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DAVID W. BROWN

November 22, 2005

Via Email

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

Re: **Clarksburg Town Center**

Dear Chairman Berlage:

I write to enclose a corrected copy of a letter delivered by email yesterday on behalf of my clients, the Clarksburg Town Center Advisory Committee (CTCAC), and a slightly revised copy of the slide-by-slide memorandum that accompanied that letter.

The corrections to the letter are few in number and only typographical. There is no substantive change whatsoever. The memorandum has been revised slightly to make technical editorial corrections, to clarify points in a few instances, and to include Exhibit A identified and quoted within. These minor adjustments should in no way interfere with the Staff's ability to utilize CTCAC's original submission to prepare its report by tomorrow, but CTCAC and this firm want the record to reflect, to the best of their ability, a completely error-free work product.

CTCAC also wants the Board to be aware of the difficult circumstances that made it necessary to file corrected documents in this instance. Please understand that while CTCAC is representative of a broad community, the actual working group on this project is quite small, and consists of non-lawyers with families and jobs. Its legal "team" consists of one person—the undersigned. Right after the November 3rd hearing, CTCAC began requesting materials used or referenced in that hearing. Access to these was crucial to the preparation of a rebuttal. Some of the requested materials did not arrive until late last week, more than a week later. Others never arrived. CTCAC was particularly handicapped by the failure of Newland and the builders to honor our request for an electronic copy of their PowerPoint™ presentations, which would have made preparing a critique of them much easier and less time-consuming. In contrast, CTCAC promptly made available to all parties an electronic copy of its October 25th presentation.

These difficulties prompted CTCAC to request late last week a two-day extension of the deadline for submission of its rebuttal. The request was denied. Instead, CTCAC

was given three additional business hours to complete its submission. CTCAC worked literally around the clock for days to meet this deadline and did so. Nevertheless, it was simply not possible under the circumstances to perform the final polish on the submitted materials to ensure an error-free response. We respectfully ask that these corrected /revised versions be included in the record.

Sincerely yours,

David W. Brown

/enclosures

cc: William Mooney, Director
Michele Rosenfeld, Esq.
Rose Krasnow, Chief, Development Review
John A. Carter, Chief, Community-Based Planning
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DAVID W. BROWN

November 21, 2005

CORRECTED

Via Email

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

Re: **Clarksburg Town Center**

Dear Chairman Berlage:

This letter is the fourth and final installment of the rebuttal presentation of the Clarksburg Town Center Advisory Committee (CTCAC) to the presentation of Newland and the builders on November 3, 2005. Earlier installments consisted of letters dated November 7th (revised version), 17th and 18th, 2005.[1]

INTRODUCTION AND SUMMARY

In the sections of the letter to follow, CTCAC's principal focus is on additional responses to the presentations on November 3rd. We also point out where our earlier presentation has not been challenged or rebutted in any way.[2] These sections thus discuss

[1] For ease of reference, convenience and commonality of understanding, CTCAC will, upon identification of any document listed in the Appendix to the November 8, 2005 Report of the Office of Legislative Oversight, add a bracketed notation of the Folder and Document Number in the Appendix.

[2] The evidence and arguments presented to the Board since the grant of reconsideration on May 5, 2005 consists of (1) numerous letters – June 1, 2005 [H119]; June 21, 2005 [H119]; June 28, 2005 (two letters and attached 5-page issues and discrepancies worksheet [H122]; August 10, 2005 [H119]; September 16, 2005; September 19, 2005 [B003]; September 21, 2005; September 26, 2005 with 2 exhibits [B004]; October 17, 2005; October 18, 2005 with 6 attachments [H134]; October 24, 2005 with 15 attachments; October 31, 2005; November 2, 2005; the post-hearing letter identified above; (2) presentations to the Board (PowerPoint™ and transcript) on July 7th [B002; H062]; October 6th; and October 25, 2005 [B006]; and (3) two exhibits: (a) correspondence and emails supporting CTCAC history of investigative efforts [H119 & Tab 10 to Board July 7th Hearing Binder] and (b) a 13-page issues and discrepancies worksheet (September 13, 2005).

the following points: (1) The applicable development standards for the entire CTC project were set forth in the original Project Data Table and have never been amended; (2) Condition 38 could not reasonably be relied upon for anything more than legitimate minor amendments; (3) Rather than rely on Condition 38 or Staff authority to make amendments, the developer abandoned approved plans in favor of changes prior to approvals – either presupposing later approval or without regard to approval requirements; (4) The realignment of "O" Street and the relocation of the Pedestrian Mews are unlawful, improperly approved changes to the Phase I Site Plan; (5) the MPDU violations identified by CTCAC have not been rebutted by Newland or the builders; (6) Newland has not met its obligations on community-wide amenities, both in terms of timeliness and quality; (7) The development standards violations identified by CTCAC are almost entirely unrebutted; (8) CTCAC's claims of fraudulent and dubious documentation have not been rebutted; instead additional problematic documents have emerged; (9) CTCAC's analysis of the shortfall in residential parking spaces is unrebutted; (10) Internal streets and alleys are undersized in terms of pavement width; (11) CTCAC's disclosure of record plat violations is unrebutted; (12) The inadequacies in the RMX-2 green area are unrebutted; (13) CTCAC's evidence of substantial unapproved grading changes is unrebutted.

I. THE APPLICABLE DEVELOPMENT STANDARDS FOR THE ENTIRE PROJECT, SET FORTH IN THE PROJECT DATA TABLE, HAVE NEVER BEEN AMENDED

Our September 26, 2005 letter in Part I [B004]details why, under Condition #14 of the Preliminary Plan, the Project Data Table in the Project and Preliminary Plan, and in the Phase I Site Plan, must be viewed as the legally binding, operative set of development standards for the entire CTC project. Nothing presented by Newland and the builders contradicts the analysis leading to this conclusion and it should be the operative guidepost for assessing both Phase I and Phase II Site Plan violations.

The only possible issue here is whether the so-called "signature set" for Phase II alters this conclusion. Our September 26, 2005 letter in Part VI [B004]details the numerous ways, uncontradicted by Newland in its presentation, why this "signature set" is an invalid guide to development standards for Phase II. That discussion makes clear why the purported Phase II amendments to the Project Data Table, all of which surreptitiously post-dated the Board's June 2002 approval of Phase II with a Project Data Table apparently unaltered from Phase I, are invalid and unreliable.

II. CONDITION 38 COULD NOT REASONABLY BE RELIED UPON FOR APPROVAL OF ANYTHING MORE THAN MINOR AMENDMENTS

In Part II of our September 26, 2005 letter [B004], CTCAC delineated the limits placed upon the Board by the District Council in assigning the Board responsibility to approve and enforce site plans. The statutory scheme in Division 59-D of the Zoning Ordinance is crystal clear: major (i.e. non-minor) site plan amendments require a public hearing and any attempt by the Board to delegate to the staff authority to approve such an amendment administratively is unlawful and void. For this reason, the Council prescribed that changes that "entail matters that are fundamental determinations assigned to the Planning Board," §59-D-2.6, may not be made by the staff as a minor amendment. 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).

Newland attempts to elude this basic framework for allocation of work between Board and Staff with reference to §7-111(b) and §7-111(c)(1) of the Regional District Act, Art. 28, Md. Ann. Code ("Act"). These provisions in no way detract from the straightforward application of the Zoning Ordinance as described by CTCAC.

First, contrary to the implication of Newland's argument, the Board's power over site plans is exclusively a function of local law, not a mandate flowing from §7-111(b) of Art. 28. Section 7-111(b) does not state or imply that the District Council cannot enact local law to define the terms and conditions under which site plan reviews are to be conducted by the Board. Rather, §7-111(b) gives the Board only zoning power that is "[w]ithin its jurisdiction," which is determined by other provisions of law, whether state or local. As for state law, §7-111(a) does not include site plan approval and enforcement as a matter exclusively within the jurisdiction of the Board, and §7-108.1(b) makes clear that "local government" -- in this case the District Council – is to implement "planning and zoning controls." This is explicitly confirmed for the District Council in §8-101(b)(2) and §8-104(a)(1) of the Act. Hence, the District Council could decide to remove from the Board's jurisdiction its current site plan approval or enforcement responsibility and place it elsewhere. In fact, several Council members have recently sponsored legislation to transfer site plan enforcement responsibility from the Board to DPS. See SRA 05-04 (Introduced Nov. 1, 2005). Plainly, therefore, if the District Council can strip the Board of site plan approval authority, it has the authority, as exercised in §59-D-2.6, to define what site plan approvals the Board can and cannot delegate to its staff.

Second, §7-111(c)(1) of the Act in no way contradicts or impairs the allocation of responsibility defined by the District Council. That section merely gives the Board administrative control over staff members performing the duties and functions assigned in this section" to the Board. But "this section," i.e., §7-111, does not assign site plan approval and enforcement responsibility to the Board; that responsibility came to the Board via a District Council enactment. Hence, §7-111(c)(1) confirms the District

Council's ultimate control over the allocation between Board and staff of decision-making authority on site plan approval and enforcement issues.

Third, the foregoing analysis is completely consistent with the various recent legal memoranda prepared and sent to Karen Orlansky, Director, Office of Legislative Oversight, by the Staff Director and his legal staff regarding Board authority: August 8, 2005 (Responses to Questions 2, 6 and 7) [H107]; September 7, 2005 (Response to Question 1 [H109]; September 8, 2005 (Response to Question 3) [H110]; September 12, 2005 (Response to Question 9) [H111]. Most particularly, the Board was asked to identify in Question 7 all State and County laws implicated in defining the proper scope of any delegation of authority to staff to amend approved site plans. The answer cited only the provisions of County law enumerated by CTCAC in its September 25th letter.

Newland and the builders also attempt to justify all of the various site plan amendments as properly within the Zoning Ordinance definition of minor amendment. In doing so, they fail to address the substance of the problem with the amendments in this case – that they change the "requirements expressed or imposed by the Planning Board in its review of the plan." §59-D-2.6. As detailed in Attachment 1 to this letter, virtually every amendment disclosed by Newland – 16 in all – alter Board-imposed requirements. At best, only a small number of them may be viewed as genuinely minor in nature. Id.

Rather than deal with this express statutory limitation on staff approval authority, Newland and the builders prefer to argue that the approvals are within the purview of Board-imposed Condition 38, which, Newland claims, "clarified the definition of a minor amendment in this instance." Newland PowerPoint™ Slide 120. This argument is a red herring. Even assuming Condition 38 were properly understood to give the staff unlimited approval authority, any delegation that exceeds the Board's authority to delegate is invalid and ineffectual. Newland and the builders have no response to this elementary point, just as they offer no coherent response to the point in our September 25th letter that, as professionals with years of practice before the Board, they could not reasonably rely on staff to modify site plan requirements. Doing so, as they claim to have done in this case, is rendered all the more patently unreasonable when one considers the actual "amendments." It appears that the **more** significant the amendment, the **less** the amount of written documentation of staff-level approval of the changes to the site plan wrought by it. See the extensive discussion, amendment-by-amendment, in Attachment 1.[3]

[3] For example, it is instructive to contrast the paucity of documentation for approval of developer-initiated site plan amendments with Miller and Smith's documentation of the process whereby there was a staff-level approval of an amendment allowing a 2' projection into the front yard setback on a single lot (Block FF, Lot 15). The width of the requested projection was 12.5', so the total area affected was only 25 square feet. In a

Finally, Newland and the builders fail to come to grips with the limited nature of Condition 38 itself. By its own terms, Condition 38 deals with a far narrower class of site plan amendments than were ostensibly approved under its rubric.[4] To understand what Condition 38 means, it is necessary to first compare the language of Condition 38 as set forth in the 1998 Staff Report [H020] with the version in the Board Opinion [H021] (repeated in the Site Plan Enforcement Agreement [H022]):

Staff Report [H020]

> 38. The applicant may propose compatible changes to the units proposed, as market conditions may change, provided the fundamental findings of the Planning Board remain intact (regarding building type and location, open space, recreation and pedestrian and vehicular circulation, adequacy of parking etc.) for staff review and approval.

Board Opinion; SPEA [H021, H022]

> 38. The applicant may propose compatible changes to the units proposed, as market conditions may change, provided the fundamental findings of the Planning Board remain intact and in order to meet the Project Plan and Site Plan findings. Consideration shall be given to building type and location, open space, recreation and pedestrian and vehicular circulation, adequacy of parking etc. for staff review and approval.

November 7, 2005 letter to the Board, Miller and Smith documented a series of email exchanges between Wynn Witthans and Colleen Dwelly of Miller and Smith during the period October 21 – November 1, 2004, leading to staff-level approval of this change. Even though this was at a time well in advance of CTCAC's allegations of widespread site plan violations and unauthorized site plan amendments, the Board's legal staff was directly involved in the question of whether the matter should be brought to the Planning Board. Ultimately, the Director determined that this was a minor amendment that need not go before the Board, a decision reflected in writing in a January 25, 2005, letter from Ms. Witthans to Miller and Smith. See Miller and Smith PowerPoint™ Slide 41.

[4] There is no Condition 38 (or comparable condition) in either the Phase II Site Plan approval Opinion [H044] or Enforcement Agreement [H041]. Hence, wholly apart from the invalidity of the Phase II "signature set" [H042], Newland and the builders have no basis to claim that Condition 38 has any significance to the lawfulness of any Phase II amendments. This did not deter them from attempting to graft Condition 38 into Phase II in their argument to the Board.

The meaning of Condition 38 as worded in the Staff Report is unambiguous: only changes to the dwelling **units** are subject to staff review and approval, and change to them is to be approved only if certain Board findings are unaffected. This version of the Condition does not portend any changes in building type, building location, open space, recreation space, pedestrian circulation, vehicular circulation, or adequacy of parking. While these ideas are slightly rearranged in the Opinion's version of Condition 38, nothing in the Board Opinion suggests or implies that the Board intended to change Condition 38 to broaden it in any way, and legal Staff, in response to CTCAC's request, has been unable to provide CTCAC any explanation for the change in wording to Condition 38 in the Opinion. Thus, to effectuate the obvious intent of the Board, the second sentence of Condition 38 in the Opinion must be understood, as in the Staff Report, as criteria limiting when compatible changes to dwelling units may be staff-approved, as set forth in the first sentence. The second sentence is not, as Newland and the builders claim, a virtual "open season" for staff-level changes in building type, building location, open space, recreation space, pedestrian circulation, vehicular circulation, or adequacy of parking.

III. RATHER THAN RELY ON CONDITION 38 OR STAFF AUTHORITY TO MAKE AMENDMENTS, THE DEVELOPER ABANDONED APPROVED PLANS IN FAVOR OF CHANGES PRIOR TO APPROVALS – EITHER PRESUPPOSING LATER APPROVAL OR WITHOUT REGARD TO APPROVAL REQUIREMENTS

In its presentation to the Board on October 25, 2005 [B006], CTCAC illustrated in detail the methodology by which the developer abandoned a Board-approved site plan and the associated development standards, in favor of its own development plans, followed by attempts to paper over or obfuscate the changes after-the-fact. See October 25th PowerPoint™ Slides 11-37.

Numerous units were platted, permitted, constructed, and, in several cases, occupied prior to either site plan signature set or staff amendment. See October 18th letter Part II.F. [H134], and October 25th PowerPoint™ Slide 50 [B006]. As for the alleged amendment for Phase 1A (8-98001C), Newland makes the claim that the changes authorized by the amendment (incorporating rear loaded units with detached garages) enabled CTCAC member Kim Shiley, and other homeowners, to purchase their homes in their current configuration. See Newland September 7, 2005 letter. However, as presented by CTCAC to the Board on October 25th, Slides 34, 36 & 37 [B006], and discussed in CTCAC's November 7th letter, plats were submitted, permits were approved and contracts signed with homeowners prior to the alleged amendment approval date of May 30, 2003. As for the Phase II Site Plan, 383 plats were approved, 187 houses were

permitted, and 63 houses were fully built and occupied prior to site plan signature set approval. CTCAC October 25th PowerPoint™ Slide 50 [B006].

Based on a clear pattern of changes made in advance of approvals, approvals which in themselves are questionable, it is ludicrous for Newland to now assert that it was acting on amendments authorized by staff under Condition 38. Newland, as with Terrabrook before them, acted prior to approvals.

IV. THE REALIGNMENT OF "O" STREET AND THE RELOCATION OF THE PEDESTRIAN MEWS ARE UNLAWFUL, IMPROPERLY APPROVED CHANGES

CTCAC has extensively detailed the improper, staff-level approval of the realignment of "O" Street and relocation of the Pedestrian Mews. See September 26th letter, Part III [B004], October 24th letter, Part II.B.; and October 25th PowerPoint™ Slides 69-74 [B006]. Newland's response either mischaracterizes our arguments or simply fails to deal with them at all.

First, Newland claims that it is not accurate that the relocation of the Pedestrian Mews deprived the citizens of a direct connection between the mews and the Clarksburg United Methodist Church, because "O" street intervened between them. This is a red herring. The point CTCAC made was that the **mews itself** was the link, and what it connected was the **Church** to the **Town Square**. That has clearly been lost in the amended plan. Moreover, as the Phase I Site Plan Staff Report noted, the mews area between the Church and the Town Square was not merely a "vista," as Newland now claims, but rather "a visual **and walkable** axis between the church and the Town Square..." Staff Report at 10-11 [H020] Indeed, the Staff Report details precisely why walking was just as or more important than looking: within the mews, and hardly appreciated from a distance, was to be "a trellis and a memorial to John Clark with the use of found headstones from the family grave site." Id. In addition, the fact that "O" Street intervened between the Church and the mews was not viewed as a **negative**, but rather a specific **plus**, as detailed in Pastor Bill Meisch's letter to the Board dated October 21, 2005 (at 1):

> The pedestrian mews, as planned, provided easy access for Town Center residents to Clarksburg UMC and to the historic district of Clarksburg. In response to the master plan, Clarksburg UMC designed plans (at the congregation's expense) for expanding its facilities to present a welcoming, inviting appearance not only to the Historic District facing Spire Street, but also toward the new Town Center and "O" Street as well. To be clear, these plans and the congregation's enthusiasm were predicated upon the existence of both the pedestrian mews and "O" Street as depicted in the master plan.

> Additionally, decisions were made by the congregation impacting parking adequacy (considering the ability for worshipers to park along "O" Street on Sunday mornings) and anticipated new congregational programs and facility growth based upon the interconnectedness of the Historical District with the Town Center development, which featured easy access to church facilities by Town Center residents.

Second, Newland explains to the Board that at the July 31, 2001 DRC meeting on the Phase IA Amendment, the comments of the Transportation Planning Division included a copy of the original site plan. Apparently the presence of this piece of paper in the file is submitted as "proof" that the relative merits, from a whole-plan perspective, of relocating the pedestrian mews and realigning "O" Street were thoughtfully and carefully considered at that meeting. But it demonstrates no such thing, and in no way changes the basic reality that DRC meetings focus on technical issues relating to proposed changes, not the wisdom of those changes writ large. Indeed, DRC meetings are merely advisory and communicative in nature; they are not used to approve plans. As identified in the opening paragraph above, this point is explained in greater detail in our pre-November 3rd letters, a discussion completely ignored in Newland's presentation that day.

Third, as Commissioner Wellington observed at the November 3rd hearing, the record plat for Clarksridge Road—where the Pedestrian Mews was to be—Plat No. 22367, depicted on Newland PowerPoint™ Slide 70, was prepared in August 2002 and recorded in November 2002, those months being 10 and 7 months, respectively, **before** the Phase IA Amendment "approval" on May 30, 2003. Newland ironically points out that the relocated Pedestrian Mews is consistent with the developer's "concept plan" floated by the staff in April 2000, but this fact, when considered in light of recordation of the Clarksridge Road plat well before the Phase IA Site Plan Amendment, only serves to underscore CTCAC's fundamental point throughout its presentation: the developer took action at all times according to its **own** plan, not any **approved** plan.

Finally, with what can only be described as deliberate obliviousness, Newland reiterates that the Project Plan and Preliminary Plan did not show a Pedestrian Mews between the Church and Town Square. CTCAC's point, already made and again ignored by Newland, is that the Site Plan **corrected** this, leaving this question unanswered as to the Phase IA Amendment: if the conversion to a Pedestrian Mews was significant enough to be identified to the Board at Site Plan approval as an amendment to the Project Plan, why was the change suddenly no longer significant enough to warrant Board review in determining to change it back to a street yet again?

Newland now claims that the new plan is superior to the old one because now there is a pedestrian connection to the church from "O" Street. Two months ago the

claim was that it reduced curb cuts and impervious surfaces, preserved hedgerows and increased recreation space. See Newland September 7th letter. While it is clear that both the Church and CTCAC disagree with this assessment of the alternatives, the point to be made here is more fundamental: the Board did not and could not give the Staff the responsibility to weigh these competing values and decide among them, without benefit of public input via a hearing process. That was the Board's responsibility, and a Staff-level decision obviating that process deprives the public and the Board of the opportunity for an informed decision in light of those competing considerations.

V. THE MPDU VIOLATIONS IDENTIFIED BY CTCAC HAVE NOT BEEN REBUTTED BY NEWLAND OR THE BUILDERS

CTCAC has detailed the various violations of Newland and the builders with respect to their MPDU obligations, including matters subject to DPS, DHCA and Board jurisdiction. See September 26th letter, Part V [B004]; October 18th letter, Part III.A. [H134]; October 24th letter, Part III.A. Newland's response fails to come to grips with these problems and fails to rebut them.

Newland is under a stop work order for violation of its MPDU Agreement with DHCA. In effect, Newland has conceded the correctness of CTCAC's MPDU claims in relation to DHCA jurisdiction.

As for permitting requirements apparently subject to joint DPS/Board enforcement, no reply was offered on November 3rd to CTCAC's listing of 109 building permits applied for before execution of the MPDU Agreement on May 31, 2002, in violation of §25A-5(b) and ¶5(h) of that Agreement. See Attachment 15 to October 24th letter.

It has also become clear in the course of the Clarksburg hearings that the basic division of authority between DHCA and the Board over MPDU's is that DHCA controls the timing and quantity of units, whereas the Board controls their location in a Site Plan. The Board has tools to accomplish this: the Site Plan and the record plats, which are to disclose the location of MPDU's. See October 18th letter at 19. In this case, Newland has ignored those requirements and treated MPDU locations like easily moved pawns on a chessboard, all under the radar screen of Board scrutiny. Newland does not dispute our assessment that, when the project is complete, there will be a significantly uneven distribution of MPDU's within the various phases and sub-phases of CTC. Id. at 21.

On November 3rd, Newland was forced to concede that many current MPDU locations do not appear on signed site plans. In actuality, the discrepancy is larger than Newland would concede, because so many of the "signed" site plans are questionable amendments. But however extensive the problem, it does exist, and Newland cannot simply explain it away. Instead, Newland has offered the Board some inconclusive,

fragmentary notes from its agents to show that MPDU's were discussed at one or more meetings with Staff. These notes offer no proof that changes in MPDU locations were comprehensively discussed, to say nothing of approved.

Faced with a nearly complete absence of evidence of MPDU oversight, even at the staff level, Newland also offered the Board an excerpt from the February 10, 2005 hearing on the Bozzuto manor homes. This excerpt did not demonstrate that MPDU locations were reviewed and approved at that hearing. To the contrary, it demonstrates only that one Commissioner had an ongoing concern, which she expected to have an opportunity to address later, that Newland might not quantitatively fulfill its required complement of MPDU's. CTCAC, however, has never claimed that Newland will not ultimately build the required number of MPDU's. As a further diversion, Newland presented the Board with a color slide of one MPDU location near a mews, to stress the quality of the units, whereas CTCAC has not put MPDU unit quality at issue in this case.

The Board should conclude that changes in MPDU locations are not minor amendments, but rather a major amendment requiring Board review and approval at a public hearing, and that Newland has violated this requirement. As a last resort, Newland argues that the Board approved MPDU location shifts when it approved record plats with lots for MPDU construction. From every perspective, the claim is wrong. First, approval of a record plat is hardly tantamount to a considered judgment about any MPDU relocation it may show. Second, plats are approved one at a time, which hardly constitutes a considered judgment of the propriety of the sweep of all MPDU relocations. Third, the record plats do not in many cases disclose the existence of MPDU's; their existence would have to be inferred from the fact that the lots sizes for the units might be smaller than those for market-rate units.

To conclude CTCAC's observations on Newland's MPDU location violations, it is sufficient to note that Newland's cavalier attitude toward them simply mirrors its approach in general: proceeding as it pleases in the expectation that any problems that emerge can be cured by papering them over with "amendments." Thus, at present, Newland will be substantially short in meeting its quantitative MPDU requirement unless MPDU's are added in Phase 3 to the retail sector of CTC. But Newland has no assurance that MPDU's will be allowed in the retail sector not currently approved for residential units; this would require a significant amendment of current plans. So why would Newland risk coming up significantly short on MPDU's by counting on an uncertain plan change? The answer is distinctively "pre-Clarksburg," as that term is now widely understood in Montgomery County development circles: because such "problems" are always patched up after-the-fact. The Board must ensure that this is no longer going to be allowed to happen.

VI. NEWLAND HAS NOT MET ITS OBLIGATIONS ON COMMUNITY-WIDE AMENITIES, BOTH IN TERMS OF TIMELINESS AND QUALITY

CTCAC has already detailed Newland's default on its obligations with respect to community-wide amenities, and the Board has already concluded that Newland has violated its obligation to provide community-wide amenities with the issuance of the 540th building permit. This was plainly correct. See CTCAC September 26th letter, Part IV [B004]; Staff Report for October 6th Hearing at 3-5. Newland's October 14th request for reconsideration of that decision should be denied. See CTCAC letter of October 17th.

At the November 3rd hearing, Newland offered no specific rebuttal to the Staff Report's assessment that there are significant deficiencies in every age group in recreational facilities, and that these amenities have been treated as an afterthought, relegated to residual space on the backside of the Town's streets. Instead, Newland simply listed 29 meetings with Staff from 1997 to 2004 where it is claimed amenities were discussed. See Newland PowerPoint™ Slides 114-15. This is an average of 3 meetings a year, but since the claim is that amenities on the approved Phase I Site Plan were inappropriately changed, the relevant period is 1999-present. Over that period, the only meeting for which Newland's (unidentified) meeting notes with Staff indicate a discussion of recreation amenities is the one that took place on October 25, 2001. If the level of amenity oversight is as sparse as Newland's agent's records would suggest, it is hardly any wonder that the amenities provided by Newland are both late and inadequate. And while Staff can perhaps be faulted for not monitoring the situation more closely, the larger point is that Newland was responsible for compliance, whether strictly or loosely policed in that endeavor.

VII. THE DEVELOPMENT STANDARDS VIOLATIONS IDENTIFED BY CTCAC ARE ALMOST ENTIRELY UNREBUTTED

CTCAC discussed in its October 18, 2005 letter [H134], and then again in explicit detail in its October 25th presentation [B006], the scope and breadth of development standards violations within CTC. Setback violations of each variety were specifically addressed at the hearing and itemized within the PowerPoint™ presentation.[5]

In its November 3rd presentation, Newland offered little comment on CTCAC's specific findings on development standards violations, other than to agree with our

[5] CTCAC acknowledges, based on receipt of the Porten letter of November 18, 2005, that there were three clerical errors regarding Lots 15, 70, and 73 Block A, pertaining to Porten Homes. These lots, although included within the rear yard setback violation category of CTCAC's presentation, are not claimed to be in violation of the 25' rear yard setback requirement.

finding of 35 single family detached lots as below the minimum net lot requirement of 4,000 sq. ft. Newland simply made the generic claim that "standards are consistent with approved site plan drawings or recorded subdivision plats." See Newland PowerPoint™ Slide 118. Likewise, Miller and Smith in its presentation does not disagree with the findings of CTCAC as to numbers of units below Net Lot Sq. Ft. Minimum, Lot Width at Building Line Requirement, or Rear Yard Setback Requirement. Instead, they too, try to position plat recordation as sufficient to amend development standards. See Miller and Smith PowerPoint™ slides 32-35. These responses are legally insufficient.

First, as has been made clear in numerous CTCAC letters and presentations, the development standards have never been amended by the Board. See Part I, supra. Therefore, Newland and the builders are legally bound by the development standards as adopted by the Board and consistent with the Project Plan, Preliminary Plan and Site Plan Phase I data table.

Second, a record plat cannot amend site plan development standards. This elementary rule is reflected in the "Notes" section of the record plats as acknowledged by signatures of the developer and its agents:

> 1. All terms, conditions, agreements, limitations, and requirements associated with any Preliminary Plan, Site Plan, Project Plan, or any other Plan, allowing the development of the property, approved by the Montgomery County Planning Board, are intended to survive and not be extinguished by the recordation of this plat, unless expressly contemplated by the plan as approved.

It is hardly surprising that neither Newland nor the builders were able to offer much in the way of rebuttal to the violations as so painstakingly detailed by CTCAC. What is surprising is that to date, Newland maintains a cavalier attitude about the violations, and an arrogant indifference towards requirements under Board-approved plans and the Zoning Ordinance.

VIII. CTCAC'S CLAIMS OF FRAUDULENT AND DUBIOUS DOCUMENTATION HAVE NOT BEEN REBUTTED; INSTEAD ADDITIONAL PROBLEMATIC DOCUMENTS HAVE EMERGED

Virtually all correspondence with the Board by CTCAC over many months has highlighted questionable aspects of the documentation in Board files that supposedly validates CTC construction. Specific examples were highlighted in CTCAC's October 25, 2005 PowerPoint™ presentation, Slides 16-67 [B006]. Not only have these not been credibly and coherently rebutted by Newland and the builders, additional problems have emerged. The supposed site plan "amendments" are rife with non-genuine signatures,

from both ends of the spectrum: developer "certifications" and staff-level "approvals." See CTCAC's November 17th and 18th letters. In addition, duplicate "approvals" on different dates for site plan amendments have emerged. See discussion in Attachment 1 of Newland PowerPoint™ Slide 49. Numerous other examples are detailed in Attachment 1.

IX. CTCAC'S ANALYSIS OF THE SHORTFALL IN RESIDENTIAL PARKING SPACES IS UNREBUTTED

CTCAC detailed the shortfall in residential parking spaces in Part II.E. of its October 18th letter. [H134] The simple response from Newland obviating that analysis would have been to produce a waiver authorizing Newland to provide far more on-street residential parking spaces than the 596 contemplated at the time of approval of the Project Plan. No such waiver has been produced, so CTCAC assumes it does not exist.

Events since CTCAC discussed the parking problem in its presentation to the Board on October 25th have only exacerbated the situation. According to the Washington Post of November 2, 2005, Thomas W. Carr, Jr., chief of the County's Fire and Rescue Service, informed Newland that the County had found approximately 15 fire-code violations affecting 122 homes, including on-street parking that prevents rescue vehicles from getting as close to homes as required by law.

CTCAC's PowerPoint™ presentation, Slides 116-19, summarizes the parking shortfall problem. While initially the Project Plan contemplated 596 on-street spaces, 573 of them are projected to be exhausted meeting Phase I requirements, whereas a reasonable projection for Phase II on-street parking is 410 spaces. The number of on-street spaces likely to be needed, therefore is 983, resulting in a supply shortfall of about 387 from initial projections. Stated differently, the actual need for on-street parking under the reconfigured site plans for CTC is about 165% of the original Project Plan projection. This is taking place over time with no notice to the Board of the havoc caused, particularly in light of overly narrow streets and alleys and substandard two-car garages, leaving the situation to worsen, uncorrected.

X. INTERNAL STREETS AND ALLEYS ARE UNDERSIZED IN TERMS OF PAVEMENT WIDTH

The CTCAC letters of October 18th, Part II.D. [H134] and October 24th, Part II.D., discuss the pavement width standards applicable to internal streets and alleys. CTCAC believes that the minimum lawful pavement width for internal streets, whether they be public or private, is 20' for one-way traffic, 26' for two-way traffic, and 16' for alleys. If the Board accepts Newland's claim, based on a DPS email shown in Slide 97, that more relaxed standards may be applied to private streets, CTCAC wishes to point out that most

of the internal streets are not private, because the Phase I Site Plan signature set, Sheet A, lists only a very small number of private streets. To the extent the Phase II Site Plan signature set may be utilized for this purpose, it, too, lists a minimal number of private streets. In any event, Sheet A in the Phase I Site Plan signature set delineates the approved cross-section standards to be applied to all internal streets, and none of them show a pavement width below the standards stated above.

The only place streets are discussed in the Newland PowerPoint™ presentation is at Newland Slides 83-97. Slides 86-91 deal with street alignment and have nothing to do with pavement width. Slides 83-86 deal with waivers on various street elements in certain discrete instances, none of which involve a reduction in pavement width. Indeed, by including non-relevant waivers in its presentation, Newland effectively acknowledges that there are no pavement width waivers.

What remains is Slides 92-97. Newland uses Slides 92-93 to conclude that Montgomery County Fire and Rescue Service considers "14-foot wide streets are acceptable." November 3rd Tr. 92 (Todd Brown, Esq.). But these Slides demonstrate no such thing. Slide 92 makes clear that the issue being addressed at that time was "travel way," which is the clearance on the street for moving vehicles assuming parked cars on at least one side. Given the typical car width and minimal allowable parallel parking allocation of 8', a travel way of 14', as specified for a single lot in Slide 92, is consistent with a pavement width of more than 20'. In addition, Slide 93 makes clear that a 14' travel way was acceptable only because the houses to be served "are accessible from multiple directions."

It is ironic that at the same time Newland is presenting the Board with the ostensible blessing of Fire and Rescue Services for its streets, that agency was citing Newland for numerous fire code violations in relation to street width, as noted in Part IX. More fundamentally, however, Fire and Rescue is not the agency that provides the Board check-off approval for streets and alleys; that is the responsibility of DPW & T. Hence, Newland has completely failed to rebut CTCAC's claims of undersized streets and alleys. In Slides 94-97, Newland effectively acknowledges its reliance on Fire and Rescue to determine alley width. This is simply erroneous. At best, a 14' alley would be lawful only if no parking in any part of the alley were strictly enforced, or there would never be a 14' clear "travel way," as Fire and Rescue insists upon. Furthermore, there is no such enforcement regime in place at the CTC.

XI. CTCAC'S DISCLOSURE OF RECORD PLAT VIOLATIONS IS UNREBUTTED

CTCAC'S October 24th letter, Part II.F. and Attachment 12 thereto disclosed numerous record plat violations, including 19 Phase II record plats approved before the

supposed signature set date of October 14, 2004. Our PowerPoint™ presentation, Slide 68 [B006], identified 10 alleyways that were platted incorrectly. No rebuttal has been offered as to any of this information.

XII. THE INADEQUACIES IN THE RMX-2 GREEN AREA ARE UNREBUTTED

CTCAC's October 18th letter, Part II.I. [H134], details the projected inadequacies in the Green Area, both for the Residential Open Space requirement and the Commercial Open Space requirement. The shortfall is significant enough that Newland has proposed curing it with a *sub silentio* rezoning of RDT-zoned land to RMX-2. Id. CTCAC's October 24th letter, Part II.I., observes that Staff has concluded there is no prospect for such a rezoning. Hence, the shortfall in Green Area must be projected to be a serious problem that should not be ignored by the Board in assessing Site Plan compliance issues.

XIII. CTCAC'S EVIDENCE OF SUBSTANTIAL UNAPPROVED GRADING CHANGES IS UNREBUTTED

Concerns about substantial unapproved changes in grading were discussed briefly in Part II.G. of both our October 18th [H134] and October 24th letters, and in greater detail in CTCAC's October 25th PowerPoint™ presentation, Slides 76-81. Since then, these issues have been discussed with Staff member Marion Clark, and CTCAC will rely primarily on the Staff report to illuminate this problem.

It is nonetheless appropriate to note that evidence of significant cut and fill in three discrete CTC areas has emerged. Two of the areas are near the Clarksburg United Methodist Church (Phase IA) and near Overlook Park Drive. The third area encompasses the northwest corner of Phase IB3 and portions of Phase II, with the highest point near the intersection of Clarks Crossing and Clarksburg Square Roads. Newland has offered the Board no information, rebuttal or otherwise, about this issue. CTCAC has been in contact with DPS concerning growing concerns of homeowners, faced with deep foundation cracks, that their homes were built on infill that may shift all too easily. CTCAC sampled DPS files for apparent infill areas, looking for certifications by engineers of soil compaction. Thus far, DPS has found few admissions of any infill construction.

Sincerely yours,

David W. Brown

/enclosures

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