



-MCPB
Item # 2
10/06/05

MEMORANDUM:

TO: Montgomery County Planning Board

FROM: Rose Krasnow, Chief, Development Review Division *RKZ*

SUBJECT: Consideration of the Following Alleged Violations:
(1) Elimination of "O" Street and the Pedestrian Mews (Deferred)¹
(2) Phasing and Provision of Amenities
(3) Phasing and Clustering issues related to MPDUs
(4) Discrepancies regarding the Site Plan for Phase II- (Deferred)
(5) Inspections related to the Site Plan Enforcement Agreement
(6) Alteration of Clarksburg Town Center Documents (Deferred)

PROJECT NAME: Clarksburg Town Center

REVIEW BASIS: Div. 59-D-3.6 of the Montgomery County Zoning Ordinance

Case #: 8-98001 & amendments and 8-02014 & amendments

ZONE: RMX-2

LOCATION: In the northeastern quadrant of the intersection of Stringtown Road and Frederick Ave (MD RT. 355), Clarksburg

MASTER PLAN: Clarksburg and Vicinity Master Plan

HEARING DATE: October 6, 2005

PREFACE

On April 14, 2005, in response to a request from the Clarksburg Town Center Advisory Committee (CTCAC), the Planning Board held a hearing to consider alleged height violations at

¹ Item numbers 1, 4, and 6 have been deferred pending further investigation. Staff intends to present these items at the October 25th hearing.

Clarksburg Town Center. At the conclusion of the hearing, the Board voted 4 -1 (with Commissioner Wellington dissenting) to approve a motion that no violation had occurred. On July 7, 2005, the Board held another hearing to reconsider its earlier decision with respect to height violations and to consider whether or not violations had also occurred with respect to front setbacks at Clarksburg Town Center. With respect to both height and setback, the Board voted 5 – 0 that violations had occurred. The Board then held a hearing on the same day to determine Sanctions and/or Plan of Compliance. The Board members unanimously agreed that units that were either under contract and under construction, or under contract but construction had not yet begun as of July 7th, 2005 would be grandfathered. However, the remainder of the Sanctions/Plan of Compliance hearing was postponed until July 28th to give staff time to correctly determine the number of units that were in violation with respect to height and setback.

On July 14, 2005, CTCAC sent another letter to the Planning Board asking that they consider additional violations at Clarksburg Town Center with respect to Clarksburg Town Center. They also requested that the Plan of Compliance Hearing be postponed until these violations could be heard. The Board agreed to both requests and scheduled a hearing for October 6th to consider the violations alleged in the July 14th letter. Since that time, however, numerous additional violations have been alleged. On Tuesday, October 25th, the Board will hold another hearing to consider possible violations with respect to the following:

- 1) Setback violations with respect to side and rear yards, as well as the minimum space required between end buildings for townhomes and multi-family dwellings
- 2) Minimum net lot area
- 3) Lot Width Minimum at Building Line
- 4) Lot Coverage Standards for Accessory Buildings
- 5) Elimination, Rerouting and/or Reduction in Size of Alleys and Roadways
- 6) Changes to Blocks with respect to unit types and configuration without Planning Board Approval
- 7) Changes in Grading from Signature Site Plan to Actual
- 8) Modification of Environmentally-related Features
- 9) Reduction in required green space
- 10) Record Plat Irregularities
- 11) Issues related to the Manor House Amendment
- 12) Parking Requirements
- 13) Elimination of "O" Street and the Pedestrian Mews (Deferred from 10/6/05)
- 14) Discrepancies regarding the Site Plan for Phase II (Deferred from 10/6/05)
- 15) Alteration of certain Clarksburg Town Center Documents (Deferred from 10/6/05)

After decisions have been reached regarding all alleged violations, the Board will hold a Sanctions and/or Plan of Compliance Hearing on Thursday, November 3rd.

Background Regarding the Clarksburg Town Center Project

The Clarksburg Master Plan and Hyattstown Special Study Area ("Master Plan") was approved by the County Council in June of 1994. It called for the creation of a Town Center in

Clarksburg, which would include the Historic District as a focal point and would be surrounded by a mix of uses, including office, residential, and retail.

In December of 1994, both a Project Plan (#9-94004) and a Preliminary Plan (#1-95042) were submitted for review by Piedmont and Clarksburg Associates, represented by Steve Klebenoff and Mark Montgomery. Using the optional method of development under RMX2 zoning, the plan envisioned what is now known as a neo-traditional community and called for the construction of a maximum of 1300 residential units, 100,000 square feet of office, and 150,000 square feet of retail, to be constructed in phases. The Project Plan was approved in June of 1995. The Preliminary Plan was approved in March of 1996.

The first site plan for Phase One (#8-98001) was approved in the Spring of 1998. The Phase II Site Plan (#8-02014) was approved in June of 2002. At this time, approximately 725 units have been built or are under construction in Phase I and II of the project. A Site Plan covering the Phase III (#8-04034) retail portion of the project is pending.

I. Alleged Violations in the Phasing and Provision of Amenities

Finding:

Staff finds that the reference to the 540th building permit does relate to the community as a whole, not just to Phase I. Since more than 540 building permits have been issued and many of the promised community-wide facilities are not yet in place, staff finds the applicant to be in violation.

Staff further finds that the elimination, reduction and placement of the required amenities represents an additional violation.

These findings incorporate in full the analysis in Staff's memorandum at Attachment One.

Community Position

CTCAC asserts that the trigger for conveyance of community-wide recreational facilities and amenities was set at the time of issuance of the 540th building permit as noted within the Site Plan Enforcement Agreement #8-98001, and that this trigger did not relate to the 540th permit for Phase I only but referred to the total number of permits released for all phases.

CTCAC also asserts that staff level amendments have changed, reduced, or eliminated recreation facilities and community-wide amenities.

Applicant's Position

The applicant states that Newland Communities has already constructed the required recreation facilities and amenities including 3 tot lots, a multi-age play lot, 3 open play areas, 11 picnic/seating areas, 6 neighborhood squares and greens, and a community pool. These are located within both Phases 1 and 2 of the Project and are available for the resident's use.

The applicant further states that while it is true many of the community-wide facilities have not yet been constructed, the phasing triggers have not been violated because each such trigger is related only to a single phase of the entire project, as follows:

Site Plan 8-98001: 540th unit for Community Wide Facilities
Site Plan 8-02014 70% occupancy of units.

Since fewer than 540 permits have been issued for Phase I, and 70 percent occupancy has not been attained within Phase II, the applicant claims to be within the proscribed schedule for the provision of both local and community-wide amenities.

Staff Analysis

The Town Center Project Plan depicts a comprehensive system of recreation, environmental, and open space amenities with careful consideration of the type and location of facilities to meet the needs of future residents. The Project Plan offers facilities at the neighborhood and community levels and off-site (park/school). There are three issues of review: fulfillment of amenities contained in the Project Plan; providing facilities in the timely manner required by the 1999 Site Plan Enforcement Agreement, and the adequacy of facilities constructed.

The Planning Board's approval of Project Plan 9-40004 called for the provision of the following amenities:

- Tot Lots (4)
- Multi-age Play Fields (6)
- Picnic/Sitting Areas (6)
- Tennis Courts (3)
- Bike System
- Pedestrian System
- Nature Trails
- Nature Area
- Swimming Pool (2)
- Wading Pool
- Indoor Fitness Center
- Soccer Field
- Baseball Field

Staff began the analysis with the amenities called for in the Project Plan and followed these facilities through the series of site plans where recreation adequacy was assessed. (See Staff Memo, Attachment One, pp. 3&4).

The Recreation Analysis for Existing Amenities shows the number and adequacy of recreation facilities provided for the currently occupied housing population. (See Attachment One, p. 8). Staff concludes that recreation facilities, to date, do not fulfill recreation demand as computed

from the *M-NCPPC Recreation Guidelines*. Staff finds a significant deficiency in every age group and particularly for teens and adults.

Moreover, Staff finds that the holistic perspective of the Project Plan and the subsequent comprehensive site plan recreation analyses argue that the phasing of facilities was clearly meant to embrace the community as a whole, reaching across site plans and phasing lines. This approach is validated by the fact that the individual site plans consistently refer to the provision of amenities across all phases of the Town Center Project. For example, we see in the applicant's own submissions for both Phase I (8-98001 and amendments) and Phase II (8-02014 and amendments) that there are consistent references to the comprehensive system of amenities that serve both phases. Likewise, Planning Board approvals of the various Site Plans and amendments incorporate recreation amenities for both phases, per staff report recreation analyses.

Finally, analysis of the recreation amenities currently provided within the Town Center must also consider the adequacy of the facilities themselves. As a whole, the local amenities cited in the applicant's letter do not conform to the standards of the *1992 Recreation Guidelines*, per evaluation of the amendment drawings. For example, of the three Open Play Areas cited, two play areas do not provide adequate setbacks and square footage. The third does not meet the minimum width for an open play area. Likewise, the Multi-age Play lot also does not meet the setbacks recommended in the Guidelines. Tot Lots require seating, which appears to be missing. Furthermore the location of the amenities that have been provided is of grave concern to staff. Most are located within the block interior, clearly sited within residual space remaining after the location of housing units, garages, alleys, stormwater facilities and dumpsters. A number of the six existing seating areas rest adjacent to bio-retention ponds with views of alleys, garages and nearby dumpsters. Such siting indicates that the recreation elements are not designed as an integral part of the public life of the Town Center, but rather, as required elements relegated to the backside of the town's streets as an afterthought.

II. Alleged Failure to Inspect the Community on a Timely Basis

Finding:

Staff finds that no violation has occurred with respect to inspections of Clarksburg Town Center.

Community's Position:

CTCAC states that Maryland National Capital Park and Planning Commission (M-NCPPC) inspection staff has not performed general inspections of the site as called for in the Site Plan Enforcement Agreement (SPEA). It further alleges that the Developer has not requested the necessary site inspection as required determined by the SPEA.

Applicant's Position:

The Applicant states that the SPEA required the developer to send written notice requesting inspection at three specific times: 1) prior to clearing and grading; 2) at 70% occupancy, and 3)

at completion of the work. Newlands was not the owner of the property at the start of construction so has no knowledge regarding whether the first required inspection occurred. With respect to the remaining inspections, the applicant points out that the project has not yet been completed, and that 70% occupancy has not been attained within either Phase I or Phase II, so a written request for such inspections is not yet required.

Staff Analysis

Item #3 of the SPEA calls for the periodic inspection of the project by representatives of the Planning Board (Board) in order to enforce the terms, conditions and restrictions of the site plan and the SPEA. Such inspections are performed on a random, informal basis. Inspectors go out to the community to verify that housing is being constructed as roads are being installed and that other community amenities were also being constructed in a similar time frame. Such random inspections have been occurring, as indicated by the inspection records found in Attachment Two.

Item #4 of the SPEA requires the Developer to submit a written request for inspection in accordance with the approved Site Plan and the Development Program. Appendix A of the Planning Board Opinion, dated 03/03/98, calls out when the Developer should request an inspection and what site elements should be inspected. A 70% occupancy level triggers this inspection for each Phase of the project. When this level is reached the Developer is required to submit in writing a request for a site inspection. This inspection is performed to ensure that necessary elements of the approved site plan have been installed for that Phase. These elements include street tree plantings, community-wide pedestrian pathways, and community-wide recreational amenities. The 70% occupancy level is an extremely difficult value to determine by just field inspections alone. Staff typically uses ocular methods and subjective judgment to determine if the 70% occupancy level is being reached. However, there is no valid method to determine when this level has been achieved. Staff typically relies on the Developer to inform us when this milestone has been reached and at which point the Developer is encumbered to request an inspection. The Developer requested inspection called for under Item #4 of the SPEA has not been received by staff as of this date. However, it does not appear that the 70% occupancy level has been reached, so no violation has occurred.

III. Alleged Inadequacies in the Phasing/Clustering of MPDU's

Finding:

Staff finds that no violation has occurred with respect to the phasing or placement of MPDUs, even though the provision of MPDUs has not kept pace with the construction of market-rate units.

This finding incorporates in full the analysis in Staff's memorandum at Attachment III.

Community's Position

CTCAC alleges that based on calculations present within the MPDU Location Plan, and the assumption that 36 multi-family dwelling units will be approved within the Phase III Retail portion of Clarksburg Town Center, the resulting MPDU segregation/ concentration would be in breach of Council and Planning Board policy to have MPDUs dispersed among the market rate units.

CTCAC also alleges that Newland has violated its MPDU staging obligations under Chapter 25A and under its agreement with DHCA.

Applicant's Position

The applicant reiterates that all required MPDU's will be provided, although the actual number will be determined by the total number of units present at buildout. Based on the loss of developable land area as a result of increased environmental regulations, the applicant expects to develop less than the 1,300 units approved, so the number of MPDU's required will drop accordingly. Once the final number of units to be built in the completed project is determined, the applicant recognizes that the DHCA reement will have to be modified to accurately reflect the 12.5 percent MPDU requirement for that number of units.

The applicant states that, as of September 1, 2005, building permits have been issued for 753 total units in both Phase I and Phase 2, including 73 MPDUs. The MPDUs represent 9.7 percent of the total number of the permitted units. 671 total units have actually been constructed and occupied within the Town Center. This number includes 57 MPDUs that have been constructed and are either occupied or are available for occupancy pending identification of qualified MPDU purchasers (the remaining MPDUs are under construction). The number of constructed MPDUs represents 8.5 percent of the total number of occupied units. The applicant states that this conforms with its 2002 MPDU Agreement to Build with Montgomery County (See Attachment C in Suarez/Mascal memo). The approved phasing sequence in the MPDU Agreement permits MPDUs to be built throughout the entire timeframe of the project, including towards the end of the project development. The MPDU Agreement to Build indicates 72 MPDUs (9.2 percent) be included with the first 779 units. As of September 1, 2005, building permits for 753 units had been issued, including 73 MPDUs (9.7 percent).

Applicant points out that the Planning Board's 2005 Opinion for Site Plans 8-98001G and 8-02014B states that the remaining MPDUs would be constructed in later phases of the project and the Board's initial 2003 Opinion approving Site Plan 8-02014 states that to maintain an equitable balance of MPDUs, units within (pending Section 1A-4) would not be constructed until the Planning Board approved a revision to that area.

Finally, all sections of the project (Finally, all sections of the project (with exception to Section 1B-1, which contains 23 single family detached dwellings) contain or will contain MPDUs as stated in the signed MPDU Agreement to Build with the County, which clearly shows that the MPDU's are dispersed throughout the entire development.

Staff Analysis

In order to determine whether, as CTCAC contends, there would be a breach with County Council or Planning Board policy regarding the dispersal of MPDUs, staff reviewed affordable housing and MPDU documents, ordinances, and guidelines, as well as Planning Board opinions for project and site plans, and the 2001, 2002, and 2005 MPDU Location Plans and the MPDU Agreement to Build. Staff also reviewed Chapters 25A and B of the Montgomery County Code, the current Montgomery County Housing Policy document, the Montgomery County General Plan, and the Clarksburg Master Plan. Staff reviewed additional documents to determine whether the Board should address the MPDU Staging Agreement between the applicant and DHCA. (See Staff Memo, Attachment 3)

Of particular relevance is **Montgomery County's MPDU Ordinance 25A** which contains no policy or rule dictating that MPDUs should be dispersed equally throughout the subdivision or development. In Sec. 25A-2. (3) It is the public policy of the County to "Assure that moderately priced housing is dispersed within the County consistent with the General Plan and area master plans." No mention is made of concentration or dispersion with regard to MPDUs. The MPDU ordinance anticipates that master plans, in compliance with the General Plan, will put in place the type of zoning necessary to implement this policy at the master plan level—not at the subdivision level. Additionally, it is the Montgomery County Department of Housing and Community Affairs and Department of Permitting Services who are tasked with enforcing the Staging Agreement.

Furthermore, The Montgomery County Housing Policy Regulations 25B clearly state that affordable housing should be dispersed on a countywide basis and that assisted-housing be dispersed at the community level. A hallmark of the MPDU program is that it is developer-funded; MPDUs are not typically considered "assisted" housing.

It is also important to look at the Planning Board's 1995 *Site Plan Guidelines for Projects Containing MPDUs* which convey the Planning Board's guidance to Department staff regarding the location of MPDUs within subdivisions, among other things. Of this list of 16 guidelines, only five deal with MPDU issues of concentration or dispersal. Nothing that has been proposed or completed in Clarksburg Town Center to date conflicts in any way with the Planning Board Guidelines.

Staff has verified that 72 MPDUs within 753 units have been offered or under construction in the Clarksburg Town Center. Thus far, there does not appear to be any breach of the Planning Board's site plan guidelines with regard to dispersal or concentration. Especially; there has been no breach of Guideline #4—there are not any back to back MPDU townhomes, nor are there 30 or more non-garage MPDU townhomes adjacent to or confronting each other. (Garage townhouse, duplex, and detached MPDUs are exempt from limits on aggregation.)

Staff understands that future MPDU's numbering somewhere between 66 and 91 will need to be built to meet the 12.5 per cent provision. However, there appears to be ample space to locate

future MPDU's in the as-yet unbuilt portions of the site, while still complying with the Planning Board's MPDU guidelines.

According to Christopher Anderson at DHCA, MPDU units in the Town Center are being constructed in accordance with the approved **Agreement to Build Moderately Priced Dwelling Units for a Permit of 50 or More Dwellings dated May 31, 2002**. Staff believes the MPDU staging plan is consistent with the Clarksburg Town Center Enforcement Agreements for Site Plan #8-98001 and Site Plan #8-02014. In addition, the construction of MPDUs in the Town Center have been built in every section of the development along with the construction of market rate housing except in Section 1B-1 (the first 23 single-family detached units built in the development).

In conclusion, Staff determined that no County policy or Planning Board policy including the Planning Board Approved Site Plan Guidelines related to the dispersal or concentration of MPDUs will be breached by the construction of MPDUs in the remaining approved phases of the Clarksburg Town Center. Care will be needed, nevertheless, to ensure continued compliance with all applicable guidelines and regulations for the remaining phases of the development that have not received approval of a site plan.

Attachments:

- I. Staff Memorandum, Phasing of Amenities, dated September 25, 2005
- II. Inspection Reports, Clarksburg Town Center
- III. Staff Memorandum, MPDUs Distribution and Concentration, dated September 28, 2005
- IV. Letter from CTCAC to Montgomery County Planning Board, dated July 14, 2005
- V. Letter from Steve Kaufman and Todd Brown on behalf of Newland Communities to Derick Berlage, dated September 7, 2005
- VI. Letter from David Brown on behalf of CTCAC to Derick Berlage, dated September 26th, 2005