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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

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OFFICE OF THE CHAIRMAN  
THE MARYLAND NATIONAL CAPITAL  
PARK AND PLANNING COMMISSION

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 3<sup>rd</sup> 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 25<sup>th</sup> 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

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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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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 7<sup>th</sup> (revised version), 17<sup>th</sup> and 18<sup>th</sup>, 2005.<sup>1</sup>

### INTRODUCTION AND SUMMARY

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

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<sup>1</sup> 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.

<sup>2</sup> 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 7<sup>th</sup> [B002; H062]; October 6<sup>th</sup>; 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 7<sup>th</sup> Hearing Binder] and (b) a 13-page issues and discrepancies worksheet (September 13, 2005).

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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**

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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

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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 25<sup>th</sup> 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 25<sup>th</sup> 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.<sup>3</sup>

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<sup>3</sup> 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.<sup>4</sup> 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.

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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.

<sup>4</sup> 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 25<sup>th</sup> 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 18<sup>th</sup> letter Part II.F. [H134], and October 25<sup>th</sup> 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 25<sup>th</sup>, Slides 34, 36 & 37 [B006], and discussed in CTCAC's November 7<sup>th</sup> 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 25<sup>th</sup> 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 26<sup>th</sup> letter, Part III [B004], October 24<sup>th</sup> letter, Part II.B.; and October 25<sup>th</sup> 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.

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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 3<sup>rd</sup> 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 7<sup>th</sup> 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 26<sup>th</sup> letter, Part V [B004]; October 18<sup>th</sup> letter, Part III.A. [H134]; October 24<sup>th</sup> 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 3<sup>rd</sup> 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 24<sup>th</sup> 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 18<sup>th</sup> 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 3<sup>rd</sup>, 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 540<sup>th</sup> building permit. This was plainly correct. See CTCAC September 26<sup>th</sup> letter, Part IV [B004]; Staff Report for October 6<sup>th</sup> Hearing at 3-5. Newland's October 14<sup>th</sup> request for reconsideration of that decision should be denied. See CTCAC letter of October 17<sup>th</sup>.

At the November 3<sup>rd</sup> 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 IDENTIFIED BY CTCAC ARE ALMOST ENTIRELY UNREBUTTED**

CTCAC discussed in its October 18, 2005 letter [H134], and then again in explicit detail in its October 25<sup>th</sup> 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.<sup>5</sup>

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

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<sup>5</sup> 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 17<sup>th</sup> and 18<sup>th</sup> 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 18<sup>th</sup> 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 25<sup>th</sup> 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 18<sup>th</sup>, Part II.D. [H134] and October 24<sup>th</sup>, 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 3<sup>rd</sup> 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 24<sup>th</sup> letter, Part II.F. and Attachment 12 thereto disclosed numerous record plat violations, including 19 Phase II record plats approved before the



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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 18<sup>th</sup> 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 24<sup>th</sup> 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 18<sup>th</sup> [H134] and October 24<sup>th</sup> letters, and in greater detail in CTCAC's October 25<sup>th</sup> 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

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/enclosures

cc: Charles Lochr, Director  
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**MEMORANDUM**

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DAVID W. BROWN

TO: Chairman Derick Berlage  
Montgomery County Planning Board

**REVISED**

FROM: David W. Brown  
KNOFF & BROWN

DATE: November 21, 2005

RE: Clarksburg Town Center Advisory Committee – Analysis of  
Slide Presentations by Newland, Bozzuto, and Miller and Smith

SLIDE NUMBER	ANALYSIS OF SLIDES – NEWLAND PRESENTATION
3	The April 13, 2000 meeting agenda from Wynn Witthans states that the meeting is being held “to discuss the general Terrabrook changes to CTC, especially the first section of SFD’s that they want to move along quite rapidly. This is an opportunity for our old review team to review the concepts prior to the applicant submitting them for staff level approval.” Contrary to implying that a major project concept change will be approved at the meeting, the memo specifically indicates that changes will be submitted for review at a later date. It also implies that initial changes apply to SFD’s in the first section (now known as Phase IB1). Based on the fact that the single family detached units within Phase IB1 changed very little from the approved Phase I Site Plan (garages and driveways were modified), this would serve to support the real intention of Condition 38 – enabling the staff to make truly minor amendments to units.
4-7	The July 17, 2000 memorandum from Wynn Witthans, with attachment of July 13, 2000 memorandum from SKG Architects & Planners, merely highlights the fact that staff anticipated handling some changes at a staff level and some at a Planning Board level. The memo also confirms that the decision regarding staff level versus Board level approvals will be decided at a later date when changes are reviewed more fully. A meeting for discussion of the submission is then scheduled for July 26, 2000. The attachment to the memo discusses a “revised Clarksburg Town Center master plan.” The Clarksburg Town Center Master Plan has not been revised. Clearly, SKG at the time was using erroneous language to refer to the concept plan being presented. The memo merely confirms CTCAC’s assertions that the developer intended from the beginning to track to its own plan rather than the Board-approved Project Plan and Site Plan. The concept plan shows significant alteration to every block within the project, with the exception of Phase IB1. Even so, Wynn’s memo does not imply, contrary to Newland’s November 3 <sup>rd</sup> presentation, that these changes would be accepted at a staff level. It only states that the proposed changes will be reviewed more fully at later dates.
8-15	The August 7, 2000 memo, with attachments, from Stephen Gang on street section re-

	<p>visions pertains to changes proposed to streets. Of note is the fact that most of the revisions shown are relative to streets within Phase II. Clearly, as discussed in Wynn's memo of July 17, 2000, none of these changes were anticipated to be approved at a staff level (as Phase II was not yet approved and had to come before the Board in a public hearing). The same can be said of slides 12-14 relative to the Pedestrian Pathway System Plan. Contrary to what Newland suggests at the November 3<sup>rd</sup> hearing (i.e. that a number of meetings with DRC and individuals from DPS served as approval for these changes), there is nothing on record to support that these street changes were approved in any DRC or other meetings. In fact, as late as June 6, 2002, Wynn Withans, in a presentation to the Clarksburg Civic Association concerning the CTC Streetscape Plan (Exhibit A) states: "The reason for the street scape presentation was to involve the Clarksburg community. Once this plan is accepted, the developer's site plans must conform to the accepted streetscape plan. The streetscape plan is a 'road map' for planning. The purpose of the street scape plan is to define the character of the roadways in Clarksburg. This involves defining the roadway widths, the lighting type and placement, decorations, and the rural/urban character. This is a draft working document. The Planning staff would like comments from the CCA and the citizens of the Clarksburg area. This is the first preliminary effort to get this plan written. The Planning staff would like to get a final approval from the CCA in the Fall 2002 prior to approval from the Planning Board."</p>
<p>16-23</p>	<p>There are a number of questionable aspects to Les Powell's partial summary of CPJ meetings with MNCPPC and MCPS. These include multiple duplicate entries where the second entry matches the first with the exception of supplemental detail added to the second entry. (Example: Slide 16 contains two entries for 9/25/2000. Both entries reference 2.0 hours. The first entry Meeting Description lists "DRC meeting." The second entry lists "DRC meeting 'for site plan'.") Additionally, several entries contain uncharacteristic detail in comparison with typical entries. The uncharacteristic detail coincides with issues being stressed by Newland in its presentation. (Examples: Slide 16 entry for 12/1/00 regarding "Meeting with Malcolm Shaneman to review how the previously recorded lots would be handled and what format he wanted for waiver requested." Slide 21 entry for 10/8/2003 regarding "CTC2 10/8 mtg. @P&amp;P w/Malcolm, Rich, Wynn &amp; Nancy about 'plat of correction' issues the w/Wynn and Nancy about pool, then w/Dave, Nancy, Bill, Jim, and Bozutto and Craftstar about site issues.")</p>
<p>27</p>	<p>This is amendment 98001A, also known as Phase 1B, Part 2, approved by Wynn Withans on 8/3/01. As noted in our November 17, 2005 letter, the Wynn Withans signature for this phase is not genuine. What we see on Slide 27 is a composite overlay which fails to show the real Phase 1B, Part 2 site plan underneath. The real Phase 1B, Part 2 site plan that was submitted would expose the pre-inclusion of the Phase 1B, Part 3 modifications in the area just above the blue area highlighted on this composite insert. Slide 27 also shows an approval date of 10/23/01. We have been unable to locate any approval relating to this amendment for that date. In addition, it shows a landscape approval date of 12/4/01. We have been unable to locate any landscape approval for that date either. There is an 8/3/01 landscape plan, again with signature by Wynn Withans which is not genuine. Todd Brown's statement at p.40 of the transcript for 11/3/05 was that "there are signed plans with those dates for this amendment." We believe that statement to be false as it relates to 10/23/01 and 12/4/01.</p>

29	<p>This slide represents the alleged 12/17/01 pre-Bozzuto approval of the 8-98001 section 1B-3. (It is also depicted as the pre-Bozzuto amendment in the Bozzuto PowerPoint™ presentation slide 27.) Our forensic examiner has effectively determined that the signature on the 12/17/01 site plan is not Wynn Witthans' signature, nor is it Tracy Graves' signature. The forensic examiner further clarified that the printing and dating within the developer's certificate block was in the hand of Les Powell. See CTCAC letter to the Board dated November 18, 2005. This amendment is not the 8-98001C amendment, as Bozzuto claims on its presentation slide 7 and as is noted within the minor amendment approval block on the actual document. (The actual 8-98001C amendment relates to Phase 1A, approved on 5/30/03, two years later.) In addition, slide 29 states that there was a DRC meeting on this amendment on 5/21/01. In fact, the DRC minutes for that meeting relate to a 22.14 acre site, which is the acreage involved in Phase 1B, Part 2 – i.e., the slide 27 amendment. Once again, the slide is actually a composite insert and the area depicted in purple is not the area that actually is the subject of the amendment document presented to the Board. The area that is shown depicts Bozzuto amendments of a later date, as depicted in Bozzuto slide 8 and in detail on the right hand side of Bozzuto slides 10 and 11. If one compares the purple area on Newland slide 29 with the actual document that it purportedly represents with a 12/17/01 approval date, it is evident that they simply do not match. Further, in comparing the alleged 12/17/01 amendment document information to the Amendment Application Log, we note that this particular amendment seems to have been squeezed in on an interlineation at some unknown later date than the actual date that it is purported to have been entered. Otherwise, it would have its own separate entry line within the log [H090].</p>
31	<p>This is a supplemental amendment to the initial Phase 1B, Part 2 (8-98001A). This amendment is referenced as 8-98001D, approved on 3/7/02. In this case, there are some discrepancies regarding the amendment application and fee. The application fee was filed and fee paid on the same day that the documents were prepared, or at least some of the documents (some of the documents are dated 11 days later on 2/22/02). This amendment was treated as a minor amendment, and apparently, at least in terms of the records made available to us, generated no concern or discussion about whether or not this was a legitimate subject for a minor amendment, notwithstanding the fact that lots were platted into what was once a public square. This Miller &amp; Smith amendment is to be contrasted with the later Miller &amp; Smith amendment (Amendment F) where a single setback amounting to a difference of 25 sq. ft. on one single lot generated considerable discussion and consternation as to whether or not it was an amendment that required Board approval rather than staff level approval. Ultimately, that amendment was approved at the top level of the staff, by Director Charlie Loehr as a minor amendment. Why, then, was this much more extensive amendment not considered something that should be brought before the Board? The only explanation that we can come up with is that at the much later time the F amendment was considered, the CTCAC had already been making noises about the amendment approval process and questioning data table standards adherence.</p>
33	<p>We have no record of any signatures approving this change in unit type, even fake signatures. There is no documentation whatsoever for this change, even though Todd Brown states in his testimony that the date of this signature set revision is 6/10/02 and that there is a signed site plan for this revision. There is no signed site plan for this re-</p>

	<p>vision in any of the documents submitted to the Board in support of Newland's Power-Point™ presentation and we have been unable to locate any in Board files after months of searching for all of the amendments. There is also no record of any fee being paid in the Amendment Application Log [H090] for this amendment.</p>
35	<p>This slide is referenced as a Site Plan/Landscape Revision for multi-family unit with garage with update of unit architecture. It is also depicted as the Bozzuto minor amendment on slides 8 and 9, and on the right hand side of slides 10 and 11 of the Bozzuto presentation. This is pitched by Newland merely as a refinement of the 12/17/01 Phase 1B, Part 3 amendment. In fact, as we explained in our October 25, 2005 presentation, the only reasonable way to view this amendment is as an attempt to incorporate prior changes for all of Phase 1B, Part 3 into a document signed by Clark Wagner for minor adjustments to the Bozzuto homes depicted in the northwest corner of the Phase 1B, Part 3 area. It would seem that all of the changes to the area within Phase 1B, Part 3 were effectively sought to be approved under the Clark Wagner signature, with all of the townhouse changes essentially coming in under the radar screen with no processing or consideration of any amendment. There is also no amendment fee record relating to the amendment as depicted in slide 35. In effect, what has happened is that because Newland could not defend the certification of this plan under the name Clark Wagner (who has no direct affiliation with Newland), Newland dredged up an earlier plan not in Board files supposedly approving all of the rest of Phase 1B, Part 3 except for minor revisions to the Bozzuto homes that are then attributed to the Wagner signature.</p>
37	<p>This is what is known as amendment 8-98001C, also known as Phase 1A, approved on 5/30/03 by Wynn Wittbans. Again, her signature is not a genuine signature on that approval document. The Amendment "Site Plan File Number" on Page 1 of the Application is altered from an underlying letter to the letter "C," with the notation "OK per LP" (presumably Les Powell) and Page 2 of the application for this site plan amendment appears to be done in a different hand and ink than the rest of the application, suggesting a modification of this document after the fact [H030]. The DRC meeting on 7/31/01 has been discussed at length in earlier letters submitted to the Board, detailing CTCAC's belief that there was no substantive discussion of the relative merits of removing the Pedestrian Mews and truncating "O" Street. The DRC discussion was about the technical aspects of the street (90° turn, curb radii, etc.), rather than the land planning aspects of the pluses and minuses of amending the Mews or "O" Street. In addition, the DRC minutes note with regard to some adjustments to streets that certain waivers would be required, and the minutes themselves note that these waivers would be obtained at a later site plan review. In other words, those in attendance at the DRC meeting thoroughly anticipated that there would be a Board site plan review of this amendment.</p>
39	<p>This is the Park &amp; Pool amendment which is the first amendment to Phase 2. This is the sum total of what Newland said about this amendment: "This is the pool clubhouse section in Phase 2. This was a site plan that was for the adjustments to the pool and to the park area within Phase 2. There is a signed staff signature set for this adjustment dated 11/12/03." This is to be contrasted with the extensive presentation made by CTCAC on 10/25/05 documenting at length the absurdities associated with this signature set. There is absolutely no rebuttal from Newland to the points made in our presentation.</p>

41, 43, 45	<p>Slide 41 shows the first of 4 amendments that Newland acknowledges do not have approved site plan signatures – all of which were ostensibly approved on 10/8/03. What Newland says is that these approvals are reflected on record plats that were presented by staff to the Board as being in order and in compliance and appropriate for recordation. Newland does not explain how a plat of correction can amend a site plan – especially in view of the language contained in the “Notes” on the signed plats:</p> <p style="text-align: center;"><i>Notes:</i></p> <p style="text-align: center;"><i>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.</i></p> <p>Our rhetorical question is ‘what is the point of a site plan if one can plat without regard to the site plan?’ Examination of the plats that are identified on slides 41, 43 and 45 reveals that all of these plats were prepared after 10/8/03. Newland does not offer as part of its documentary evidence any pieces of paper purporting to show what in fact was reviewed and considered at the 10/8/03 meeting. If the plats were prepared after the meeting, it seems all but impossible that they could have been considered at that meeting. The only documentation we have of the meeting is Les Powell’s billing notes of the meeting, which show up on slide 21 in an uncharacteristically detailed entry.</p>
47	<p>What is true of slides 41, 43 and 45 is also true of slide 47, with one minor difference. Slide 47 involves 2 plats of correction. One plat was prepared before the 10/8/03 meeting, i.e., plat 22766, and one was prepared nearly one year after the meeting, plat 23038. These plats involve separate parcels, both depicted on slide 47. Hence, while it is possible that the meeting on 10/8/03 involved consideration of one already drawn plat, the same is not true for the other plat: i.e., it presents the same problem as the alleged plats of correction on slides 41, 43 and 45.</p>
49	<p>We have two sets of documentation relating to slide 49. We have Wynn Witthans’ signature, which appears to be clearly in her hand, dated 1/19/03 approving a minor amendment for the dumpster removal with a unit change. The interesting thing about this signature date is that it is almost 2 years before the date of preparation of the document that she is purporting to sign, showing a plotted date of 12/3/04. We have a second Wynn Witthans signature approval dated in 2005, following a stamped receipt of the amendment on 12/10/04, which would coincide with the plot date for the earlier version of the amendment. The signature block with Wynn Witthans’ signature appears again on this document and appears again to be a valid signature of hers, although different from the earlier signature. The arrangement and wording of what was approved is different on the two documents. In addition, the date has been changed from 1/19/03 to 1/19/05, although it appears that when it was first written it was written as January 17<sup>th</sup>. The “05” approval is completely uninformative with respect to what has been changed and approved because it is shown on a map of the entire Phase 1/Phase 2 site. Also noteworthy about this particular diagram is that there are significant alterations to the Project Data Table on it, including a material alteration to the</p>

	<p>front yard setback requirement for townhouses. It changed from 10' to "non-applicable" at the very time that there was great consternation internal to Park and Planning regarding known front yard setback violations, as reflected in the Miller &amp; Smith email dialogue (detailed in Robert Brewer's letter of 11/17/05) culminating in a 1/25/05 approval of a one-lot waiver of 2' from the 10' setback requirements. See discussion of slide 51. According to this record, this was just 6 days after an amendment had been approved showing that there was no setback requirement for townhouses at all.</p>
<p>51</p>	<p>This is a revision to Phase 1A, referenced as 8-98001F. In contrast to virtually every other minor amendment, the documentation for this minor amendment is complete and conclusive. It demonstrates that there was extensive back and forth discussion between the applicant and the Board staff about whether or not this matter could be resolved as a minor amendment and it was conclusively decided that it should be a minor amendment by the director of the staff, Charlie Loehr. This decision is then reflected in a letter to Miller &amp; Smith, signed by Wynn Witthans and dated 1/25/05, essentially confirming that it would be a minor amendment to allow reduction in the setback on a single lot from 10' to 8'. Attachments to Miller &amp; Smith letter to the Board, dated November 17<sup>th</sup>, provide Email correspondence indicating that the legal staff was involved in the analysis of this matter, effectively concluding that the front yard setback for townhouses was 10' and that it would be appropriate in this one instance to amend it to 8' to ratify a 2' X 12.5' foundation layout field mistake (i.e., a net adjustment of 25 sq. ft. from what was required according to the site plan Project Data Table). The documentation also includes the notation that the Planning Director found the setback amendment to be minor in nature and that additional landscaping added to the front area in question would create compatibility with adjacent units so that the goals and objectives of the site plan would not be frustrated in this instance even though there was a minor deviation from standards. The extensive and careful documentation of this change reflects the proper mode of analysis and decision making on a minor amendment. CTCAC does not regard it as a mere coincidence that this careful documentation came at the time that it did, in January of 2005.</p>
<p>53</p>	<p>This slide depicts the Phase 2 portion of the Manor Home amendments that were discussed at length in the CTCAC's 10/25/05 presentation to the Board. Newland's discussion of slide 53 before the Board answered none of the issues, questions or allegations raised by CTCAC at the 10/25/05 hearing. It should also be noted that the application for amendment for the Phase II Manor homes was initially logged in on the Amendment Application Log as Amendment 8-02014A on 9/8/04 and then overwritten with a B. [H090]. This amendment to Phase 2 was applied for on 9/8/04 and a DRC meeting date scheduled for 10/18/04 before there was an approval date on the Phase 2 signature set, which later turned out to be 10/14/04. Whether there was a DRC meeting on 10/18/04 or not is not known from the records, but it is fairly clear from the information disclosed that if there was a meeting on that date, it did not discuss this amendment. Nor does slide 53 disclose a DRC meeting date. The project application for this amendment is inconsistent with slide 53. Slide 53 shows 4 different units with a maximum of 12 multi-family dwellings in each unit, for a total of 48 or fewer units, yet the application shows 58 units and references a record plat that is involved with the application known as 8-98001G (which is shown in slide 55).</p>



55	The application for amendment 8-98001G in slide 55 is dated 2/2/05 but, in fact, as demonstrated by the application for slide 53, 8-02014B, the earlier application already accounts for the units supposedly brought forward in the later application. This later application was therefore completely unnecessary.
57	This slide represents the unapproved site plan amendment 8-98001E for Phase 1A, Part 4 which has yet to come before the Board and is, therefore, of no current significance in the case.
60-70	These slides depict the Project and Preliminary Plan views of the mews area as well as DRC meeting minutes of July 31, 2001, with attachments. CTCAC has never questioned that the mews was initially depicted as a street in the Project and Preliminary Plans. Instead, CTCAC focused on the reason for inclusion of the mews as a visual and walkable connection to the Church and historic district (described in detail in the staff report for Site Plan 8-98001 Phase I and noted by staff as an addition and amendment to the Project Plan). DRC meeting minutes and Transportation Committee Review notes do not serve as evidence that the elimination of the Pedestrian Mews or the significant truncation of "O" street were considered or approved.
72-78	Slide 73 represents an MPDU Location Plan "Signed by Terrabrook on 3/27/03." This plan is not actually approved until October 14, 2004, along with the Phase II Site Plan. CTCAC previously detailed the questionable aspects of the Phase II Site Plan approval and the fact that units were platted, permitted, built and even occupied prior to that date. The MPDU plan presented to the Board by Newland does not justify construction prior to MPDU agreement with DHCA. Slides 73-77 depict DRC meeting dates and comments that do not specifically address or approve MPDU changes. Additionally, slide 78 depicts transcript notes from the February 10, 2005 Bozzuto Manor Home Hearing, during which the subject of MPDU's was raised, although MPDU's were not before the Board for consideration. This slide only serves to accentuate CTCAC's contentions regarding the shortfall in MPDUs at the time and Newland's presumptive reliance on as yet unapproved MPDU locations to compensate for that shortfall.
82-97	Covered in detail in CTCAC November 21, 2005 final submission letter.
98-103	CTCAC covered in its presentation to the Board on October 25, 2005 the issues surrounding the School and Park Site. As previously discussed, delay in approval of the school site did not warrant platting and permitting prior to approval of the Phase II Site Plan. It remains illegal to plat or permit prior to approval of a site plan signature set.
103-111	These slides cover the chronology of the pool and plaza amendment, but fail to answer why the amendment precedes the approval of the Phase II Site Plan.
112-116	Slides 112-116 have no substance. Newland's presentation to the Board neither responds to CTCAC's contentions regarding the failure to provide amenities in accordance with the Site Plan Enforcement Agreement phasing schedule, nor addresses the woefully inadequate amenities currently provided on-site.
117-119	In slides 117-119, Newland agrees with CTCAC's assessment that 35 single family detached lots are below the Board-approved development standard of 4000 sq. ft. The data table has never been amended and still depicts, even on alleged amendments, a 4000 sq. ft. minimum lot requirement. Plat records cannot serve as authorization vehicles for amending development standards on an approved site plan (as noted regarding slides 41-45). Nor is it self-evident from any of the site plan drawings that these lots are undersized. Newland remains in violation on these lots.
120-124	Covered in detail in CTCAC November 21, 2005 final submission letter.

SLIDE NUMBER	ANALYSIS OF SLIDES – BOZZUTO PRESENTATION
5	Bozzuto references the 8-98001G amendment as pertaining to Buildings 1-4. According to the Amendment Application for Amendment G, this amendment pertains only to one 12-unit Manor Home.
7	As noted in CTCAC's November 17, 2005 letter to the Board, the validity of the site plan represented by this slide is in serious question. Neither Wynn Witthans' signature nor Tracy Graves' signature are authentic. In CTCAC's November 21, 2005 final submission letter, this site plan document and conditions surrounding production of the document are further detailed.
12	This slide represents approvals contained in the Phase II site plan, dated October 14, 2004. CTCAC has already presented to the Board issues pertaining to questionable aspects of the Phase II Signature Set and date.
14-15	All Manor homes are depicted too close to abutting buildings and in violation of setback requirements. At the Manor Home hearing on February 10, 2005, the staff did not make the Board aware of the alterations in the site plan to the previously approved development standards, including elimination of the 30' spacing requirement between end units, and a reduction in the side yard requirement. The approved data table still reflected a requirement of 30' between end buildings for multi-family units and other dwelling units and a multi-family side yard of 10'/20.' All Manor Homes, if constructed as currently planned, will be in violation of side yard minimum requirements as well as end unit setback requirements.
17	<p>This slide depicts email correspondence of November 4, 2004 between Jackie Mowrey of Bozzuto and Wynn Witthans. The emails clearly indicate that Bozzuto is questioning whether Manor Home site plan revisions must go the Board for approval or whether they can be handled through staff level approval. Wynn's response makes clear that the plans will have to go the Planning Board for approval, pending citizen comments. What CTCAC finds disturbing about this exchange (as clearly presented to the Board in its presentation of October 25, 2005) is that the Manor Home amendments in question (amendments within both Phase I and II of the project to revise units from 9-unit to 12-unit dwellings) had already been submitted by Bozzuto and permits approved by Wayne Cornelius in June and August of 2004 respectively.</p> <p>Actions to schedule a hearing before the Board are of particular interest here in view of the chronology of events relative to CTCAC's actions at the time. [H119]. First, CTCAC was questioning not only height standards, but all development standards at the time. Second, it is now clear that the staff, the Director and legal counsel for the Board were aware of rampant setback violations at the time. It is no coincidence that the data table contained in the site plan as presented to the Board during the February 10, 2005 Manor Hearing contains altered height and setback requirements. (The Board was not fooled by this attempt to get Board signature on a "4 story" definition of height within a data table. The applicant was required to guarantee that the units would not exceed 45' and to specify the height on the site plan.) This was an unabashed attempt to incorporate changes without Board or public awareness and supports CTCAC's assertions that the developer and builders proceed according to their own plans and attempt to paper over problems after the fact.</p>

<b>27</b>	Although building #9 is not yet built, this slide clearly depicts setback violations. One side measures 18.6' from the adjacent building, while the other side measures 12.6' from the adjacent building. Each requires a 30' setback according to the approved data table standards.
<b>28-29</b>	This slide depicts building #10. This building is also clearly in violation of setback requirements. One slide measures 10.8' from the adjacent Miller and Smith SFD, which actually requires 4' minimum for its setback, leaving only 6.8' for the Manor Homes' side setback. This is a clear violation of the end unit setback requirements even as shown on Bozzuto's own presentation slides 9 and 29. The slide 29 data table is suspect, as detailed above in our comments to slide 17.

SLIDE NUMBER	ANALYSIS OF SLIDES – MILLER AND SMITH PRESENTATION
19	Approved signature set 8-98001B is referenced here. The current amendment documentation on file for this modification appears to be the first instance of private land platted into HOA “green” space and owned by private homeowners, who pay tax on the property. There are serious concerns with this relative to liabilities for homeowners, as well as the apparent disregard for area that was initially to be turned over to HOA. How was it determined, without public hearing to convert this parcel to private ownership? Where was the discussion on alternate HOA green space? As with the many other illegitimate amendments, this was done without Board hearing or input.
15-16	Slides 15-16 review setback violation allegations with regard to Miller and Smith units. In many instances, the slides reference consistency with plat recordation as the basis for “no violation.” As noted in comments to the Bozzuto presentation, plat recordation is not a legally sufficient means of amending approved development standards.
20-26	<p>Slides 20-26 depict Amendment 8-98001D, including Amendment Application, detail of the corresponding record plat 616-41 (M-NCPPC reference), filed as plat 21971, and details of specific aspects of change in signed drawings. Although this amendment was presented as representing all of the Miller and Smith arts and crafts homes, the plat only covers lots 48-49 C and 38-41 D. Slide 20 erroneously positions that the amendment “maintained” the approved 32-foot wide lots. The lots depicted are actually lots 30-34 E (plat record 21973). This is problematic not only because the amendment was not for the lots shown in the presentation to the Board, but also because the 32’ lots had never been previously approved (either by Klebanoff or others), nor could they be approved by these plats (See Note 1 on all plats: “all terms, conditions..”). Additionally, the plat approvals within these slides once again pre-date the amendment site plan approvals (Plats dated 4/12/01; site plan dated 8/3/01).</p> <p>Further, Miller and Smith alleges in slide 20 that 32’-wide lots were approved by Wynn Witthans’ signature on the 8-98001D Signature Set, which is listed in Amendment Application Log at Park and Planning as “8-98001BC,” dated 2/11/02. This slide shows a section of a “site plan” which actually appears to be a landscaping plan. It is possible that it might be representative of a builder site plan, but not a standard site plan signature set. Either way, it does not legally alter the approved data table or development standards. Therefore, Miller and Smith is still in violation of the Minimum Lot Width at Building Line requirement.</p> <p>Contrary to the major, unauthorized amendment to lot widths, slides 22-26 depict truly minor amendments (including the addition of windows to a right side elevation of one unit; addition of trees, groundcover and fencing, and use of ribbon driveways). Detailed drawings and approvals are presented for the minor changes, serving only to highlight the fact that the same type of documentation one would expect for a more major change is mysteriously absent.</p>
29-30	Based on the foregoing information, Miller and Smith conclusions are inaccurate.
32-33	Once again, Miller and Smith conclusions are inaccurate. As discussed relative to slides 20-26, Amendment 8-98001D does not include “all” arts and crafts homes, and even if it did, it does not approve changes to lot sizes or setback requirements.

34-35	Once again, Miller and Smith attempts to position in slides 34-35 that the plat approvals for lots 29 and 30 in some way authorized reduction of the lot widths. Although the plat record highlighted in the slide does show reduced lot widths, the development standards were never amended to allow for this and the development is still subject to the approved standards. See Note 1 on the plat.
36-38	This slide does not actually depict lot 15 Block FF, as noted. It actually represents lots 33-35 Block C (as shown in pictures).
45	These lots did not meet minimum development standards for single family home net lot sq. ft. requirements. The 4,000 sq. ft. minimum net lot requirement was never changed in the development standards and is still shown as "4,000 sq. ft." on the binding site plan data tables to date.
48	In this slide, Miller and Smith alleges that a 4' setback is appropriate for SFD home lot 5 block S. As the home is next to a Manor Home (end unit) requiring 30' setback, 4' is appropriate for a SFD, but not on this lot between the SFD and Manor Home.
50	We are unable to find this data table in any approved documents. There is no document, for instance, that approves a 3' side yard for single family homes. The setback for townhomes does not change with this data table, however.
52	The data table Miller and Smith relies upon is a compilation of other data tables. As shown on this slide, it does not exist in public records.
54-55	These slides neatly illustrate the creation of artificial terracing as used throughout our community by Miller and Smith and then used in their claims of reduced height.
58	Any claim of new calculus for height determination in August, 2005 is beside the point; terracing happened after determination of height violations.

**Shiley, Kimberly (NIH/NCI)**

**From:** John Fauerby [johnfauerby@hotmail.com]  
**Sent:** Wednesday, August 18, 2004 10:28 PM  
**To:** Shiley, Kimberly (NIH/NCI)  
**Subject:** CCA Planning Committee Notes on Streetscape Plan 6/6/2002

I've copied and pasted the meeting notes inline. For some reason, it takes too long to create attachments. You may not want to receive attachments anyway. I have also searched my other CCA Planning Meeting notes for Town Center or Streetscape notes and found the following notes may be relevant: 11/29/2001, 12/13/2001, 11/7/2002, 1/23/2003, 2/27/2003, 7/24/2003, and 3/25/2004. I remember that the 6/6/2002 was the first of two or three discussions on the streetscape plan.

Here's the notes from the 6/6/2002 CCA Planning Meeting:

**Minutes from the June 6, 2002 Clarksburg Civic Association Planning Meeting****Presentation of the Draft Clarksburg Street Scape Plan**

Nellie Mascall will be taking over at the Clarksburg Planner from Karen Kumm. Karen Kumm was always the interim Clarksburg Planner. Nellie worked on the Clarksburg Master Plan and claims to be fully familiar with Clarksburg. She will be the primary staff reviewer of future preliminary plans.

Karen Kumm and Wynne Witthans are the authors of the draft street scape plan for Clarksburg. Karen Kumm will continue to work with Wynne until this plan is accepted by the Planning Board. Karen presented the plan at the CCA planning meeting. Wynne is the primary staff reviewer of site plans.

The reason for the street scape presentation was to involve the Clarksburg community. Once this plan is accepted, the developer's site plans must conform to the accepted street scape plan. The street scape plan is a "road map" for planning.

The purpose of the street scape plan is to define the character of the roadways in Clarksburg. This involves defining the roadway widths, the lighting type and placement, tree types and placement, decorations, and the rural/urban character.

This is a draft working document. The Planning staff would like comments from the CCA and the citizens of the Clarksburg area. This is the first preliminary effort to get this plan written. The Planning staff would like to get a final approval from the CCA in the Fall 2002 prior to approval from the Planning Board.

Referring to the street scape plan, Karen specified that the plan only addresses the types of roads shown in black. These are the main through roads. The neighborhood residential roads are not included. John Fauerby requested that sample street scape plans be included for these residential roads.

Karen Kumm went over the street scape objectives. The comprehensive plan shows sample features in limited areas also called treatments. The bolded titles below are the types of treatments addressed by this plan. The plan includes both text and drawings.

I-270:

EXHIBIT A

8/19/04