include this letter in the public hearing record.

Clarksburg Master Plan

The thrust of CTCAC’s argument seems to be that building height within a 4-story structure in excess of 45 feet is, *per se*, incompatible with the historic district and contrary to the recommendations of the Approved and Adopted Clarksburg Master Plan & Hyattstown Special Study Area (1994) (“Master Plan”) and subsequent Planning Board approvals for the Town Center development. The CTCAC relies on language selectively extracted from the Master Plan as support for its contention. As discussed below, the language cited by CTCAC is taken out of context and consists of generally stated principles the Master Plan itself clarifies with specific recommendations. In its letter, the CTCAC fails to advise the Board of the specific provisions of the Master Plan relevant to the building height issue. In so doing, the CTCAC tends to mislead the Board and unjustly criticizes the significant efforts by Staff in administering this large and complex development.

First, the Master Plan contains absolutely no specific height limitation for buildings in the Town Center in terms of feet. To the contrary, the Master Plan recommends that “all apartment buildings in the future Town Center will be four stories or less except within walking distance of

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the transit stop, where a building height of six to eight stories may be allowed if Master Plan recommendations concerning compatibility with the historic district can be achieved.” p. 46.

Thus, the Master Plan does not support the CTCAC argument for imposition of a specific building height limitation in terms of feet. Moreover, the above-quoted passage demonstrates buildings in the Town Center District containing as many as **eight stories** are not, *per se*, incompatible with the historic district. Rather, the Master Plan confirms that a building containing up to eight stories may in fact be authorized if the Master Plan’s recommendations regarding compatibility can be achieved.

The CTCAC also quotes part of a general statement found in Master Plan Policy 6 that states assuring compatibility with the historic district was a guiding principle of the planning process. p. 26. However, the CTCAC fails to advise the Board that the detailed discussion under Policy 6 recommends a specific buffer concept around the historic district to protect its character. *Id.* The Master Plan describes the buffer concept in detail, along with other recommendations, to assure development around the historic district complements the district’s scale and character. p. 48-49. Again, the Master Plan recommendations in this regard do not contain any height limitation in terms of feet. Moreover, in pertinent part, the Master Plan recommends the following to assure the desired relationship between the “old” and “new” elements of Clarksburg:

“On the east side of the historic district, all development 400 feet east of existing MD 355 and/or on land which is within the historic district should be single-family detached structures which are no higher than two stories...New development near the church on Spire Street should be smaller in scale and sufficiently set back from the church.” p. 49. (Emphasis supplied.)

The Master Plan also contains a diagram (Figure 21) that graphically represents the above guidelines (Attachment 1). The CTCAC fails to disclose to the Board either the specific Master Plan recommendations regarding compatibility with the historic district or Figure 21.

Figure 21 and the Master Plan language quoted above demonstrate the buffer area and height limitations recommended to assure a compatible relationship with the historic district are limited to the areas immediately adjacent to the historic district. The buildings in question are located more than 400 feet east of MD 355 and therefore are not subject to the height limitations within the described buffer area. In fact, the Bozzuto Condominium buildings are located over 2,500

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feet from the designated buffer area and are not visible from the historic district. As a consequence, the previously discussed recommendation for apartments containing 4 stories is the controlling guidance in the Master Plan.

RMX Zone, Project Plan and Site Plan

The Town Center is classified RMX-2. The CTCAC cites certain provisions of the Zoning Ordinance for the proposition that optional method development in the Zone is intended to encourage development in accordance with the recommendations, including the numerical limitations, of the Master Plan. However, as discussed above, more than a selective reading of the Master Plan demonstrates its language does not support the specific height limitation the CTCAC seeks to impose. This is particularly evident since the CTCAC argues such height limit was imposed to assure compatibility with the historic district in accordance with the Master Plan. However, the Master Plan assured a compatible relationship between “old” and “new” Clarksburg by expressly including the specific (and inapplicable) buffer recommendations discussed above.

We further note the project plan is in the nature of a concept plan. For example, Section 59-G-2.12(d) of the Zoning Ordinance requires the project plan to show only “the *general* bulk and height of the principal buildings” and “a *preliminary* classification of dwelling units by type....”(emphasis supplied) Section 59-D-3.4 of the Zoning Ordinance confirms the general nature of the project plan by requiring a site plan “to be consistent” (*i.e.*, harmonious or compatible) with an approved project plan. Section 59-D-3.4 does not require the site plan to be an exact replica of the project plan. *See Logan v. Town of Somerset*, 271 Md. 42, 57-58, 314 A.2d 436, 444 (1974) (construction and maintenance of swimming pool found to be consistent with the use of land for public park purposes); *Carriage Hill-Cabin John, Inc. v. Maryland Health Resources Planning Commission*, 125 Md. App. 183, 222, 724 A.2d 745, 765 (1999) (in evaluating a comprehensive care facility application’s “Less Costly or More Effective Alternatives” criterion, numerical cost comparisons are not relevant when costs fall within a reasonable range, and projects may be found consistent even if one applicant’s costs exceed that of another’s in a comparative review) (quoting COMAR 10.24.01.07H(2)(c); *MacDonald v. Board of County Commissioners*, 238 Md. 549, 555, 210 A.2d 325, 328 (1965) (“the building of a golf course, the dredging of Swan Creek, the reservation of a school site . . . and the authorization of public utility services . . . are as consistent with increased rural residential development as they are with the building of high-rise apartments”). Thus, decisional precedent also confirms “consistency” does not mean exactitude. Nevertheless, and the foregoing

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notwithstanding, we also note the data table included with the Board's opinion approving the Project Plan specifically identified the *required* building height as "4 stories." Therefore, construction of the four story apartments in question satisfied this criterion.

We further note the RMX-2 Zone does not specify a maximum building height for development. Rather, because development in the Zone requires approval of a site plan, building height limits are established by the site plan approval. The Planning Board approved Site Plan 8-98001 for Phase I of the Town Center by its Opinion mailed on March 3, 1998. In its Opinion, the Planning Board specifically found the Site Plan as conditioned was consistent with the approved Project Plan. Significantly, the Board did not impose a condition specifying a maximum building height for development. To the contrary, Condition No. 38 of the Opinion states:

"The applicant may propose compatible changes to the units proposed, as market conditions may change, provided the fundamental findings of the Planning Board remain intact and in order to meet the Project Plan and Site Plan findings. Consideration shall be given to building type and location, open space, recreation and pedestrian and vehicular circulation, adequacy of parking etc. for staff review and approval." (Emphasis supplied.)

Therefore, contrary to the CTCAC's contention that the Project Plan established numerical standards that were inviolate, the Board's opinion approving the Phase I Site Plan demonstrates unequivocally that the Board delegated authority to staff to "review and approve" modifications in units and building types and locations provided the fundamental findings of the Board remained intact and in order to meet the Project Plan and Site Plan findings. As discussed above, the Master Plan authorizes 4-story buildings in the Town Center outside the historic district buffer area and without limitation as to building height in terms of feet. Furthermore, the data table appended to the Project Plan Opinion identified 4 stories as the required height limit. We also note the January 16, 1998 Staff Report and Recommendation for Site Plan 8-98001 stated "The multifamily units are four story apartment style buildings . . ." p. 12. The Staff Report also contained a project data table which similarly identified both the "Permitted/Required" building height and the "Proposed" building height as 4 stories. p. 32.

Regarding the Phase II Site Plan (8-02014), the Board's Opinion mailed June 17, 2002 specifically found the Site Plan, as conditioned, was consistent with the Project Plan. Similar to the Project Plan Opinion and Phase I Site Plan Opinion, the Board did not impose a numerical condition regarding maximum building height. However, the Board incorporated the May 2,

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and Members of the Montgomery
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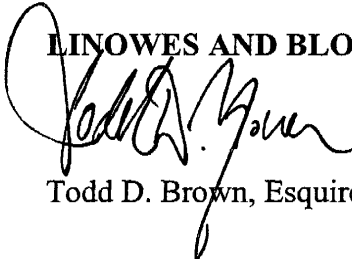
2002 Staff Report as a part of its Opinion. The Staff Report contains a project data table that identifies the "Permitted/Required" building height as 4 stories and the "Proposed" building height as 4 stories. No height limitation in terms of feet is referenced.

For the foregoing reasons, we respectfully request the Board find that no cause exists for issuing a notice of violation or a finding of noncompliance with the terms, conditions or restrictions of the Town Center site plans.

Thank you for consideration of these remarks. We look forward to discussing this matter before the Board at the upcoming hearing.

Very truly yours,

LINOWES AND BLOCHER LLP

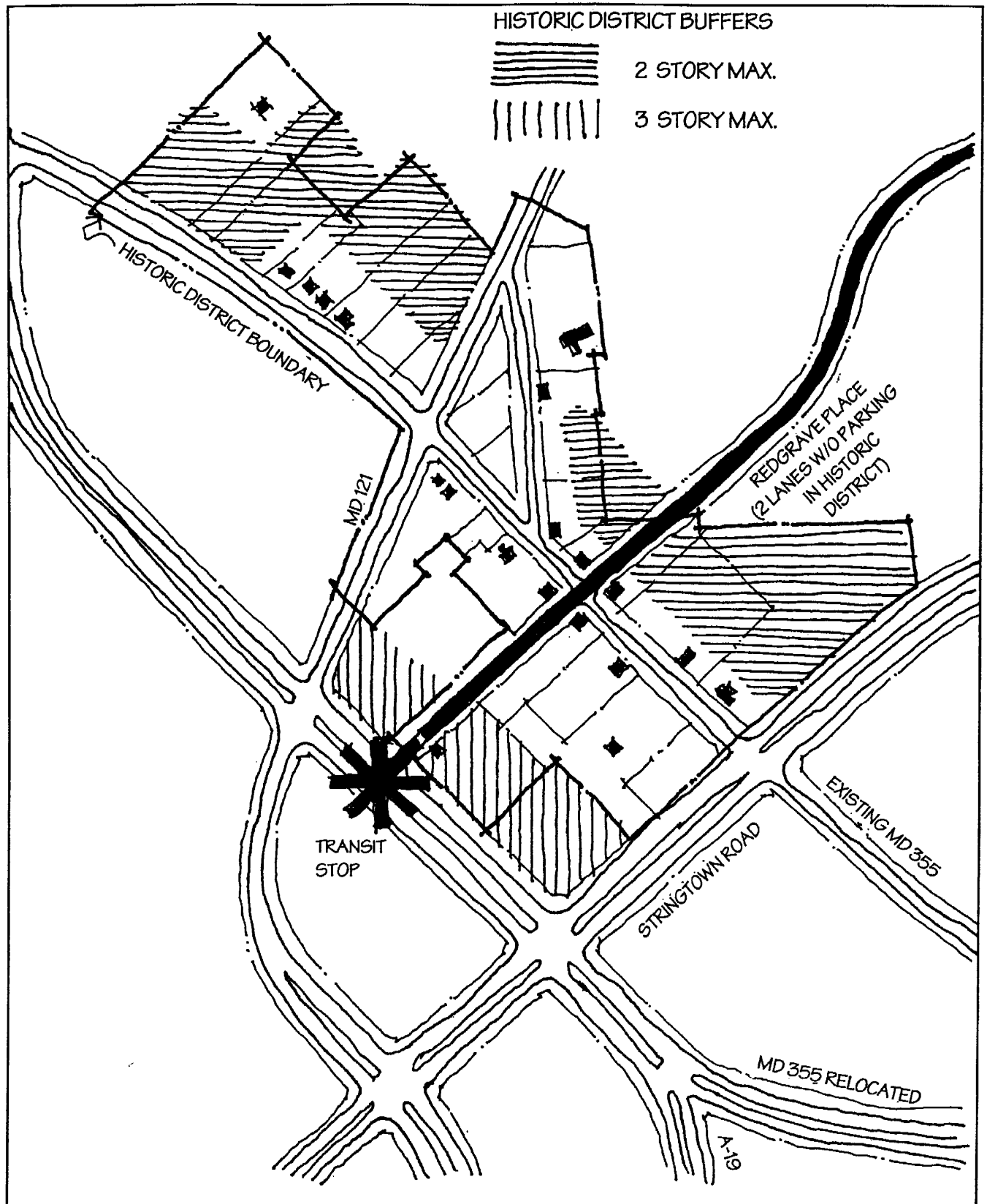

Todd D. Brown, Esquire

TDB:cp
Attachment

cc: Hon. Michael Knapp
Ms. Kim Ambrose
Ms. Rose Krasnow
Mr. Michael Ma
Ms. Wynn Witthans
Mr. John Carter
Ms. Sue Edwards
Ms. Nellie Maskal

Clarksburg Historic District Buffers

Figure 21



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March 24, 2005

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By Hand Delivery

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

Re: Extension of Preliminary Plan No. 1-95042 Validity Period (Clarksburg Town Center)

Dear Ms. Krasnow:

On behalf of the Applicant, NNPII-Clarksburg L.L.C. (formerly, Terrabrook Clarksburg LLC) (“Newland”), the purpose of this letter is to request a 24-month extension of the Preliminary Plan validity period to allow the remaining subdivision plats for the project, including the Village Center, to be recorded.

Pursuant to Section 50-35(h)(3)(d) of the Montgomery County Subdivision Regulations, Newland requests a 24-month extension of the Clarksburg Town Center Preliminary Plan validity period. At present, subdivision plats for 940 of 1,300 approved dwelling units, most of the subdivision streets, open space parcels, the park/school site and recreation space parcels have been recorded, and property has been conveyed to Montgomery County Public Schools and M-NCPPC for the park/school site. Pursuant to Preliminary Plan Opinion Condition No. 17 and Site Plan Review No. 8-98001, the remaining elements of the Preliminary Plan must be recorded by March 26, 2005.

In accordance with Section 50-35(h)(3)(d), delays subsequent to the Preliminary Plan approval have materially prevented Newland from validating the entire plan. In addition, the occurrence of significant and unanticipated events beyond Newland’s control have also substantially impaired Newland’s ability to validate the plan in its entirety. In 2004, Newland filed two site plan review applications with the Planning Board for the Clarksburg Town Center development designated Site Plan Review Nos. 8-04034 and 8-98001C. The applications proposed development of the Clarksburg Town Center Village Center and the area located north of Clarksburg Square Road, west of Overlook Drive (“Section 1A-4”).

After Newland filed the Village Center site plan application, existing residents of the Town Center expressed concerns about the configuration of uses proposed within the Village Center.

Ms. Rose Krasnow
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Their concerns included, among other matters, vehicular and pedestrian circulation, proposed building orientation, preservation of the Town Square as an open area and the general layout of land uses. In an effort to resolve these concerns, Newland met with residents organized as the Clarksburg Town Center Advisory Committee. ("CTCAC") These meetings lasted several months and resulted in significant design modifications to the proposed site plans.

During the course of meeting with the CTCAC, Newland also participated in a series of meetings with Planning Staff, County Executive representatives from the Upcounty Regional Services Center, the Montgomery County Department of Public Libraries and the Montgomery County Department of Public Works and Transportation. The subject of these meetings was the County's desire to construct a public library within the Town Center and how best to accommodate the library's needs while at the same time fully integrating the library with the remainder of the Town Center community.

Once the interested parties recognized the substantial challenges associated with constructing a library within the previously identified Town Square, Newland undertook a comprehensive review and redesign of the Village Center to address both private and public sector needs and desires. In addition, significant concerns expressed by new community residents ultimately extended beyond the proposed Village Center Site Plan to include the original configuration of retail uses shown on the approved Project Plan. The cumulative effect of these factors substantially impaired Newland's ability to validate the remainder of the plan while being responsive to these concerns.

We further note that Newland has undertaken exceptional efforts thus far to validate the Preliminary Plan. As noted above, Plats for 940 (about 72%) of the approved number of units, most of the subdivision streets and open space/recreation parcels have been recorded. Site construction has been continuous since 2000-2001 and approximately 630 dwelling units have been occupied by new Town Center residents. In this respect, the traditional neighborhood design of the Town Center further complicated and lengthened the administrative review process for practically every aspect of the development, from utility service issues to street design and layout to stormwater management controls. All of these factors have resulted in significant additional delay.

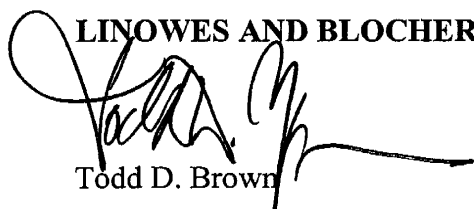
Lastly, the Town Center is envisioned as a complete community. The Village Center, residential density and recreational amenities and open spaces remaining to be recorded and developed will be critical to the success of the Town Center as a sustainable, vibrant new town. Exceptional and undue hardship would result not only to Newland, but to the Town Center residents and surrounding residents and businesses if the project is not allowed to proceed to completion. We

Ms. Rose Krasnow
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therefore request a 24-month extension to record the remaining subdivision plats and obtain building permits.

Thank you for your consideration. If you need additional information, please do not hesitate to contact us.

Very truly yours,

LINOWES AND BLOCHER LLP

Todd D. Brown

TDB:cp

cc: Ms. Kim Ambrose
Mr. Michael Ma
Ms. Wynn Witthans

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June 10, 2005

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By Hand Delivery

Mr. Derick Berlage, Chair
and Members of the Montgomery
County Planning Board
Maryland-National Capital Park
and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Clarksburg Town Center Building Heights

Dear Chairman Berlage and Members of the Planning Board:

On behalf of the developer of the Clarksburg Town Center, NNPII-Clarksburg LLC and Newland Communities, LLC, the project development manager (such developer and project development manager are referred to herein collectively as "Newland Communities"), this letter requests that the Board reconfirm its prior decision that no site plan violation has occurred. Please include this letter in the public Record.

Building Height Compliance.

As the Board will recall, the RMX-2 Zone does not specify a maximum building height. Therefore, the proposed and constructed building heights do not violate any zoning standard. Further, although the Project Plan Opinion identified "4 stories (45 ft.)" as the **proposed** residential building height, the Project Plan Opinion clearly indicated "4 stories" as the controlling building height standard. Project Plan Opinion at 9. Moreover, as set forth in Section 59-D-2.12 of the Zoning Ordinance, a project plan requirement is to specify only the **general** bulk and height of buildings.

As part of the Site Plan Opinions for both Phase I and Phase II, the Planning Board expressly incorporated an associated Staff Report and Recommendation that identified "4 stories" as the "permitted/required" and "proposed" building height for the Site Plan. In the Site Plan Opinions, the Board did not indicate in any manner, express or implied, that a general building height expressed numerically at project plan would strictly control construction even though subsequent Site Plan approvals specified a different standard (*i.e.*, 4 stories). Similarly, the written Site Plan Opinions did not indicate that subsequent physical site plan drawings by and of themselves could

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in any way override the Board's written opinion of permitted building heights within the project (*i.e.*, 4 stories). The suggestion that a chart inadvertently repeated in subsequent drawings could override the Board's stated 4-story standard is particularly unsettling because the Board expressly found in each Site Plan Opinion that the Site Plan was consistent with the Project Plan and that each structure (with a permitted 4-story building height) was compatible with existing and proposed adjacent development. The Record is clear. All buildings proposed for the development and constructed to date meet the 4-story standard imposed by the Board in its Site Plan Opinions.

Staff Level Review = Approval by Delegated Authority.

It is also important to recall that the Planning Board does not review the signature site plan documents. Such documents are administered entirely at the staff level. Accordingly, in the event a subsequent signature site plan contains a development standard different from that established by the Planning Board in its Site Plan Opinion, the Site Plan Opinion itself must control, unless authority to modify the standard has been properly delegated to staff. In this case, the Board expressly authorized staff in the Phase I Site Plan Opinion mailed March 3, 1998 to review and approve compatible changes to the units proposed, provided the Board's fundamental findings remained intact. Condition 38, Site Plan 8-98001 ("Condition 38"). The Site Plan Enforcement Agreement dated May 13, 1999 included this statement of delegated authority as a Stipulation to which the developer and Board's designee expressly agreed. Therefore, the Board, through its Site Plan approval and through the signed Site Plan Enforcement Agreement with the developer, authorized staff to review and approve changes (including height within the 4-story standard) to the units proposed by the Site Plan. This is true regardless of the inadvertent repetitive inclusion of the project plan height chart subsequently placed on various revisions submitted by the developer's engineering consultants.

It is also important to recognize that neither the Phase I Site Plan nor the Phase I Site Plan Enforcement Agreement required either an amendment to the Site Plan Enforcement Agreement or the attached signature set of documents in connection with the approval of changes to units pursuant to Condition 38. To the contrary, the fact that the Planning Board expressly authorized such changes to be reviewed and approved by staff demonstrates that formal amendment to the Site Plan or Site Plan Enforcement Agreement, to which the Planning Board is a signatory (through its designee), was *not* required. Moreover, the absence in Condition 38 of language requiring an amendment to the signature set of site plan documents for a change in unit type approved by staff is in direct contrast to other conditions in the Phase I Site Plan Opinion which expressly mandated revisions to the signature set of site plans. *See, e.g.*, Conditions 12 and 13, Phase I Site Plan Opinion. Clearly, if the Board had intended the Site Plan Enforcement

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Agreement or signature set of documents to be amended for each and every unit change approved by staff pursuant to Condition 38, the Board would have stated so expressly, particularly when it had so stated on other issues elsewhere in its Opinion.

We further note at the Planning Board's May 9, 2002 hearing on the Phase II Site Plan, staff advised the Board, without objection or controversy of any kind whatsoever, that pursuant to the express authority delegated to staff by the Board in Condition 38, Staff had administratively approved a number of modifications to dwelling units and site layout. At the May 9, 2002 hearing, staff expressly reminded the Board of the authority delegated by it under Condition 38 and described what actions had been taken pursuant to that authority. Staff indicated:

“[The Phase I Opinion] had something like 43 conditions to it and one of these conditions was to allow staff to work with the applicant to change unit types and make minor modifications to the layout so that we didn't come back with every change in the site plan. And the applicant has kept us pretty busy with a lot of changes to those. The single-family detached section stayed the same but there have been significant, I think improvements in the layout and unit types and design relationships that were achieved and other of their revisions to the Phase I approved buildings . . .”

In this case, the Planning Board incorporated the Phase I and Phase II staff reports as a part of its Site Plan Opinions. In neither Opinion did the Board express a conclusion as to building height different from that clearly specified in the staff reports. Therefore, in its Opinions, the Board established conclusively the Site Plan building height as “4 stories” as stated in the staff reports. The Board cannot simply ignore its prior decision in this regard.

In its current deliberations, in fairness to the Applicant, the Board must take the entire course of administrative events into account. However, the signature site plan document at issue initially, inadvertently and clearly mistakenly indicated the building height was 35'/45'. To our knowledge, the Planning Board *never* reviewed the signature site plan document prior to its approval. Accordingly, to the extent the height limit in feet was inconsistent with the Board's fundamental finding in the Site Plan Opinion that buildings containing 4 stories are permitted, any inconsistent modification of the signature site plan imposing a height limit in feet, as opposed to stories, was invalid.

In this case, however, it is not necessary to determine whether the Board authorized staff to impose a specific height limit in feet when none had been imposed by the Board in its Site Plan Opinions. Clearly, if Condition 38 of the Site Plan Opinion authorized staff to impose a building

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height limit not imposed by the Board, the condition similarly authorized staff to *remove* such building height limit. This is particularly evident since eliminating the 35'/45' height limit would have been more consistent with the Board's Site Plan Opinions (which imposed no such limitation) than adding the limitation.

We understand staff may have modified the building height table in the signature site plan from 35'/45' to "4 stories" sometime in the Fall of 2004. If this is correct, the modification occurred *after* the Bozzuto building had been constructed and units within the building had been sold and occupied. We also note the modified building height table shows "4 stories" for single family detached and townhouse units, not just multifamily units, which we believe merely corrected an oversight as permits had been consistently approved over an extended period of time (between two and three years) for buildings that exceeded 35'/45' but complied with the 4-story standard. Again, if the modification was done outside of the normal process, it occurred last Fall long *after* several hundred townhouses and multifamily units had been built, sold and occupied.

For over two plus years the Planning Commission and Department of Permitting Services have relied upon the Planning Board's Site Plan Opinions. It is in the instant case a matter of fact that commencing in 2002, both the Planning Commission and Department of Permitting Services consistently approved building permit applications for buildings in excess of 35'/45' but within the 4 story limit imposed by the Board in its Site Plan Opinions. The Department of Permitting Services also inspected each townhouse and multifamily product and issued use and occupancy certificates. All of this occurred long *before* the signature site plan was physically modified last Fall to read "4 stories." Clearly the "after the fact" modification of the signature site plan last Fall did not and could not have influenced either agency to approve permit applications and issue permits before the plan was so modified.

Accordingly, given the course of administrative review over an extended period of time by all reviewing parties, the only reasonable explanation for the Planning Commission and the Department of Permitting Services to issue permits and approve inspections consistently even though buildings exceeded 35'/45' is that staff had previously determined, as authorized in both Site Plan Opinions of the Board, that "4 stories" was the approved building height standard. The physical modification of the signature site plan last Fall to reflect this prior administrative determination may have demonstrated untidy recordkeeping and perhaps questionable judgment in terms of timing, but it did not vitiate the prior consistent administrative determination that 4 story buildings were permitted under the Board's Site Plan approvals. **Importantly, the Board's fundamental, and only finding, on building height in either Site Plan Opinion (through the incorporation of the staff report and recommendation) was that "4 stories" was permitted.**

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Whether the Planning Commission's and MCDPS' consistent determination as to building height is attributed to (i) the Board establishing, through incorporation of the staff reports in its Site Plan Opinions, a legal building height limit of 4 stories; or (ii) each building permit application for construction in excess of 35'/45' comprising a request to change the unit in accordance with Condition 38 of the Site Plan Opinion, it is clear that decisions have been made in this case consistent with the Board's fundamental finding during the Site Plan review process that buildings containing 4 stories were to be permitted in the Town Center development. Further, to the extent staff approved the increased building height pursuant to Condition 38, it is only staff's judgment in exercising the authority delegated by the Board that can be questioned, not whether such authority existed. Under such circumstances it would be manifestly unjust to find a building in violation of a limitation approved by staff pursuant to the authority expressly delegated by the Board.

Setback Compliance.

Regarding the issue of setback compliance, we understand compliance questions have been raised concerning the required building setback from a street. Initially, we note with significance that the Clarksburg Town Center project was the first major neotraditional mixed-use community within Montgomery County. As reflected in the Project Plan Opinion mailed June 12, 1995, the Planning Board granted several waivers from standard requirements to provide additional flexibility to both the developer and planning staff in the implementation of this new form of development.

In the Project Plan Opinion, the Planning Board approved the use of closed-section streets, the use of on-street parking to reduce the requirement for off-street parking and reduced setbacks along the streets and boundary lines. In this latter respect, as stated in the Project Plan Opinion: "These reduced setbacks will allow buildings to be oriented to streets to encourage the use of sidewalks and generally improve the pedestrian environment. The Clarksburg Master Plan also anticipated the reduction in setbacks to foster the creation of a pedestrian oriented town." Project Plan Opinion at 7. *The Planning Board further indicated in the Project Plan Opinion that no minimum setback from the street was required if in accordance with an approved Master Plan. Id. at 9.*

Subsequently, in the Phase I Site Plan Staff Report dated January 16, 1998, the project data table indicated the following, in pertinent part:

Check this

Best explanation of this