

**LINOWES**  
**AND | BLOCHER LLP**  
ATTORNEYS AT LAW

Attachment 5

September 7, 2005

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

Re: Clarksburg Town Center – Alleged Site Plan Violations

Dear Mr. Berlage and Members of the Planning Board:

On behalf of Newland Communities LLC and NNPII – Clarksburg LLC (collectively, “Newland Communities”), the purpose of this letter is to address the allegations made by the Clarksburg Town Center Advisory Committee (“CTCAC”) in its letter to the Planning Board dated July 14, 2005. Each allegation is addressed below in the order presented. Please include this letter in the Record of the Board’s proceedings in this matter.

As discussed below, a fundamental issue in this matter is the review and approval by Planning Staff of changes to plans previously approved by the Planning Board. As the Board is aware, its Opinion approving Site Plan 8-98001 included Condition 38 which authorized Planning Staff to review and approve changes within the development provided “the fundamental findings of the Planning Board remain intact and in order to meet the Project Plan and Site Plan findings.” Condition 38 further provides: “Consideration shall be given to building type and location, open space, recreation and pedestrian and vehicular circulation, adequacy of parking etc for staff review and approval.”

Thereafter, in order to facilitate implementation of the delegated authority set forth in Condition 38, at an internal staff meeting on April 13, 2000, Planning Staff distributed a memorandum that explained the process by which changes to existing approvals for Clarksburg Town Center would be reviewed and approved at the staff level. Specifically, the memorandum provided:

“Because many of the changes will be handled as staff level approvals (as allowed in the earlier reviews) we will still need to coordinate any staff

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approvals of changes to original site plan. At the end of our last meeting with [Terrabrook], I had explained that we would have them submit their changes to the DRC [Development Review Committee] for review prior to staff approvals. This way we could get comments in our usual format so we could determine if there was [sic] any issues of concern prior to staff sign-off."

This memorandum further indicated that general comments would be needed from staff on design issues that "will affect road design, SWM, SPA, possible historic preservation issues (may not change) PP road approvals, layout, parking, etc." (Attachment 1). It therefore is clear that Planning Staff had the authority to approve various types of changes within the Clarksburg Town Center and exercised that authority.

**1. "O" Street and Pedestrian Mews.**

This allegation concerns Phase 1 of the project and involves an area that lies between the Town Square and the adjacent Clarksburg United Methodist Church ("Church") property to the west. The CTCAC questions (i) the construction of a street in place of a pedestrian mews shown on the initial Phase 1 signature set site plan signed by Joseph Davis on March 24, 1999 ("1999 Site Plan"), and (ii) the deletion of a segment of Street "O" shown on the 1999 Site Plan adjacent to the Church property.

**a. Project Plan and Preliminary Plan Show Street, Not Mews.**

The area shown as a pedestrian mews on the 1999 Site Plan, was very clearly shown as a *street* on the Project Plan and Preliminary Plan approved by the Planning Board (9-94004 and 1-95042, respectively) (Attachment 2) and numerous exhibits comprising the Project Plan application. Many of these exhibits were reproduced in the Project Plan Staff Report dated March 23, 1995 and were considered by the Planning Board prior to approving the Project Plan. Along with the approved Project Plan drawing itself, exhibits clearly depicting this street included (i) Illustrative Building Plan (Attachment 3); (ii) Parking Framework Plan (Attachment 4); (iii) Framework Street Plan (Attachment 5); and (iv) Pedestrian Framework Plan (Attachment 6). The Parking Framework Plan clearly identified the area as "Private Street w/ On-Street Parking Both Sides". The Pedestrian Framework Plan depicted a "Primary Pedestrian Sidewalk" on both sides of this road.

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Significantly, the Illustrative Building Plan identified the "visual connection" between the Town Square and the Clarksburg United Methodist church as an "Important Vista". The CTCAC has raised this as a significant concern. However, the Board determined and found through its approval of the Project Plan that this important vista would be provided along and over a roadway, not a pedestrian mews.

**b. Development Review Committee Reviewed Realignment of Street "O" and Relocation of Mews.**

As noted, the 1999 Site Plan depicted a pedestrian mews (Attachment 7). However, on July 31, 2001 the Development Review Committee, comprised of representatives of MNCPPC Environmental Planning, MCDPS, MCDPWT, WSSC, MDSHA, MNCPPC Transportation Planning, PEPCO/Verizon/Washington Gas, MNCPPC Development Review, MNCPPC Community Based Planning, Parks Department, MCDEP and MCFRS, reviewed a proposed amendment to the 1999 Site Plan in accordance with the protocol described in the April 13, 2000 memorandum discussed above.<sup>1</sup> Among other items, the amendment proposed to realign Street "O" (to be known as Clarksridge Road), relocate the pedestrian mews, create a new park for the Clark Memorial and create a new tot lot (Attachment 9). The amendment also proposed changes in unit types to include rear loaded single-family detached and townhomes with detached garages accessed from alleys consistent with traditional town designs. The official minutes of the July 31, 2001 DRC meeting specifically reference the design of Clarksridge Road (the former mews area) and its intersection with what was shown on the plan as Street "M" (Attachment 10). The minutes also indicated a need to redesign this intersection. This redesign ultimately occurred and is reflected in an approved amendment to the 1999 Site Plan (discussed below).

We have also enclosed a complete signature set of plans approving an amendment to the 1999 Site Plan, approved by Planning Staff on May 30, 2003 (Attachment 11). This approved amendment (i) realigns Clarksridge Road; (ii) relocates the pedestrian mews; (iii) replaces a cluster of townhouses with a new tot lot; (iv) preserves an extensive hedgerow adjacent to the Clarksburg United Methodist Church; (v) creates a new park for the Clark Memorial; and (vi) expands the alley concept by incorporating rear loaded single-family detached and townhomes with detached garages. We also note the recorded subdivision plat dedicating Clarksridge Road

<sup>1</sup> This was only one of several DRC meetings that were held to review proposed changes to the 1999 Site Plan that would be approved at the staff level (Attachment 8).

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as a street was reviewed by the Planning Board and signed by the Chairman and the Director of MCDPS (Attachment 12).

Based on the foregoing, the realignment of Street "O" and the relocation of the pedestrian mews were comprehensively reviewed by the professional staff of several agencies, including MNCPPC, MCDPS and MCDPWT. The changes to the 1999 Site Plan were approved in accordance with the protocol established by the April 13, 2000 memorandum and in accordance with the Planning Board's delegation of authority to approve changes to the site plan provided its fundamental findings remained intact. In this regard we note (i) the approved Project Plan contemplated the important vista between the Town Square and the Clarksburg United Methodist Church would be provided along a street, *not* a pedestrian mews; (ii) the Framework Street Plan reviewed at the time of the Project Plan approval did *not* designate Street "O" (Clarksridge Road) as a framework street, and thus its alignment was not particularly significant; (iii) the protocol established by the April 13, 2000 memorandum stated that consideration of changes would include building type and location and pedestrian and vehicular circulation – the very modifications at issue in this matter; and (iv) the realignment of Clarksridge Road and the relocation of the pedestrian mews were accompanied by other changes which, *inter alia*, (1) preserved an existing hedgerow and thereby increased green space and buffers; (2) provided additional recreation space; (3) improved the pedestrian environment by reducing curb cuts for driveways at the front of units and providing sidewalk continuity; and (4) reduced impervious surfaces in a designated Special Protection Area, all valid planning justifications.

## **2. Phasing of Amenities.**

This allegation contends Newland Communities has not complied with the site plan enforcement agreement concerning the phasing of amenities. Specifically, the CTCAC refers to a requirement that all community wide facilities within Site Plan No. 8-98001, must be completed and conveyed to the homeowners association no later than the receipt of a building permit for the 540<sup>th</sup> Lot/Unit.

First, it is important to dispel the suggestion that community amenities and recreation facilities have not been provided. Newland Communities has already constructed attractive recreation facilities and amenities within both Phase 1 and Phase 2 that are available for the residents' use. These facilities include 3 tot lots, a multiage play lot, 3 open play areas, 11 picnic/seating areas and 6 neighborhood squares and greens, one of two community pools and has graded and

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conveyed land to MNCPPC and MCPS for a new elementary school site and 3 athletic fields within Phase 2. We also note pending amendments to the Project Plan and the Phase 1A-4 site plan identify additional community amenities and facilities Newland Communities is prepared to provide.

Newland Communities will also provide other previously approved amenities and recreation facilities within Phases 1 and 2 in a timely and appropriate manner. Although delivery of some facilities is dependent on completion of home and road construction in adjacent areas to avoid introducing recreational uses to an active construction site, the full complement of amenities will be provided. The Board should also appreciate the administrative modifications previously approved by staff will result in a significantly greater number of amenities of higher quality than reflected on the original approved plans (Attachment 13).

**a. Phase 1 Site Plan Enforcement Agreement**

As to the asserted violation, by its terms the Site Plan Enforcement Agreement dated May 13, 1999 (Attachment 14) referred to controls development within Site Plan No. 8-98001. This is Phase 1 of the project. The agreement refers in several passages to Site Plan No. 8-98001 and the fact that Site Plan 8-98001 proposes construction of 768 units only (the Project Plan approved 1300 units). We also note the Planning Board's Opinion approving Site Plan 8-98001 is limited to 768 units.

The Phasing Plan attached as Exhibit E to the Phase 1 Site Plan Enforcement Agreement provides "All community wide facilities *within Site Plan 8-98001* must be completed and conveyed to the Association not later than the earlier of the receipt of a building permit for the 540<sup>th</sup> Lot/Unit [of Phase 1] or by fifteen (15) years from the date of the Site Plan Approval." (emphasis supplied) The Planning Board approved the Phase 1 Site Plan by its Opinion dated March 3, 1998. Clearly, one of the two outside points of completion, the 15-year trigger referenced above, has not been reached.

To the best of our knowledge, regarding issuance of a building permit for the 540<sup>th</sup> Lot/Unit, as of September 1, 2005, of the 768 units approved by the Planning Board in Site Plan 8-98001, a permit had been issued for 421 total units. Therefore, a permit for the 540<sup>th</sup> Lot/unit under Site Plan 8-98001 has not yet been issued, and this alternative trigger specified in the Site Plan Enforcement Agreement similarly has clearly also not been reached. We further note that of the 421 units for which a permit has been issued, 409 units were occupied as of September 1,

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2005, representing 53% occupancy of the total number of units approved by the Planning Board under Site Plan 8-98001.

**b. Phase 2 Site Plan Enforcement Agreement**

The Planning Board and Terrabrook Clarksburg L.L.C. (Newland Communities' predecessor) entered into a separate site plan enforcement agreement for Site Plan 8-02014 dated October 14, 2004 (Attachment 15). This agreement controls development within Phase 2 of the project. Phase 2 consists of 487 total units pursuant to the Board's Opinion for Site Plan 8-02014 dated June 17, 2002.

The Phase 2 Site Plan Enforcement Agreement includes a development program and phasing schedule independent of the phasing plan for Site Plan 8-98001 (Phase 1). The relevant triggers under the Phase 2 Site Plan Enforcement Agreement require local recreational facilities to be conveyed to the homeowners association by the earlier of (i) the date that applicants have closed on title to 70% of lots or units planned within such Phase; or (ii) 36 months from the date of receipt of the initial building permit "for a lot or unit in that Phase". All community-wide recreation facilities must be completed and conveyed to the homeowners association in the same timeframe, unless phases are delayed.

As of September 1, 2005 a permit had been issued for 332 units within Phase 2, of which 262 were occupied. This represents a 54% occupancy rate within Site Plan 8-02014. Thus, based on the Site Plan Enforcement Agreement schedule for completion and conveyance of recreational facilities within Phase 2, the specified level of occupancy within Phase 2 (*i.e.*, 70%) has not been reached. Additionally, the first building permit for a unit within Site Plan 8-02014 (Phase 2) was issued on November 24, 2003. Therefore, thirty six months from the date of receipt of such permit have not elapsed.

Based on the foregoing, there is no violation of the phasing of amenities.

**3. MPDU Plans.**

This allegation seems to contend that calculations regarding MPDU phasing are not accurate with respect to housing that has actually been constructed on-site. There is also the suggestion that MPDUs have not or will not be dispersed throughout the project.

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As indicated in the Project Plan Opinion, the MPDU requirement for Clarksburg Town Center is 12.5% of the total number of units within the project. As noted above, as of September 1, 2005 building permits have been issued for 753 total units within both Phase 1 and Phase 2. To the best of our knowledge, these permitted units include 73 MPDUs. Thus, the number of permitted MPDUs represents 9.7% of the total number of permitted units at this time. We further note that as of September 1, 2005, 671 total units have been constructed and occupied within Town Center, and 57 MPDUs have been constructed and are either occupied or are available for occupancy pending identification of qualified MPDU purchasers (we understand the remaining MPDUs are under construction). The number of constructed MPDUs represents 8.5% of the total number of occupied units.

MPDU construction within the project is subject to an Agreement with Montgomery County dated May 31, 2002 (Attachment 16). The Agreement contemplated construction of 163 MPDUs. That figure represented 12.5% of the 1,300 total units approved by the Planning Board in the Project Plan and Preliminary Plan Opinions. Based on a number of factors, including the loss of developable land area as a result of increased environmental regulation, less than 1,300 units will be developed within the Town Center. Accordingly, 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% MPDU requirement for that number of units.

Exhibit A to the MPDU Agreement establishes the phasing sequence for MPDUs within the project. The approved phasing sequence permits MPDUs to be built throughout the entire timeframe of the project, including towards the end of project development. The MPDU Agreement indicates 72 MPDUs (or 9.2%) be included with the first 779 units. As noted above, as of September 1, 2005, building permits for 753 units had been issued, including 73 MPDUs (9.7%).

We also note the Planning Staff reports for Site Plan 8-02014 (Phase 2) (Attachment 17) and 8-02014B and 8-98001G (Manor Homes) (Attachment 18) each advised the Planning Board the provision of MPDUs was somewhat behind the number of units approved. This is entirely consistent with the signed MPDU Agreement as discussed above. The Staff Reports further advised the Board that when Phase 3 and the revisions to Phase 1 (i.e., the Phase 1A-4 site plan amendment pending before the Board) were reviewed, the full measure of MPDUs would be supplied to the project. In fact, the Board's March 21, 2005 Opinion approving Site Plan 8-98001G and 8-02014B referenced testimony by both Staff and the applicant that remaining

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MPDUs would be constructed in later phases of the project (Attachment 19 at 3-4), and the Board's initial Opinion approving Site Plan 8-02014 dated June 17, 2002 stated 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. (Attachment 20 at 5).

The CTCAC also asserts without supporting evidence that the MPDUs have not been integrated into the community as a whole. This is incorrect. With the exception of the first section of the project constructed (Section 1B-1), which consists of 23 single-family detached homes (including the home of a principal advocate for the CTCAC), *all* sections of the project contain or will contain MPDUs. With respect to the single family detached section, the signed MPDU Agreement with the County clearly indicates that no MPDUs will be provided in connection with the first 23 units constructed in Section 1B-1.

#### **4. Discrepancies Regarding Site Plan for Phase II.**

This assertion (i) questions the sequence of plat recordation and permitting relative to the signing of the Phase 2 site plan enforcement agreement; (ii) states the site plan does not contain height information; and (iii) questions the authenticity of the Phase 2 signature set of site plans.

Regarding plat recordation and permitting relative to the signing of the signature set, the Commission's long standing practice is for the signature set of plans to be signed at the same time as the site plan enforcement agreement. In this regard, the Site Plan Enforcement Agreement for Site Plan 8-02014 (Phase 2) was revised to address Planning Staff comments, signed by Terrabrook Clarksburg L.L.C. (Newland Communities' predecessor) and submitted to the Planning Commission on June 27, 2003. The agreement was not signed until October 14, 2004. The exact sequence of events which occurred between these two dates (a period of approximately 17 months) is described below and documented in the enclosed letters and emails. (Attachment 21). These events highlight a longstanding issue within the review and approval process concerning lag time between the substantive approval of a plan and the review and execution of accompanying documentation:

**May 20, 2003** – Letter to MNCPPC transmitting revised draft SPEA, modified to reflect telephone conversation with Planning Staff.



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**June 19, 2003** – Letter to Terrabrook referencing a June 18, 2003 meeting with Planning Staff in which staff indicated its satisfaction with the SPEA but advised Terrabrook counsel of a need for MCPS to review the draft concerning the Park/School site.

**June 27, 2003** – Letter to MNCPPC referring to revisions to the SPEA made in response to a June 26, 2003 telephone conversation with staff and transmitting SPEA signed by Terrabrook for final approval.

**October 6, 2003** – Telephone conversation with Office of General Counsel during which the Board's attorney advised he would be speaking with MCPS about Park/School issues.

**October 20, 2003** – Telephone conversation with Office of General Counsel during which the Board's attorney advised he would be speaking with Planning Staff about conditions concerning road construction and requesting language be added to the SPEA to reference the Memorandum of Understanding and associated easements concerning the Park/School site.

**October 31, 2003** – Email to Office of General Counsel and Planning Staff transmitting revised portions of SPEA referencing MCPS and Clarksburg Development District.

**December 12, 2003** – Email to Office of General Counsel resending October 31, 2003 email.

**February 9, 2004** – Email to Terrabrook transmitting revised SPEA containing additional Planning Staff comments to incorporate Preliminary Plan conditions as a part of the SPEA.

**March 12, 2004** – Email to Planning Staff transmitting revised SPEA.

**September 20, 2004** – Email from Office of General Counsel requesting copy of Land Exchange Agreement with MCPS and MNCPPC that had been negotiated during intervening months and was signed on June 16, 2004. Also transmits final comments of Office of General Counsel.

**September 22, 2004** – Email to Office of General Counsel agreeing to language change requested by Office of General Counsel and confirming Land Exchange Agreement will be forwarded.

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**September 22, 2004** – Letter to Office of General Counsel transmitting executed Land Exchange Agreement and Construction and Grading Easement Agreement concerning Park/School site.

**October 13, 2004** – Telephone conversation with Office of General Counsel during which the General Counsel's office advised the SPEA had not yet been approved.

**October 14, 2004** – Email from Office of General Counsel confirming telephone conversation of even date concerning additional revisions to the SPEA and indicating the SPEA will be forwarded to Richard Hawthorne for signature on behalf of the Planning Board.

**October 14, 2004** – SPEA and signature set for Site Plan 8-02014 signed by Richard Hawthorne.

By letter dated June 30, 2005 (Attachment 22), the project engineers, Charles P. Johnson & Associates, Inc. ("CPJ"), advised the Planning Board that the Phase 2 record plats were recorded prior to signature of the Phase 2 site plan based on a discussion with three members of Planning Staff during which staff agreed (i) unresolved issues concerning the Park/School site were beyond the control of the developer; (ii) staff had reviewed the Phase 2 Site and Landscape Plans and determined all conditions of approval had been met; and (iii) staff would therefore allow the plats to be recorded. In this letter, CPJ also stated that a reference to the Phase 1 site plan on the Phase 2 plats was unintentional and "had absolutely no bearing on staff's decision to record the Phase 2 plats as discussed above." We are not aware of any evidence to the contrary.

Regarding the absence of building height information on the Phase 2 signature set and the suggestion that the plans are not authentic, Richard Hawthorne signed the Phase 2 site plan documents on behalf of the Planning Board on October 14, 2004. As indicated above, the Office of General Counsel specifically advised our office on October 14, 2004 that Mr. Hawthorne would be signing the documents for the Planning Board. To our knowledge, Mr. Hawthorne does not dispute this. Moreover, the absence of a specific building height standard on the plans does not vitiate their approval in any respect. The Planning Board height limit imposed either (i) through the incorporation of the Phase 2 Staff Report in its Phase 2 Site Plan Opinion (4 stories) or (ii) through the Project Plan Opinion (4 stories/45 feet) established the applicable residential building height standard whether shown in a site plan data table or not. We also note the May 30, 2003 amendment to the 1999 Site Plan (Section 1A Amendment)

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was approved without a building height limit specified on the plans themselves. This occurred more than one year before CTCAC raised any concern regarding building heights within the project, and completely dispels any suggestion that the absence of a height standard on the Phase 2 Site Plan data table was indicative of improper conduct by staff. The height limit approved by the Board in its applicable written opinion (as we have asserted throughout these proceedings), including attachments, controls whether specified in a data table or not.

#### **5. Inspections Related to Site Plan Enforcement Agreement.**

Each site plan enforcement agreement requires the applicant to send written notice requesting inspection of the project at certain specified times. Inspections are to be requested (i) prior to clearing and grading; (ii) at 70% occupancy; and (iii) at completion of the work under the site plan. At issue is whether such request was made prior to clearing and grading activities.

The project was an active construction site when acquired by Newland Communities in October 2003. Newland Communities does not have any information about whether its predecessor requested the required inspection under Site Plan 8-98001 or 8-02014 prior to clearing and grading. As discussed above, occupancy under neither Site Plan 8-98001 (Phase 1) nor Site Plan 8-02014 (Phase 2) has reached 70%. Therefore, the second required inspection request under each site plan is not yet required.

#### **6, 7 and 8. Altered Documentation, Pattern of Violation and Sanctions.**

These matters are for the Board to decide. However, the foregoing demonstrates the latest assertions by the CTCAC in its July 14, 2005 letter lack substantive merit. Significantly, the Board will recall staff very pointedly advised the Board at the beginning of the Phase 2 Site Plan hearing on May 2, 2002 that staff had been approving a number of changes pursuant to the authority delegated by the Board.<sup>2</sup> As demonstrated above, the more significant changes were

<sup>2</sup> At the Phase 2 site hearing staff stated:

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

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taken to the Development Review Committee for a thorough review by all relevant regulatory agencies.

Furthermore, the assertions by the CTCAC in its July 14, 2005 letter show a willingness to justify its various positions by highlighting elements from different plans and agreements approved by the Board and its staff without regard to chronological timing or subsequently approved modifications or the terms of the several agreements at issue in this matter. For example, the Board will recall the CTCAC previously argued for enforcement of the Project Plan. Earlier correspondence from the CTCAC is replete with references in this regard. However, as demonstrated above, the pedestrian mews did not exist on the Project Plan. The area was very clearly shown as a street, not a pedestrian mews. The CTCAC now asks the Board to enforce the 1999 Site Plan, even though subsequent changes reviewed by the Development Review Committee and approved by staff are shown on the approved signature set of site plans for the Section 1A Amendment.

We also previously noted the Section 1A Amended Signature Set incorporated rear loaded townhomes with detached garages. This modification removed front loaded townhomes and the extensive and repeated driveway curb-cuts associated with that unit type. The result is a significantly more pedestrian-friendly environment, a major objective of the Master Plan, with uninterrupted sidewalks and pedestrian and vehicular conflicts minimized. As noted, this modification was reviewed by the DRC and subsequently approved by Planning Staff. This modification also provided the opportunity for at least two of the CTCAC principal spokespersons to purchase their homes on General Store Drive and Ebenezer Chapel Drive. The purchased units are townhomes with rear loaded detached garages. These units did not even exist on the 1999 Site Plan the CTCAC seeks to enforce. To the contrary, the 1999 Site Plan depicted townhomes on these streets as front-loaded units with integral garages. Thus, although the pedestrian mews was shown on the 1999 Site Plan (and subsequently relocated by the approved Section 1A Amendment), the homes of two principal complainants were not (Attachment 23).

Similarly, the CTCAC previously argued the site plan enforcement agreement was a binding document. In its decision on building heights, we understood the Board adopted this point of view. However, the CTCAC now seeks to avoid the terms of this agreement. It asks the Board to combine the number of dwelling units built under separate site plans and site plan enforcement agreements to require the provision of recreational facilities and amenities before the time specified in either agreement for such facilities and amenities to be provided for the

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units subject to that agreement. It appears to be a tactical argument that completely ignores the binding nature of the very document the CTCAC has relied on for other purposes.

Regarding MPDUs, the CTCAC is either unaware of or chooses to ignore the signed MPDU Agreement with the County. As demonstrated above, the provision of MPDUs is proceeding in accordance with the terms of that Agreement.

Lastly, it has been brought to our attention that in at least one instance approved and recorded subdivision plats reflect a lot configuration that is different from the configuration shown on the most recently signed signature set for that section of the project. We have discussed this matter with the project engineering consultants and are advised that in every such instance the engineers presented revised site plan drawing(s) to Planning Staff for review, Planning Staff reviewed and approved changes reflected on the revised drawing(s) and directed the engineers to submit record plats consistent with the reviewed and approved changes. An affidavit confirming the above approval process is attached (Attachment 24). We also emphasize that to our knowledge in every instance staff presented the record plats to the Board, and advised the Board that the plats were in order. The Board then approved the plats and they were signed by the Chairman, along with the Director of MCDPS and recorded.

It is clear that in many instances the recordkeeping in this case has been significantly less than adequate. However, that fact alone does not demonstrate a failure of the Planning Staff to review each and every modification to the site plans in accordance with the authority delegated by the Board and which changes were ultimately reflected in the final recorded subdivision plats for the project. As noted, each plat was reviewed and approved by this Board. Such approval and recordation constitutes *prima facie* evidence that the plats were in accordance with all legal requirements. More importantly, the professional consultant who worked with staff has stated exactly what occurred in this case and that each modification was reviewed and approved by staff. There is absolutely no evidence that such review did not occur. To the contrary, we understand staff has corroborated what is stated in the attached affidavit.

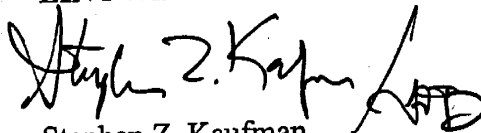
In closing, we request that the Board conclude this matter and find that no violations exist concerning the issues raised by the CTCAC in its letter. We also ask the Board to allow the pending Project Plan and Site Plan applications to be processed and presented to the Board for decision. Our client has heard from many within the community who are pleased with the Town Center development and who would like the project to be completed. We share that view. The Board should conclude this matter and, if necessary, impose a plan of compliance

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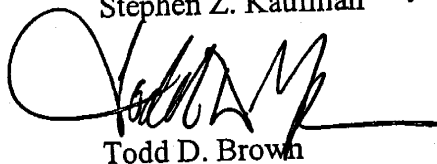
for the height and setback violations previously found by the Board to exist. Such plan should be reasonable and appropriate under the circumstances and should consider all the facts and the various governmental authorities whose decisions were not ignored, but instead were acted on by our client and the builders in good faith reliance and in the reasonable belief that the government had authorized construction to proceed following its review and approval of applicable plans and applications.

Very truly yours,

**LINOWES AND BLOCHER LLP**



Stephen Z. Kaufman



Todd D. Brown

Enclosures

cc: Mr. Charles Lochr  
Mr. William Mooney  
Ms. Rose Krasnow  
Michele Rosenfeld, Esq.  
Mr. Richard Croteau (w/o enc.)  
Mr. Douglas Delano (w/enc.)  
Robert Brewer, Esq. (w/o enc.)  
Timothy Dugan, Esq. (w/o enc.)  
Kevin Kennedy, Esq. (w/o enc.)  
Barbara Sears, Esq. (w/o enc.)  
David Brown, Esq.

**List of Attachments**

1. April 13, 2000 MNCPPC Staff Memorandum
2. Approved Project Plan (9-94004) and Preliminary Plan (1-95042)
3. Project Plan Illustrative Building Plan
4. Project Plan Parking Framework Plan
5. Project Plan Framework Street Plan
6. Project Plan Pedestrian Framework Plan
7. Site Plan 8-98001 (1999 Site Plan) Signature Set
8. Development Review Committee Minutes and comments 2000 – 2001.
9. Proposed amendment to 1999 Site Plan Signature Set prepared by M/K Engineers, Inc., dated December 6, 2000 and signed by Terrabrook on June 21, 2001.
10. July 31, 2001 Development Review Committee Minutes
11. Section 1A Site Plan Amendment Signature Set
12. Subdivision Plat for Clarksridge Road
13. Status of Amenities – Phase I
14. Site Plan Enforcement Agreement dated May 13, 1999 for Site Plan 8-98001 (Phase 1)
15. Site Plan Enforcement Agreement dated October 14, 2004 for Site Plan 8-02014 (Phase 2)
16. MPDU Agreement with Montgomery County dated May 31, 2002
17. MNCPPC Staff Report for Site Plan 8-02014 (Phase 2) dated May 2, 2002.
18. MNCPPC Staff Report for Site Plan 8-98001G (Manor Homes) dated February 2, 2005.
19. Planning Board Opinion approving Site Plan 8-98001G and 8-02014B (Manor Homes) dated March 21, 2005

20. Planning Board Opinion for Site Plan 8-02014 (Phase 2) dated June 17, 2002
21. Letters and emails dated May 20, 2003 through October 14, 2004 concerning Site Plan Enforcement Agreement for Site Plan 8-02014 (Phase 2)
22. Letter dated June 30, 2005 from Charles P. Johnson & Associates, Inc. to MNCPPC
23. State Department of Assessments and Taxation Reports for property located at 23601 General Store Drive and 13021 Ebenezer Chapel Drive and excerpts from the 1999 Site Plan Signature Set and the Section 1A Amendment Signature Set
24. Affidavit of Lesley Powell, Charles P. Johnson & Associates, Inc. dated September 6, 2005.