LAW OFFICES OF

KNOPF & BROWN

401 EAST JEFFERSON STREET

SUITE 206

ROCKVILLE, MARYLAND 20850

(301) 545-6100

FAX: (301) 545-6103

E-MAIL BROWN@KNOPF-BROWN.COM

WRITER'S DIRECT DIAL

(301) 545-6105

DAVID W. BROWN

October 18, 2005

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

Re: **Clarksburg Town Center**

Dear Chairman Berlage:

This letter serves to delineate the matters that the Clarksburg Town Center Advisory Committee (CTCAC) intends to raise at the October 25, 2005 hearing on CTC Site Plan and other violations. This letter is provided in accordance with the procedural schedule established by the Board on October 12, 2005.

I. PRELIMINARY CONSIDERATIONS

Before detailing the violation issues, several preliminary points must be made to place our listing and evidence in proper context.

A. Piedmont Woods Is Excluded

Our CTC analysis excludes the area known as "Piedmont Woods." This is 63.72 acres of RDT-zoned land north of what is now Snowden Farm Road, which appeared on the Project Plan and Preliminary Plan as Piedmont Road. During a meeting with Staff on September 13, 2005, CTCAC asked Associate General Counsel Rosenfeld for information relative to inclusion or exclusion of this area from CTC. On September 21, 2005, CTCAC submitted a follow-up written request for this information and for any documents pertaining to the current status of the area in relation to the CTC Project. In the absence of any response, CTCAC cannot provide analysis relative to development plans for the area, but will address other issues pertaining to the area (See Part II.I. infra.) during the October 25th hearing.

B. Requested Information Has Not Been Provided

My September 29, 2005 letter to Chairman Berlage outlined several areas where additional information was needed to complete our analysis. This information was requested in letters of August 10th, September 9th and 16th, 2005. To date, we have received none of the building height justifications, setback methodology or contract

information requested of Newland and its project engineer, Charles P. Johnson & Associates (CPJ) to validate grandfathering claims with respect to building height and front-yard setback violations. Nor has the Board responded to our questions regarding the final record plat submission and approval process in areas subject to site plan. Without this information, our analysis of violations is necessarily incomplete. Under the current procedural schedule, both Newland and the Staff will have an opportunity to close these gaps in the record in time for CTCAC to respond in writing. The requested information should be made part of the record by November 3, 2005.

With respect to the CTC aerial photogrammetry and other relevant geospatial data requested on September 6, 2005, this request was not responded to until October 6, 2005. The data provided to CTCAC on October 6th was unusable, as it had been inappropriately preprocessed by the contractor (Virginia Resource Mapping) prior to delivery to CTCAC and was also missing critical metadata required for analysis. CTCAC worked with staff (Jeff Zyontz and John Schlea) to address the issues and retrieve the raw, unprocessed data for analysis. The new data was not provided to CTCAC by Virginia Resource Mapping until after the close of business on October 12th.

Since the time of receipt of the new data, CTCAC has been engaged in evaluating the data's reliability, completeness and feasibility of use. That review is only partially complete, as is our analysis of the data in relation to numerous compliance issues, including: building height, setbacks (front, rear and side), spaces between end buildings, net lot areas, lot width (at building line); accessory building coverage of the rear yards; widths of private roads and alleys (right-of-way and pavement), block and roadway changes and grading changes. The reliability of our conclusions will be tied to the reliability and completeness of data as supplied to CTCAC.

C. Only Supplementary Analysis Is Provided

This letter supplements, rather than replaces, CTCAC's analyses of various issues as set forth in the letters from the undersigned to the Board dated as follows: June 1, 2005; June 21, 2005; June 28, 2005 (2); August 10, 2005; September 16, 2005; September 19, 2005; and September 26, 2005. Later letters may expressly or impliedly modify earlier letters. Otherwise, those letters, along with this letter, constitute the matters raised for hearing by CTCAC as CTC Site Plan violations.

D. There Is No "Burden of Proof" On CTCAC

At the April 14, 2005 hearing in this matter, the Chairman stated that the "burden of proof" was on CTCAC to demonstrate that one or more violations occurred. CTCAC respectfully disagrees with this formulation. CTCAC does agree that a violation must be demonstrated, but there is no "burden" on CTCAC to demonstrate a violation by a

preponderance of the evidence or any other proof standard. The situation CTCAC is in, as a member of the public reporting on misdeeds to public officials, is comparable to that of a citizen who reports a traffic accident to the police. The obligation on the citizen in case is to report fairly and accurately what has been observed, not to "prove" that the driver of the wrecked vehicle was reckless, negligent or in violation of the traffic laws.

The immaterial difference here is that the Board serves as prosecutor, judge and jury, and the citizens, instead of being passive witnesses, are actively involved in shaping the case to be presented and assisting the Board staff in presenting it. None of this alters the Board's basic responsibility to enforce compliance with its Site Plans and orders, particularly in the face of detailed, specific charges where it is claimed that a violation exists. CTCAC is presenting detailed, specific charges. These specifics require the Board to investigate and determine, on a hearing record, whether the claimed Site Plan violations are extant. In the exercise of its power to enforce its orders, the Board's investigation of alleged violations

> may not be based upon mere conjecture or supposition that a violation of law exists. Rather, it is incumbent upon an agency to demonstrate some factual basis to support its concerns.

Unnamed Attorney v. Attorney Grievance Comm'n, 313 Md. 357, 545 A.2d 685, 689 (1988).

In this case, CTCAC is providing the Board more than it needs to investigate: not just **some** supporting facts, but a very detailed, documented, specific factual and legal basis for Board concern on each matter raised. Providing that, it is up to the Board, utilizing its full array of investigatory powers, to decide whether a violation exists. For example, if the materials and arguments furnished by CTCAC leave unanswered a question relevant to resolution of a given concern, the proper response is not that CTCAC failed to meet some hypothesized burden of proof, but rather a Board determination of what additional investigatory steps need to be taken to arrive at the answer. Of course, if the Board is satisfied that a violation has been demonstrated even in the face of some unanswered questions, it can, in its discretion, proceed directly to finding a violation without further investigation.

E. Additional Supporting Information Will Be Presented At or Before the Hearing

This letter provides the Board and the developer/builders as detailed an itemization of CTCAC's alleged violations as could be prepared by this date. As noted, based on an October 12th receipt of aerial data, CTCAC has been given only three full

business days to make use of the data for analysis. Supplemental analysis of data will be presented as soon as possible, and in no event later than in the course of the hearing on October 25, 2005. CTCAC's efforts to document the widespread problems in the CTC are not at a standstill, however. Data analysis is now underway, using a premier software tool for geospatial analysis (Remote View™),[1] and will be disclosed as soon as possible, but in no event later than the closure of the record in this proceeding. It is currently anticipated that additional disclosures will simply be evidentiary detail regarding categories of violations, because CTCAC has already made a good faith attempt to exhaustively inventory and present to the Staff the various categories of CTC violations that can be observed, with available supporting evidentiary detail. Nevertheless, CTCAC does not waive its right to present new categories of concern should they surface after the record closes in this proceeding.

II. VIOLATIONS NOT YET HEARD BY THE BOARD

A. Significant Changes to Blocks Without Board Approval

CTCAC will detail, block-by-block for all Phase I and II blocks, how they have deviated on an "as built" basis from the Phase I Site Plan and the May 2002 version of the Phase II Site Plan (as well as the supposed October 14, 2004 "Signature Set" Phase II Site Plan).[2] CTCAC will show that Newland has orchestrated development according to its own plan, as reflected in the July 2004 colored site layout, rather than on the basis of approved Site Plans. CTCAC will present overview exhibits graphically illustrating the changes between the Site Plans and Newland's July 2004 color diagram. A detailed review of the changes to Phase IB3 will be explored at the hearing for illustrative purposes, but the scope of altered blocks will be identified as in the range of 70% - 80% of all blocks.

This presentation will focus on changes in street layout, unit types, configuration of units and density changes. MPDU alterations will be dealt with as part of a separate MPDU topic. See part III.A., infra. CTCAC will also show, through a "domino effect," the impact of these changes on other original Site Plan features, including, but not limited to, the mews at Murphy Grove, the pool that has been built, the widespread fragmentation of open space, and the diminution in space available for planting of street trees.

Finally, CTCAC will review and reinforce the points made in Part II of my September 26th letter, i.e., that Newland could not rely on staff approvals to change Site

[1] Remote View™ is the dominant imagery exploitation and production tool used within the National Geospatial-Intelligence Agency. It is deployed at every Unified Command and in every branch of the U.S. Military Worldwide in geospatial data and imagery analysis (See Overwatch Systems letter, Attachment 1)

[2] The numerous problems with, and unanswered questions about, the so-called Phase II Signature Set are detailed in Part VI of my September 26th letter. This will be recounted at the hearing.

Plan requirements. Since CTCAC anticipates Newland will argue that some form of informal staff approval exists for all changes CTCAC will disclose, CTCAC will document the process established by staff to approve minor plan amendments in writing. CTCAC will show that the small number of plan amendments that went through this process were genuinely minor in nature, and that major changes have been made despite the absence of any paper trail for their approval, even assuming (quite generously) that such changes could be approved at the staff level.

B. Removal of Essential Plan Features

The principal violation in this category is the unapproved removal of "O" Street behind the Clarksburg United Methodist Church and the Pedestrian Mews connecting "O" Street at the Church with the Town Square. See Part III of my September 26th letter. Other features that will be identified as removed include the amphitheatre; the multi-age playground behind General Store Road; traffic calming measures; and lighting of various streets and alleys.

C. Development Standards Violations

CTCAC has done an in-depth analysis of as-built compliance with the Project Data Table development standards. As detailed in Part I of my September 26th letter, and as will be reinforced at the hearing, the Phase I Project Data Table, identical to that in the approved Project Plan and Preliminary Plan, is applicable in full to Phase II. Because of their earlier adjudication, the building height and front yard setback standards are not included in this part of the presentation. See Part III, infra. Our analysis is based on review of aerial data and supplemental height data submission by CPJ.

Before turning to the particulars of the development standards violations, some preliminary comments must be made that concern a number of them. In February 2005, while CTCAC was still seeking the Board's attention to its concerns about building height violations, Newland was in the process of preparing a Project Plan Amendment, which was finalize and filed in May 2005. CTCAC views this entire Amendment as improper and "out of order," as stated in my June 1st letter, a portion of which bears repeating here:

> [O]ne of the specific amendments (vi) is to "provide a clear set of development standards applicable to the project." But the development standards are "clear" and require no amendment. Upon closer examination, the drawings reveal that the height and setback restrictions on already constructed residences are proposed to be "amended," such that, if approved, the "amendment" will retroactively validate

> existing height and setback violations once corresponding Site Plan "amendments" are filed. It appears that the amendment process is being used by [Newland] to "cure" Site Plan violations. This attempt to paper over existing violations is an obvious abuse of the amendment process.

June 1, 2005 Letter at 11, D.W. Brown to M. Rosenfeld, Esq.

Of course, the focus at this point is on extant violations of current development standards, not the propriety of a Project Plan Amendment, so what is the relevance of the proposed Amendment to that issue? The answer is simple: **every proposed alteration of a development standard in the Amendment is a sure sign that construction exists that violates the standard if it is not amended as proposed.** Otherwise, is pointless to seek an amendment. Hence, in CTCAC's discussion of development standard violations, we will examine how Newland proposed to amend it in the yet-to-be-considered Project Plan Amendment. For ease of reference, Attachment 2A is a copy of the Project Data Table, as it appears in the Project Plan, Preliminary Plan and Phase I Site Plan; Attachment 2B consists of proposed Project Plan replacement page 40, the proposed revised development standards for the entire Project.

Based on the information generated by CTCAC in the fashion described above, CTCAC has compiled a listing by block and lot number of development standard violations in the following categories:

1. Side Yard Setbacks

a. <u>Single-Family Dwellings</u>

The Project Data Table specifies that the side yard setback for single-family dwellings is 0' for one yard and 8' for both side yards. In other words, the sum of the two side yards must be at least 8,' although one yard can be non-existent (in which case the other must be a full 8'). In the Project Plan Amendment, Newland proposes that each side yard minimum be 3', which would translate to a combined measurement of 6', a 25% reduction in the requirement. Unsurprisingly, therefore, CTCAC has found single-family dwellings that meet the 6' combined proposed standard but fail the existing 8' standard. Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing single-family dwellings that fail to meet the 8' combined standard, and the approximate shortfall, by lot will be provided under separate cover.

b. **Multi-Family Dwellings**

The Project Data Table specifies that the side yard setback for multi-family dwellings is 10' for each side yard. The Project Plan Amendment proposes that the side yard be measured without regard to utility rooms that project from the side of the unit. But the Zoning Code specifies that the side yard is "the shortest distance between the side lot line and the nearest point of the building, porch, or projection." §59-A-2.1. Unsurprisingly, therefore, CTCAC has found side yards for multi-family dwellings that do not meet the specified minimum unless, contrary to the Code, utility room projections are ignored. Second, for 2 Over 2 Units, which were approved at Site Plan as units subject to the multi-family standards, Newland is proposing to obviate any multi-family setback violations by creating a separate classification for 2 Over 2 Units with an "AS SHOWN" standard. This simply means that whatever has been built is automatically approved.

Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing multi-family dwelling units that fail to meet the multi-family side yard standard, the number of individual units affected, and the approximate shortfall, by building will be provided under separate cover.

2. **Rear Yard Setback**

In the proposed Project Plan Amendment, Newland has sought presumptive validation of all existing rear yards, for all types of units with the "AS SHOWN" designation. Hence, one would expect to find rear yard setback violations among all types of units. CTCAC has indeed found multiple rear yard setback issues.

a. **Single-Family Dwellings**

The Project Data Table specifies that the rear yard setback for single-family dwellings is 25' for each rear yard. Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing single-family dwelling units that fail to meet this standard, the number of units affected, and the approximate shortfall, by lot, will be provided under separate cover.

b. **Townhomes**

The Project Data Table specifies that the rear yard setback for townhomes is 20.' Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing townhouses that fail to meet this standard and the approximate shortfall, by lot, will be provided under separate cover.

c. **Multi-Family Dwellings**

The Project Data Table specifies that the rear yard setback for multi-family dwelling units is 10.' Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing multi-family dwelling units that fail to meet this standard, the number of individual units affected, and the approximate shortfall, by lot, will be provided under separate cover.

3. Minimum Yard Space Between End Buildings

The Project Data Table specifies the minimum yard space between end buildings for both townhomes and multi-family units. In the proposed Project Plan Amendment, Newland has brazenly proposed not simply a relaxation of the numerical spacing requirement between end buildings, but an outright alteration of the meaning of the requirement. Under the Newland proposal, any spacing requirement for "not like" buildings is eliminated; only a reduced requirement is left for spacing between "like" buildings. In its analysis of on-site compliance, CTCAC has ignored this unwarranted and inappropriate distinction and examined spacing between all end units, regardless of whether they are "like" or "not like" the adjacent building.

a. Townhomes

The Project Data Table specifies that the minimum yard space between each block of townhomes is 20.' The proposed Project Plan Amendment would reduce this figure to 6', a reduction of an amazing 70%. CTCAC has, of course, found instances where end unit spacing complies with the proposed 6' minimum but not the 20' minimum. Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing yards between townhome blocks that fail to meet this standard and the approximate shortfall in each case will be provided under separate cover.

b. Multi-Family Dwellings

The Project Data Table specifies that the minimum yard space between multi-family buildings is 30.' Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing yards between multi-family buildings that fail to meet this standard, the number of individual units affected, and the approximate shortfall in each case will be provided under separate cover.

4. Net Lot Area

The Zoning Code defines "net lot area" to exclude any right-of-way shown on an approved site plan. §59-A-2.1. CTCAC has therefore computed net lot areas that exclude streets and alleys shown on the relevant Site Plans.

a. Single-Family Dwellings

The Project Data Table specifies that the net lot area for single-family dwellings is 4,000 sq. ft. The following table itemizes the initial lots noted by CTCAC to be substandard:

Final Record Plat	Block	Lot
21971	C	48-49
21971	D	39-40
21973	D	2-4
21975	C	44-47
22537	O	2-8
22534	G	13-14
22534	H	18
22631	S	4-5
22783	W	10-11, 15-16
23046	K	7-10, 14
23049	N	15-17

Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis confirming all single-family dwellings that fail to meet this standard and the approximate shortfall by lot will be provided under separate cover.

b. Townhomes

The Project Data Table specifies that the net lot area for townhomes is 1,120 sq. ft. The proposed Project Plan Amendment would reduce this number to 950 sq. ft., a 15% reduction. CTCAC has, as expected, found townhomes whose net lot area meets the hoped-for amended criterion but fail to meet the existing standard. Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing townhomes that fail to meet this standard and the approximate shortfall by lot will be provided under separate cover.

5. Minimum Lot Width at the Building Line

a. Single-Family Dwellings

The Project Data Table specifies that the minimum lot width at the building line for single-family dwellings is 40.' On initial review of record plats and on-site analysis, CTCAC believes that several single-family dwellings fail to meet this standard. Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing single-family dwelling units that fail to meet this standard and the approximate shortfall by lot will be provided under separate cover.

b. Townhomes

The Project Data Table specifies that the minimum lot width at the building line for townhomes is 16.' On initial review of record plats and on-site analysis, CTCAC believes that several townhomes fail to meet this standard. Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing townhomes that fail to meet this standard and the approximate shortfall by lot will be provided under separate cover.

6. Rear Yard Coverage By Accessory Buildings

The Project Data Table specifies that the rear yard coverage for accessory buildings, such as detached garages, is a maximum of 50% of the area of the rear yard. On initial review, CTCAC believes that there are multiple dwelling units at issue. Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing dwelling units that fail to meet this standard and the approximate shortfall by lot will be provided under separate cover.

D. Undersized Internal Streets and Alleys

Under the Zoning Code, site plans are to show the location and dimensions of all internal streets and alleys. § 59-D-3.23(g). The Phase I Site Plan does this, depicting widths for internal streets and alleys that are well within Code. On site, however, the alleys and tertiary roads are narrower than allowable under Code. The developer has violated both the Code requirements and the Site Plan. The ostensible Phase II site plan shows streets and alleys whose widths are below Code. This, of course, reinforces the conclusion drawn in part VI of my September 26th letter that there is no valid Phase II signature set site plan.

CTCAC has reviewed the actual construction with reference to the Road Construction Code, Chapter 49, Article II. Section 49-34(f)(1) of that Article provides that, absent waivers – and CTCAC is unaware of any street or alley width waivers – the width of a tertiary residential street (which most of the internal CTC streets are) is as follows:

	Two-way traffic	One-way traffic
Right-of-way	27' 4"	21' 4"
Pavement	26'	20'

For alleys, § 49-34(g) provides that the paved surface must not be less than 16'. Our review of the Phase I Site Plan discloses that it was approved in conformity with these standards. This is hardly unexpected, given that the Board must expressly find that the Site Plan has a vehicular circulation system that is "adequate, safe and efficient." § 59-D-3.4(a)(3).

As with the setback and other dimensional standards discussed in subpart C., supra, CTCAC is conducting an analysis of the geospatial data, as provided by staff to the developer and CTCAC, to validate actual street and alley widths to determine compliance with the foregoing standards. Based on the late receipt of aerial data from M-NCPPC, as explained above, the final analysis detailing tertiary residential streets and alleys that each fail to meet the minimum standards has not been completed. For purposes of this letter, CTCAC is confident in stating that fewer than 10 alleyways and tertiary streets meet the standard.

At the hearing, CTCAC will identify, with illustrative slides, particular properties where these street and alley width violations impair ingress to and egress from homeowner garages, cause garage apron parking to spill over into the public way alley, and preclude the planting and rooting of trees that had been planned for the Project. Road width discrepancies between the Phase I Site Plan and Record Plats will also be shown.

E. Shortfall in Residential Parking Spaces

CTCAC has analyzed Newland's compliance with the residential parking space requirements for the Project. CTCAC is not able at this juncture to assess compliance with the commercial parking requirement, as Phase III of the Project, containing the commercial sector, remains unbuilt. It is possible, however, despite the fact that the residential portion is not fully completed, to assess compliance with the residential parking requirement.

Under §59-C-10.3.10 and §59-E-3.7 of the Zoning Code, the residential off-street parking requirement for the Project is 2 spaces per unit for single-family detached and attached dwellings; 1.5 spaces per unit in multi-family buildings. The latter now includes 2 Over 2 units. There is no distinction in the Code or in any applicable plan requirement between MPDUs and market rate units regarding the parking requirement. The final number of spaces required is a function of the number and type of units actually constructed.

It is possible to obtain a waiver of some of the off-street residential parking obligation, and the Project Plan indicates that 596 on-street spaces are contemplated. The Project Plan Opinion at 9, without differentiating between residential and commercial on-street parking, indicates that a waiver will be necessary for some of the townhouse and multi-family units. In the Phase I Site Plan Opinion at 2, the Board indicated that its approval of Phase I was subject to a waiver of the full implementation of the 2 and 1.5 spaces per dwelling unit requirements in §59-E-3.7. CTCAC, however, has been unable to discover any parking waiver approval to date.

Just how many of the 596 on-street spaces approved in the Project Plan have to be residential can be preliminarily inferred from the shortfall in off-street spaces evident in the Project Plan parking analysis. It shows an off-street residential parking requirement of 2,355 spaces, and off-street residential spaces provided to be 1,833, for a shortfall of 522—about 88% of the on-street allowance of 596. But even assuming that all 596 spaces are residential, the Phase I Site Plan signature set shows 573 of those spaces used up (359 in Phase IA; 214 in Phase IB). One would therefore have expected only 596-573 = 23 on-street spaces in Phase II, but the ostensible Phase II signature set shows 264 on-street spaces, which is 241 over the allowance specified for the overall Project in the Project Plan.

This number—241– even though it takes the Project over the on-street allowance significantly, is too low. This is evident from the schedule of units on the Phase II Site Plan. It shows 487 units, of which 132 are multi-family, generating a parking requirement of 198 spaces, and 355 single-family units (attached and detached), generating a parking requirement of 710 spaces, for a total of 908 Phase II spaces. But the Phase II Site Plan reports only 408 garage spaces, which means that the real on-street parking precipitated by Phase II is scheduled to be 500 spaces, or almost double the initially proposed amount. Phase II, if built as reported in the Site Plan, will generate a requirement for excess residential on-street parking of at least 477 spaces, i.e., the 500 scheduled, less the 23 spaces within the 596-space allowance of the Project Plan.

This increase in on-street parking has both a cause and effect that are highly inimical to CTC residents. The absolute number of off-site spaces proposed to be met on-street is the 596 allowed by the Project Plan and the additional 477 spaces built into Phases I and II, not to mention Phase III, for a total of 1,073 spaces. But, as high as this number is,

it actually understates the problem. On the cause side, many homes built with ostensible two-garages have nothing of the sort. Examples include the following:

NV Townhomes: end units have two single garage doors with a centertpiece that creates a narrow passage impeding turns into and out of the garage. Most of these homes are on narrow alleys that exacerbate the problem relative to available turning radius.

Miller & Smith Townhomes: Many market rate unit garages are lower than the grade of the back yard, requiring stairs at the back of the garage to exit in the rear. This actually precludes use of half the garage for parking, effectively turning it into a one-car garage. MPDUs in Phase I have no garage at all, just a single parking pad. In Phase II, some MPDUs have garages for one car. Some of these have stairs in the rear posing similar problems as with the market rate units.

Craftstar Townhomes: These units have decks extending over the garage with stairs that interfere with parking such that two cars cannot get in and out of the garage.

Craftstar 2 Over 2's: Market rate units have a very narrow one-car garage; MPDUs have no garages or simply parking pads, causing MPDU residents to rely on on-street parking exclusively.

Manor Homes: Most of the units in these homes lack off-street parking. Residents will have to compete for on-street parking with residents of other units relying on on-street parking, such as the Craftstar 2 Over 2's. The practical effect is that much of the on-street parking is likely to be in places nowhere near the Manor Homes.

Also on the cause side, many townhomes are assigned one or two off-street spaces that can best be described as partially off-street spaces. These are units where one or both off-street spaces are ostensibly satisfied by parking on the driveway between the house or garage and the alley. However, in many instances these aprons are so short that they cannot serve as full off-site spaces, as most parked vehicles in these spaces will stick out into the alleyway, creating a safety hazard and an otherwise inappropriate intrusion into the public right-of-way.

On the effect side, the sheer volume of on-street parking must be considered in light of the overly narrow streets and alleys, as described in subpart D. supra. It is CTCAC's understanding that the streets and alleys are being examined for compliance with right-of-way standards for emergency vehicles such as fire trucks and ambulances. That inspection, while not necessarily final, is reportedly going to require the elimination of many on-street parking spaces so as to ensure safe passage of emergency vehicles. Should

that happen, Newland may be far short of the minimum required residential parking, even with a liberal off-street waiver.

F. Record Plat Violations

1. Plats Recorded Prior to Site Plan Approval

A critical component of the site plan development process is final record plat recordation, which is controlled by §§ 50-36 & 37 of the Subdivision Ordinance. The record plat is the framework for all property transfers of individual units that flow from the development of the land. Such plats must be scrupulously accurate or property rights uncertainty is created that may require significant adjustments in property boundaries or owner expectations far in the future when problems are discovered. Because the site plan is the key development document, record plats must be certified by the property owner as consistent with the applicable site plan.

In this case, since there is no valid Phase II Site Plan, see Part VI of my September 26th letter, all record plats of Phase II development are illegal plats. Attachment 3 is a listing of the 21 record plats of Phase II development that have been recorded to date, i.e., before any valid Phase II Site Plan approval. In the event the Board were to validate the Phase II Site Plan signature set of October 14, 2004, such a finding would still render unlawful those record plats of Phase II development approved prior to Site Plan approval on that date. Attachment 4 is a listing of the only 4 record plats of these 21 that, on the assumption October 14, 2004 is an operative Site Plan approval date, properly post-date that "approval," leaving the remaining 17 invalid.

2. Site Plan/Record Plat Inconsistencies

Because Newland and the builders have ignored the Site Plan and built to their own plan, there is no agreement between the Site Plan and the record plats of many areas within the Site Plan. This is true whether one is considering the approved Phase I Site Plan or the ostensibly valid Phase II Site Plan. The sources of the inconsistencies are several: the street and alley violations discussed in subpart D. infra, as well as the many platting problems enumerated above. For example, where two lots confront each other across an alley, if the alley is platted at the lawful 16' and is actually built at 13', the 3' shortfall will eventually show up as a platting error in need of correction. Attachment 5 lists examples of alleys with these types of errors. Based on the late receipt of aerial data from M-NCPPC, as explained above, a more detailed analysis will be provided under separate cover.

3. As Built - Site Plan/Record Plat Inconsistencies

Because Newland and the builders have ignored the Site Plan and built to their own plan, there is no agreement between CTC "as built" development and either the Site Plan or the record plats of certain areas within the Site Plan. This is true whether one is considering the approved Phase I Site Plan or the ostensibly valid Phase II Site Plan. There are some record plats of Phase I or Phase II development where the ostensibly applicable Site Plan and the "as built" development simply do not match. Based on the late receipt of aerial data from M-NCPPC, as explained above, a detailed listing of these record plats will be provided under separate cover.

G. Grading Changes

There have been substantial "as built" grading changes from the grades shown on the Phase I Site Plan. One prominent example is the area around the intersection of Clarks Crossing and Clarksburg Square Roads. It appears that in this area alone, the developer has increased the grade by as much as 15'. The effects of these changes are multifold, encompassing both environmental and aesthetic concerns.

Based on late receipt of aerial and contour data from M-NCPPC, as noted above, CTCAC was not able to complete its analysis of these issues for inclusion in this letter. At the October 25th hearing, CTCAC will present comparative analysis and visual aids to highlight these problems throughout the Project.

H. Alteration of Environmental Features

Murphy's Grove Pond appears on the Project Plan, and is a prominent feature in the marketing literature for CTC. On the Phase I Site Plan it is also shown, as a "Permanent Pool," along with an aeration system and an amphitheatre. The Pond has not been built and apparently is not scheduled to be built, in that the area is planned for conversion into a stormwater management facility, as shown on the proposed Project Plan Amendment.

It has also come to CTCAC's attention that the passive storm water management system through the Project has been altered. Based on the late receipt of data from M-NCPPC, as stated above, CTCAC has not completed its final analysis of this issue and will provide further detail under separate cover.

Finally, CTCAC expects to present at the hearing documentation pertaining to detailed requirements for environmental monitoring of the streams within the Project. It appears that Newland has failed to meet these requirements.

I. Inadequate RMX -2 Green Area

1. Residential Open Space

In the RMX-2 Zone, as set forth in the Project Plan, the minimum residential green area is 50% of the residential area zoned RMX-2. In this case, because the residential area zoned RMX-2 is 186.74 acres, the minimum green area, which is calculated exclusive of space devoted to Project amenities (bonus features of the Project not required by law), is half of that, or 93.37 acres. In the Project Plan open space analysis, Newland's predecessors proposed a residential green area of 98.46 acres, or 3 percentage points more than the minimum 50%. Its analysis was as follows (all figures in acres):

Amenity Deductions			
Formal greens	1.42		
Town Square & Civic Dedication	.66		
School/Park Site Reservation	9.16		
Hilltop District Pond	1.60		
Amenity Subtotal		34.13	
Roadway Pavement		20.29	
Residential Driveways		2.25	
Residential Building Footprints		21.41	
Residential Parking Lots		10.20	
Total Deductions		88.28	
Residential Area			186.74
Less Deductions			88.28
Total Residential Green Area			**98.46**

Because the Project Plan was approved predicated in part on this analysis, Newland should be held to the 53% green space standard, or 98.46 acres, although, as detailed below, it fails to meet the 93.37 required acres standard as well. The Phase I green area number Newland currently anticipates to be met, according to replacement page 85 of the 1994 Project Plan 9-94004 Amendment submission in May 2005, is 30.26 acres. This is a significant drop from the amount approved under the Phase I signature set site plan (70.65 acres). The reported amount on the asserted Phase II signature set is 40.68 acres. When this is added to the anticipated actual Phase I amount (30.26 acres) the total Phase I and II green space is 70.94 acres. This is a substantial

shortfall of 27.52 acres, or 28%, in the promised green area, and a shortfall of 22.43 acres, or 24%, in the required green area.

To make up for this shortfall, Newland, without in any way calling attention to what it is doing, simply redefines the tract subject to RMX zoning (residential and commercial), increasing it from 201.34 acres, as shown on the Preliminary Plan Open Space Analysis, to 270.16 acres, as shown on the Project Plan Amendment replacement page 85. Newland does this not by noting that it proposes to increase the tract with rezoning, but by simply redefining the "gross site" as 270.16 acres. The difference, 68.82 acres, is currently zoned RDT, as shown on the Preliminary Plan Open Space Analysis. Newland apparently envisions counting 63.72 acres of that RDT land, or over 92% of it, as green area. In other words, the only way clear for Newland to comply with the residential green area requirement is to either completely disguise its actions or to obtain a highly uncertain rezoning of land that was never included in the open space planning for the CTC in the first place. Since there is no mention anywhere in the Project Plan amendments filed by Newland about a rezoning, the only reasonable interpretation is subterfuge. Although neither Phase I nor Phase II is completed as yet, the conclusion is inescapable that Newland is on the road to failure in meeting its residential green area obligations.

2. Commercial Open Space

In the RMX-2 Zone, as set forth in the Project Plan, the minimum commercial green area is 15% of the commercial area zoned RMX-2. In this case, because the commercial area zoned RMX-2 is 14.60 acres, the minimum green area is 15% of that, or 2.19 acres. In the Project Plan open space analysis, Newland's predecessors proposed a green area of 4.06 acres, or 13 percentage points more than the minimum 15%. Its analysis was as follows (all figures in acres):

Commercial Building Footprints	3.84	
Commercial Parking Lots	6.70	
Total Deductions	10.54	
Commercial Area		14.60
Less Deductions		10.54
Total Commercial Green Area		**4.06**

Because the Project Plan was approved predicated in part on this analysis, Newland should be held to the 28% green space standard, or 4.06 acres. The Phase I green area number Newland currently anticipates to be met, according to

replacement page 85 of the 1994 Project Plan 9-94004 Amendment submission in May 2005, is 2.86 acres. This is a substantial shortfall of 1.2 acres, or nearly 30%, in the promised commercial green area. It therefore appears that Newland is not going to meet its promised goal in this area.

J. Quality of Amenities

CTCAC is in agreement with Staff's assessment as contained in the Staff Report, at 4, for the October 6th hearing:

> Staff concludes that recreation facilities to date, do not fulfill recreation demand as computed from the *M-NCPPC Recreation Guidelines*. Staff finds a significant deficiency in every age group and particularly for teens and adults.

CTCAC has serious concern regarding the inadequacy of the amenities provided to date, specifically in that amenities are of poor quality and appear to be an afterthought rather than designed as an integral part of the community. Again, CTCAC is in agreement with Staff's assessment at 5:

> As a whole, local amenities...do not conform to the standards of the *1992 Recreation Guidelines*.... Furthermore, the location of the amenities that have been provided is of grave concern to Staff. Most are located within the block interior, clearly sited within residual space remaining after the location of housing units, garages, alleys, stormwater facilities, and dumpsters. . . Such siting indicates that the recreation elements are not designed as an integral part of the public life of the Town Center, but rather, as required elements relegated to the backside of the town's streets as an afterthought.

III. VIOLATIONS PREVIOUSLY HEARD BY THE BOARD

A. MPDU Violations

1. MPDU Staging Obligations Enforced by DHCA

In my September 26th letter, I outlined the manner in which Newland has violated its obligations under Chapter 25A of the Code and its MPDU Agreement with

DHCA. At the October 6th hearing, CTCAC brought to the attention of the Board a September 26, 2005 letter from Christopher J. Anderson, the DHCA employee with direct oversight responsibility for enforcement of DHCA's MPDU agreements, stating that Newland's actual MPDU construction schedule is not in conformity to the schedule in the Agreement.

Also surfacing at that hearing was an email from Mr. Anderson to CTCAC at 12:09 am that same day to CTCAC principals, effectively withdrawing the conclusion in the referenced letter that Newland was in violation of the MPDU Agreement. The skepticism and uncertainty that emerged at the hearing over this sequence of events, in significant part from Board members, received widespread publicity. Whether as a result of this or otherwise, it has been reported that the midnight reversal of position by Mr. Anderson has since been reversed, by action of DHCA Director Elizabeth Davidson. CTCAC has requested a copy of this DHCA action from Mr. Anderson, to no avail. CTCAC requests that the Staff ensure that this document be made part of the record.

2. MPDU Violations Subject to Board Jurisdiction

At the October 6th hearing, CTCAC supplemented the views expressed in my September 26th letter regarding MPDU violations, detailing how Newland has violated requirements within the jurisdiction of the Board. To ensure completeness of the record, these violation claims are reiterated here.

Four distinct but interrelated provisions of law are relevant to this analysis: First, Condition #36 at 7, of the Site Plan Opinion #8-98001, states: "the site plan and record plats must identify all MPDU locations." Second, the SPEA in paragraph (ll) of Exhibit B requires the Site Plans and record plats to identify all MPDU locations. While SPEAs are no longer utilized by the Board, its use was required through October 2004, and no site plan has been approved since that time. Third, Guideline 16 of the Board's 1995 Site Plan Guidelines for Projects Containing MPDUS states: "Clearly state on the record plat that the site provides MPDUs, the location of which are shown on the site plan." Violation of this guideline is a violation of the Subdivision Ordinance, in that it provides, in § 50-36(d)(2), that subdivision record plat must include, among other items, what is required by "Planning Board guideline." Id., subparagraph t. Fourth, §25A-5(b) required Newland to have an MPDU agreement in effect with DHCA in order to obtain any building permits from DPS. Under subparagraph 5(h), the agreement is to be filed with DPS with the first application for a building permit.

Turning first to the fourth point, on October 3, 2005, the PHED Committee conducted an oversight hearing into MPDU development issues. A part of the hearing packet was a September 29, 2005 Memorandum by Elizabeth Davidson, DHCA Director. She responded to, inter alia, the following question:

Q: Who inspects and confirms that the MPDUs have been built according to the Agreement?

A: DPS and Park and Planning would sign off on all building permits for both market rate units and MPDUs.

Id. at 2.

Whether this is a correct appraisal of the pre-existing process and the Board's role in it is open to question, given the lack of clarity about the respective roles of the Board Staff and DPS in building permit enforcement in site plan areas generally, and given that Director Loehr, in responding to similar questions for the hearing, made no mention of a role for the Staff in MPDU enforcement. In addition, the oversight hearings revealed that there would be changes in MPDU enforcement policy as a result of the hearing. In light of the foregoing, CTCAC believes it is appropriate to bring to the Board's attention that the MPDU Agreement in this case was entered into on May 31, 2002, and that at least one hundred building permits had been issued before that date. If any Board member, in the course of the hearing, expresses the belief that it would be appropriate for the Board to consider the particulars of these prematurely issued permits, CTCAC will prepare and submit a list of them, along with the pre-May 31, 2002 issue date for each.

Turning to the question of identification of MPDU locations, at the October 6th hearing, it became clear that, notwithstanding the SPEA provision referenced above, it is not standard practice to identify MPDU locations on record plats. CTCAC will accordingly ignore this apparent SPEA violation. The requirement to disclose on the record plat that the platted land contains MPDUs whose location is referenced to a site plan has not been abolished; the 1995 Guidelines are still operative. CTCAC has examined all the record plats and none of them disclose this information.

As for MPDU locations on the relevant Site Plans, even assuming the validity of the Phase II signature set of October 13, 2004, there is no question that MPDU locations are shown on the Site Plans, and equally unquestioned that those locations have materially changed, virtually everywhere in the CTC. Newland did not deny this; rather they attempted to show, by affidavit of CPJ employee Les Powell, that these changes had been administratively approved, with no corresponding documentation, by the same Staff member that lied about falsifying a Site Plan in this case. Given the lack of credibility that can be attributed to the Staff person, there is no way to test the credibility of Mr. Powell.

At the hearing, the Board's initial instincts regarding these alleged MPDU location change "approvals" was highly skeptical, whether these changes are to be considered minor amendments or not. Either way, the sense of the Board was that a documented paper trail of conscious approval was required. CTCAC submits that only the Board could make such changes; but even if the Board believes this authority could have been delegated to the Staff, there is simply no credible evidence that it has been exercised in a lawful, responsible manner.

One of the most noticeable problems emerging from this paperless amendment process is the manner in which MPDU dispersal has moved from the ideal of 12.5% of MPDUs evenly dispersed among all Phases and Sub-phases of the Project, to the point where the dispersal is quite uneven, as shown in this tabulation by Phase, projecting scheduled but unbuilt units:

Phase I	8.4%
Phase II	25.6%
Phase III	17.5%

Looking at the results from a purely geographic perspective, the West Side (Town Square) of the Project has a 50% greater concentration of MPDUs than the East Side (Hilltop District). While this may not, in and of itself be a violation of law, each unapproved change in MPDU locations is a violation, and the violations are widespread.

B. Height and Front-Yard Setback Violation Analysis

1. Building Heights

CPJ has provided the Board a Project-wide analysis of building height violations. In tabulating its conclusions, CPJ utilized a 35' height standard for townhomes and a 45' height standard for multi-family units, including 2 Over 2 units. While CTCAC initially expressed the view that the 2 Over 2 units were subject to the 35' height limit, CTCAC now agrees that these units were categorized as multi-family at the Phase I Site Plan stage. However inappropriate that designation may have been at the time—and CTCAC believes it to be highly inappropriate—it is not contested here, either as to Phase I or Phase II.

The first and most obvious preliminary question CTCAC wishes to raise about the CPJ data concerns the number of units on which height data is reported: 491. This is to be contrasted with Newland's contemporaneous statement to the Board (letter of September 7, 2005 at 7) that as of September 1, 2005, "671 total units have been

constructed and occupied within Town Center." Why, then, is there no report on the height of the remaining 180 units? CPJ should make clear how many of these are single-family detached units excluded from the analysis, and account for any other discrepancy.

Assuming *arguendo* that 491 units is the correct number, CTCAC and CPJ are close to agreement about multi-family violations. CPJ lists 35 violations out of 48 units, a 72.9% violation rate. CTCAC finds 36 violations, by including Bozzuto Building 2. In addition, we are not in agreement on the amount of excess height on 16 of the 36 violations. On townhomes, our numbers differ materially: CPJ reports 272 violations out of 443 units, or a violation rate of 61.4%. CTCAC finds 306 violations out of 443 units, or a violation rate of 69%. The difference, 34 townhomes, is attributable to CPJ's failure to use centerline street grade data associated with those units, where the effect of ignoring that point of reference, in favor of a higher point of reference, produces a lower building height— lower enough in those cases to affect the conclusion as to those units. In addition, there are another 27 townhomes whose height violations are quantitatively understated for the same reasons. All 61of these units are identified in the CTCAC's annotated version of the CPJ report (Attachment 6). The annotation also identifies the 16 Craftstar 2 Over 2 units that, although reported by CPJ to be over the 45' height limit, have height violations that are understated in the report.

Depending on the unit, CPJ employs two different higher reference points, neither of which is justified under the circumstances. First, in 30 townhome instances, the building height is measured from a "terrace." It is important for to note that in many cases, the "terraces" were constructed after the height violation allegations were brought to the Board's attention and well after the units were occupied. These terraces are artificial increases in the natural grade of the land in relation to the street, such that townhomes identical to those not standing on a terrace will have a higher elevation (in relation to sea level). As detailed above and in the annotation, these terraces mask either the fact that the units exceed 35' in height from street grade or the amount of the violation otherwise there. Under DPS interpretation of the Zoning Code definition of "height of building," §59-A-2.1, the increase in height for a terrace is allowed only when the terrace "is a natural element in comparison with adjacent lots." Siegel v. Montgomery County, Maryland, No. 1321, Sept Term, 2004, at 7 (Md. Ct. Sp. App. May 26, 2005). None of the terraces identified by CPJ qualify as true terraces under DPS policy, and they should be disregarded.

The second erroneous reference point is CPJ's use of average elevation of the finished grade along the front of the building when there is no street within 35' of that building front. When there is no street reference point, then whatever artificial terracing has been done to result in a finished grade results in increased building height. In fact, however, in 32 instances there is a street reference point within 35' of the unit that can be utilized to properly constrain height. As detailed above and in the annotation, CPJ's

failure to use it has resulted in underreporting of townhouse units over 35' in height or understatement of the amount by which several units in violation of the 35' height limit. This error also applies to Bozzuto Building 2. CTCAC has confirmed with senior staff at DPS that DPS will use the street, alley or parking area grade as a reference point whenever any street, alley or parking area is within 35' of the building. In other words, in the definition of "height of building," which permits measurement along the building front when the street is more than 35' distant from the building, DPS interprets "street" to mean not just a street along the front of the building, but any paved vehicular surface within that distance. In fact, since townhome projects can readily be built with no street along the front of the building, this interpretation fairly and properly avoids townhome block configurations with fronts placed away from streets so as to evade the height requirement.

2. Front-Yard Setbacks

In its Report for the July 7th hearing, the Staff concluded that there were 102 front-yard setback violations in Phases I and II. In response to this, CPJ submitted a report on July 21, 2005, acknowledging 97 such violations. It is not possible for CTCAC to compare and contrast these conclusions because the Staff did not disclose which units were in violation. CTCAC assumes Staff will make this comparison and resolve any discrepancies, either in its violation hearing report or its sanctions hearing report.

To the extent time permits, CTCAC will separately analyze the front-yard setbacks as part of its computer-aided assessment of other setback standards, as detailed in part II.C., supra, and present any available findings at the July 25th hearing.

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