



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

September 28, 2005

MEMORANDUM

TO: Rose Krasnow, Chief  
Development Review Division

FROM: Sharon K. Suarez, AICP, Housing Coordinator *SKS*  
Research and Technology Center

Nellie Shields Maskal, Community Planner *NSM*  
Community-Based Planning Division

SUBJECT: Clarksburg Town Center MPDUs Distribution and Concentration

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**Problem Statement**

The Clarksburg Town Center Advisory Committee (CTCAC) has concluded that the March 2001, April 2002, and June 2005 MPDU Phasing Plans (as submitted to CTCAC within the MPDU Phasing Calculations Plan) are not accurate with respect to what currently exists. CTCAC states believes that improper plans will lead to a situation where MPDU units are segregated from the mix of market units. Such segregation, CTCAC maintains, will go against the County and Planning Board policy of distributing MPDUs equally throughout the Town Center.

**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.

To determine whether the Planning Board should address the MPDU Staging Agreement between the applicant and DHCA, staff reviewed:

- COMAR 25A.08.01.04, Standards for MPDU Developers and Builders;
- Montgomery County Code, Chapter 25A, Sections 25A-5 "Requirement to build MPDUs; agreements" paragraphs (g) through (j) and 25A-10 "Enforcement";
- Executive Regulation 13-05 AM, Sections 25A.00.03 "Requirements to Provide MPDUs" and 25A.00.11 "Enforcement,"
- Executive Regulation 75-92 (which was in effect at the time of the 2002 MPDU Agreement to Build), Section 4 "Standards for MPDU Developers and Builders" and Section 8 "Enforcement."

See Attachment A for the documentation used for this analysis.

A summary of staff's review of these documents is as follows:

- **The 1969 *Montgomery County General Plan Elements: A Summary*** predated the MPDU program, but it did have something to say about locating housing. One of the four policies addresses the importance of locating housing near jobs: "To integrate housing with employment opportunities, housing should be located convenient to job-producing centers, and the availability and economic feasibility of providing housing for all wage levels should be promoted."
- **The 1993 *General Plan Refinement*** has a housing section, with goals, objectives, and strategies. The housing goal is to "Encourage and maintain a wide choice of housing types and neighborhoods for people of all incomes, ages, lifestyles, and physical capabilities at appropriate densities and locations."<sup>1</sup> None of the objectives or strategies listed in the General Plan Refinement require that MPDUs be distributed "equitably" at either the County or the subdivision level. The six objectives and those strategies that could influence MPDUs or the co-location of MPDUs and retail include:
  - Objective 1. Promote variety and choice in housing of quality design and durable construction in various types of neighborhoods. *Two strategies are worth mentioning:*
    - A) *Permit increased flexibility in residential development standards to meet a broader range of needs and to foster more creative design.*
    - B) *Expand opportunities for a variety of housing densities within communities to offer more choice to a broader range of households.*

<sup>1</sup> M-NCPPC, *General Plan Refinement of the Goals & Objectives for Montgomery County*, 1993, pp. 52 and 53. Approved and adopted.

- Objective 2. Promote a sufficient supply of housing to serve the County's existing and planned employment and the changing needs of its residents at various stages of life. *Key strategies include:*
  - A) *Provide adequate zoning capacity to meet the current and future housing needs of those who live or work in the County.*
  - D) *Develop additional techniques to provide housing opportunities to meet the special housing needs of young workers, the elderly, and persons with disabilities.*
  - E) *Encourage employer assistance in meeting housing needs.*
  - F) *Develop new techniques to provide housing, including incentives.*
  
- Objective 3. Encourage housing near employment centers, with adequate access to a wide variety of facilities and services. Support mixed-use communities to further this objective. *Nearly all the strategies encourage and seek to expand the integration of employment and housing:*
  - A) *Assure the availability of housing near employment centers.*
  - B) *Integrate housing with employment and transportation centers.*
  - C) *Examine County regulations and policies for opportunities for mixed-use development; develop additional options.*
  - D) *Ensure a reasonable distribution of residential and commercial uses in mixed-use zones.*
  - E) *Explore changing development standards to allow the closer integration of employment and housing within mixed-use development.*
  
- Objective 4. Encourage an adequate supply of affordable housing throughout the County for those living or working in Montgomery County, especially for households at the median income and below. *Many of the strategies that apply here apply to government-assisted (government-subsidized) housing. Typically these do not apply to MPDUs, because MPDUs are provided by the developers and are not subsidized by government. On the other hand, these regulations would apply to the Housing Opportunities Commission (HOC), for example, if it purchased MPDUs for reuse as public housing. Strategy B under Objective 4 is to "Distribute government-assisted housing equitably throughout the County." The strategies that do apply to MPDUs include:*
  - A) *Encourage the provision of low-, moderate-, and median-income housing to meet existing and anticipated future needs.*
  - C) *Plan affordable housing so that it is reasonably accessible to employment centers, shopping, public transportation, and recreational facilities.*

- E) Strategy E is specific for MPDUs: Assure the provision of low- and moderate-income housing as part of large-scale development through a variety of approaches, including the Moderately Priced Dwelling Unit program.*
- F) Preserve existing affordable housing where possible.*
- K) Develop zoning policies that encourage the provision of affordable housing while protecting the Wedges and Corridors concept.*
- Objective 5. Maintain and enhance the quality and safety of housing and neighborhoods. *The strategies listed are directed at ensuring that redevelopment or infill development is compatible with existing neighborhoods.*
  - Objective 6. Concentrate the highest density housing in the Urban Ring and the I-270 Corridor, especially in transit station locales. *All the strategies here support higher density housing and mixed-use development within the I-270 Corridor, especially in the vicinity of transit. There is nothing specific to MPDUs.*
  - **The 1994 Clarksburg Master Plan and Technical Appendix** make no mention of MPDU density or location. *The Town Center is one of the eight geographical areas that comprise the Clarksburg Study Area. The Master Plan considers the Town Center District to be a transit and pedestrian oriented district with a mix of uses, interconnected streets, a diversity of housing types, and street-oriented buildings. The Plan states on page 28 that neighborhoods should avoid large concentrations of any single type of housing. The Master Plan treats the Town Center District as a neighborhood and does not delineate any neighborhood other than the Historic District.<sup>2</sup> In the Master Plan Technical Appendix on pages 9 and 10, MPDUs are discussed, but no mention is made of distribution, density, or concentration.*
  - **In Montgomery County's MPDU Ordinance 25A**, no policy or rule dictates 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."<sup>3</sup> *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*

<sup>2</sup> M-NCPPC, *Clarksburg Master Plan and Hyattstown Special Study Area (Approved and Adopted)*, June 1994, pp.28 and 42-53.

<sup>3</sup> Section 25A-2(3). See both the pre- and post-April 1, 2005, versions of 25A.

*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.*

- **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. Only if the MPDUs in Clarksburg Town Center are considered “assisted-family” units would they be subject to a community-level dispersal/concentration” test under 25B, as follows.**
  - **Section 25B-1(e):** “Wide distribution of affordable, including assisted-family, housing throughout the County is a desirable objective of public policy in order to provide for a balance of housing choices in any one community to avoid over concentration of **assisted-family** housing in any community, and because communities that are racially, ethnically, chronologically, and economically heterogeneous are preferable to those which do not reflect the broad diversity of the people who live in the County.”<sup>4</sup> (Emphasis added.)
  - **Section 25B-2 (c): “Assisted-family housing” is defined as** “Those units of affordable housing which consist of privately or governmentally owned rental units for which the owners receive subsidies from the federal, state, or local government in the form of rent supplements or mortgage interest subsidies, except (1) units designated for occupancy by persons 62 years old or older; and (2) units which benefit from tax-exempt financing but receive no other government subsidy.” *Even if developers receive tax-exempt financing, the MPDUs they construct would not be considered assisted-family housing unless they receive some other form of government subsidy, as well.*
- **Executive Regulation 75-92, Requirements for the Moderately Priced Housing Program.** *This regulation was in effect from 1992 until April 1, 2005, and it included a section for the Planning Board, even though the Planning Board was not and is not part of the Executive Branch. That aside, it is only the impact of the bonus units upon the density of development that was mentioned as a cause for*

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<sup>4</sup> Section 25B-1(e). The proposed changes to 25B as a result of a new Executive Regulation for the MPDU program requirements does not change this section of 25B.

**concern:**<sup>5</sup> “Where the review of plans by the Montgomery County Planning Board (MCPB) is required by zoning, subdivision, or other regulations, the review should include among other items: (a) The number of MPDUs to be provided, dwelling unit type, location in the subdivision, community facilities, and other plan features; (b) **The number and location of bonus units and their impact with regard to site plan, density of development, topography, and other physical features;...**”  
<sup>6</sup>(Emphasis added.)

Additionally, **Section 8, Enforcement**, clearly states, “DHCD and DEP are responsible for enforcing the provision of the MPH Law. In the event that an applicant does not construct the MPDUs according to the terms of an approved MPDU agreement, DHCD will contact the applicant to determine the reasons for such noncompliance...Revisions to an approved MPDU agreement are the responsibility of the applicant and should be requested as soon as the applicant recognizes that the terms of an approved MPDU agreement cannot be met.”<sup>7</sup>

- **Executive Regulation 13-05 AM, Requirements for the Moderately Priced Housing Program.** On September 27, 2005, the County Council adopted **Executive Regulation 13-05 AM**. This regulation incorporates the recent changes to the MPDU ordinance and addresses the responsibilities and role of the Executive Branch. It does not include a section for the Planning Board’s review of development plans, nor does it mention dispersal or concentration of MPDUs.

Additionally, **Section 25A.00.11** of this new Executive Regulation for the MPDU program tasks the DHCA and DPS with the enforcement of the provisions of Chapter 25A. Specifically, it states that “The Department and DPS are responsible for enforcing the provisions of Chapter 25A. Complying with Chapter 25A and an approved MPDU Agreement to Build is the responsibility of the applicant; revisions or amendment should be requested as soon as the applicant recognizes that meeting the terms of an approved MPDU Agreement to Build may not be feasible...”

- **The Planning Board’s 1995 Site Plan Guidelines for Projects Containing MPDUs conveys the Planning Board’s guidance to Department staff regarding**

<sup>5</sup> This regulation was in effect at the time of the time of the *Clarksburg Master Plan* in 1994 and the original Clarksburg Town Center development application in 1998 and all subsequent applications and amendments.

<sup>6</sup> Executive Regulation 75-92, Section 4.2, Review of Development Plans.

<sup>7</sup> Montgomery County, MD, Executive Regulation 75-92, Section 8.1, “Revisions to MPDU Agreement.” Section 4.3 (f) also states “Revisions to the agreement may be negotiated, but must be approved by DHCD.” See also COMAR 25A.08.01.04.3 (Standards for MPDU Developers and Builders) and 25A.08.01.08 (Enforcement).

**the location of MPDUs within subdivisions, among other things. Of this list of 16 guidelines (Attachment B), five deal with MPDU issues of concentration or dispersal.<sup>8</sup>**

- Guideline #4: Discourage location of more than 16 back-to-back MPDUs or 30 non-garage townhouse MPDUs adjacent to or confronting each other. Quantities larger than this should be separated from other MPDUs of these two types by market rate buildings. Garage townhouse, duplex, and detached MPDUs would be exempt from limits on aggregation.
- Guideline #5: Permit townhouse-type buildings containing only MPDUs.
- Guideline #6: Encourage, but do not require, MPDUs and market rate units on a single garden apartment stairwell. If an individual stairwell has only MPDUs, then the remainder of the building must contain some or all market rate units.
- Guideline #7: Encourage distribution of any MPDU-only apartment stairwells among the market rate stairwells.
- Guideline #9: Permit enough clustering of single-family detached and duplex MPDUs to take advantage of production and marketing efficiencies.
- **Clarksburg Town Center documentation.** *Staff reviewed various documentation to determine whether any breach of the Planning Board's site plan guidelines, thus far, and to postulate whether there is likely to be in the future, given the number of MPDUs yet to be constructed. (Refer to Attachment A.)*
  - **Extant MPDUs.** **Staff has verified that 72 MPDUs within 753 units have been offered or are under construction in the Clarksburg Town Center.<sup>9</sup>** *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.)*

<sup>8</sup> The Site Plan Guidelines can be found on DHCA's website. Go to [http://www.montgomerycountymd.gov/content/dhca/housing/housing\\_P/mpdu/guidelines\\_for\\_unit\\_types.htm](http://www.montgomerycountymd.gov/content/dhca/housing/housing_P/mpdu/guidelines_for_unit_types.htm)

- o **Future MPDUs.** The number of future MPDUs to be constructed in Clarksburg Town Center is likely to range between 66 and 91, because the total number of MPDUs is based on 12.5 percent of the total number of units—and that total has yet to be determined. There appears to be ample space to locate a large number of MPDUs in either Phase 1A-4 and/or Phase 3, while still complying with the Planning Board’s site plan guidelines.

| <b>MPDU Yield Scenarios at 12.5%</b> | <b>1,000 Units</b> | <b>1,225 Units</b> | <b>1,300 Units</b> |
|--------------------------------------|--------------------|--------------------|--------------------|
| MPDUs Required                       | 138                | 154                | 163                |
| Minus Existing MPDUs                 | 72                 | 72                 | 72                 |
| <b>MPDUs to be Built</b>             | <b>66</b>          | <b>82</b>          | <b>91</b>          |

- o **2002 Agreement to Build.** This Agreement clearly does not include the Planning Board and, instead, states that the Agreement is between Terrabrook Clarksburg, L.L.C. and Montgomery County, Maryland. The Agreement was predicated on the assumption that there would likely be a number of amendments reflecting site plan approvals: “WHEREAS, the applicant and the County anticipate either amending this Agreement or entering into subsequent agreement(s) to build additional MPDUs within the Clarksburg Town Center pursuant to subsequent site plan approval(s).” Additionally, DHCA pledges to monitor the agreement in paragraph 18: “The County shall, from time to time, upon not less than ten (10) days notice from the Applicant, execute and deliver to Applicant and/or any mortgagee and/or purchaser of all or a portion of the Project, from time to time, a certificate in recordable form, stating (i) that this Agreement is unmodified and in full force and effect, or if modified, that this Agreement is in full force and effect as modified and stating the modification, and (ii) whether or not Applicant is in default in any respect under this Agreement, and if in default, specifying the nature of such default.” The **Exhibit “A” (Construction Schedule)** indicates that if 72 MPDUs are under construction or completed, up to 779 market rate units may be under construction or completed.

**Applicant Position (Letter dated September 7, 2005 from Stephen Kaufman and Todd Brown)**

According to the applicant, as of September 1, 2005, building permits have been issued for 753 total units in both Phase 1 and Phase 2, including 73 MPDUs. The MPDUs represent 9.7 percent of the total number of the permitted units. In addition, 671 total units have been constructed and occupied within the Town Center and 57 MPDUs 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.

MPDU construction is subject to a 2002 MPDU Agreement to Build with Montgomery County (Attachment C) that contemplated construction of 163 MPDUs. Based on the loss of developable land area as a result of increased environmental regulations, less than 1,300 units will be developed within the Town Center. Once the final number of units to be built in the completed project is determined, the MPDU Agreement will have to be modified to accurately reflect the 12.5 percent MPDU requirement for that number of units. 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).

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 (with exception to Section 1B-1) contain or will contain MPDUs as stated in the signed MPDU Agreement to Build with the County. Section 1B-1 contains 23 single-family detached homes.

**Community Position (Clarksburg Town Center Development – Violation & Discrepancies Worksheet, prepared by CTCAC, September 5, 2005 and Letter dated September 26, 2005 from David W. Brown to Derick Berlage)**

According to CTCAC, based on calculations present within the MPDU Location Plan, and the assumption of approval of the planned 36-unit multi-family dwelling units within

the Town Square area (adjacent to the library), the resulting MPDU segregation/concentration would be in breach of Council and Planning Board policy to have MPDUs dispersed among the market rate units.

According to CTCAC, the MPDU Location Plan depicts an MPDU calculation based on 1,300 total units. The Plan shows "22+" MPDUs slated for the "Commercial/Residential" area, as well as "21+" and "21+" in Phase 1A-4 directly across from "22+".

In addition, the CTCAC notes that the Developers anticipate (as early as March 2003) that an amendment to allow residential units within the commercial area will be granted. The CTCAC is concerned by the potential for segregation of MPDUs, but has not researched the MPDU situation in depth due to lack of information available. The CTCAC expects that the Board would "audit" the current phasing plan and units on site to provide an accurate report. Finally, CTCAC expects that the Board would not approve supplemental residential units in the retail area.

Finally, in response to the applicant's September 7, 2005 letter, CTCAC's attorney states in his September 26, 2005 letter to Derick Berlage that Newland has violated its MPDU staging obligations under Chapter 25A and under its agreement with DHCA.

### Staff Position

As of September 2005, 725 dwelling units are near completion or are completed for Clarksburg Town Center, Phase 1 and Phase 2. According to Montgomery County Department of Housing and Community Affairs (DHCA) MPDU sales offering agreements records, 72 MPDUs have been approved for the Town Center as shown on the following table. It should be noted that, not all of the 72 MPDUs are built.

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.** (See Attachment C.) 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.

| <b>Clarksburg Town Center<br/>MPDU Distribution</b>  |              |
|--|--------------|
| <i>Development Phase</i>   | <i>Units</i> |
| Phase 1A - 1   | 6            |
| Phase 1A - 2   | 4            |
| Phase 1A - 3   | 0            |
| Phase 1A - 4   | 0            |
| Phase 1B - 1   | 0            |
| Phase 1B - 2   | 12           |
| Phase 1B - 3   | 18           |
| Phase 2A   | 8            |
| Phase 2B   | 10           |
| Phase 2C   | 6            |
| Phase 2D   | 8            |
| Phase 3  | 0            |
| <b>Total:</b>  | <b>72</b>    |
| Source: Montgomery County Dept. of Housing and Community Affairs, MPDU Sales Offerings Records |              |

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).

### **Conclusion/Recommendation to Planning Board**

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. Regarding residential units in a retail area, staff could find County and Planning Board policies that encourage a mix of housing and commercial uses, but could not find any policies discouraging that mix.

In conclusion, the May 31, 2002 MPDU Agreement to Build between the applicant and DHCA states that 163 (12.5 percent of total units) MPDUs are to be provided for the 1,300 total units approved by the Planning Board for Phases 1 and 2. As stated in the Planning Board Opinions on Site Plan #8-02014B and #8-98001G, the applicant testified that the MPDUs that need to be provided are expected to be presented in a subsequent phase for Planning Board review. The issues of the total number of units and MPDU numbers and location will be addressed by the Planning Board during the hearings for the pending site plans for Phase 1A, Phase 2, and Phase 3A.

If the number of units approved in pending site plans causes the Applicant to anticipate construction of fewer MPDUs than agreed upon, the Applicant must notify DHCA and revise the 2002 MPDU Agreement to Build.

## Attachment A. Clarksburg Town Center Documentation Used for Analysis

1. **Planning Board Site Plan Opinions** (date mailed)
  - #8-98001, Clarksburg Town Center Phase I (3/3/98)
  - #8-98001G & #8-02014B Town Center Manor Homes (3/21/05)
  - #8-02014, Clarksburg Town Center Phase II (6/17/02)
  
2. **Signature Set of Site Plans** prepared by date approved
 

|                     |                |          |
|---------------------|----------------|----------|
| Site Plan #8-98001C | Terrabrook LLC | 5/30/03  |
| Site Plan #8-02014  | Terrabrook LLC | 10/14/04 |
  
3. **Approved Record Plats**

| Phase 1A-1        | Phase 1B-1        | Phase 1B-3      | Phase 2B        | Phase 2D |
|-------------------|-------------------|-----------------|-----------------|----------|
| 22366             | 20998             | 22228           | 22631           | 23046    |
| 22365             | (resubdivided     | 22230           | 22907           | 23049    |
| 22369             | by 21975)         | 22596           | 22633           | 23048    |
|                   |                   | 22537           | 22632           | 23047    |
| <b>Phase 1A-2</b> | <b>Phase 1B-2</b> | 22550           | 22865           |          |
| 22367             | 20995             | 20997           | 22526           |          |
| 22368             | 21971             |                 | 22634           |          |
|                   | 21972             | <b>Phase 2A</b> |                 |          |
| <b>Phase 1A-3</b> | 22494             | 22535           | <b>Phase 2C</b> |          |
| 22766             | 21973             | 22534           | 22783           |          |
| 23038             |                   | 22761           | 22785           |          |
|                   |                   | 22551           | 22536           |          |
|                   |                   | 22536           | 22786           |          |
|                   |                   | 22533           | 22784           |          |
|                   |                   | 22495           | 23050           |          |
  
4. **Clarksburg Town Center MPDU Location Plan**, prepared by Charles P. Johnson & Associates for Newland Communities, June 2005
  
5. **Clarksburg Town Center MPDU Location Plan**, prepared by Charles P. Johnson & Associates for Terrabrook Clarksburg L.L.C., April 2002
  
6. **Clarksburg MPDU Location Plan**, prepared by SKG Architects & Planners, March 30, 2001
  
7. **Clarksburg Town Center Agreement to Build Moderately Dwelling Units for a Permit of 50 or more Dwellings**, May 31, 2002
  
8. **Department of Housing and Community Affairs MPDU Sales Offering Agreements** for the Clarksburg Town Center with Bozzuto, Craftstar, and Miller & Smith

9. **Planning Board Site Plan Guidelines for Projects Containing MPDUs, Approved June 1, 1995**
10. **Enforcement Agreements for Site Plans # 8-98001 (May 13, 1999) and #8-02014 (October 14, 2004).**
11. **Montgomery County General Plan (On Wedges and Corridor) for the Physical Development of the Maryland-Washington Regional District in Montgomery and Prince George's Counties, (1964 and 1969)**
12. **General Plan Refinement of the Goals and Objectives for Montgomery County (December 1993, M-NCPPC)**
13. **Montgomery County Code, Chapter 25A, Sections 25A-5 "Requirement to build MPDUs; agreements" paragraphs (g) through (j) and 25A-10 "Enforcement"**
14. **Executive Regulation 13-05 AM, Sections 25A.00.03 "Requirements to Provide MPDUs" and 25A.00.11 "Enforcement"**
15. **Executive Regulation 75-92, Section 4.2 "Standards for MPDU Developers and Builders" and Section 8 "Enforcement"**
16. **1994 Clarksburg Master Plan & Hyattstown Special Study Area and Technical Appendix**
17. **COMAR 25A.08.01.04 "Standards for MPDU Developers and Builders" and 25A.08.01.08 "Enforcement"**
18. **Montgomery County: The Place to Call Home, 2001 Montgomery County Council adopted housing policy**

**Attachment B. PLANNING BOARD'S SITE PLAN GUIDELINES FOR PROJECTS  
CONTAINING MPDUs (Approved 6/1/95)**

| <b>Guidelines For Unit Types</b>                            |  |
|---|--|
| 1.  | Encourage a variety of MPDU unit types. Promote, but do not require, duplexes or single-family detached MPDUs in a single-family-detached-only section of a subdivision. Encourage more than one MPDU unit type in subdivisions with three or more market rate unit types. MPDU unit types need not be the same.                                   |
| 2.  | Prohibit back-to-back townhouse MPDUs unless it can be demonstrated that no other unit type is suitable to the site, that the disadvantages associated with that unit type are eliminated in the site design, and the MPDUs are scattered among market rate back-to-back units.  |
| 3.  | Encourage innovative site and building configurations for townhouses, piggybacks, quadraplexes, triplexes, duplexes, small-lot detached units, and apartments. Solicit comments from agencies most familiar with the market, delivery, and life of MPDUs prior to preparation of site plans for review.  |
| <b>Guidelines For MPDU Locations And Site Plan Features</b> |  |
| 4.  | Discourage location of more than 16 back-to-back or piggyback MPDUs OR 30 non-garage townhouse MPDUs adjacent to or confronting each other. Quantities larger than this should be separated from other MPDUs of these two types by market rate buildings. Garage townhouse, duplex, and detached MPDUs would be exempt from limits on aggregation. |
| 5.  | Permit townhouse-type buildings containing only MPDUs.   |
| 6.  | Encourage, but do not require, MPDUs and market rate units on a single garden-apartment stairwell. If an individual stairwell has only MPDUs, then the remainder of the building must contain some of all market rate units.   |
| 7.  | Encourage distribution of any MPDU-only apartment stairwells amount the market rate stairwells.  |
| 8.  | Continue to advocate siting of MPDUs to facilitate access to public facilities.  |
| 9.  | Permit enough clustering of single-family detached and duplex MPDUs to take advantage of production and marketing efficiencies.  |
| 10.   | Continue to give special attention to site plans for MPDUs in order to provide usable open space, play and congregating area near units, age-appropriate recreation, adequate parking for residents and guests, and adequate provision for storage and garbage collection.   |
| 11.   | Ensure that open space and recreational facilities, which are required for site plan approval, are equally available to all residents, regardless of income or unit type.  |
| 12.   | Continue to require close proximity for MPDUs to open space and recreation facilities required for site plan approval; where off-site recreation facilities are allowed, locate MPDUs nearby unless additional, age-appropriate facilities are located near the MPDUs.   |
| 13.   | In townhouse and garden apartment areas where residents lack individual private and defensible yards, continue to require open space areas, which are adjacent and useable; steep slope and inaccessible open space areas are insufficient.  |
| 14.   | Require phasing plan contained in site plan to conform to Section 25A-5(i) of the Montgomery County Code.  |
| 15.   | Clearly identify MPDUs on all site plan applications set drawings  |
| 16.   | Clearly state on the record that the site provides MPDUs, the locations of which are shown on the site plan.   |

## Attachment C. Agreement to Build

MONTGOMERY COUNTY, MARYLAND  
DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS  
100 Maryland Avenue, 4th Floor, Rockville, Maryland 20850

AGREEMENT TO BUILD MODERATELY PRICED DWELLING  
UNITS FOR A PERMIT OF 50 OR MORE DWELLINGS

CLARKSBURG TOWN CENTER

THIS AGREEMENT dated the 31<sup>ST</sup> day of May, 2002, by and between TERRABROOK CLARKSBURG, L.L.C., a Delaware limited liability company (herein "Applicant") and MONTGOMERY COUNTY, MARYLAND (herein "County").

WHEREAS, the Applicant plans to construct 50 or more dwelling units in the subdivision known as Clarksburg Town Center located in Montgomery County, Maryland in the RMX-2 Zone; and

WHEREAS, the provisions of Chapter 25A of the Montgomery County Code, 1994, as amended, require that a percentage of the total number of dwelling units in a residential development project be moderately priced dwelling units (MPDUs); and

WHEREAS, the County is willing to issue building permits for the construction of dwelling units under the terms stated in the Agreement and pursuant to the provisions of Chapter 25A of the Montgomery County Code, 1994 as amended; and

WHEREAS, the Applicant and the County anticipate either amending this Agreement or entering into subsequent agreement(s) to build additional MPDUs within the Clarksburg Town Center pursuant to subsequent site plan approval(s).

NOW, THEREFORE, in consideration of the mutual promises, conditions and obligations provided for herein, and to comply with Section 7-506.1, the parties hereto agree as follows:

1. Applicant agrees to construct 1,300 total dwelling units in the subdivision, including 163 MPDUs, in strict accordance with the construction schedule attached hereto and made a part hereof as Exhibit "A".
2. All land owned by the Applicant in whole or in part or which is under contract to the Applicant in Montgomery County, Maryland, which is available for residential building development is shown on the Statement of Land Owned, attached hereto, and made a part hereof as Exhibit "B".
3. The Applicant shall construct MPDUs along with or preceding market rate dwelling units in the subdivision, and the County agrees that compliance with the construction

schedule in Exhibit "A" shall satisfy the MPDU staging requirement and the provisions of Section 25A(5)(i) of the Montgomery County Code, 1994 as amended.

4. The County will issue building permits and use and occupancy permits as requested by the Applicant for Clarksburg Town Center. Applicant acknowledges County's authority to suspend or revoke any or all building or occupancy permits issued to Applicant for Clarksburg Town Center and/or to suspend or deny the issuance of all subsequent permit requests by Applicant for Clarksburg Town Center, and/or invoke any other of the enforcement measures authorized by Section 25A-10 of the Montgomery County Code, 1994, as amended, and Executive Regulations adopted pursuant thereto, for failure to comply with this Agreement.

5. (a) Applicant must offer MPDUs for sale or rental in accordance with the requirement of Chapter 25A of the Montgomery County Code, 1994, as amended, and in accordance with any Executive Regulations promulgated, or as may be promulgated, in the furtherance of said Chapter. Applicant agrees to offer the MPDUs for sale or rent by completing fully and truthfully the Offering Agreement form provided by the Department of Housing and Community Affairs. The Contract of Sale or the Lease executed by Applicant for the sale or rental of any MPDU must contain language imposing a covenant running with the land invoking the requirements of Chapter 25A. This provision is not to be construed as granting the rental option to those Applicants who are not eligible to rent their MPDUs according to the provisions of Chapter 25A.

(b) Applicant must, at the time the Contract of Sale or Rental Agreement is executed or otherwise agreed to, or entered into, by Applicant, whether written or oral, or at such other time as may be requested by the County, execute a separate Declaration of Covenants, to run with the land, subjecting the MPDUs to the requirement of Chapter 25A, Montgomery County Code, 1994, as amended.

(c) The Contract of Sale, Deed, Lease and the separate Declaration of Covenants must contain language as contained in Exhibit "C" attached hereto and made a part hereof. In addition, the duly recorded Deed or executed Lease Agreement must contain specific language, in conspicuous form, subjecting the herein referred property to the Declaration of Covenants, which language shall contain the date of recordation and the Liber and Folio reference of the said duly recorded Declaration of Covenants.

(d) The Declaration of Covenants contained in Exhibit "C" must be fully executed by the Applicant and must contain the necessary jurat for either individual or corporate

signatures, as the case may be, in such form as may be required to properly record said Declaration of Covenants among the Land Records of Montgomery County, Maryland. Said Declaration of Covenants must be returned to Montgomery County for approval, execution and recordation by Montgomery County among the Land Records.

6. Applicant, his agents, heirs, assigns or successors, hereby irrevocably assigns to Montgomery County, Maryland, all its right, title, interest and obligation to enforce the provisions of the Declaration of Covenants referred to herein during the term the Covenants are in effect; to institute any proceeding in law or equity for the collection of such sums as may be in excess of those allowed by law, or to enjoin any violation or attempted violation of said Covenants or the provisions of Section 25A of the Montgomery County Code, 1994 as amended.

7. Applicant must provide a copy of the final Contract of Sale or Lease Agreement for each MPDU covered by the building permits issued under the Agreement to the County, as well as settlement sheets and such other documents and information as may be required by Executive Regulations.

8. The County shall be entitled to enter upon the property and/or into the subject unit or units for purposes of inspection at all reasonable times to determine compliance with the Agreement.

9. The number, type, location and development phases of the MPDUs to be constructed by Applicant are shown on the approved site plan attached hereto and made a part hereof as Exhibit "D".

10. A waiver by the County of a specific default must be in writing from the County, and shall not be a waiver of any other subsequent default of similar or different nature.

11. No failure on the part of the County to exercise, and no delay in exercising, any right to remedy permitted by law or pursuant to this Agreement will operate as a waiver thereof.

12. Applicant may make written application to the Director of the Department of Housing and Community Affairs or designee for a modification of the construction schedule set forth on Exhibit "A", describing the basis for such change. The Director or designee must review the application and make a final determination on the request which must be delivered to the Applicant within thirty days. Applicant may not depart from the schedule set forth on Exhibit "A" without the prior approval of the Director or designee.

13. Any notices sent pursuant to this Agreement must be delivered in writing to:

Montgomery County:  
ERIC LAYSEP  
Department of Housing and Community Affairs  
100 Maryland Avenue, 4th Floor  
Rockville, Maryland 20850

Applicant:  
Terrabrook Clarksburg, L.L.C.  
c/o Tracy Z. Graves  
General Manager  
Terrabrook  
42935 Waxpool Road  
Ashburn, VA 20148

14. No member, officer or employee of the County, and no other public official of the County will either exercise any function or responsibility with respect to the subject matter of this Agreement during his or her tenure, or for one year thereafter have any interest, direct or indirect, in the subject matter of this Agreement. This section will not be construed to prohibit any such person from owning an MPDU as a personal residence.

15. This Agreement is binding upon the agents, successors, heirs and assigns of the Applicant. The foregoing notwithstanding, the obligations and liabilities of Applicant shall apply for only so long as Applicant is the fee simple owner of the property. When Applicant ceases to own a fee simple interest in the property, the obligations and liabilities of Applicant shall automatically become the obligations and liabilities of Applicant's successor-in-interest, and Applicant shall automatically be relieved of any further obligation or liability hereunder.

16. The terms of this Agreement will survive the execution and delivery of any deeds or leases, and shall not merge therein.

17. Applicant agrees to abide by and comply with all applicable laws and regulations regarding the subject matter of this Agreement, whether or not such laws or regulations are herein specifically enumerated or referred to, including those amendments described in Montgomery County Council Bill No. 25-88, if applicable, and Applicant agrees to sign such documents as may be required to effectuate the intent and purpose of this Agreement.

18. The County shall, from time to time, upon not less than ten (10) days' notice from Applicant, execute and deliver to Applicant and/or any mortgagee and/or purchaser of all or a portion of the Project, from time to time, a certificate in recordable form, stating (i) that this Agreement is unmodified and in full force and effect, or, if modified, that this Agreement is in full force and effect as modified and stating the modification, and (ii) whether or not Applicant is

in default in any respect under this Agreement, and, if in default, specifying the nature of such default.

IN WITNESS WHEREOF, Applicant has caused these presents to be executed by its Authorized Representative and its corporate seal to be affixed, and does hereby appoint Tracy Z. Graves as its true and lawful attorney-in-fact to acknowledge and deliver these presents, and Montgomery County, Maryland has on the day and year hereinabove written caused these presents to be signed by Elizabeth B. Davison representing the Department of Housing and Community Affairs, and does hereby appoint the said Elizabeth B. Davison its true and lawful attorney-in-fact to acknowledge and deliver these presents.

WITNESS/ATTEST:

*[Signature]*

APPLICANT:

TERRABROOK CLARKSBURG, L.L.C.,  
a Delaware limited liability company

By: WESTERRA MANAGEMENT, L.L.C.,  
a Delaware limited liability company,  
its authorized representative

BY: *[Signature]*  
Tracy Z. Graves  
Assistant Vice President

WITNESS/ATTEST:

*[Signature]*

MONTGOMERY COUNTY, MARYLAND

BY: *[Signature]*  
Elizabeth B. Davison, Director  
Department of Housing and  
Community Affairs

STAFF REVIEW BY

*[Signature]*

STATE OF ~~MARYLAND~~ Virginia  
COUNTY OF ~~MONTGOMERY~~ Loudoun

I HEREBY CERTIFY that before me, a Notary Public in and for the aforesaid jurisdiction, personally appeared Tracy Z. Graves, attorney in fact for Applicant who is personally well known to me as the person named as attorney-in-fact in the foregoing instrument, and as attorney-in-fact, as aforesaid executed and acknowledged the foregoing instrument in the name and on behalf of Applicant, for the uses and purposes herein contained.

WITNESS my hand and seal this 31<sup>st</sup> day of May

My Commission Expires: 02/31/05

*[Signature]*  
NOTARY PUBLIC



STATE OF MARYLAND  
COUNTY OF MONTGOMERY

I HEREBY CERTIFY that before me, a Notary Public in and for the jurisdiction aforesaid, personally appeared Elizabeth B. Davison, attorney in fact for Montgomery County, Maryland, who is personally well known to me, and as attorney-in-fact as aforesaid, and by virtue of the power vested in her, executed and acknowledged the foregoing instrument to be the act and deed of Montgomery County, Maryland for the uses and purposes herein contained.

WITNESS my hand and seal this 6<sup>th</sup> day of JUNE, 2002.

My Commission Expires: 8/1/05

*[Signature]*  
NOTARY PUBLIC

**EXHIBIT "A"**  
**CONSTRUCTION SCHEDULE**

In compliance with Chapter 25A of the Montgomery County Code, 1994, as amended, Applicant agrees that the Units in Clarksburg Town Center will be constructed in accordance with the schedule indicated below. Applicant is aware that this schedule must indicate that the MPDUs shall be constructed along with, or preceding, other dwelling units in Clarksburg Town Center and that failure to comply with this schedule may result in suspension or revocation of any building permit, occupancy permit or subdivision plan associated with the project described herein or such other enforcement measure authorized by Chapter 25A of the Montgomery County Code, 1994, as amended. The MPDU staging plan must be consistent with the site plan enforcement agreement. The Applicant must sequence the construction of the MPDUs so that the construction of MPDUs reasonably coincides with the construction of the market rate housing. Subject to the construction schedule below, the last building built must not contain only MPDUs.

| Development Phase | No. Of Market Priced Units | Approx. Mo. & Yr. Of Constr. 1/ Start of Mkt. Price Units* | Approx. Mo. & Yr. Of Constr. 2/ Completion of Market Price Units* | Number of MPDUS | Approx. Mo. & Yr. Of Constr. Start of MPDUs* | Approx. Mo. & Yr. Of Constr. Completion of MPDUs |
|-------------------|----------------------------|--|---|-----------------|--|--|
| 1B-1              | 23                         | 11/01  | 04/02   | 0               | N/A  | N/A  |
| 1B-2              | 115                        | 02/02  | 08/02   | 9               | 06/02  | 12/02  |
| 1B-3              | 154                        | 11/02  | 05/03   | 17              | 03/03  | 09/03  |
| 2                 | 487                        | 05/03  | 11/03   | 46              | 09/03  | 03/04  |
| 1A                | 165                        | 11/02  | 05/03   | 23              | 03/03  | 09/03  |
| 3                 | 356                        | 11/03  | 05/04   | 68              | 03/04  | 09/04  |

Total Units

1. "Construction Start" is defined as the date on which footings are poured for the subject units.
2. "Construction Completion" is defined as the date that final inspections by the Department of Permitting Services are completed.
  - Builder to determine exact date for construction start and completion.

EXHIBIT "B"

STATEMENT OF LAND OWNED FOR COMPLIANCE WITH THE MODERATELY PRICED HOUSING LAW

Pursuant to Article 25-A-5 (h) of the Montgomery County Code, 1994, as amended, Applicant hereby provides a list\* which is attached hereto as Schedule A, \*\* describing all land owned in whole or in part, or which is under contract to, the Applicant, in Montgomery County, Maryland, which is available for residential development. Applicant, in consideration for the issuance of Building Permit Application No. SEE NOTE 1 affirms that the said Schedule A includes all property as described above for which:

- 1. A preliminary subdivision plan or development plan has been filed or for which a building permit application has been filed; and
2. Public water and sewer will be utilized; and
3. The optional zoning provisions of the Moderately Priced Dwelling Unit Law and/or Zoning Ordinance, are applicable, Article 25A.

Applicant affirms that the attached Schedule A includes all such property in Montgomery County, Maryland and not solely that property within the subdivision which is the subject of this Building Permit Application.

WITNESS/ATTEST:

APPLICANT:

TERRABROOK CLARKSBURG, L.L.C., a Delaware limited liability company

By: WESTERRA MANAGEMENT, L.L.C., a Delaware limited liability company, its authorized representative

[Handwritten signature]

BY: [Handwritten signature] Tracy Z. Graves Assistant Vice President

SUBSCRIBED AND SWORN to before me, a Notary Public in and for the State of Maryland, County of Montgomery, by Applicant(s) this 31st day of May, 2002. Virginia Loudoun

My Commission Expires: 08/31/03

[Handwritten signature] NOTARY PUBLIC

\* For any Building Permit Application subsequent to the initial application subject to these requirements, Applicant needs only submit changes to the list of property holdings.

\*\* Schedule A shall contain information stating the owner's name, location and size of parcels, subdivision name, Liber and folio references of latest deeds and Plat Book references.

NOTE 1: Building permit applications to be identified at time of application by builder.

**SCHEDULE A**  
**LISTING OF PROPERTY IN MONTGOMERY COUNTY, MARYLAND**

Terrabrook Clarksburg, L.L.C., a Delaware limited liability company, owns the following property in Montgomery County: all that land acquired from Clarksburg Land Associates, LLLP and Piedmont Land Associates, LLLP by Deed dated February 4, 2000 and recorded among the Land Records of Montgomery County, Maryland, in Liber 17865 at folio 495.