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THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Derick Berlage, Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Clarksburg Town Center

Dear Chairman Berlage:

This letter is being provided in response to the September 7, 2005 letter, with 24 Attachments, sent to the Board by Newland Communities LLC and MNPII - Clarksburg LLC (collectively "Newland") in response to the letter sent to the Board on July 14, 2005 by the Clarksburg Town Center Advisory Committee (CTCAC").

The Newland letter is a pastiche of responses: the legally erroneous; the factually unsupported; the straw-man argument; the obfuscation; the misdirection; even the *ad hominem* attack. On inspection, its ostensible depth and thoroughness is a chimera, and Newland's labored attempt to be persuasive has precisely the opposite effect of what is intended. To try this hard and fail completely is a reliable sign that its actions were simply indefensible.

I. THE BOARD SHOULD MAKE CLEAR THAT THE APPLICABLE DEVELOPMENT STANDARDS ARE SET FORTH IN THE PROJECT DATA TABLE FOR THE ENTIRE CTC PROJECT AND THAT ANY VIOLATION OF THOSE STANDARDS IS A SITE PLAN VIOLATION

Before responding to the specifics of Newland's claims, it is appropriate to review a critical issue the Board had to address at the July 7, 2005 hearing in this matter. The question that arose was where the Board was to look for binding development standards to be enforced in any site plan violation proceeding. As detailed below, the answer for this case is simple: the Board should look to the Project Data Table, which appears on the Project Plan, the Preliminary Plan and on the Phase I Site Plan. It should be regarded as binding for the entirety of the CTC Project. At the July 7th hearing, the Board

effectively reached this conclusion, not in general terms, but certainly as to building height, given that it concluded at that hearing that dwelling units built in excess of the height limit set for that type of unit in the Project Data Table constituted a Site Plan violation, whether in Phase I or in Phase II.

That this is the correct approach generally for all development standards in the Project Data Table, not just building height becomes apparent from a review of the origins of the Table. The initial CTC developer recognized the need for scale and compatibility with the historic district, as emphasized in the Master Plan:

This Plan proposes a transit-oriented, multi-use
Town Center which is **compatible with the scale and
character of the Clarksburg Historic District.**

...

**Assuring compatibility of future development
with the historic district has been a guiding principle of
the planning process.**

Clarksburg Master Plan 26 (July 1994) (emphasis added). Based on the recognition of the need for scale and compatibility with the historic district, the developer proposed development standards for the project. Staff reviewed those standards. The Board approved and adopted those development standards, as shown in succession on the data table of the Project Plan, then the Preliminary Plan, Newland Attachment 2, and again in the Site Plan Phase I. Newland Attachment 7 (Sheet B). The development standards were ratified by the Board, as evident through signatures on each successive, legally-binding document containing those standards.

The Staff Reports and Board Opinion(s) associated with those detailed plans (Tabs 2-4 to July 7, 2005 Board Hearing Packet) contain an overview of some, but not all, of the development standards, along with threshold information based upon the underlying, legally-binding documents that were before the Board for ruling at each point, i.e., the actual Project Plan, Preliminary Plan, and Phase I Site Plan. Contained within each of these reports and opinions is a mere "comparison table" to confirm that the underlying plans meet or exceed any specific requirements of the zone and/or Master Plan. Such tables cannot reasonably be viewed as a substitute for the more detailed standards on the various Signature Sets.

The primacy of the development standards/data table as contained within the Project Plan is found within the Preliminary Plan Opinion issued by the Board in

September, 1995. First, the Board recognizes the Project Plan as the underlying development authority:

The underlying development authority, Project Plan No. 9-4004, was approved by the Planning Board on May 11, 1995, after two prior Planning Board meetings (held on April 6 and 20, 1995).

Board Preliminary Plan Opinion 1 (March 26, 1996) (emphasis added)(Tab 3 to July 7th Hearing Packet).

Second, the Board subjects approval of the Preliminary Plan to certain conditions. Id. at 3-7. Among these is Condition #14:

Preliminary Plan 1-95042 is expressly tied to and interdependent upon the continued validity of Project Plan No. 9-94004. **Each** term, condition, and **requirement** set forth in the Preliminary Plan and Project Plan are determined by the Planning Board to be **essential components of the approved plans** and are, therefore, **not automatically severable**.

Id. at 6 (emphasis added). Condition # 14, by its express terms, confirms the binding nature of the development standards and requirements as set forth in both the Project Plan and Preliminary Plan. It in essence states that the Board found the development standards to be essential components of the plans and prohibited any unapproved alteration of those standards.

Condition #14 also explains why the development standards, exactly as approved by the Board, were once again included on the Preliminary Plan, and yet again on the Site Plan, Phase I. As for the Staff Report for Phase I, it would hardly be necessary to reference every single component of the development standards contained within the approved data table. Once again, a comparison table or confirmation of compliance with thresholds was all that would have been necessary for the Board to approve the underlying Site Plan -- especially in view of the fact that the Site Plan contained the full set of development standards as **required** according to prior Board action (Condition #14).

In short, the Project Data Table in the Project Plan, repeated in the Preliminary Plan and the Phase I Site Plan, must be viewed as the legally binding, operative set of development standards for the entire CTC project. But that still leaves open the question whether those standards could lawfully be modified in particular instances by Staff

without explicit Board approval. As detailed in the next section, the answer to that question is a resounding "No."

II. NEWLAND COULD NOT REASONABLY RELY ON STAFF APPROVALS TO CHANGE SITE PLAN REQUIREMENTS

In its latest letter, Newland, as it has in the past, justifies any and all changes from the Board-approved Site Plan with reference to staff-approved amendments under Condition 38 to the Opinion approving Site Plan 8-98001. As CTCAC will detail at the hearing, however, there are few documented changes to the Site Plan that can actually be deemed approved under Condition 38. These include items clearly administrative in nature, such as amendments to the positioning of a dumpster (Exhibit 1 to this letter). All are genuinely minor changes. More significant changes lack documented approval, i.e., a record of staff evaluation and finding that the change is (a) within the scope of authority delegated to staff and (b) appropriate in light of the Board-approved Site Plan. Indeed, CTCAC will show that the evaluation process on genuinely minor changes was not employed for more significant changes. See point III, *infra*.

The point here, however, is more fundamental. Whether there is evidence of staff approval of amendments or not, those approvals are legally deficient – and obviously so – if they exceed the approval authority lawfully delegated to the staff by the Board. CTCAC will assume for present purposes that Condition 38 was intended to delegate as much authority to the staff as the Board lawfully could delegate. That delegated authority is limited by statute. Specifically, §59-D-3.7, which references the definition of "minor amendment" in §59-D-2.6, prescribes the outer limit of staff authority to approve changes to Site Plans. The staff may not make changes that "entail matters that are fundamental determinations assigned to the Planning Board." *Id.* The staff may not amend in any way that would "alter the intent, objectives, or **requirements** expressed or imposed by the Planning Board in its review of the Plan." *Id.* (emphasis added).

Thus, in a great many instances, whether the staff approved a change or not is beside the point. As noted in Part I, an already resolved example is building height. The Board has rejected the argument advanced by Newland that building height changes that contravene the Site Plan standards can be justified on the grounds of staff approval as a minor amendment. This is the only legally defensible conclusion the Board could have reached. The Board is required by law to hold a public hearing and make findings on any site plan or major (i.e., non-minor) site plan amendment. §59-D-3.4. Any attempt by the Board to delegate this hearing and finding responsibility to Staff would be unlawful.

This point is so elementary and fundamental that none of the experienced professionals involved in this case, with years of practice before the Board, could have

reasonably relied on Staff to modify Site Plan requirements. Such a change must emanate from the Board itself. If they did rely on such changes, without seeking advance confirmation from the Board, they did so unreasonably, whether Staff played an active or passive role in the process.

III. THE REALIGNMENT OF "O" STREET AND THE RELOCATION OF THE PEDESTRIAN MEWS ARE UNLAWFUL, UNAPPROVED CHANGES

Newland's discussion of the evolution of "O" Street and the Pedestrian Mews puts great emphasis on the insignificant at the expense of what is material. Newland also misstates what transpired after the Site Plan fixing the location of both became final. There is no evidence these changes to the Phase I Site Plan were properly approved.

Newland begins its attempt to "document" the change of the Pedestrian Mews on the Phase I Site Plan to a street by noting that it originally was a street on the Project Plan and the Preliminary Plan. Newland Letter 2. But there has never been any question that this is so, and Newland's "proof," Attachments 2-6, is an irrelevant diversion that contributes nothing to the evidentiary record. Moreover, if it matters whether a Site Plan feature is on the Project Plan and Preliminary Plan or not, why does Newland conveniently fail to mention that the original configuration of "O" Street is on both of those plans as well as the Phase I Site Plan?

This attempt to have it both ways is pure obfuscation designed to take the Board's focus off the only real question that matters: was the feature on the Phase I Site Plan and, if so, how did it get changed thereafter? Here, Newland is obliged to concede the indisputable: the Pedestrian Mews and the original "O" Street are on the Phase I Site Plan. Attachment 7. Left out of Newland's presentation, however, is the basis for and significance of adding the Pedestrian Mews directly between the church and the Town Square. This change was explained in the Phase I Site Plan Staff Report:

Close to the edge of the Clarksburg Historic District, is a diagonal pedestrian mews. The mews contains sitting areas and two large lawn panels and connecting walks, **linking the church with the Town Square.** The sitting area closest to the Town Square includes a trellis and a memorial to John Clark with the use of found headstones from the family grave site. **The mews develops a visual and walkable axis between the church and the Town Square, highlighting these significant features of the existing and proposed development.**

Tab 4 to July 7th Hearing Packet at 10-11 (emphasis added).

What then, is Newland's explanation for why and how this got changed? Newland's answer is that the realignment ("O" Street) and relocation (Pedestrian Mews) were "comprehensively reviewed by the professional staff of several agencies, including MNCPPC, MCDPS and MCDPWT." Newland Letter 4. There is simply no evidence to document and validate this claim. The evidence submitted by Newland is the minutes of a July 31, 2001 DRC meeting. Attachment 10. Those minutes show that its focus was on technical issues relating to the proposed Site Plan for Phase I-A, Part 1, which had been submitted the prior month. Attachment 9. The minutes refer to Clarksburg Road and its intersection with Street "M" and otherwise discuss technical aspects of the plan. That is all. Nowhere do the minutes suggest or imply that in the brief consideration of the proposed Plan (40 minutes for all agency comments), there was any discussion of the appropriateness of amending the Phase I Site Plan to eliminate a segment of "O" Street or relocating the Pedestrian Mews. The eliminated road segment is nowhere in evidence on the proposed Plan; the Mews as shown on the Phase I Site Plan is not depicted as removed, and the place to which it was ultimately relocated is not identified as a mews area. Attachment 9, Sheets 3 and 4. For all that appears, the meeting was conducted with no general awareness that the plan under discussion differed significantly from the Phase I Site Plan, let alone discussion of the appropriateness of the changes. Indeed, the broader questions raised by site plan changes, in terms of their fit into the site plan as a whole, are policy judgments for the Board, for which, at most, only limited technical input can be expected from contributors at a DRC meeting.

Newland attempts to divert the proper focus of the inquiry by diminishing the significance of the changes. "O" Street was not a "framework" street, Newland claims, so changing it was not significant, and within the staff's established "protocol," Attachment 1, for staff-level changes. Newland Letter 4. This is nonsensical. The staff report, as quoted above, specifically called out this area as changed from a street to a pedestrian mews, a change the Board approved when it approved the Phase I Site Plan. If this was significant enough an item to be so identified to the Board at Site Plan approval as a change from the Preliminary Plan to the Site Plan, it was obviously still significant enough to warrant Board review and approval when changed back to a street yet again. Indeed, Newland's letter unwittingly identifies the very considerations it could have presented, but failed to present, to the Board to justify the change. *Id.* Whether these considerations – hedgerow preservation, increased recreation space, reduced curb cuts, and reduced impervious services – were both realizable and a good trade-off for the changed configuration of "O" Street and the Pedestrian Mews were precisely the kind of judgments reserved to the Board under the site plan amendment process that Newland, by subverting the amendment process, failed to give the Board the chance to make in this instance

Last, in a desperate attempt to defend the indefensible with any argument that might strike the fancy of the Board, Newland also notes that "the recorded subdivision plat dedicating Clarksridge Road as a street was reviewed by the Planning Board and signed by the Chairman and Director of MCDPS (Attachment 12)." Newland Letter 3-4. At the hearing, CTCAC will document the highly irregular nature of the Board's signature and approval process for Clarksburg record plats in relation to the process prescribed in §50-36 and §50-37 of the Subdivision Code. For present purposes, however, it is sufficient to note that it is the private preparer of the record plat that must certify its compliance with the applicable Site Plan, not the Board. The designated Board signatory does not perform a comprehensive comparison, matching site plan to plat; if it is done at all, it is done by the very staff that Newland claims approved an amended site plan. Thus, the Board's "approval" of the plats means nothing more in this context than that the staff might have checked it against a changed site plan that the Board neither saw nor approved. Newland's claim is just another red herring.

IV. NEWLAND HAS NOT PROVIDED COMMUNITY-WIDE AMENITIES AT THE REQUIRED TIME

Newland begins its defense of this charge with another diversion: a refutation of "the suggestion that community amenities and recreation facilities have not been provided." Newland Letter 4. Newland claims it is "important to dispel" this suggestion. Why is it "important" to dispel a charge that was never made? CTCAC has not formally complained about **localized** amenities, which is the focus of Newland's response. In truth, CTCAC will detail at the hearing what a miserable job Newland and the builders have done to date on local amenities, and why the promise of "a significantly greater number of amenities of higher quality than reflected on the original approved plans," *id.* at 5, is illusory.

The point made by CTCAC, however, is focused elsewhere: on the **community-wide** amenities. Newland's interpretation of its obligation in this respect is that under Exhibit E to the May 13, 1999 Site Plan Enforcement Agreement ("SPEA"), community-wide facilities need not be furnished until issuance of a building permit for the 540th unit of Phase I. Newland Letter 5. Newland claims that, as currently constituted, Phase I is 768 units and the building permit for the 540th unit in the current Phase I has not been reached. *Id.*

CTCAC disagrees with this analysis. Exhibit E specifies that Phase I is 200 units. Attachment 14 at E-2. Obviously a 540-unit trigger cannot refer to a 200-unit phase. The 540-unit trigger must have therefore been referring to all the phases expressly mentioned in Exhibit E:

Phase I	200 units
Phase II	569 units
Phase III	<u>531 units</u>

1300 units

Id. The only sensible way to understand what the signatories to the SPEA meant when it was signed, therefore, is that the trigger was the 540th of all 1300 units, a 41.5% trigger.

It may be the case that Newland knew as early as this 1999 time period that Phase I would be 768 units, such that Exhibit E could have been revised to include a revised phasing schedule. But it was not, and the SPEA provides that any modifications have to be in writing. SPEA ¶10, id. at 5. There are no such writings, whether generated at that time or since. Newland should be held to its agreement. It acknowledges that the total number of issued permits to date is 753. Newland Letter 5-6 (Phase I -421 units; Phase II - 332 units). Hence, Newland is over the 540 trigger.

Of course, whether Newland is over or under a 1999-determined trigger is, in a larger context, beside the point. There is nothing to prevent Newland and the Board from agreeing to modify the existing SPEA to take account of current realities. Those include the fact that residents have been waiting for years for the community-wide amenities. Construction is being deftly allocated between (what Newland regards as) the Phase I trigger (540 units) and the Phase II trigger (341 units) so that community-wide facilities will be delivered at the last possible minute: upon issuance of the 880th building permit, Phase I or II. This is still some time away, as Newland reports that the combined total of issued permits for both phases is 753. The Board should either find Newland in violation of the 1999 SPEA or demand compliance with a revised phasing schedule that precludes issuance of any further building permits until the community-wide amenities are delivered.

V. NEWLAND HAS VIOLATED ITS MPDU STAGING OBLIGATIONS UNDER CHAPTER 25A AND UNDER ITS AGREEMENT WITH DHCA

Newland's statutory staging obligation is to construct MPDU's along with or preceding market rate dwelling units, to maintain a pace of MPDU construction that reasonably coincides with that for market rate units, and to ensure that the last buildings do not contain a concentration of MPDU's. §25A-5(i). Because the CTC project is over 50 units, the required number of MPDU's is 12.5% of total units. §25A-5(a) - (d). Newland claims that it is meeting these obligations because it is subject to and in compliance with an MPDU Agreement entered into with the Department of Housing and

Community Affairs ("DHCA"). Newland Letter 7, referencing Attachment 16. Close examination of the Agreement, however makes clear that Newland is not in compliance with its obligations under either the Code or the Agreement.

Integral to the Agreement is Exhibit "A," a construction schedule that implements the Code, and the public policy behind staging control that ensures dispersal of MPDU's throughout the project. §25A-2(2). The Agreement provides that construction is to take place "in strict accordance with...Exhibit A." Agreement ¶3, Attachment 16 at 1. The construction schedule in Exhibit A may not be departed from without prior DHCA approval, which Newland was and is free to seek under the Agreement. *Id.*, ¶12. Exhibit A requires the staging plan to be consistent with the SPEA.

Newland details at length how its rate of MPDU construction is in keeping with Exhibit A. Newland Letter 7. But there is no indication Newland (upon whom the Agreement is binding as successor to Terrabrook, *id.* ¶15) has sought any change in the Exhibit A construction schedule, which Newland's own figures show is well behind the statutory goal that MPDU construction "reasonably coincide" with market rate construction. Since the requirement is 12.5% of units built, and, at present, the level achieved is 9.7% of units built, Newland Letter 7, the shortfall is $[(12.5 - 9.7) \div 12.5]$, or 22.4%. It is highly questionable whether a 22.4% shortfall from full synchronization of MPDU-market rate construction meets the statutory standard. But even assuming that the shortfall is not an outright violation of the statute, its validity is tied to the accuracy of the construction schedule in Exhibit A. As detailed below, that construction schedule is not in accordance with the current phasing plan in the Phase I and II SPEA's, and bears no resemblance to what construction has actually taken place.

Exhibit A defines three phases of construction for 1300 units as follows:

Phase 1 (1B-1, 1B-2, 1B-3, 1A)	457 Units
Phase 2	487 Units
Phase 3	<u>356 Units</u>
	1300 Units

In addition, the schedule shows completion of the last of these phases (phase 3) during 2004. But as reported elsewhere in the Newland Letter, there is no residential phase 3; phase 1, with its matching SPEA, is 768 units; and phase 2, with its matching SPEA, is 487 units, for a total of 1255 units. Newland Letter 5-6. Newland asserts that it intends to get the Agreement modified "once the final number of units in the completed project is determined." *Id.* at 7. But the Agreement (in ¶12), plainly provides for DHCA prior approval of a departure from construction in "strict accordance with ... Exhibit A." Agreement ¶3. Not only is there no approved adjustment to Exhibit A to reflect a change

in the number of phases and the number of units in each phase, there is also no approval of the rather lengthy delay in the delivery of MPDU's that has already arisen from a failure to proceed with construction of the phases within the time frames laid out in Exhibit A a little more than three years ago. If the phasing depicted in Exhibit A had been adhered to, and given that Newland has obtained permits for 753 units, this would place current construction at about 60% completion of Exhibit A's phase 2, which Exhibit A advises was to be **completed**, not **60% finished**, over a year and a half ago.¹

In short, Newland's approach to its MPDU obligations mirrors its approach to Site Plan amendment approval: circumvent the established regulatory process in the expectation that what is done without proper advance approval will be ratified after the fact.

VI. THE VALIDITY OF THE OCTOBER 2004 SIGNATURE SET FOR THE PHASE II SITE PLAN HAS NOT BEEN ESTABLISHED

Since CTCAC's letter of June 1, 2005, Tab 10 to July 7th Hearing Packet, CTCAC has questioned the validity of the October 14, 2004, signature set of the Phase II Site Plan. That letter raised numerous questions that have been partially answered since, but in many cases the answers have only raised more questions. This is especially true of Newland's attempt to validate the 2004 documents.

1. Why were Phase II subdivision plats approved before the Phase II Site Plan's ostensibly effective date? There are 21 Phase II plats that were approved by the Board prior to October 14, 2004, representing the vast majority of Phase II dwelling units:

<u>Plat #</u>	<u># of Lots Represented</u>
22229	28
22533	37
22534	32
22535	18
22536	6
22537	8

¹ Another point about Exhibit A must be noted. In every phase, Exhibit A reveals a built-in 4-month lag in completion of MPDU's after completion of market rate units. This is inconsistent with §25A-5(i). It is not clear on this record whether the developer sought and obtained DHCA's express concurrence to this delay or whether in its review of the developer's proposal, DHCA simply overlooked this deficiency. Whether this problem implicates the efficacy of DHCA oversight of the MPDU construction program, or the Board's MPDU responsibilities, as reflected in §59-D-2.43(f) is an issue that ought to be addressed at some point, but it is not central to the MPDU problem addressed here.

22631	23
22632	33
22633	33
22634	7
22783	28
22784	12
22785	23
22786	11
22907	6
23038	7
23046	17
23047	14
23048	17
23049	16

Total lots platted prior to October 14, 2004: 394

How could such recordation take place, given that the Board may refuse to record a final record plat until the site plan is approved? §50-37(b)(2). The only explanation offered is that the recorded plats made reference to the Phase I Site Plan, rather than the Phase II Site Plan, due to a completely "unintentional and inadvertent oversight" and an unexplained "discussion" that took place between staff and CPJ employee Les Powell. Attachment 22. Where is the documentation of this "discussion," let alone documentation that staff had the authority to waive the Board's prerogatives under §50-37(b)(2)? This is hardly a trivial paperwork complaint. The undisputed fact is that many homes were built, sold, and occupied in Phase II before the ostensible effective date of October 14, 2004 for the Signature Set. See CTCAC's June 1, 2005 letter at 7 (Tab 10 to July 7th Hearing Packet). Pursuant to what plans were these homes built if there was no Site Plan in effect? Put another way, if the reference to the wrong Site Plan was an "unintentional" mistake, what Site Plan was the "intended" reference? And, why would Newland, with able counsel, acquiesce in a staff "discussion" of how to handle the matter when Board authority over the timing of plat recordation is so clear? Newland offers the Board no answers to these questions.

2. Where is the Site Plan that the Board reviewed for Phase II in June, 2002? Attachment 20 is the Board Opinion of June 17, 2002 approving that Site Plan. A reduced version is part of the Staff report for that Board action. Newland Attachment 17, Attachments G and H thereto. A full-size copy apparently no longer exists within Board files. What about Newland files? Newland does not say, one way or the other. These copies lack signed developer and surveyor certificates, but an earlier version, presented at the DRC meeting of November 19, 2001, is so signed. The DRC version is attached (Exhibit 2 to this letter). No full size copy of this Site Plan has surfaced, either.

Which of these was revised and approved in June 2002 is not clear. What is clear is that neither one is the same as the one signed in October 2004. In this respect, it is necessary to compare the "evolution" of the minimum lot requirements from 2001 to 2002 to 2004. In 2001, as shown on Exhibit 1, those requirements tracked to those approved on the Phase I Site Plan, and the Preliminary Plan, Attachment 2, including, inter alia, building height and rear yard setback. This was in keeping with Condition #14 to the Preliminary Plan, as detailed in Part I. In 2002, the rear yard requirement had been changed from 25' (Single Family) and 20' (Town Home) to "AS SHOWN," effectively ratifying whatever rear yards the developer saw fit to offer. This change violated the Project Data Table and Condition #14. By 2004, on the ostensible Signature Set, there was a further "evolution;" the building height requirement had been dropped entirely, yet a further transgression of the Project Data Table. The record is devoid of any evidence that the Board made a conscious decision to erode the building height or rear yard setback standards as the CTC project shifted from Phase I to Phase II. As explained in Part I, supra, both were subject to the identical Project Plan and Preliminary Plan standards. On what basis were these established standards relaxed or eliminated? Newland offers no explanation. Instead, Newland, aware that Staff's record keeping is so lax that copies of these Plans cannot be found, keeps whatever copies it has conveniently hidden from public scrutiny. The proper conclusion to be drawn is that the October 14, 2004 Plan does not accurately reflect what the Board approved in June 2002.

3. How could the October 14, 2004 Signature Set be the operative Phase II Site Plan when it lacks any principal building height controls? Inexplicably, **accessory** building height limit is listed (27'), but no **principal** building height is shown. The omission renders the Site Plan unlawful. Section 59-D-3.23(a) requires the Site Plan to show the height of **all** structures. Newland's claim that building height does not have to appear on the Site Plan, Newland Letter 10, is a blatant misstatement of the Code.

4. Why wasn't the Phase II Site Plan signed within close proximity to the time of its approval, i.e., without a delay of over two years? Phase II was, from a land use requirements perspective, little more than a routine continuation of the established pattern and form of construction in Phase I. So, why all the delay? Newland claims the existence of a "long standing practice" for the Signature Set and the SPEA to be signed at the same time. Newland Letter 8. Where is the proof of this "long standing practice?" Just looking back to Phase I, this "long standing practice" was not followed. Execution of the SPEA (May 1999) followed execution of the Site Plan (March 1999) by two months. There is no statutory requirement linking the two signatures, and the practicalities are that the SPEA is best negotiated **after**, not **coincident with**, finalization of the Site Plan. Newland also points to a protracted negotiation with the MCPS. Newland Letter 8-10; Attachment 21. Even a cursory examination of this correspondence reveals, however, that none of the give and take with MCPS had

anything to do with execution of the Signature Set. The **only** issue under negotiation was the terms of the SPEA. Newland offers no plausible reason for delay in execution of the Signature Set.

5. Finally, instead of addressing the obvious relevant issues raised by the questionable October 14, 2004 documents, Newland highlights the fact that the May 30, 2003 amendment to the Phase I Site Plan omitted building height more than a year before CTCAC started raising questions about building height. Newland Letter 10-11. Newland sees this as "completely dispel[ling] any suggestion...of improper conduct by staff." *Id.* at 11. This is, to put it kindly, an absurd argument. Staff does not prepare the Site Plan, deficient or otherwise; it was prepared by the **developer** (Newland's predecessor-in-interest). A deficiency in a Plan reflects improper action by **Newland** (as successor) and its agents. This reality is self-evident. What is not self-evident is the role of the Staff in failing to correct the deficiency. There are really only two possibilities: intentionally or negligently failing to do so. Which happened in this case is surely important to the Board for future reference, but it is of no significance to the validity of the October 2004 Signature Set. For present purposes, the Board must not allow Newland to misdirect the focus away from its own improper conduct. Properly focused, Newland's claim reduces to the absurd point that "We got a Site Plan approved improperly without building height before CTCAC came along, so what is the problem in getting away with it again after they came along?" The answer is that post-scrutiny repetition of pre-scrutiny improper conduct is not a sign of innocence; it is a sign of arrogance, indifference or stupidity. Whichever is correct, the October 14, 2004 Signature Set is an invalid guide to development of Phase II.

VII. MANY RECORD PLATS ARE INCONSISTENT WITH THEIR UNDERLYING APPROVED SITE PLANS

Newland has recently been advised that in a number of instances "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." Newland Letter 13. Newland's attempts to explain away this problem are unpersuasive and ineffectual. Newland does not deny that such discrepancies exist, and, after identifying at least 11 problem plats, Attachment 24, ¶4, ruefully notes that "in many instances the recordkeeping in this case has been significantly less than adequate." Newland Letter 13. At the hearing, CTCAC intends to demonstrate, plat-by-plat-by-plat, what an understatement this is.

Newland attempts to reassure the Board that there has not been a failure "to review each and every modification to the Site Plans..." *Id.* The "reassurance" provided, however, is hardly reassuring. First, Newland claims that the fact of plat approval by the Board "constitutes *prima facie* evidence that the plats were in accordance with all legal

requirements.” *Id.* In other words, even though it has already been demonstrated that Newland is complicit in widespread Site Plan violations, the Board may be “reassured” in further investigation by a legal presumption of Newland’s correct behavior. To the contrary, nothing should be clearer to the Board at this juncture than that it should not accept at face value Newland’s generic claims of probity.

In the same vein, the Board should reject the conclusory assertion of Newland’s consultant that each modification was reviewed and approved by Staff. *Id.*, Attachment 24. To paraphrase President Ronald Reagan, the time to “trust” is over; it is time to “verify.” The need for close scrutiny arises, unfortunately, not just from Newland’s abysmal track record, but also from Staff’s. The consultant identifies the Staff member who ostensibly reviewed and approved the plans. *Id.* ¶5. This is the same person who personally altered a Site Plan and subsequently lied about it to the Board at the April 14, 2005 hearing in this matter. See CTCAC letter of June 1, 2005 at 2-5; CTCAC letter of June 21, 2005 at 1-2 (both letters are in Tab 10 of the July 7th Hearing Packet).

The Board is now faced with unreliable Staff approvals – approvals that may or may not in fact exist at all--and a developer whose conduct likewise cannot be depended upon as reliable. The only option left is to assign to a special master or other reliable neutral the task of checking every detail of every questionable plat to verify its consistency with the relevant lawfully approved Site Plan.²

VIII. CTCAC SEEKS TO ENFORCE THE ONE DATA TABLE THAT APPEARS IN THE PROJECT PLAN, PRELIMINARY PLAN AND SITE PLAN, AND THE FEATURES APPROVED IN THE SITE PLAN

When all else has failed, Newland engages in irrelevant, *ad hominem* attacks on CTCAC. Newland Letter 12-13. The Board should give them no credence, and they merit only brief, if any response. First, CTCAC’s initial focus on the Project Plan (during most of the first eight months of its investigations) stemmed from the fact that it was simply unable to obtain Site Plans from any source. Once obtained, they became the focus of CTCAC’s inquiry. They remain the focus today.

Second, CTCAC is not selectively seeking enforcement of Project Plan features when it suits its members and Site Plan features when those are deemed more suitable. As explained in Part I, *supra*, CTCAC’s point of reference, as should be the Board’s, is the properly approved Site Plans, not any predecessor plans or any improperly approved successor Site Plans.

² Once the deficiencies are catalogued, the next step will be to determine what to do about each, beginning with a comparison of the discrepant documents with the actual configuration of the land and any construction on it. CTCAC will present its views on this subject at the appropriate time.

Third, CTCAC, with finite time and resources, has not been able to investigate the propriety of every single Staff or Board action in relation to the CTC, including the approval of the Section 1A amendment that altered the units owned by two of CTCAC's principal complainants. If it came to CTCAC's attention that this change was improperly effectuated, CTCAC would not hesitate to bring it to the Board's attention and to let the chips fall where they may as to remediation. Indeed, the CTCAC members so identified by Newland would not object to having their current units replaced with units that are configured in accordance with the Phase I Site Plan.³

Fourth, CTCAC is not selectively endorsing and rejecting the SPEA. CTCAC considers the SPEA a binding document. In relation to amenity phasing, there is simply a difference of opinion between Newland and CTCAC regarding what is required. See point IV, supra. Similarly, CTCAC is not ignoring the MPDU Agreement. CTCAC simply disputes Newland's claim that it is abiding by that Agreement. See point V, supra.

CONCLUSION

Newland asks the Board to quickly conclude this matter on behalf of "many within the community who are pleased with the Town Center development and who would like the project to be completed." Newland Letter 13. CTCAC, with support as deep as it is wide in the community, is not "pleased with the Town Center development," but "would like the project to be [properly] completed [as originally promised]." Id. Newland, displaying not the slightest hint of remorse for the harm to the community caused by its transgressions, whether already or yet to be adjudicated, urges the Board to get on with the task of approving Project Plan amendments that would ratify virtually every transgression from the Project Data Table development standards to date. Id. CTCAC will demonstrate to the Board the scope and breadth of Newland's efforts to disregard Board-imposed constraints, whether due to ineffective site plan enforcement by the Board or otherwise. In this proceeding, the Board has the opportunity to decisively reverse any perception of Board ineffectiveness that Newland has taken advantage of by simply holding Newland, its builders and agents properly accountable for the site plan violations they planned and implemented.

³ For that matter, other CTCAC principals would gladly trade the units they own for units whose yards and streets were not negatively transformed by likely improper amendments to the Phase I Site Plan.

Derick Berlage, Chairman
September 26, 2005
Page 16

Sincerely yours,



David W. Brown

cc: Charles Loehr, Director
Michele Rosenfeld, Esq.
Rose Krasnow, Chief, Development Review
John A. Carter, Chief, Community-Based Planning
Barbara A. Sears, Esquire
Todd D. Brown, Esquire
Timothy Dugan, Esquire
Robert G. Brewer, Jr., Esquire
Montgomery County Council

Plotted: Dec. 3, 2004

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MINOR REVISIONS
CHECKED BY STAFF AS SHOWN
FILE NO. 8-8001
OMERY COUNTY PLANNING DEPARTMENT

W. H. Hays 1/19/03
P. Ruppert Dugester
Just Change

CLARKSBURG TOWN CENTER
SITE DEVELOPMENT PLAN @ PARCEL A BLOCK FF
DRAWN BY: CAD D CHECKED BY: MES
DATE: 12/03/04
ARCH: RECEIVED: N/A
SCALE: 1"=30'
SP #8-98001C

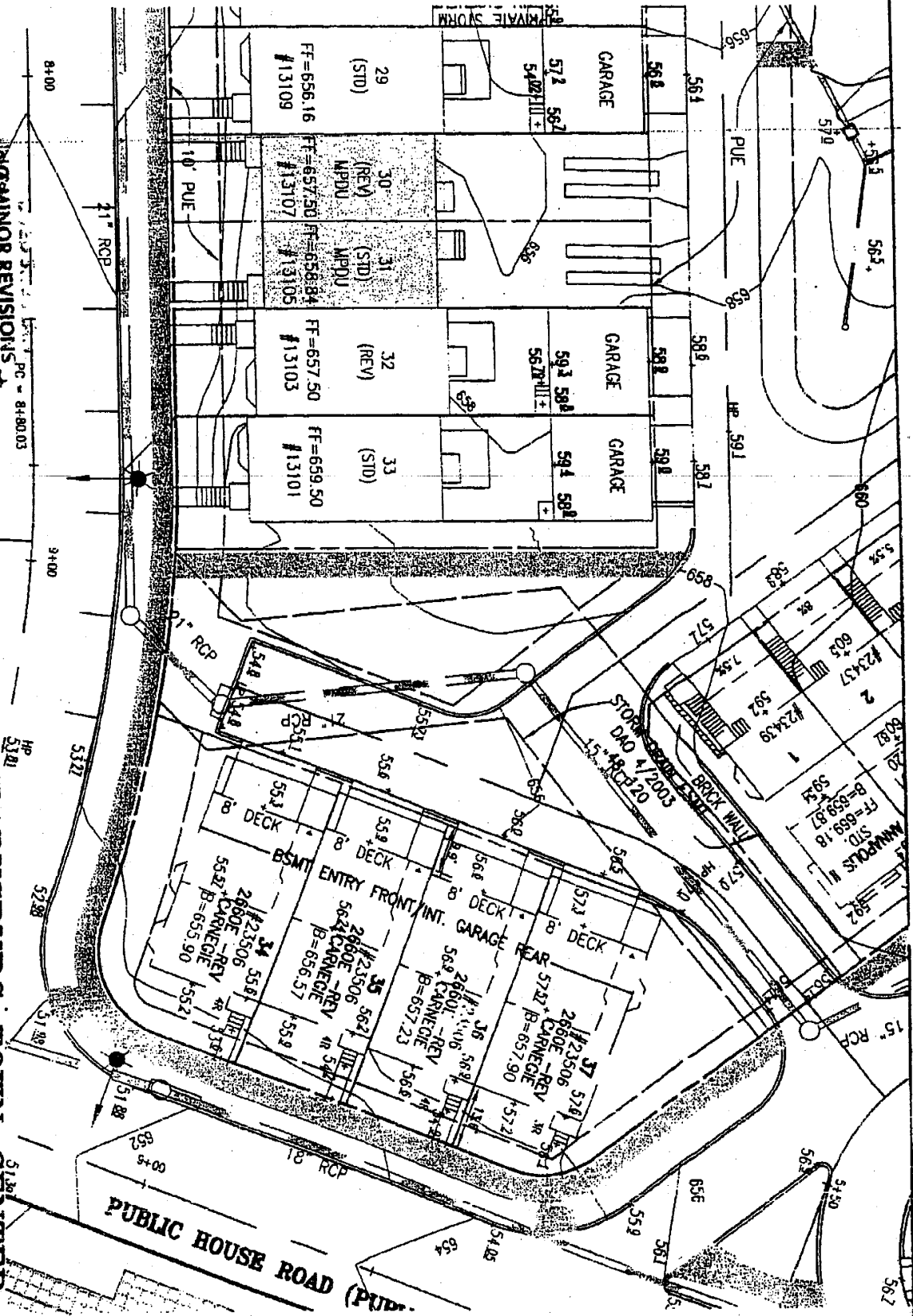


EXHIBIT 1

**DEVELOPMENT REVIEW COMMITTEE
TRANSPORTATION PLANNING COMMENTS**

Item No. 11 Memo Required ? Yes No X

Meeting Date 11/19/01 Transportation Planner Ki Kim Ext 4538

Date of Prior DRC yes Dev. Rev. Planner W.Wythans Ext 4584

Plan Number(s) 8-02014 Zone RMX-2

Plan Name Clarksburg Town Center (Phase II)

Applicant Name, Representative, or Attorney

Applicant=Terrabrooke Clarksburg LLC - Jim Richmond

Engineer=Charles P. Johnson and Associates - Les Powell

Attorney=Linowes & Blocher, LLP - Steve Kaufman

Policy Area Clarksburg Parcel or Lot Numbers Parcel 655

Development Type	Single-Family Det. Units	Town- Houses	Multi- Family
Size/Number of Units	148	194	142

No. of Lots =484 Phasing

WSSC Map No(s) 233NW13 Tax Map No(s) EW

I. ADEQUATE PUBLIC FACILITIES

Existing Land Use/Occupied

Prior approval	1300-hu's, 150-ksf	as	1-95042	on	9/28/95+7/12/01
For	retail, 100-ksf office	as	9-94004	on	
For		as		on	
For		as		on	

a. Policy Area Review

Staging ceiling capacity (jobs/housing) available Yes No

Number of jobs remaining as of

Number of housing units remaining - 6,873 as of 10/31/01

If deficit: De Minimis Mitigation #1* Pay & Go DAP

Proposed traffic mitigation program for policy area review:

Required/optional participation in TMO I-3 Zone

b. Local Area Review

Traffic study required No>#2 Traffic statement required No Submitted on

Traffic study/statement acceptable Letter sent Submitted by

Key Transportation issues

1. No deficit when preliminary plan was first approved & now in Clarksburg Development District.
2. No traffic study assuming that the number of HU's are within the preliminary plan limit.
- 3.
- 4.

EXHIBIT 2

II. RIGHT-OF-WAY DESIGNATION/USE

Roadway(s)	Clarksburg Road- MD 121	Piedmont Road
Master Plan designation	Arterial (A-27)	Rustic
Master Plan right-of-way	80 feet	70 feet
☒ Dedicated as shown on plan	80 feet	70 feet
☐ Additional dedication for		
☒ Designated bikeway as Class/Side of Road	Class I, B-19	
☒ Sidewalk		
Rustic Road		Rustic
Roadway(s)	Stringtown Road	Midcounty Arterial
Master Plan designation	Arterial (A-260)	Major (M-83)
Master Plan right-of-way	120 feet	120 feet
☒ Dedicated as shown on plan	120 feet	120 feet
☐ Additional dedication for		
☒ Designated bikeway as Class/Side of Road	Class I, B-9	Class I, B-2
☒ Sidewalk		
Rustic Road		

- ☐ Provide roadway connection to
- ☐ Provide sidewalk connection to
- ☐ Abandonment needed for
- ☐ Place in reservation for
- ☐ Place in easement (transit/roadway) for

COMMENTS:

See comments in key transportation issue plus:

1. Additional roadways:

#5=Redgrave Road, as Primary (P-5), with a 70-foot ROW

#6=Burnthill Road, Rustic

#7=Old Frederick Road (Now MD 355), as Business (B-1), with 50-foot ROW & Class III (B-5) bikeway

plus>>North-South Greenway Class I (B-1) Bikeway

2. Limited transit service on Frederick Road.

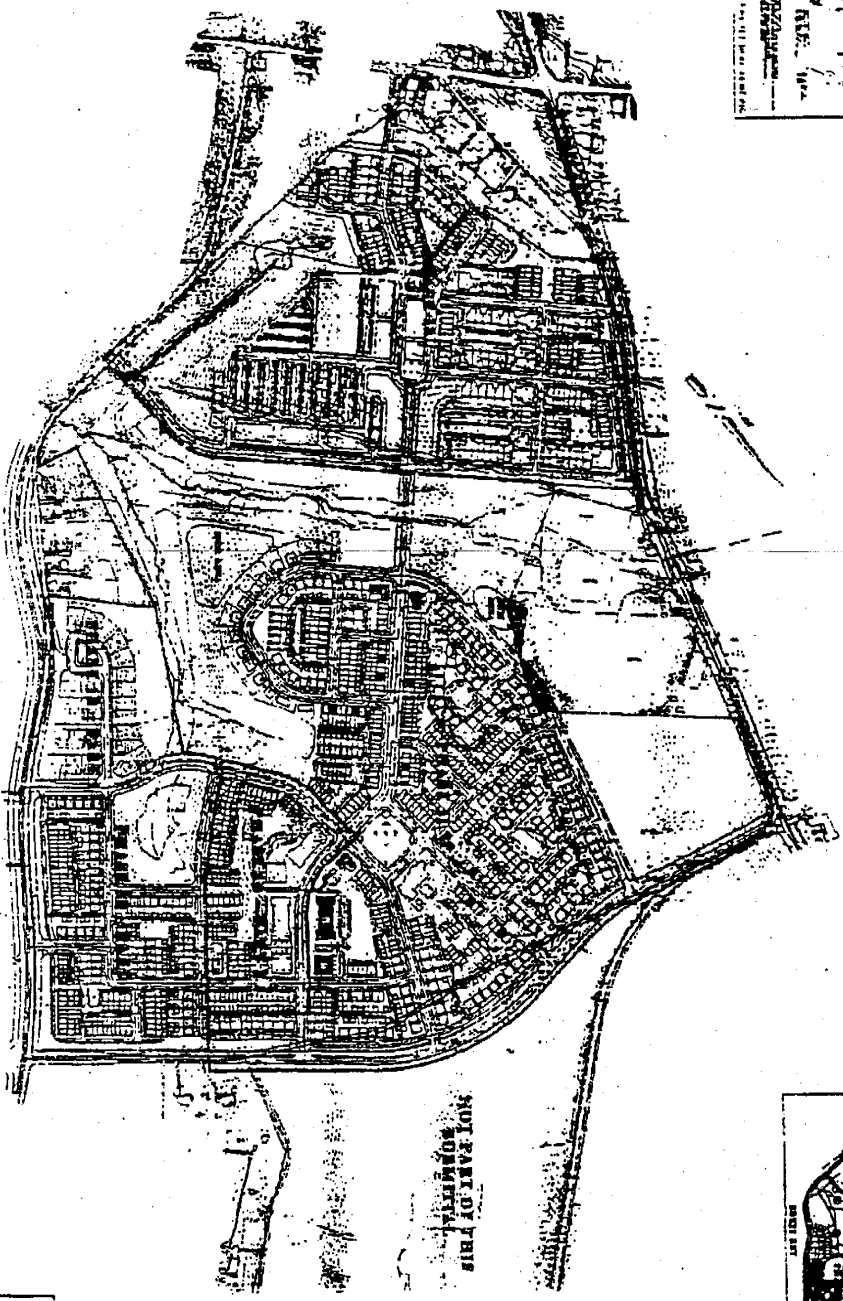
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APPROVED FOR CONSTRUCTION

DATE: 8/20/14



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