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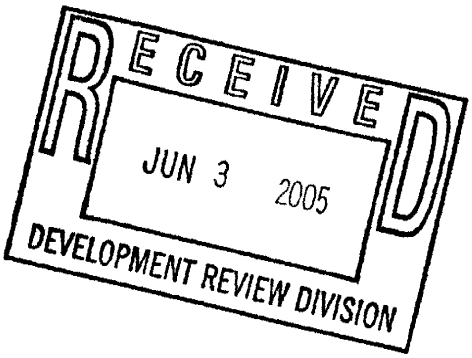
June 1, 2005



VIA EMAIL AND REGULAR MAIL
[michele.rosenfeld@mncppc-mc.org]

Michele Rosenfeld, Esq.
Associate General Counsel
The Maryland National Capital Park
and Planning Commission
Office of General Counsel
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: **Clarksburg Town Center - Site Plan Review**
Nos. 8-98001 and 8-02014
Building Height Violation Reconsideration Hearing

Dear Michele:

As you are aware, this firm has been retained recently to assist the Clarksburg Town Center Advisory Committee ("Committee") in seeking answers and remedies for what the Committee regards as widespread, ongoing violations of the Clarksburg Town Center ("CTC") Site Plans. The principal purpose of this letter is to document for the record what the Committee has uncovered concerning these violations, in order to assist the staff in understanding and identifying all violations, and in providing a detailed explanation to the Board for how they came about. **Please make this letter part of the record in the above-referenced proceeding.** Other critical issues are also addressed: (1) the need for an immediate stop work order to minimize ongoing site plan violations and facilitate additional enforcement activity, including collecting from the developers information to inventory and then correct or remediate existing or ongoing site plan violations; and (2) the Committee's as yet unfilled request to the staff for information, as critically needed by the Committee as it is by you, to prepare a proposal to mitigate the effects of past site plan violations.

These three issues – violations, enforcement and mitigation – flow directly from the Committee's endless days and weeks of poring over such records as have been made available in pursuit of straight answers to two simple questions: (1) Why has there been such a mismatch between what was legally required and what has actually been done in the construction of the CTC? (2) What is the Board going to do to enforce compliance with the approved Site Plans? The Committee, a group of lay citizen residents of the CTC, through persistence and diligence that is unprecedented in my experience, has revealed staff malfeasance in particular instances and a pattern of staff inattention to

obvious site plan compliance problems that have resulted in hundreds of illegally oversized homes. Some have been built and sold, and are now occupied by private citizens. Other homes are still under construction, with nothing being done to stop the work or to insist on corrective action. Nor has there been any effort to remediate the adverse effects of violations before, as a practical matter, it becomes too late to correct problems directly.

Whether the problems with the CTC Project will be comprehensively addressed remains to be seen. If past is prologue, the Committee is understandably concerned about the future. One foreseeable possibility is a staff recommendation on pending CTC Project Plan Amendments that they be approved, with the effect of retroactively validating all of the site plan violations and minimizing the impact of staff efforts in April that misled the Board into an initial ruling that there was no Site Plan enforcement problem. Such an approach would do irrevocable damage to the public trust and confidence in the Board and its staff. Prompt and active intervention at the highest levels of the professional staff is needed to avoid this. The Committee is prepared to work with you and the Director to ensure that the CTC Project gets back on track, and to mitigate whatever illegal construction the Board determines ought not now be undone.

I. THE STAFF REPORT SHOULD FULLY DISCLOSE CTC SITE PLAN VIOLATIONS TO DATE

The Planning Board must be fully and candidly apprised of all that has gone wrong to date in the execution of the CTC Site Plans. The Board and the public deserve no less. To ensure that happens, this letter sets forth the Committee's findings for the benefit of all parties to the forthcoming reconsideration hearing.

A. The April 8, 2005 Staff Report And Its Defense At The April 14th Hearing Appear To Be Fraudulent

As I trust you will appreciate, I do not casually use the word "fraudulent." Nonetheless, as we understand the facts, it appears to be an accurate characterization. The author of the April 8, 2005 staff report, who initialed the report, defended it at the April 14th hearing, and is known to all parties, shall remain nameless in this letter, being referred to as PBS (for Planning Board Staff member). PBS' recommendation, subsequently adopted by the Board, was a "finding that building heights of subject structures comply with site plan approvals." This recommendation was based on a materially incomplete description of the underlying facts. Specifically, PBS omitted the fact that Site Plan 8-98001 was subject to explicit numerical height limits of 35' for single family homes and townhomes and 45' for multi-family homes. CTC Site Plan, Phase 1, Sheet B, No, 8-98001 (approved March 24, 1999 by signature of Joseph R. Davis). If this information had been disclosed, it would have been obvious – from the building height table on p. 7 of the PBS Memo – that all of the Phase I townhouses were

illegally high (by 2'8", 5', 7'6", or 13'5" – 16'7") and that the four-story Bozzuto Condominiums were as well (by 5'10" or 8'8").

This omission cannot be overlooked just because what is otherwise contained in the memorandum is technically true: "fraud may consist in the suppression of the truth as well as in the assertion of a falsehood." Hoffman v. Stamper, 385 Md. 1, 867 A.2d 276, 292 n. 12 (2005). Of course, "non-disclosure does not constitute fraud unless there is a duty of disclosure." Frederick Road LP v. Brown & Sturm, 360 Md. 76, 756 A.2d 963, 976 n. 14 (2000). In the civil context, such non-disclosure would be actionable if there was an intention to deceive and action taken in justifiable reliance on the concealment. Hoffman, supra.

All the elements of fraud appear to be present in this case. When the Phase I Site Plan was before the Board in 1998, the assigned staff person—PBS—recommended a generalized "four story" building height. But the Site Plan before the Board, which the Board approved, did not use this measurement. Instead, the Site Plan, just as the approved Preliminary Plan had done before it, utilized explicit height limits of 35' and 45', as described above. These explicit limits only made sense, given the same explicit limits in the Data Table on the CTC Preliminary Plan, No. 1-95042 (Final Submission), and the Data Table on the approved CTC Project Plan (John Carter, signatory, April 26, 1996). Despite the fact that the issue of building height was brought to PBS's attention in advance, PBS omitted from the April 8th Memo the critical fact that explicit height limits existed on the Board-approved Phase I Site Plan, 8-98001. The PBS Memo instead emphasizes developer compliance not with the explicit height limits the **Board approved**, but rather the elastic height limit the **staff recommended**:

> In the Site Plan staff report...the proposed height limitation for residential buildings was set at four stories....

PBS Memo at 8. This is followed by argument shrugging off any compliance problem, on account of asserted compliance with a four-story height limitation in the Project Plan. In this and other ways that need not be detailed for present purposes, the critical information about Site Plan height limits was omitted and obscured in the PBS Memo.

At the April 14th hearing, the Committee challenged the PBS Memo's reliance on the **Project Plan** by presenting the March 24, 1999 signature set of the Phase I **Site Plan** with the explicit numerical height limits quite evident. The Committee's position was that the specific criteria of the Site Plan were controlling over the more generalized Project Plan, particularly as to the condominiums whose height was then at issue. PBS presented to the Board supplemental materials, not referenced in the PBS Memo, in an effort to show that the condominiums were subject to a "4 story" height limit, including the Data Table for the Phase IB(Part 3) Site Plan, with the notation "4 stories" written over the underlying specific heights. In response to questioning by the

Board about the discrepancy between the Phase I and Phase IB(Part 3) Site Plans on building height, PBS asserted that all Site Plans for townhomes and multi-family in Phase I were subject only to a "4 stories" height limit. Based upon these representations, the Board concluded that there was no Phase I building height violation.

After the hearing, the Committee went to DPS where they found and retrieved an unaltered copy of the Phase IB(Part 3) Site Plan, which had been signed by PBS, and which reflected exactly the same explicit numerical height limits as the 1999 Phase I signature set. In the copy submitted to the Board by PBS, the height limits had been manually written over, replaced by the words "4 stories." This clean set was submitted by the Committee to the Board as part of its request for reconsideration.

Subsequently, PBS admitted to superiors his/her alteration of the Phase IB(Part 3) Site Plan. As the Committee understands the facts now, the alterations apparently took place not as part of a process of amending site plans before construction, as PBS stated or implied at the hearing, but rather long after everything was built, i.e., at the time the Committee was beginning to make known to PBS its concerns about building height. The Committee received a voice mail message on May 10, 2005 from Mr. Loehr regarding what PBS did. In relevant part, his message has been transcribed as follows (with PBS's name and gender-specific pronouns deleted):

> I did want to tell you something which I was not able to tell you before, but can now, which is that [PBS] did admit that [he/she] changed the drawing after you all brought the height issue to [his/her] attention. So, that's obviously part of what changes the whole picture. I mean not that your evidence wasn't pretty compelling as it was, but there's obviously no doubt now.

In short, PBS omitted material information from the April 8th Memo that would have discredited PBS's no-violation recommendation, falsely stated what residences were subject to explicit height limits and "backed up" the falsehood with documents PBS had altered. PBS's efforts to cover up the true facts make clear that the omission was knowing and intentional, not inadvertent. In terms of fraudulent intent, the situation is, at the least, comparable to a blind man on a street corner who, upon asking if any **cars** are coming, is told "No" by a police officer, and then proceeds to get run over by a **truck** that the officer saw was coming. Without in any way qualifying the foregoing, I must stress that it is not my intention to state or imply that the conduct of any staff person other than PBS was fraudulent. For all that appears, those who reviewed or approved the April 8th Memo were misled by it and PBS' false statements just as the Board was. In any event, the scope of improper staff conduct, and the responsibility for it at higher levels, are matters within the jurisdiction and control of the Board.

Mr. Loehr's voice mail message should be a wake-up call for the Board to take due regard of the seriousness of the matter, and the potential for a deleterious impact on public trust and confidence in the agency. The Committee urges you to join it in recommending that the Board promptly ensure that the matter is investigated by someone independent of the Board and its staff to understand the motivation for this cover up, to fix responsibility for this incident every place where it belongs,[1] and to ensure there is no repetition of it in future cases.

B. The Staff Should Assess and Disclose All CTC Site Plan Violations in Phase I

The Committee's concern about CTC Site Plan violations is not limited to building height, even though, as noted above, that problem is obvious and widespread among Phase I homes. The staff report should acknowledge and rectify the "errors" in the earlier report, but it should not stop there. Whatever motivation PBS may have had for "covering up" the building height violations, the Site Plan alterations substantially post-date all Phase I building construction. The question naturally arises: what other Site Plan limitations have the Phase I developers had the impunity to ignore?

The Committee is in no position to answer this question comprehensively, although some of the more obvious transgressions are quite apparent: numerous setback violations and phasing problems (construction beginning on subsequent phases of housing before required amenities for constructed phases are installed). The responsibility for a complete answer, and for proactive enforcement action, belongs to the Board and its staff, under §50-41 of the Subdivision Ordinance. Under that section, the staff has broad authority to control further progress on approved development, in pursuit of corrective action for site plan violations, including stopping work to obtain a comprehensive assessment of all violations to facilitate issuance of appropriate and efficacious corrective orders. §50-41(i).

The Committee believes the staff should exercise that authority now and order all CTC work stopped. There may be reluctance to stop the CTC project dead in its tracks over Site Plan violations, however widespread, without additional guidance from

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[1] At the April 14th hearing, the developers had done nothing to correct PBS' representations. They had made no mention of the Phase I Site Plan height limits in their responsive letters. But the developers did not have the same duty to disclose the key material facts as did a public employee. Of course, if any of them or their representatives actively participated in misleading the Board, that is a different matter. This is just one part of the thorough investigation that the Committee believes is necessary. A good place to start is with the transcript of the April 14th hearing. It ought to be readily apparent on the tape of the hearing whether any developer or developer representative expressly concurred in erroneous statements about which residences were subject to the explicit Phase I Site Plan height limits.

the Board. Even so, however, this should not deter the staff from taking whatever enforcement steps are necessary to make a comprehensive and timely assessment of the present scope of the problem and report its findings to the Board. As explained in Part IV, the Committee needs this information as well. The staff should proceed to do this now, on this rehearing, so that further damage from Site Plan violations can be attenuated, if not eliminated.

C. The Report Should Also Disclose the Problems Affecting Phase II and Recommend Stopping Work and Development of a Plan of Corrective Action

The problems of Site Plan compliance with Phase II are, unlike those in Phase I, slightly more amenable to direct corrective action, because to some degree Phase II is ongoing or future construction. Thus, the staff report should assess Phase II problems immediately. Again, the Committee must stress that its concerns about CTC are not limited to a particular development standard or a particular Phase. The Committee is concerned about orderly, lawful development of the entirety of the CTC Project.

Among the findings the Committee believes are warranted and that the staff report should reflect regarding the Phase II Site Plan are the following:

1. The Preliminary Plan for CTC - #1-95042 (11/20/95 Final Submission) for all units with Phases I & II lists the same 35' and 45' residential height limits as the Phase I Site Plan.

2. The recorded subdivision plats for Phase II indicate that "development is subject to a site plan enforcement agreement pursuant to M-NCP&PC file number 8-98001", i.e., the Phase I Site Plan Enforcement Agreement. See Plats 22533-37 (Phase IIA); 22631-34 (Phase IIB); 22783-86 (Phase IIC); and 23046-48 (Phase IID). Yet all of these record plats were approved by the Board after the deadline (2/26/02) specified by the Board in the Phasing Plan incorporated by reference into the Agreement (Exhibit "E").

3. The Phase II Site Plan was initially reviewed in 2001 and approved by the Board in June 2002. This could not have happened without an actual site plan before the Board for approval. Such copies of the plan as the Committee has been able to find show principal building heights at exactly the same limits as were set forth in the Phase I Site Plan.

See PBS Staff Memo for Phase II Site Plan Review, Attachment G (May 2, 2002); Attachment to Development Review Committee Comments on Phase II (Nov. 19, 2001).

4. A 2002 signature set of drawings for the Phase II Site Plan i.e., 8-02014, has yet to be found. What has been produced is an October 14, 2004 set, which is suddenly devoid of any limitation on principal building height, in violation of § 59-D-3.23(a). Only a height limit for accessory structures is shown (27').

5. There is also no Phase II Site Plan Enforcement Agreement contemporaneous with the June 2002 Site Plan approval.

6. The actual Phase II Site Plan Enforcement Agreement is a brief, one-page document apparently drafted on April 24, 2003, but not signed until October 14, 2004.

7. Despite the October 14, 2004 dates on the available Phase II Site Plan and on the Enforcement Agreement, many Phase II homes were built and occupied before that date. According to SDAT records, completed homes were sold to private citizens on these prior dates: 4/4/03; 12/19/03; 6/14/04; 6/28/04; 7/14/04; 7/15/04; 8/12/04; 8/18/04; 9/1/04; and 9/14/04. Of course, this means construction may have been started on many other Phase II homes prior to the October 14, 2004 signature date as well.

8. In short, either a viable Phase II Site Plan was in effect during the 2003-2004 period that preceded the October 14, 2004 site plan, or extensive construction took place in violation of the development procedure for optional development in the RMX-2 zone. § 59-C- 10.3.11(a).

The Committee is again in the position of the blind person in trying to figure out what the complete story is on the Phase II Site Plan. The Committee expects your next staff report to fill in the blanks and answer several obvious questions raised by the foregoing. These include: (1) Why are there no principal building heights on the October 14, 2004 Site Plan, and principal building heights on earlier iterations? (2) What happened to the signature set of the Phase II Site Plan approved in June 2002? (3) Has there been another alteration to official documents in an attempt to retroactively validate excessive building heights? (4) Given the explicit height limits for residential buildings

in the Preliminary Plan, why were these not carried forward into the October 14, 2004 version of the Phase II Site Plan?

If and when you have answers to these questions, I believe it will be apparent that immediate corrective action is required to ensure that future Phase II construction is within the height limits that were obviously intended to be the same for both Phase I and Phase II, i.e., 35' for single family homes and townhomes, and 45' for multi-family. **Unless the staff has already taken prompt action, the Committee expects your report to recommend that ongoing work be stopped and not resumed until a comprehensive corrective action/mitigation plan is devised, in consultation with the Committee, and is being implemented.**

II. THE REPORT SHOULD ADDRESS THE BROADER ENFORCEMENT IMPLICATIONS RAISED BY THE FAILURES APPARENT IN THIS CASE

Your report to the Board should make unmistakably clear that since the improper attempt to alter Site Plans did not take place until **after** the homes subject to the Plans were built, the developers built in open violation of readily apparent explicit height limits. The Board must be brought to realize that the situation brings into sharp focus broader questions about the efficacy of site plan enforcement. How did it come about that developers, with no apparent regard for risk of corrective action, felt free to build in violation of explicit development constraints? In the Committee's view, your report to the Board would be seriously incomplete if it does not address whether developers have reason to expect their transgressions to be unnoticed, excused, covered up or otherwise disregarded by the staff.

The obvious starting place for this assessment is a thorough investigation of the communications between staff and developers in this case after site plan approval, with particular attention to anything said about building height. In light of the admitted alteration of official documents and the false statements to the Board regarding them, consideration should be given to seeking this information under oath, both from staff and developers and their agents in contact with staff. Apart from what went wrong in this particular case, however, the Board needs to understand what it is about the enforcement process that might have led the developers to believe that they could violate explicit development standards without fear of consequence.

The record in this proceeding to date is far from clear on why the developers acted as they did. In its March 10, 2005 letter, Craftstar Homes has ducked the question by ignoring the explicit height limits in the Site Plan. Did Craftstar know that PBS was in the process of trying to eliminate all traces of those limits? If not, why did Craftstar believe that it would be a sufficient response if it tried to explain its actions without reference to those limits? For their part both Bozzuto Homes (March 8, 2005 letter) and Newland (March 4, 2005 letter) reflect awareness of the Site Plan limits

(though, to be sure, they are not mentioned directly) by arguing that the Board gave the staff authority to approve building modifications that were not "fundamental." Did Bozutto Homes and Newland undertake the risk of constructing acres of homes in violation of explicit, fixed building height limits without advance assurance that exceeding the height limits would be excused by the staff as "non-fundamental modifications"? After all, such risk could be avoided entirely by (a) simply complying with the prescribed height limits or (b) getting Board approval, prior to construction, of a building height amendment. If this did not happen, what does the record show regarding requests for building height changes as "non-fundamental modifications?" Were staff approvals sought and obtained? Before or after construction? Where is the documentation of all of this? Is this considered a legitimate way to end run Board-prescribed Site Plan limits? Is what happened in this case representative of what generally happens in site plan enforcement?

In the end, all the Committee can do is raise questions; it cannot answer them. Site plan enforcement is exclusively a responsibility of the Board. §50-41(k). But the Committee can and does demand that those with this authority exercise it with due regard for the public interest and particularly the fact that the public has no other recourse but to rely on its public servants to protect them from the consequences of illegal development.

III. THE BOARD MUST BE MADE AWARE THAT THE CTC SITE PLAN ENFORCEMENT ISSUES GO WELL BEYOND BUILDING HEIGHT VIOLATIONS, TO THE POINT THAT SITE PLAN REVOCATION MUST BE CONSIDERED AMONG THE REMEDIES

Although this proceeding began with the Committee's concern over building height violations, your report should make clear that there are many more enforcement issues to be addressed than just building height within CTC. Whether separated from the instant reconsideration matter or not, these issues need to be promptly and thoroughly addressed. In the end, the message to the developers should be clear: provide expeditious cooperation in acknowledging, correcting, remediating and mitigating all Site Plan violations, or face Site Plan revocation.

A. Minor Plan Amendments

I am advised by the Committee that the staff has approved numerous Site Plan amendments as minor amendments under § 59-D-3.7 & § 59-D-2.6(a), thereby obviating public participation in the amendment process, in contrast to what is required for major plan amendments under § 59-D-3.4 & § 59-D-3.7. This is proper only if the amendment "does not alter the intent, objectives or requirements expressed or imposed by the Planning Board in its review of the plan." § 59-D-2.6(a)(1).

The Committee is deeply concerned that the community is being deprived of the opportunity for input on significant plan changes by an overly generous application of the minor amendment process. The Committee feels there have been significant changes in massing and location of buildings, elimination of vistas deemed important to the overall plan for Clarksburg development, and elimination of an entire road, all without an opportunity for public input. In addition documentation of developer requests for, and staff analysis and approval of, so-called minor amendments is missing in many instances.

B. Setbacks

It is the Committee's understanding that setback violations on existing CTC construction are numerous. As part of its authority to investigate and correct Site Plan violations, the staff should insist that all developers provide certified surveys or plats for each home or block of homes showing required vs. actual setbacks.

C. Amenity Phasing

As noted previously, the approved Project Plan requires that amenities for one CTC Phase be completed before construction of a subsequent Phase has commenced. The Committee reports that this requirement has not been honored to date.

D. Extension of Preliminary Plan

The CTC community received a letter dated April 1, 2005 on behalf of Newland Communities stating that the developer would be seeking an extension for Preliminary Plan #1-95042. The Committee subsequently determined that the Preliminary Plan had expired March 26, 2005. The Committee was told by staff that when the extension request was scheduled to come before the Board, the Committee would be advised of the date of the hearing. The Committee wants to be certain that the staff includes in its report the implications of the need for the extension, with particular emphasis on what opportunities the Preliminary Plan expiration provides the Board to maximize the remediation and mitigation of Site Plan violations.[2]

E. Project Plan Amendments

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[2] To this end, the report should detail what the developer must demonstrate in order to qualify for an extension, in light of (1) any limit to the APFO validity period under §50-20(c)(3); (2) any currently non-validated portions of the Preliminary Plan under §50-35(h)(2)b; (3) an assessment of whether an extension (as opposed to Preliminary Plan amendment) is improper in light of the approved phasing schedule, under §50-35(h)(3)d.ii.; and (4) any other procedural or substantive problems with the extension request.

The CTC Project developers have filed comprehensive Project Plan Amendments. They are evidently being treated as major amendments under § 59-D-2.6, in that a public hearing has already been scheduled for July 21, 2005. Over the Memorial Day weekend, each and every CTC homeowner received, via certified mail, a package dated May 27, 2005 from developer counsel, giving "notice of Application for Project Plan Amendment No. 9-94004A". The Committee has done a preliminary examination of the requests, and their reaction borders on the unprintable. In significant part, what is being proposed for amendment are the standards to be applied to what is already built. In particular, one of the specific amendments (vi) is to "provide a clear set of development standards applicable to the project." But the development standards are "clear" and require no amendment. Upon closer examination, the drawings reveal that the height and setback restrictions on already constructed residences are proposed to be "amended," such that, if approved, the "amendment" will retroactively validate existing height and setback violations once corresponding Site Plan "amendments" are filed. It appears that the amendment process is being used by the developers to "cure" Site Plan violations. This attempt to paper over existing violations is an obvious abuse of the amendment process.

The Committee, applying common sense, understands that developers are unlikely to invest the time and energy into submitting detailed amendments in the absence of some sense beforehand that they will be approved. That developers even imagined that this method of validating Site Plan violations would work constitutes the final straw in the Committee's loss of confidence that, absent forceful intervention, the CTC will look anything like what was promised by the developers and required by the Board. The picture is not pretty: widespread violations, ignored by site plan enforcement staff, uncovered only after heroic efforts by citizens to understand what went wrong - efforts nearly successfully derailed by fraudulent efforts to keep the problems shielded from public view – followed by efforts to gloss over the problems. It is no wonder that, in Clarksburg, public confidence in the Board and its staff is riddled with anxiety and doubt, and the belief that developers are free to do what they want because any excesses can and will be papered over after-the-fact, if they are discovered at all. The Committee urges you to recommend that the Board, if it does not reject the Amendments forthwith in light of other problems, defer any hearing or action on them until there has been full and complete disclosure of existing problems and appropriate penalties and corrective measures imposed.

F. Revocation of Site Plan Approval

Rather than hold an amendment hearing sought in whole or in part to exonerate developers who have flouted the restrictions in the Site Plans, the Board should be headed in the opposite direction. On its own motion, the Board should schedule a hearing pursuant to § 59-D-3.6, informing the developers that the Board has

preliminarily determined that grounds for revocation exist as to both Site Plans, i.e., 8-98001 and 8-02014.[3]

In the meantime, to preserve the status quo and not extend ongoing or imminent Site Plan violations to current and future construction, all work should be stopped. The exact time for this process is obviously a matter of discretion and judgment within the expertise of the Board, but the Board has ample authority to take this action under § 50-41 of the Subdivision Ordinance, including doing so before the Site Plan revocation hearing.

Threat of revocation may be precisely the stimulus needed to ensure full and prompt developer cooperation in correcting and remediating all Site Plan violations. If such cooperation is not forthcoming, the Board may well be justified in the extreme remedy of revoking Site Plans.

IV. THE COMMITTEE CANNOT PARTICIPATE MEANINGFULLY IN DEVELOPING A MITIGATION PACKAGE ON INCOMPLETE INFORMATION

You have suggested that one way to ameliorate the Committee's concern about how development has been taking place in the CTC is for the Committee to develop a mitigation package, i.e., a list of amenities that the Committee would like to see added by the developers to offset any Site Plan violations that, as a practical matter, cannot be corrected because the buildings have been built, sold and occupied. These are, presumably, benefits that the developers might agree to provide in lieu of severe financial penalties (up to $500 per day per violation under § 50-41 (c)(2)) that could be imposed by the Board. The Committee is not at all sure that the Board lacks the authority to demand appropriate mitigation as part of its comprehensive corrective action authority under § 50-41 (i) and § 59-D-3.6. Nevertheless, the Committee is amenable to further exploration of this solution. It should be clear from the foregoing, however, that such a resolution will not restore needed public trust and confidence in the absence of a Board finding that Site Plan violations have taken place and have not been properly corrected. In other words, the resolution should not resemble a typical civil suit settlement where each party may thereafter continue to deny the truth of claims made by the other party.

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[3] The PBS memorandum of April 8, 2005 (at 3-4) asserts that §59-D-3.6 establishes a multi-step compliance process that includes **two** Board hearings: a "Threshold Hearing" to determine if a site plan violation exists, and a "Compliance Hearing" to determine the appropriate remedy. The Committee disagrees. There is no two-hearing requirement in §59-D-3.6. That section mandates only **one** hearing, at which the developer has the opportunity to either demonstrate that the Board's determination of a violation is in error or to address the issue of appropriate remedy, or both. The Board could establish a two-hearing process in its Rules of Procedure, but it has not done so.

Accordingly, the Committee believes you should not delay in the scheduling of the hearing on reconsideration of violation of Site Plan 8-98001 and 8-02014, if not a broader Site Plan revocation hearing, except to complete a comprehensive staff report along the lines indicated above. In the meantime, the Committee is already developing the requested mitigation package. To complete the job effectively, however, the Committee needs to be more fully informed than at present on critically material facts, as previously disclosed in an email to Director Loehr. The Committee does not want to be placed in the position of asking for something that is already required, or inconsistent with what is required. To reiterate, the documentation and information that should be provided to the Committee includes the following:

- Recreation and Amenity Plans

  - Approved Site Plan signature set showing amenities for each development phase.
  - Planned timeline and current status of each scheduled amenity.
  - Specific detail regarding Piedmont Woods, Murphy's Grove and Hilltop Plaza park areas, as well as the Town Square Green and Greenway, with information on walking paths, bike paths and other amenity features.
  - Information regarding any amendments, either Staff level or other, that have permitted removal or repositioning of any amenity features. Also include proposed Phase 3 and Phase 1A amendment.

- Landscape Plans

  - Approved Landscape Plan signature set showing landscaping detail, including tree, shrub and planting varieties for each development phase.
  - Planned timeline and current status of landscaping for each phase.
  - Specific detail regarding Piedmont Woods, Murphy's Grove, Hilltop Plaza, Town Square Green and Greenway, and all entryways. Also include proposed Phase 3 and Phase 1A amendment.

- Framework Streetscape Plans

  - Approved signature set showing main entryways and framework. streetscapes with detail of fixtures, such as entryway signage, lighting, brickwork, benches and awnings. Also include proposed Phase 3 and Phase 1A amendment.
  - Planned timeline and current status of each entryway and streetscape.

- Proposed Phase 3 and Phase 1A Amendment

  - Proposed elevations for all structures, with certified height calculations in feet/inches.

- MPDU Plans

  - Approved plans detailing total number and location of MPDU's.
  - Specific detail regarding planned location for MPDU's not yet constructed.

- Height and Setback Violations

  - Staff assessment of the number and location of setback violations, by builder.
  - Staff assessment of the number and location of height violations, by builder.

Your prompt attention to these matters is greatly appreciated. I look forward to hearing from you about an early date for the reconsideration hearing.

Sincerely yours,

David W. Brown

cc: [Via Email & Regular Mail]
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Silver Spring, Maryland 20910

Re: **Clarksburg Town Center - Site Plan Review**
Nos. 8-98001 and 8-02014
Building Height Violation Reconsideration Hearing

Dear Michele:

I write on behalf of the Clarksburg Town Center Advisory Committee ("Committee") to express the Committee's continuing concern about its unfilled requests for documentation that should be in the Planning Board files for the CTC Project.

1. Some of the information requested in Part IV of my June 1st letter – information needed by the Committee to develop a mitigation package – was furnished by you on June 10th. Much of what was requested, however, has yet to be provided, even though my June 1st letter requests were essentially a repetition of earlier requests. To itemize, the Committee still does not have:

a. Recreation and Amenity Plans, with phasing plans and current status

b. Landscaping plans for Phase 3 and the Phase 1A amendment

c. Timeline and current status on all landscaping plans

d. Framework Streetscape Plans, with phasing plans and current status

e. Complete and accurate MPDU Plans for all phases, both constructed and planned

f. Staff assessment of height and setback violations

Until the Committee gets these materials, its efforts to develop a meaningful mitigation package will continue to be frustrated.

2. Last week I asked you for copies of the Appendices to the Phase I Site Plan Enforcement Agreement. These Appendices are essential to development of our response to the Newland Communities Letter of June 10, 2005. We intend to file that response as soon as possible, so that the staff will have the benefit of the Committee's position on the claims made by Newland before the staff report is finalized and released on Friday, June 24th. **If the Appendices are anywhere to be found in the Board files, I ask that you send a copy to me by courier immediately.** If that is done right away the Committee's response should be in your hands sometime tomorrow.

Thank you for your prompt attention to these outstanding matters.

Sincerely yours,

David W. Brown

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DAVID W. BROWN

June 13, 2005

Derick Berlage, Chairman
and Members of the Board
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

Re: **Clarksburg Town Center - Site Plan Review**
Nos. 8-98001 and 8-02014
Building Height Violation Reconsideration Hearing

Dear Chairman Berlage and Members of the Board:

Enclosed please find a June 1, 2005 letter from the undersigned, sent to Michele Rosenfeld, Esq. on behalf of our client, Clarksburg Town Center Advisory Committee.

Newland Communities, through their counsel, hand-delivered a letter to you and the other members of the Board on June 10, 2005, addressing issues raised in, and specifically responding to, my June 1st letter. I therefore thought it appropriate that the Board have a copy of my letter. The Committee anticipates filing a response the June 10th letter in the near future, addressed to the Board.

Sincerely yours,

David W. Brown

David W. Brown

/enclosure

cc: Charles Loehr, Director (w/o encl.)
Rose Krasnow, Chief, Development Review (w/o encl.)
John A. Carter, Chief, Community-Based Planning (w/o encl.)
Barbara A. Sears, Esquire (w/o encl.)
Todd D. Brown, Esquire (w/o encl.)
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DAVID W. BROWN

June 21, 2005

Derick Berlage, Chairman
and Members of the Board
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

Re: **Clarksburg Town Center - Site Plan Review**
Nos. 8-98001 and 8-02014
Building Height Violation Reconsideration Hearing

Dear Chairman Berlage and Members of the Board:

This letter supplements my June 13, 2005 letter to you in the above-referenced matter, enclosing a discussion of the concerns of my client, the Clarksburg Town Center Advisory Committee ("Committee"), as set forth in my June 1, 2005 letter to Associate General Counsel Michele Rosenfeld.

I. THE INFORMATION DISCLOSED SINCE THE BOARD'S NO-VIOLATION DECISION ON APRIL 14, 2005 MAKES CLEAR THAT THAT DECISION SHOULD BE REVERSED AT THE REHEARING

Since my June 1st letter, I have had an opportunity to listen to the tape of the Board's April 14th hearing. That experience changes none of the analysis and conclusions reached in that letter. Rather, it confirms the materiality of PBS's misrepresentations to the no-violation outcome of that hearing. It was quite late in the hearing before PBS [the author of the April 8, 2005 Staff Report] stated, in response to a question from Vice Chair Perdue, that the final approved Phase I Site Plan had been amended such that sub-phases of Phase I were built on site plans that replaced specific numerical building heights with a "4 stories" limitation. Shortly thereafter, Ms. Krasnow added that

> we have been unable to ascertain why it went from 45' to 4 stories, but clearly it did, and the buildings were built in accordance with the 4 story regulation. It is silent in the record as far as we can [tell].

Following this comment, Vice Chair Perdue made a motion to find no violation. She stated her rationale for the motion in the following words:

> It is a very messy record but I think that as to the place where it gets the clearest is with the signature set that has height limits in it, but none of the buildings in question were built pursuant to that signature set. They were built pursuant to a signature set that explicitly deleted the height limits. They are written out; they are over written. It says 4 stories and the height limit is crossed out and that's the conditions pursuant to which these buildings were built. Therefore I would not find a violation.

Commissioner Bryant seconded the motion, explaining that the record is messy but that the mess was the Board's responsibility, not the developers, and it would be a gross injustice to penalize them for following Board rules and guidelines. Commissioner Wellington declined to support the motion, stating that the record was not clear that the signature set final Phase I Site Plan had changed. Commissioner Robinson supported the motion, observing that an unclear record does not constitute a violation, and that the record was not clear that there was a violation. Finally, Board Chairman Berlage supported the motion, observing that the Committee had not met its burden of proof that a violation occurred.

It is quite clear from the foregoing that the Board's no-violation determination hinged entirely on the belief that the building height limits were changed on approved site plans before buildings were built. Why and how this change happened was not as important as the fact that it took place **before**, not **after**, buildings were built, as explicitly represented to the Board by PBS. This representation was false, as PBS has apparently acknowledged since the hearing. Thus, unless the Board were to change its rationale at the reconsideration hearing, the facts now known, i.e., that the buildings were built while the explicit numerical height limits on the Phase I Site Plan signature set were still unchanged, compel the conclusion that the buildings identified in the April 8th Staff Report as in excess of 35' or 45' in height, as the case may be, are in violation of the Phase I Site Plan.

II. NEWLAND COMMUNITIES' JUNE 10, 2005 LETTER CONTAINS NOTHING THAT SHOULD DISSUADE THE BOARD FROM FINDING THAT THE PHASE I AND II SITE PLANS HAVE BEEN VIOLATED

Most of the rest of this letter is devoted to a response to the letter of June 10, 2005, from counsel for the Newland Communities ("Newland Letter"). The Newland Letter is, in every passage, a convoluted and evasive response to my June 1st Letter, one that fails to deal with the known facts of record.

a. Building Height Claims

The Newland Letter argues Newland's compliance with the building height limitations at length. Id. at 1-5. Yet at no point does Newland deal with the basic simplicity of what, as explained above, the Board properly understood was at issue: what were the signature set building height requirements when the buildings went up? The answer to that question is now unambiguous: 35' for townhouses and 45' for multi-family units. Newland ignores this in favor of a variety of arguments that lead nowhere.

1. Newland begins its defense with the claim that because the RMX-2 (Optional Method) zone does not specify a maximum building height, the "proposed and constructed building heights do not violate any zoning standard." Newland Letter 1. This is wrong. Construction that violates the Site Plan violates the Zoning Ordinance. Section 59-D-3.4(c) requires the developer, if it executes the development authorized by the Site Plan, to agree to comply with all requirements that are part of the Site Plan." This is just as much a "zoning standard" as an explicit building height.

2. Newland argues that "4 stories" in the Project Plan Opinion is controlling. Newland Letter 1. But as Commissioner Robinson made clear at the April 14th hearing, what is controlling is the signature set Site Plan, which is supposed to fully and carefully incorporate all limitations and conditions to construction. This is especially so for building height of principal buildings, without which a site plan is incomplete as a matter of law under the Zoning Ordinance. §59-D-3.23(a).

3. Newland argues that the Site Plan Opinion incorporates the "Staff Report and Recommendation that identified '4 stories' as the 'permitted/required' and 'proposed' building height for the Site Plan." Newland Letter 1. But because the Opinion does not expressly adopt a 4-story standard, all Newland is saying is that the Board impliedly (and vaguely) adopted it. During the violation hearing, however, the Board correctly did not view the Opinion as the controlling document. Otherwise, the definitive response to the Committee at the April 14th hearing by the Board should have been that building height numbers on the Phase I Site Plan were not controlling, as they were inconsistent with the Opinion.

4. Newland argues that the Site Plan Opinion does not indicate that a subsequent Site Plan "could in any way override the Board's written opinion of permitted building heights within the project (i.e., 4 stories)." Newland Letter 1-2. But it was hardly necessary for the Opinion to parrot the established existing practice, in which the Board relies on the signature set Site Plan as the definitive gauge of Site Plan compliance and the document against which building permits are drawn.

5. Newland argues that the inclusion of the data table (including explicit numerical building height limits) in the Site Plan was merely "a chart

inadvertently repeated in subsequent drawings." Id. at 2. Newland presents no factual basis warranting the conclusion that this was just a simple mistake. To the contrary, after the hearing the Committee unearthed from DPS files the Site Plan for the Phase I subphase for the Bozzuto units, signed by Clark Wagner for Bozutto, with the same height table as in the Phase I Site Plan itself, i.e., signed before construction and before post-construction alteration of the documents by PBS. Mr. Wagner was not inadvertently repeating an error; he was repeating what the Phase I Site Plan repeated from the **final approved Preliminary Plan**. To repeat the requirements of the Preliminary Plan is hardly "inadvertent;" it is what is to be expected. Moreover, if Newland or its predecessor (both represented by the same counsel) thought that the "4 stories" in the staff recommendation should override the data table in the Preliminary Plan, it had a straightforward remedy for eliminating any doubt or confusion: ask the Board for clarification. The reality is that there was no mistake or confusion. The Phase I Site Plan was prepared for Newland by persons who understood the obvious – absent Board approval, there should be no inconsistency between the development standards on the Preliminary Plan and on the Site Plan.

6. Newland argues that under Site Plan Condition 38, building height could be changed by staff. Id. at 2-3. This is the biggest red herring of all. Where is the evidence of a conscious staff decision to **change** building height? There is no documentation in the record of such changes, and at the April 14th hearing PBS made clear no request for change was made or granted. Moreover, the argument is inconsistent with Newland's principal claim advanced in the letter, i.e., that the height limit is and always has been "4 stories," which would of course mean there was no need for a change. Finally, even if there were evidence of an attempt to change building height utilizing Condition 38, the notion that building height is a change with the purview of Condition 38 is obviously wrong. If staff alone can alter prescribed development standards, what is the point of the Site Plan approval process? Condition 38 is plainly limited to relatively minor adjustments to non-fundamental project elements, such as marginal changes in building type and location, and minor adjustments to the project as it is being built to enhance open space, pedestrian and vehicular circulation and the like, while preserving overall project compatibility. The notion that Condition 38 – which I re-emphasize was never consciously utilized in this case – could justify the building of hundreds of homes oversized in height anywhere from 2'8" to 16'7" (June 1st Letter 2-3) borders on the preposterous.

7. Newland next references the hearing on the Phase II Site Plan on May 9, 2002, where staff – PBS – advised that Condition 38 had been used to administratively modify dwelling units and site layout in Phase I. Newland Letter 4. While Newland argues that this report was received by the Board "without object or controversy," id., conspicuous by its omission is any reference to administrative modifications in building height. Again, PBS advised the Board on April 14th that there had been no height modifications. The proper inference from the Phase II Site Plan

hearing, therefore, is that it was understood all around that building height was not something the staff could administratively modify.

8. Rehashing and repackaging a variety of the above claims, Newland next argues that the Board never reviewed the signature set Site Plan prior to its approval, and the Site Plan's adoption of explicit building heights was invalid. Id. This argument requires the Board to suspend disbelief long enough to accept the notion that Newland, with the advice of highly skilled and able counsel, submitted invalid Site Plans for approval, Site Plans that contained considerably more restrictive development standards that the Board ostensibly approved. If Newland truly believed this **then**, rather than having **now** concocted this claim to excuse the violations, it is incomprehensible that it would have acquiesced in submitting unduly restrictive building height limits on the Site Plan documents. The far more plausible explanation is that Newland believed **then** that it could build in excess of the Preliminary Plan and Site Plan height limits, and, with a cooperative staff, **now** paper over the discrepancies, with Project Plan and Site Plan Amendments. Indeed, that process is now underway. See June 1st Letter 10-11.

9. Newland claims staff could remove a building height limit under Condition 38 because the Board never imposed a specific height limit in its Site Plan Opinion. Newland Letter 5. This argument assumes, incorrectly, that the Board's Opinion must specifically adopt building height standards. There is no such requirement in the Zoning Ordinance. What the Board's Opinion must contain is findings about the Site Plan. §59-D-3.4. There is no requirement, nor should there be, that the Board Opinion regurgitate every numerical requirement contained on the Site Plan. That is not to say that the Opinion need not address building height – perhaps in great detail – if that had been a contested issue when the Site Plan came before it. In the case of Phase I, however, it could hardly be a surprise that there was little or no concern about the quite conventional 35' and 45' height standards on the Phase I Site Plan.

10. Newland argues that because the Phase I Site Plans were altered after construction, the alterations did not affect permit issuance by DPS, and the years of permitting that took place before that confirms "that '4 stories' was the approved building height standard." Newland Letter 5-7. PBS's fraudulent alteration of Site Plans is dismissed as irrelevant "untidy recordkeeping" and "perhaps questionable judgment in terms of timing." Id. at 7. Turning first to the significance of the permitting that has taken place, Robert Hubbard, Director of DPS, has advised that DPS does not check permit applications against the Site Plan for height restrictions; most permit releases come through Wayne Cornelius of the Board staff. Contrary to Newland's claim, id., DPS relies upon Board staff for approval of each Site Plan (compliance with Site Plan signature set and Board-approved standards) prior to issuing permits. Nor does DPS inspect each unit for height and other zoning compliance issues before issuing a use and occupancy certificate. Under RMX-2 Optional Method zoning and the Board's structuring of the CTC Project under that zone, any violation of height limits would have to be addressed by Board staff in the course of inspection and enforcement. Within the

CTC, therefore, DPS exercises no authority to enforce height limits. Hence, the Board should attach no significance to Newland's claim of years of DPS permitting of units that violate Site Plan height limits.

What is particularly troublesome about Newland's argument is that if effectively assumes that the Board is unaware that no one at DPS is minding the store when the issue is building height. In other words, Newland makes an argument that could be persuasive only if the Board is ignorant of its own staff's enforcement obligations. The Committee is not going to indulge any such assumption, but that is not to say that the Board has done all it can to ensure that the staff is meeting those obligations. The CTC track record thus far is dismal, and the worst thing the Board could do is acquiesce in the building height violations simply because of their breadth and persistence, which is the argument Newland is making here. Put another way, Newland is saying in essence, "we have been so successful for so long in building in violation of the established standards that the established standards must be re-defined to conform to what we did." That is precisely what was being done, under wraps, before and at the April 14th hearing when (1) PBS used altered Site Plans to defend the status quo; (2) PBS lied to the Vice Chair regarding when the Site Plan alterations took place; and (3) Newland, having already submitted to PBS amendments to paper over the violations, stood mute when the opportunity to correct the record presented itself. In the end, Newland claims that it would be "manifestly unjust" to find a height violation where what it built was approved by staff. Id. But he who seeks equity must come before the Board with clean hands. Newland has now had three clear opportunities to display the kind of candor that might inspire the Board to be lenient in its findings: at the April 14th hearing, and in its prehearing letters of March 4, 2005 and June 10, 2005. Newland has struck out.

b. Setback Claims

Newland's approach to the issue of setback violations in the CTC mirrors its approach to building height: obfuscate sufficiently to warrant a Board finding that there was confusion about the requirement as the units were being built, and that it would therefore "be unjust to find a violation...." Newland Letter 10. In fact, when Newland's smokescreen is cleared away, there can be no doubt that a clearly established front yard setback of 10' has been repeatedly violated.

When the Project Plan was approved in June 1995, the following setbacks were in the Board-approved data table:

	Required	Proposed
Setbacks:		
. . .		
b. From any street*		
- Commercial Bldgs.	NA	0 ft. min.
- Residential Bldgs.	NA	10 ft. min.
. . .		

Notes: * No minimum setback is required if in accordance with an approved master plan

Board Opinion, CTC Project Plan 9 (June 12, 1995). What this means is and was easily understood by those who subsequently prepared the Phase I Site Plan, which is subject to RMX-2 Zone Optional Method development regulations, §59-C-10-.3, including minimum building setback requirements in §59-C-10.3.8. Under §59-C-10.3.8(c), the minimum residential building setback from the street (otherwise defined in the Ordinance as the front yard, §59-A-2.1) is 30 feet, except that the Board can reduce this number, if consistent with the applicable master plan, all the way to zero if appropriate. In this case, the Board determined that the 1994 Clarksburg Master Plan provided it the full flexibility to reduce both the residential and the commercial building front yard setbacks to zero, which is why the data table states "NA" under "Required." The data table also reflects what the Board approved, i.e., what became the front yard setback requirements for the Project overall: zero feet for commercial buildings and 10' for residential buildings.

Newland, ignoring or mischaracterizing the foregoing, claims that during Phase I Site Plan approval (and again during Phase II), the Board "determined conclusively that **no** setback was required from the street." Newland Letter 8, 9. Newland relies on the Phase I and II Staff Reports, identical to each other in this respect, but has misconstrued them. These Staff Reports observe that the Board had determined during Project Plan Review that on account of the Master Plan, no setback is "**necessary**." Phase I Staff Report at 32; Phase II Staff Report at 18. This, of course, is not the same as concluding that no setback would be **required**. In fact, no commercial building setback was **required**, and a 10' residential setback was **required** at the Project Plan stage, as detailed above. Indeed, both of these decisions are reflected in the Staff Report Data Tables: Phase I at 32; Phase II at 17, mirroring the 0' (commercial) and 10' (residential) setbacks in the Project Plan Opinion. Newland's claim that the Board, in approving Phases I and II, reduced the Project Plan front yard requirement for residences

from 10' to 0' is baseless, and would make sense only if the cited tables had the same zero-foot setback for both types of buildings.

The 10' residential front yard setback imposed by the Board is reflected in the Data Table in the Phase I Site Plan, which lists 10' as the front yard and street setback minimum under §59-C-10.3.8 for all the residential units. As for Phase II, for the reasons detailed in my June 1st Letter 6-9, the absence of the 10' setback on the post-construction "Site Plan" of October 14, 2004, is meaningless. What counts is the Phase II Site Plan before the Board at the Phase II Site Plan hearing of May 9, 2002. Presumably Newland has a copy of this plan; the Committee is still searching for a legible one. If it were favorable to the claim Newland is now making, it would have surely been attached to the Newland Letter, which attached other site plans. Newland relies on these highly questionable Site Plan amendments, approved by staff, to create the impression that the 10' setback requirement was never actually imposed. The reality is otherwise; the requirement was there all along and, like the 35' and 45' building height requirements, is one Newland is trying to eradicate after-the-fact with Project Plan Amendments.

That Newland is grasping at straws is also quite obvious in its effort to conjure up "an irreconcilable conflict between a 10' street setback and a 0' side yard requirement for a unit built on a corner lot where the side yard also happens to abut a street." Newland Letter 9. There is no conflict, "irreconcilable" or otherwise. As every developer with experience in the County is well aware, the official County interpretation of the Zoning Ordinance is that "on a corner lot where the side yard also happens to abut a street," that "side" yard is treated as a second front yard. See DPS Code Interpretation/Policy ZP0403-3 ("Each corner lot has two front yards and therefore requires a front yard setback from each street."). Indeed, the only confusion in the developer community about the need for corner lots to meet the front yard setback on both streets is the confusion Newland is attempting to sow with a baseless argument. Indeed, for Newland to venture forth with such an obviously erroneous claim only strengthens the inference that the construction that has taken place in violation of the 10' front yard requirement has, all along, been intentional, not inadvertent.

c. Committee Standing

Newland's last refuge is to attack the messenger, i.e., the Committee. Newland Letter 8-9. This is a new tactic, not one repeated from the April 14th hearing where things went Newland's way. It is also a further indication that all Newland has left to grasp at are straws. The attack on the Committee must be contrasted with Newland's posture as recently as May 9, 2005, when, in a cover letter to Rose Krasnow on its 9-94004A Project Plan Amendment submission, Newland expressly acknowledged the Committee as the credible representative for a substantial group of CTC homeowners. Newland Letter 1-2 (May 9, 2005). This belated effort to discredit the Committee does not wash. The depth, quantity and transparency of the Committee's work, and the Committee's level of even-handed commitment to all CTC residents, are manifest from

the enclosed history of Committee actions on behalf of CTC.[1] Newland's unwarranted attack on the Committee should be rejected out of hand.

III. THE STAFF REPORT SHOULD NOT OVERLY COMPARTMENTALIZE THE MATTERS THE BOARD NEEDS TO ADDRESS

Ms. Rosenfeld responded to my June 1st letter on June 10th. In her response she expresses the view that "other regulatory matters" that were raised in my letter are "independent regulatory review items" about which the Committee can express its views "when they come before the Board for consideration." The Committee, however, believes that the Board can most effectively serve the public interest by not adopting this overly technical, compartmentalized approach to the July 7th hearing.

Construed most narrowly, the hearing is only about reconsideration of a finding of no building height violations on just two Bozzuto Homes buildings and three Craftstar "2 over 2" buildings, and nothing else. But as my June 1st Letter makes clear, as amplified by this letter, that is merely the tip of the iceberg of CTC problems this Board must address. The Committee believes there are many more building height violations. Numerous setbacks on constructed (or under construction) homes are also in doubt, as well illustrated by various letters to the Board from counsel for Craftstar. Moreover, the Committee intends to demonstrate that all the violations have a common origin: builder deviations from clearly prescribed standards, whether intentional or not, that were facilitated by some combination of staff inattention, oversight, negligence and misfeasance, that may or may not rise to the level of malfeasance, depending upon what evidence produced at or before the hearing.

As briefly outlined in my June 1st Letter, the Committee's concerns transcend building height and setback violations. The Committee is preparing a detailed listing of issues and discrepancies culled from months of Committee efforts to understand what has gone wrong in administering the CTC Project, despite unrelenting efforts by one staff person after another to deflect or push aside its concerns, or stall in providing critical information, while construction continues apace. Completion of this list has been delayed due to unfulfilled information requests for key documentation, including a complete copy of the exhibits to the Phase I Site Plan Enforcement Agreement, which are pivotal. The Committee will present this list to the Board as soon as practicable.

For present purposes, it is sufficient to emphasize that the staff has failed to stop construction despite developer failure to meet commitments that bar further work

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[1] The enclosed 32-page history does not include copies of the referenced exhibit, which are voluminous. To ensure that these exhibits become part of the record, the Committee is sending a complete set of them attached to the copy of this letter being sent to Ms. Rosenfeld, with the request that the letter and all attachments be made part of the record.

until those obligations are met. To cite but one example, under Item 1(b) to Exhibit E to the Enforecement Agreement (of which we have only an incomplete copy), "All community-wide facilities within Site Plan 8-98001, must be completed and conveyed to the Association no later than the earlier of the receipt of a building permit for the 540th Lot/Unit or by fifteen (15) years from the date of the Site Plan Approval." Move than 540 permits have been issued but the conveyance has not been completed. According to Exhibit E, this failure "shall preclude developer from receiving any additional building permits for that particular phase and all remaining phases until such time as the default is cured." Yet construction is unimpeded, as if developer commitments were either meaningless or unenforceable. This ought to be considered a serious oversight even if there were no building height or setback violations currently on the table. Yet months of Committee prodding for enforcement action and stop work orders have produced no movement, let alone progress.

All of these concerns are inextricably linked, and they are not going to be solved in the piecemeal fashion Ms. Rosenfeld envisions. It is particularly inappropriate for the staff to have already scheduled for hearing, as if a routine matter, the propriety of extending the Preliminary Plan or any Project Plan Amendments. The need to address the scheduling of these matters in light of the outcome of the July 7th hearing is especially critical if, as the Committee believes it must, the Board finds widespread Site Plan violations, infecting more than a majority of all CTC homes built or under construction.

Sincerely yours,

David W. Brown

/enclosure

cc: Charles Loehr, Director
Michele Rosenfeld, Esq. (w/full attachments)
Rose Krasnow, Chief, Development Review
John A. Carter, Chief, Community-Based Planning
Barbara A. Sears, Esquire
Todd D. Brown, Esquire
Timothy Dugan, Esquire
Róbert G. Brewer, Jr., Esquire
Clarksburg Town Center Advisory Committee