



MONTGOMERY COUNTY PLANNING BOARD

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Item #

MCPB 1-11-07

MEMORANDUM

DATE: January 8, 2007
TO: Montgomery County Planning Board
VIA: Faroll Hamer, Acting Director

FROM: Development Review Division
Robert A. Kronenberg *RAK*
Rose Krasnow, Chief *RK*
Development Review Division
(301) 495-2187

REVIEW TYPE: Site Plan Review
CASE #: 82003023A
PROJECT NAME: Gateway Commons
APPLYING FOR: Continuance of the Site Plan Amendment 820030230 for minor revisions to the Site Plan

REVIEW BASIS: Div. 59-D-3 of Montgomery County Zoning Ordinance

ZONE: R-200/TDR-7
LOCATION: Southwest quadrant of the intersection of Stringtown Road and MD 355 (Frederick Road)

MASTER PLAN: Clarksburg Master Plan
APPLICANT: Gateway Commons, LLC, c/o U.S. Home Corp.
FILING DATE: March 31, 2006
HEARING DATE: January 11, 2007



The following staff report for the proposed amendment to the Gateway Commons Site Plan is in response to the continuance of the December 14, 2006 Board hearing, at which time the Applicant was asked to address three specific items related to the proposed amendment. The December 8, 2006 and July 7, 2006 staff reports are included as Attachment A for an overview of the site, proposed amendment items and timeline of previous approvals.

A. Introduction

The Planning Board identified potential issues with the proposed Site Plan Amendment that resulted in a continuance of the December 14, 2006 hearing so that the Applicant could address three items: (1) setbacks for the attached units on the northern property line in accordance with the TDR and PD Zone standards; (2) ways to enhance landscaping and pedestrian circulation on Latrobe Lane as a result of Fire and Rescue's request that the median in Latrobe Lane be eliminated; and (3) the effects on design and pedestrian circulation of the short driveways that came about because setback standards were not established as part of the original plan approval.

The Planning Board also discussed the validity of the Site Plan in light of CTCAC claims that the plan was approved without certain development standards and that certain issues pertaining to the gateway, recreation and community gathering space were not addressed during the original Site Plan approval. The Planning Board concluded preliminarily that the lack of development standards in the approved plan could be corrected through the proposed amendment, but wanted further clarification and revisions to the plans related to changes that were proposed in the amendment.

The following is a brief highlight of the previous two hearings for this amendment:

December 14, 2006 Site Plan Hearing

Site Plan Amendment 82003023A was brought back to the Planning Board on December 14, 2006 to address the concerns raised by the Planning Board and members of the community ("CTCAC"). Staff and the Applicant discussed the issues pertaining to the appropriateness of the gateways as well as, the adequacy of the community gathering and recreation spaces, all of which were addressed and resolved during the hearing.

July 20, 2006 Site Plan Hearing

Site Plan Amendment 82003023A was deferred by the Planning Board on July 20, 2006 for modifications to the site plan, including: modifications to the building footprints, as a result of the selection of final architectural elements, clarification of development standards in the data table and plan, site details such as retaining wall and driveway features and revisions to the access points and stormwater management facilities based upon other agency review. Additionally, the site design has remained consistent, with the exception of the specific modifications to the original concept and approval. The changes have resulted in the reduction of 6 units.

The Board action recommended deferral of the proposed amendment in order to investigate the concerns related to the gateway, public gathering spaces, and recreational facilities for teens.

B. ANALYSIS OF ISSUES

The Analysis section of this report focuses on the concerns raised by both the Planning Board and CTCAC during the public hearing and subsequent review and analysis by Staff after the December 14, 2006 public hearing.

The following three items are not inclusive of the entire hearing, but are a summary of the three primary matters that the Planning Board wanted addressed, in order to bring the site plan amendment into conformance. The issues the Planning Board directed the Applicant and Staff to address included:

- 1. Address the zoning ordinance requirement that requires a waiver to allow an attached structure to be built less than 100 feet (but not less than 25 feet) from the common boundary line of the property with the adjoining Clarksburg Elementary School property.**

The planning board and Staff voiced concerns over the provisions of the R-200/TDR Zone, which require compliance with, among other things, the compatibility requirements of the PD Zone. The previous site plan approved one-family attached units closer than 100 feet from the boundary line, approximately 14 feet from the northern property line. The 12 one-over-one units were included in a townhouse-style structure consisting of six buildings. The Montgomery County Zoning Ordinance requires that these units be located at least 100 feet from the northern property line, unless a waiver is obtained to allow them to be placed less than 100 feet from the property line, but no less than 25 feet.

Section 59-C-1.394 (b) of the Montgomery County Zoning Ordinance provides:

For TDR densities of 3 or more per acre, the lot sizes and other development standards will be determined at the time of preliminary plan and site plan for conformance with applicable master plan guidelines and in accordance with the purposes and provisions of the PD Zone, except as may be specified in Section 59-C-1.395.

The “compatibility” requirement (Section 59-C-7.15) provides that all uses must be compatible with the other uses proposed for the planned development and with other uses existing or proposed adjacent to or in the vicinity of the area covered by the proposed planned development:

Section 59-C-1.394 (b) of the Montgomery County Zoning Ordinance provides:

In order to assist in accomplishing compatibility for sites that are not within, or in close proximity to a central business district or transit station development area, the following requirements apply where a planned development zone adjoins land for which the area master plan recommends a one-family detached zone.

- (1) *No building other than a one-family detached residence can be constructed within 100 feet of such adjoining land; and*
- (2) *No building can be constructed to a height greater than its distance from such adjoining land.*

Description of Applicant's Proposal

Following the December 14, 2006 hearing, the Applicant requested a waiver of the compatibility requirements of Section 59-C-7.15(b) of the Zoning Ordinance to allow a proposed attached building (one-over-one) to be within 100 feet of the northern property line, adjacent to the Clarksburg Elementary School. The Applicant requests a waiver to permit the setback line to be reduced from 100 feet to a minimum of 25 feet from the northern boundary. As noted in the attached letter dated December 22, 2006, the Applicant notes that as grounds for the waiver, "the Clarksburg Master Plan recommends the adjoining property, which is improved with the elementary school, for an institutional use and that the property will not be adversely affected by the proposed residential use and that the property will not be adversely affected by the proposed residential development with a minimum setback of 25 feet."

The Applicant has also removed one one-over-one building on the northern property line, reducing the overall density by two one-family attached units. The loss of these two units is necessary so that the minimum 25-foot setback can be achieved. The elimination of these units on the northern property line means that the closest unit will be approximately 36 feet from the property line. In addition to the proposed setback, the proposed landscaping on the northern property line and the requested pedestrian connections to the school ensure that the adjoining property is not adversely affected by the development.

Staff Position and Recommendation

Staff supports the proposed waiver to allow attached units to be built less than 100 feet from the northern property line, in order to fully conform to the zoning requirements of the TDR Zone and compatibility requirements of the PD Zone.

Staff finds that the loss of the two one-over-one units, proposed buffer plantings, increased setback and access to the school adequately address the compatibility requirement of Section 59-C-7.15, which provides that all uses must be compatible with the other uses proposed for the planned development and with other uses existing or proposed adjacent to or in the vicinity of the area covered by the proposed planned development.

2. Address concerns over the median on the northern portion of Latrobe Lane (private) and landscaping in front of the units.

The Planning Board expressed concerns over the lack of a streetscape for the units fronting Latrobe Lane (private) as a result of the elimination of the median required

by Fire and Rescue. The elimination of the median resulted in a wider road section with less landscaping for the units fronting Latrobe Lane.

Description of Applicant's Proposal

Based upon comments from the Planning Board during the December 14, 2006 hearing, the Applicant proposes reducing the total paved area on Latrobe Lane from 36 feet to 24 feet. The proposed amendment sought to eliminate the median along Latrobe Lane (private), which resulted in a significant increase in the amount of paved area and elimination of trees. The reduction of pavement provides additional yard area in front of the units along Latrobe Lane and street tree planting. The landscaping in front of the units compensates for the loss of trees in the previously approved median.

Staff Position and Recommendation

Staff finds that the reduction of pavement coupled with the addition of street trees in front of the units provides a better relationship of the units to the street. Staff recommends approval of the changes to the street and inclusion of street trees to compensate for the loss of trees within the median. The Applicant received approval from the Fire Marshall for the modification to the street on January 3, 2007.

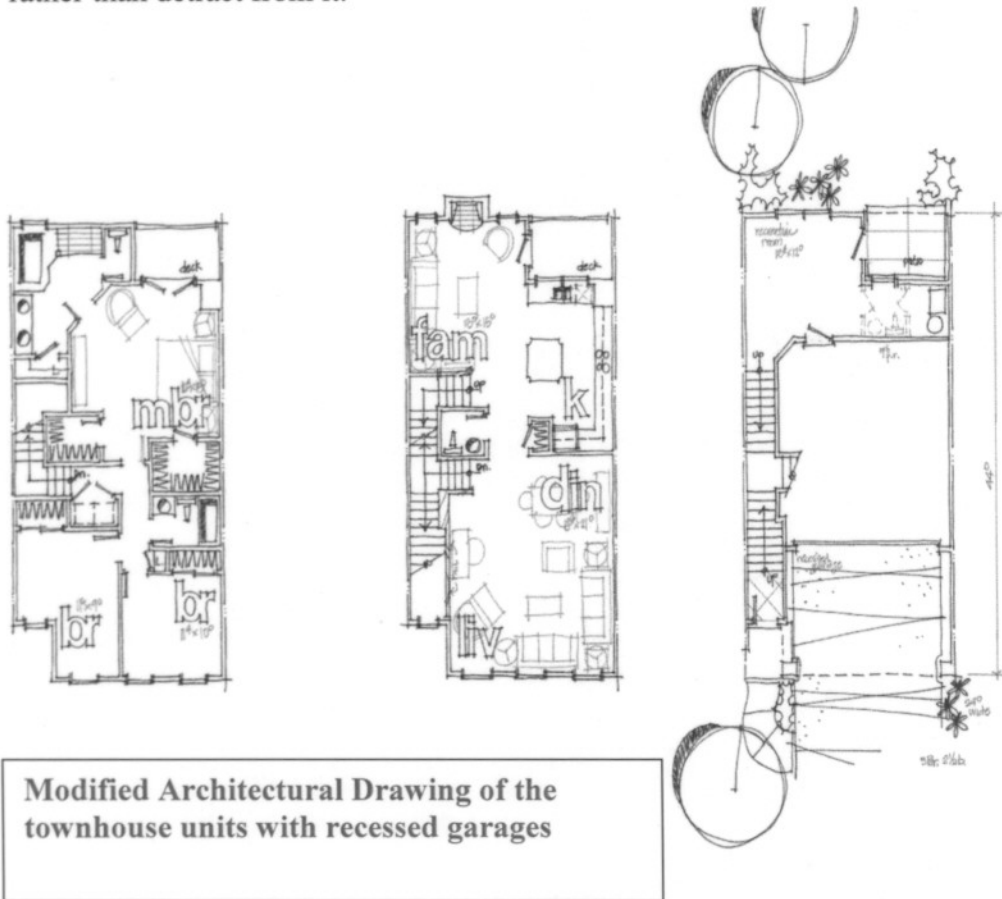
3. Address concerns regarding shallow driveways and pedestrian safety.

Staff and the Planning Board voiced concerns about the short driveways in front of the proposed townhouse units because the lengths, as proposed, would not accommodate the full length of a car, so cars would extend over the sidewalk, impeding adequate, safe and efficient pedestrian circulation. The concerns relate to certain units, which, due to the shallow front setbacks, have truncated driveways. Staff and the Board expressed the concern that residents would park in their driveways, even though the driveways were so short and were not being counted toward the community's parking requirement. In such cases, larger cars would hang out over the sidewalks, making the sidewalks impassible for pedestrians.

Applicant's Position

The Applicant provided a revised site plan proposing lengthened driveways for the townhouses in the development to address pedestrian safety and relationship of units to the street. The Applicant modified the design of the units to recess the garages by 12 feet within the building so that the driveways in front of the garages become longer to accommodate the full length of most vehicles. This modification resulted in the loss of approximately 240 square feet of living space on the first floor (12' x 20'), with only a recreation room and mechanical room remaining behind the garage. The buildings could not be pushed forward due to site constraints, such as the location of public utility easements and grading. The driveways were extended to achieve lengths ranging from approximately 17.75 feet to 27.33 feet (from the sidewalk to the actual garage entrance). These townhouse units lost marketable and livable space as a result of this modification. The longer driveways are still not being credited toward the overall parking requirement for the residential units.

The Applicant believes the recessed garage doors will soften the street appearance rather than detract from it.



Modified Architectural Drawing of the townhouse units with recessed garages

Staff Position and Recommendation

Staff reviewed the amended proposal, and finds that the issue of parked cars obstructing sidewalks has been addressed by recessing the garages. Staff is concerned about the driveways that recess a minimum of 17.75 feet into the unit because this is still too short to meet applicable parking standards (min. 9' x 18'); however, out of the 91 affected units, only 14 are short of the minimum standards and only by 3 inches or less. The units that have driveways less than 18 feet represent 15 percent of the modified units and less than 5 percent of the total number of units. Staff is also concerned about the appearance of the units from the streets and the floor plan and functionality of the first floor of the units, but believes the intent of the Board with respect to life safety issues have been satisfied with the revisions. Cars in the units that have the smaller driveways could still overhang into the sidewalk, but only by a few inches, so the effect on pedestrian circulation would be minimal. Staff recommends implementation of this scenario. Staff also recommends including additional building-mounted lighting to further respond to pedestrian safety. Additionally, staff believes the increased number of parking spaces within the units will help reduce problems caused by the high demand for parking in townhouse communities and will offer more spaces to individuals living in non-garage units.

C. STAFF RECOMMENDATION

Approval of Site Plan amendment 82003023A to reflect minor adjustments to building locations and footprints and removal of the basements of some units; the adjustment of certain grades, the deletion and addition of certain retaining walls; the relocation of a driveway and historical marker in Dowden's Ordinary; modifications to curbs and sidewalks and the deletion of the Latrobe Lane traffic circle and median; the provision of emergency access driveways to private streets; the reduction in the overall number of dwelling units from 292 to 284; clarification of the development standards to reflect the proposed changes and clarify and define items; and for a waiver of the compatibility requirements of Section 59-C-7.15(b) of the Zoning Ordinance to allow a proposed attached building (one-over-one) to be within 25 feet of the northern property line, adjacent to the Clarksburg Elementary School. All site development elements as shown on the Gateway Commons Site Plan Amendment plans stamped by the M-NCPPC on December 22, 2006, shall be required except as modified by the following conditions:

1. Preliminary Plan Conformance

The proposed development shall comply with the conditions of approval for Preliminary Plan #120020480 as listed in the Planning Board opinion dated August 13, 2002.

2. Site Plan Conformance

- a. The proposed development shall comply with the conditions of approval for Site Plan #820030230 as listed in the Planning Board opinion dated November 18, 2003, except as modified by this amendment.
- b. The proposed development shall comply with the previous conditions of approval for Site Plan 82003023A for site design, Dowden's Ordinary Special Park and Historic Preservation, landscaping, lighting, recreation facilities, fire and rescue, Moderately Priced Dwelling Units, Transfer Density Rights, Stormwater Management, Development Program and Certified Site Plan.

D. FINDINGS: For Site Plan Review

The findings section for the proposed amendment 82003023A was presented by Staff during the July 20, 2006 and preceding staff report dated July 8, 2003. The findings for the present report are directed towards the deferral of an amendment with Staff's recommendations on items or elements of the plan that need to be addressed.

The following are findings for Site Plan review:

1. *The Site Plan conforms to all non-illustrative elements of a development plan or diagrammatic plan, and all binding elements of a schematic development plan, certified by the Hearing Examiner under Section 59-D-1.64, or is consistent with an approved project plan for the optional method of development if required, unless the Planning Board expressly modifies any element of the project plan;*

An approved development plan or a project plan is not required for the subject development.

2. *The Site Plan meets all of the requirements of the zone in which it is located.*

The approved site plan (820030020) was deficient in the requirements of the R-200/TDR-7 Zone, with respect to some of the development standards for each zoning category; however, setbacks were established and applied to units adjacent to the public roads. The amendment to the site plan fully addresses and provides the necessary development standards for all of the uses in the zone.

The Applicant requested a waiver of the compatibility requirements of Section 59-C-7.15(b) of the Zoning Ordinance to allow a proposed attached building (one-over-one) to be within 25 feet of the northern property line, adjacent to the Clarksburg Elementary School. The Applicant requests a waiver to permit this setback line to be reduced from 100 feet to a minimum of 25 feet.

The Site Plan meets all of the requirements of the R-200/TDR-7 Zone as demonstrated in the project Data Table submitted with the previous staff report.

3. *The location of the building and structures, the open spaces, the landscaping, recreation facilities, and the pedestrian and vehicular circulation systems are adequate, safe and efficient.*

- a. Buildings and Structures

The varying building types and units are characteristic of many of the new developments in Clarksburg, including Clarksburg Town Center and Clarksburg Village. The blocks create an interactive neighborhood with accommodating open space areas and an interconnecting pedestrian system. The orientation of the front doors of units onto the streets creates a more inviting view from the streets and

more accommodating pedestrian environment. The tighter placement of units is a result of the constraints of the site, including stormwater management, stream valley buffer, extensive road dedications, grades and the historic park dedication. The unit massing and layout is compensated by the additional plantings provided within the open spaces, special pavement, and foundation plantings. The site grading has been adjusted for Stringtown Road to bring the units close to street grade, improving the relationship of the units to the adjacent sidewalk and entry drive to Clarksburg.

The overall unit alignment and design for Gateway Commons did not change significantly with this amendment. Consequently, the number of units was reduced from 292 to 286 based upon external agency comments, and reduced by an additional two units as a result of the comments provided during the December 14, 2006 hearing.

Many of the retaining walls have been deleted based upon final engineering and grading. The series of walls by the Dowden's Ordinary park site will be deleted if the Applicant obtains a grading easement from the adjacent property owners. An optional plan is provided on the site plan sheets if the walls are to be deleted. The walls adjacent to the dead-ends at Shaw Tavern Court, Scholls Manor Way and Roberts Tavern Court have been deleted due to the addition of emergency access roadways and relocation of units. Other smaller walls have been added to adjust to the elevations and grades associated with more precise grading.

The garages in the townhouse units were recessed by 12 feet to address concerns by the Planning Board during the December 14, 2006 hearing for pedestrian circulation and safety.

b. Open Spaces

The open space on site is limited due to the high intensity of development on site as a result of the environmental areas, right-of-way dedication, and park dedication. This heightens the importance of landscaping thus requiring more open space planting to counterbalance the effects of paving and architecture.

The green space requirement for the property is 40 percent of the gross tract area. The original site plan was approved for approximately 58 percent of the gross tract area and the amendment increases the amount of green space by an additional 9 percent up to approximately 67 percent. This increase in green space can be attributed to the loss of units and modifications to the plan, but it should be noted that the amendment includes sidewalks, lead walks, stormwater management facilities as permitted by the zoning ordinance for green space. The reduction of the two units and reduced pavement on Latrobe Lane (private) increases the green space and open space areas within the development.

The open space for the site engages the recreation facilities, seating areas and park area that provides adequate open space area for the community.

c. Landscaping and Lighting

The landscaping was designed to provide structure for the streets, shade for pedestrians and park users, buffers to adjacent homes and attractive entryways. Foundation plantings have been modified to coincide with the design for each unit type and units have been sited so these plantings occur outside the Public Utility Easements. The streetscape follows the patterns and species proposed in the draft Clarksburg streetscape guidelines. Additional plantings were provided to buffer the proposed one-family detached units by Dowden's Ordinary Park to the adjacent parcels if the series of walls is removed. Additionally, the area that separates Dowden's Ordinary and the proposed development will be planted in order to satisfy forest conservation requirements.

The lighting plan the Hadco fixture approved by DPWT for public street use in Clarksburg and the colonial style fixtures in the private street areas and common areas.

The streetscape for the units fronting Latrobe Lane (private) has been revised to eliminate the median strip and reduce the pavement width in order for the units to have street trees along the street. Additionally, the reduction of two one-over-one units on the northern boundary in concert with the proposed buffer planting provides an increased buffer to the adjacent school property.

Staff is recommending additional building-mounted lights on the face of the townhouse units to address pedestrian safety and visibility.

d. Recreation

Recreation demand is in conformance with the minimum requirements of the M-NCPPC Recreation Guidelines as demonstrated with the site plan amendment application. The tabulations were revised to correctly reflect the number and category of units. The total demand points were reduced due to the loss of units while the supply points remained the same.

Recreation facilities include 6 sitting areas, 2 tot lots, 1 play lot and 1 multiage play facility, natural areas and trails as well as an open space play area within the historic site. The multi-age play facility within the Dowden's Ordinary site is additional to the overall recreation calculations and not included in the supply.

e. Vehicular and Pedestrian Circulation

As amended, vehicular and pedestrian circulation is safe, adequate and efficient.

The street connections to the site are in accordance with the approved Preliminary Plan, and the layout provides an interconnecting system of sidewalks and bike paths. The road network through the site is permitted by the County and complete, with the exception of a portion of Stringtown Road.

The pedestrian paths complement the public sidewalks and bike paths to create a well integrated pedestrian system; however, the internal pedestrian system is in conflict with an urban environment for access to public roads by narrow driveways that tend to obstruct connectivity. The emphasis within the site is placed on the garages with less importance given to the pedestrian circulation. The Applicant attempted to highlight pedestrian circulation by providing paver walkways, which are different material from driveway and public sidewalks. The staircase and various connections provided to the future M-NCPPC Park and the path connection to the school to the north will further connect the future residents with nearby recreation opportunities.

Accessibility by the Fire Marshall during the permit review process resulted in additional connections to the public roads and to the private streets. The additional emergency access roadways resulted in the loss of 6 units. Additionally, the review by the Fire Marshall resulted in modifications to turning radii and appropriate turnaround on dead-end streets.

Based upon comments from the Planning Board during the December 14, 2006 hearing, the Applicant eliminated the median on Latrobe Lane (private) and reduced the total paved area from 36 feet to 24 feet. The reduction of pavement permitted street planting in front of the units along Latrobe Lane.

4. *Each structure and use is compatible with other uses and other Site Plans and with existing and proposed adjacent development.*

The proposed residential development is compatible with adjacent residential development because of the provision of setbacks and landscaped buffers and gradation in density. The development was envisioned to place higher density multi-family units along Observation Drive (transit alignment), with less dense unit types and smaller massing (two-over-two and one-over-one) as development moves away from the major public roads. The one-family detached units are located on the eastern perimeter to serve as a comparable use to the adjacent existing one-family homes that front onto MD 355.

The Applicant requested a waiver of the compatibility requirements of Section 59-C-7.15(b) of the Zoning Ordinance to allow a proposed attached building (one-over-one) to be within 25 feet of the northern property line, adjacent to the Clarksburg Elementary School. The Applicant requests a waiver to permit this setback line to be reduced from 100 feet to a minimum of 25 feet. The evergreen and mixed landscape buffers provided adjacent to housing and the public school will provide for a buffering of views of the new development and the maintenance of the views within the project.

The activity associated with the proposed residential will not cause any negative effect on the adjacent industrial park and residential uses. The property will not be adversely affected by the proposed residential use and that the property will not be adversely affected by the proposed residential development with a minimum setback of 25 feet.

5. *The Site Plan meets all applicable requirements of Chapter 22A regarding forest conservation, Chapter 19 regarding water resource protection, and any other applicable law.*

The applicant is proposing an optional method of development for this site. Under Section 22A-12(f) of the Montgomery County code, developments using an optional method of development must meet the appropriate forest conservation threshold on-site. Environmental Planning compared the forest conservation threshold with the amount of forest retained on-site and determined that the amount of forest retained is greater than the amount necessary to meet the minimum threshold. Therefore, the final forest conservation plan submitted for this site meets the requirements for Section 22A-12(f) of the Montgomery County code.

The site is located within the Little Seneca Creek and Ten Mile Creek watersheds, which are both designated as Use IV-P waterways. The majority of the site drains to the Little Seneca Creek watershed. The natural resource inventory delineated the onsite environmental buffers. The entire site is within the Clarksburg Special Protection area. The Applicant has built the stormwater management facilities in accordance with the Special Protection Area regulations. MCDPS approved the SWM and Sediment and Erosion Control Plan on October 14, 2004. MCDPS has also reconfirmed the approval based upon the proposed amendment on March 24, 2006.

The Applicant has already removed 12 acres of forest consistent with the approval of the final Forest Conservation Plan. The total planting requirement for the forest conservation plan is 11.4 acres. Onsite forest retention, onsite forest plantings and landscaping credit, and planting off-site shall meet the forest conservation requirements. Off-site reforestation must occur in the Clarksburg SPA. A five-year maintenance period is required for all forest planting per the environmental guidelines.

The Final FCP and approved Final Water Quality Plans and stormwater management plans meet the site performance goals, site impervious goals and overall guidelines of the Clarksburg Special Protection Area.

ATTACHMENTS

- A. Previous Staff Reports (July 20, 2006 and December 14, 2006 hearings)
- B. Waiver Request from Applicant dated December 22, 2006
- C. Letter from Applicant dated December 22, 2006
- D. Letter on behalf of CTCAC dated December 19, 2006

ATTACHMENT A

Item #
MCPB 12-14-06

MEMORANDUM

DATE: December 1, 2006
TO: Montgomery County Planning Board
VIA: Rose G. Krasnow, Chief
Development Review Division
FROM: Faroll Hamer
Acting Director, Planning Department



REVIEW TYPE: Site Plan Review
CASE #: **82003023A**
PROJECT NAME: **Gateway Commons**
APPLYING FOR: Amendment to Site Plan 820030230 to reflect 1) minor adjustments to building locations and footprints and removal of the basements of some units; 2) the adjustment of certain grades, 3) the deletion and addition of certain retaining walls; 4) the relocation of a driveway and historical marker in Dowden's Ordinary; 5) modifications to curbs and sidewalks and the deletion of the Latrobe Lane traffic circle and median; 6) the provision of emergency access driveways to private streets; 7) the reduction in the overall number of dwelling units from 292 to 286 and 8) the clarification of the development notes and tables to reflect the proposed changes and clarify and define items.
REVIEW BASIS: Div. 59-D-3 of Montgomery County Zoning Ordinance
ZONE: R-200/TDR-7
LOCATION: Southwest quadrant of the intersection of Stringtown Road and MD 355 (Frederick Road)
MASTER PLAN: Clarksburg Master Plan
APPLICANT: Gateway Commons, LLC, c/o U.S. Home Corp.
FILING DATE: March 31, 2006
HEARING DATE: December 14, 2006

A. Introduction

The Site Plan amendment for Gateway Commons was heard by the Planning Board at its July 20, 2006 meeting, specifically to address limited changes to an already approved plan. The Staff Report presented to the Board at the July 20 hearing recommended approval of the proposed amendment with certain conditions. At the hearing, the Clarksburg Town Center Advisory Committee ("CTCAC") and certain Board members raised concerns about certain design issues, in light of which the Applicant requested that the Board defer taking action on the proposed amendment. The Board requested that the Applicant, prior to returning to the Board, investigate the concerns that had been raised related to the gateway, public gathering spaces, and recreational facilities for teens. Since the July 20 hearing, Staff has extensively reviewed the plan and identified additional design issues. Further, Staff has sought, through meetings with the Applicant and representatives of CTCAC, to identify solutions to potential problems with the approved Site Plan. Staff proposed to the Applicant that certain changes be made to the Site Plan that would help to address the design issues without causing wholesale change to the plan. The Applicant did not agree with the recommendations by Staff but did offer minor changes to the architecture and changes to the tot lot located in Dowden's Ordinary. Meanwhile, CTCAC has raised further concerns that it claims call into question the validity of the Site Plan approval.

This case is somewhat unusual in that issues related to an approved Site Plan have been raised in the context of a proposed amendment to that approved Site Plan. Staff maintains the position that it took in its July 20, 2006 report to the Board, that, based upon a narrow review, the proposed amendment, in and of itself, could be approved, subject to the conditions outlined in the Staff Report, namely the inclusion of a complete set of development standards which was missing from the original approval. However, Staff understands that the Board may wish to address the concerns that have been raised with respect to the underlying plan in some manner. Therefore, Staff will address, as part of this report, the full range of issues that have been raised by the Board, Staff and CTCAC with respect to the underlying approved Site Plan.

B. Background

Site Description

The proposed development spans the intersection of new Observation Drive, the extension of Stringtown Road and new alignment of MD Route 355 (Frederick Road). Stringtown Road forms the northwestern boundary of the site. The site is northeast of the Gateway Industrial Parkway and the industrial office park. Northeast of the site are existing homes and lots in the R-200 zone. The adjacent lots are 180 feet deep and have over 125 foot rear yards. Immediately north of the site is the Clarksburg Elementary School and the Clarksburg Historic District within the perimeter of the town.

The Highlands of Clarksburg community is located directly opposite MD 355. The northeast corner of the site contains Dowden's Ordinary, a pre-revolutionary war historic

tavern site. The site was dedicated to M-NCPPC for use a specialty park and preservation site for archeological artifacts.

The property has been completely cleared and graded within the parameters of the forest conservation plan and sediment and erosion control plan. All of the roads and associated



facilities, both public and private are constructed. Additionally, all of the sediment control facilities have been installed consistent with the Clarksburg SPA (Special Protection Area) standards and guidelines.

Prior Approvals

Preliminary Plan

Preliminary Plan 120020480 for this site was approved on July 25, 2002 by the Planning Board for a total of 292 dwelling units, including 44 MPDUs and 128 TDRs.

Preliminary Plan Amendment

Preliminary Plan Amendment #12002048A was approved by the Board on August 4, 2005.

Preliminary Plan Extension

A request to extend the validity period for the Preliminary Plan 120020480 for the site was approved on September 29, 2005 by the Planning Board.

Site Plan

Site Plan 820030230 was approved on July 24, 2003 (Opinion mailed November 18, 2003) for 27 one-family detached, 93 townhouses, 88 multi-family, and 84 attached units, inclusive of 44 MPDUs and 128 TDRs on 45.24 acres.

Site Plan issues were extensive during the original review and approval of this project. The bulk of the issues were generated from attempting to achieve the Master Planned densities on a site that had several significant constraints, including special protection area storm water management treatment that increased the SWM facility size; new forest conservation legislation that increased the tree preservation areas on site; the presence of two major roads and one minor road intersecting at the center of the site; the park

dedication and developing an appropriate entry into Clarksburg given the topographical constraints. All of these issues were dealt with in the approval of the original site plan.

C. The Current Amendment

Site Plan 82003023A was first brought to the Board on July 20, 2006. This amendment was initiated by the Applicant to address architectural, engineering and construction changes, as well as changes requested by county agencies.

Analysis of the Proposed Amendment

As explained above, the proposed amendment specifically addresses modifications to the building footprints, as a result of the selection of final architectural elements, , site details such as retaining wall and driveway features and revisions to the access points, stormwater management facilities based upon other agency review, and completion and clarification of development standards. Additionally, the site design has remained consistent, with the exception of the specific modifications to the original concept and approval. The changes have resulted in reduction of 6 units.

The project provides a variety and mix of unit types as prescribed in the Clarksburg Master Plan and the provision of the future transit alignment for the implementation of the Corridor City Transitway. The unit arrangement and orientation to the streets has not changed with this proposed amendment.

The Applicant is dedicating the northeastern-most portion of the site to M-NCPPC because it contains the Dowden's Ordinary site, a tavern in operation during revolutionary era. The site is perched on a hill that keeps it removed from the rest of the development but connected by a long staircase, and bounded by Stringtown Road and MD 355. A portion of the forestation requirements and two open space play areas will be located on the Dowden's Ordinary site. The development of the park is undergoing review by the M-NCPPC Parks staff and Historic Preservation Staff to create a blend of historic and park opportunities. The proposed park will be directly accessible by foot or bicycle and a 10-foot-wide grasscrete driveway from Stringtown Road. The Applicant continues to work with the Parks Department, through the permit process, toward the ultimate construction and preservation of the special park.

The following narrative identifies the requested change to the approved plan followed by a point-by-point response of why the change occurred, who initiated the change and the recommendation by staff:

1. Minor adjustments to building locations and footprints and removal of the basements of some units.

The Applicant has modified the design of the one-family detached and multi-family units. The new architectural plans include the revisions to first floor elevations of some of the unit types, which in turn necessitated modifications to the site such as lead walks, driveway slopes and lot grading.

The unit revisions accurately reflect the builders' architectural prototypes. The lots have all been recorded and the pad sites for all of the units have been rough graded.

2. Adjustment of certain grades

Proposed grades associated with the units have changed due to final engineering and selection of models appropriate for the selected lots. Driveway grades have also been changed to reflect architectural considerations and final engineering. All of the private and public roadways have been constructed in conformance with the site plan, except as modified by the requirements by the Fire Marshall, and in conformance with Montgomery County standards for road construction.

The Applicant is also requesting a change to the grades in the area of the adjacent parcels (N414, Lot 8, part of Lot 7 and N452, lot 1-Hammermill) southeast of the proposed Dowden's Ordinary Park, but only if the adjacent property owners grant a grading easement on their properties in return for sewer service. Subsequently, the grading will need to be modified in the rear of proposed one-family lots 1-5 that back up to the adjacent lots previously referenced.

Staff recommends approval of the changes to the grading in the specified areas to accommodate final engineering and elimination of retaining walls on the adjacent parcels, only if an easement is granted by the owners of the parcels. If the owners do not grant easements to the Applicant, the original site plan remains valid.

3. Deletion and addition of certain retaining walls

As mentioned in the previous request for amendment, the Applicant is also requesting a change to the grades in the area of the adjacent parcels (N414, Lot 8, part of Lot 7 and N452, lot 1-Hammermill) southeast of the proposed Dowden's Ordinary Park, only if the adjacent property owners grant a grading easement on their property in return for sewer service. The grading would eliminate the series of retaining walls in the rear of the adjacent properties and proposed one-family lots 1-5 that back up to the adjacent parcels previously referenced.

The Applicant is also requesting minor changes to the site plan to add 2-foot-tall retaining walls for the lead walk adjacent to townhouse unit 3385 due to re-siting of the block of units further from the road to accommodate setbacks from the street. A series of additional retaining walls are proposed in front of the units (8-13, Block 5) due to more accurate architecture presented by the Applicant. The retaining walls along the MD 355 property frontage in the location of the Dowden's Ordinary site and adjacent parcel N414, Lot 8 have been removed due to final grading and road design plans for the widening of MD 355. Additional retaining walls have been deleted in the areas of the proposed emergency access roadways and the areas in between townhouse units where the final grading has been adjusted.

Staff recommends approval of the changes to the grading in the specified areas to accommodate final engineering and elimination of retaining walls on the adjacent parcels, only if the owners of the parcels grant an easement. If the owners do not grant easements to the Applicant, the original site plan remains valid.

4. The relocation of a driveway and historical marker in Dowden's Ordinary

The original site plan included a dedication of the Dowden's Ordinary Park (Gateway Commons Special Park) and initial design that included a number of recreational and historic amenities, such as seating walls, interpretive panels and art elements. The historical marker was initially shown on the site plan along the frontage of MD 355 and listed as Braddock Monument #1915. At the request of our Parks Department through the park permit process, the Applicant agreed to change the location of the proposed monument to move it near the front of the existing Dowden's Ordinary, a pre-revolutionary war historic tavern site.

A 10-foot-wide grasscrete driveway from Stringtown Road was also requested by our Parks Department through the park permit process. A vehicular entrance to the park site did not previously exist. The apron will be constructed in accordance with Montgomery County standards as noted on the site plan amendment.

The Applicant was conditioned to provide numerous amenities and facilities on the subject park site. Condition 4 (e) specifically allows the *"final design of the park site, including facilities and plantings therein, to be coordinated with M-NCPPC staff and to be acceptable to staff and the Applicant"*.

Staff recommends approval of this request because the Applicant is still required to satisfy the above noted condition and original site plan conditions. Furthermore, the Applicant is required to continue processing the park permit to satisfy the original conditions of approval.

5. Modifications to curbs and sidewalks and the deletion of the Latrobe Lane traffic circle and median

Modifications to the curbs and sidewalks were necessary as a result of the reduction to the units, which were necessitated by the inclusion of the emergency access roadways from Stringtown Road and Latrobe Lane. Dual 3-foot-wide lead-walks from the two-over-two units have been consolidated into a single 8-foot-wide lead-walk. In addition to the changes predicated by the Fire Marshall, the Applicant has made changes to the sidewalks to the units due to architectural revisions to the builder's models being proposed with the application.

The deletion of the Latrobe Lane traffic circle and median is a result of a requirement by the Fire Marshall to maintain a 20-foot-wide emergency access roadway to the proposed units. The initial median design included two 13-foot-wide travel lanes separated by a 6-foot-wide landscaped median. The amendment would eliminate the median and provide for full pavement within the road section. The traffic circle was also required to be eliminated because of the width of the travel lanes.

Staff recommends that the plans be modified to reflect as-built conditions based upon requirements by the Fire Marshall.

6. Provision of emergency access driveways to private streets.

During the permit review, the Fire Marshall required changes to the private streets for turning radii, road termini and road widths, as well as providing emergency access to the private streets.

The Fire Marshall comments during the review of the construction permits required emergency access to Shaws Tavern Court from Stringtown Road and emergency access to Scholl Manor Way and Roberts Tavern Court from Latrobe Lane. The emergency roadway access consists of a 20-foot-wide connection that incorporates grasscrete pavers to prevent a dead-end condition to the private courts. The Fire Marshall also requires the elimination of the median and traffic circle in private Latrobe Lane from Observation Drive to Scholl Manor Way to provide a wider paved area.

The curb and gutter, which includes the turning radii for most of the private driveways, including Roberts Tavern Drive and Court, Scholl Manor Way and Shaws Tavern Court, has been widened in many locations and/or removed and replaced with mountable curb to satisfy requirements by the Fire Marshall.

Staff recommends that the Fire Marshall modify the plans to reflect as-built conditions based upon requirements.

7. Reduction in the overall number of dwelling units from 292 to 286.

The Applicant reduced the overall number of dwelling units by a total of six units, from 292 to 286, primarily due to the requirements by the Fire Marshall for emergency access to Shaws Tavern Court from Stringtown Road and access to Scholl Manor Way and Roberts Tavern Court from Latrobe Lane. The reduction of the one-over-one units on Shaws Tavern Court resulted in the elimination of a stick of two buildings that housed a total of four units and shifted the remaining two buildings in the stick further to the northern property line.

Two additional emergency access points were provided from Latrobe Lane to Scholl Manor Way and Roberts Tavern Court that caused the elimination of two

townhouses. Originally, the stick of units consisted of seven townhouses in a single row; however, the amended condition breaks up the stick into groupings of two units and four units separated by the emergency access. This results in additional green space between the groups of townhouses into the private court areas.

The reduction of the one-over-one units eliminated three surface parking spaces, changed the lead walk locations of the units to remain directly onto Stringtown Road, and created a separate lead walk from the adjacent two-over-two units to Observation Drive. The reduction in the townhouse units resulted in the loss of garage parking spaces and changes to the lead walk conditions to Latrobe Lane.

Staff views the changes as mandatory as a result of the failure by the Fire Marshall to adequately review the original plans during the mandated review period and believes the loss of units adequately addresses the concerns.

The change in unit numbers has been correctly revised in the data table, development charts, green space computations and the recreation tabulations to be consistent with the total number of units.

8. Clarification of the development notes and tables to reflect the proposed changes and clarify and define items.

The original site plan did not adequately address the development standards for each use, specifically maximum building heights and clarification of setbacks for many of the units on the private streets. The Applicant provided building elevations in the original submittal and for the amendment to depict the style and configuration of the units. The original staff report does provide copies of two of the architectural elevations in the Proposal section of the staff report (pages 14-16) with a height notation of 45 feet for the units fronting Stringtown Road. This elevation was submitted to provide a contextual relation of the units to the street and to stress the visual aspects as residents enter the site. Setbacks were established for the primary public roads, including MD 355, Observation Drive, Stringtown Road, Roberts Tavern Drive, Woodport Road and Latrobe Lane. The units that front onto the private streets and courts have not been identified with specific setbacks. The setbacks would have been "as depicted or graphically shown on the approved site plan". It should be noted that none of the units are constructed and permits have not been issued. Therefore it may be possible to cure the deficiencies through the amendment process.

The neighboring site plans, such as Clarksburg Village and Greenway Village that incorporated R-200/TDR standards with a PD underlying standard, have been studied for consistency. What does this sentence mean??

The following table shows the maximum height limitations proposed for this project and the corresponding site plans that also did not include specific development standards:

Unit Type	Gateway Commons Amendment 82003023A	Clarksburg Village Amendment 82003003A	Greenway Village Amendment 82003
One-family detached	35 feet	35 feet	35 feet
Townhouse (one-family attached)	35 feet	35 feet	35 feet
One-over-one (one-family attached)	35 feet	35 feet	35 feet
Two-over-two (multi-family)	45 feet	45 feet	45 feet
Multi-family	45 feet	55 feet	55 feet

All of the lots on the site plan amendment have been modified to clearly identify setbacks and building restriction lines for the one-family detached lots and townhouses with lots, and building envelopes for the multi-family and attached units.

Staff has placed a condition in the report to incorporate the revised data table and development standards. (The complete set of Development Standards proposed has been included as Attachment F)

D. ANALYSIS OF ISSUES RAISED AT THE HEARING

During the Planning Board's July 20, 2006 hearing, the issues raised centered on community gathering spaces, recreation for teens, the fact that this development served as a gateway to the entire Clarksburg community, and the fact that the original approval lacked a complete set of development standards. CTCAC asserted that the entire site plan was invalid and should be substantially revised.

Chairman Berlage provided the following summary:

“ . . . I do not believe that the community gathering space, the open space is well designed or in the right location, I would agree that the amenity standards, recreational amenity standards have certainly been met but when I look at the site plan I don't see the kind of central

gathering space that a community, that I would like to see in a community. I am also very concerned about the absence of any real attention to the gateway issue, this is the gateway to Clarksburg, and I believe that needs to be addressed, and those are my two biggest concerns.”

Commissioner Wellington added:

“I said the community gathering point, the recreation for older kids, and I had also thought the gateway feature is significant.”

Chairman Berlage went on to say:

“I do believe the original site plan remains valid, however the fact that it’s still valid doesn’t change the fact that there were missing from that original approval heights and setbacks, and so the Board’s deliberation of that original site plan was almost by definition not as fine tuned as perhaps it should have been, and I believe it should have been, and the requirements of the Fire Marshall since then have further compromised the design of the project, and I am not persuaded at this point by preponderance of the evidence that this proposal is one that is adequate to meet the Board’s responsibilities in the site plan review process. I am not in favor of a wholesale revision of the entire plan, I am not talking about tossing out dozens of units, I am like the staff, extraordinarily skeptical of indoor meeting space that has no clear operator, but I do not believe that this plan is quite ready yet, and my preference would be that it be sent back for additional work.”

In addition, when CTCAC was asked to identify its key issues, Kim Shiley summarized them as “civic, recreational and the deletion of the front-loaded garages.”

In light of these comments, Staff has looked further into each of these issues.

1. Concerns over the “gateway” nature of this development as part of the overall Clarksburg community

As people come off of I-270, the first thing they will see will be the existing Gateway Office Park and Gateway Commons will be the first residential community observed from Stringtown Road. Therefore, the question arises of whether the development will adequately perform the role of a gateway that, by virtue of its location, it will inevitably play. This question is of special significance with respect to the units fronting Stringtown Road and the architectural treatment of the gateway signs and entrances.

The Applicant's Proposal

The site plan depicts a large masonry entry wall as the primary visual element as you approach the site from I-270 along Stringtown Road. A gated trellis feature is designed for the next intersection with Stringtown Road and Observation Drive. The site feature is absent at the northeast corner because the Applicant does not control that land. The original staff report (Attachment E) describes the entry features as follows: "Entry features are designed along the Stringtown Road frontage intersections. They include brick walls, an arch to walk under and decorative planting areas".

CTCAC Position

CTCAC is concerned because an individual's first perception of Clarksburg is likely to be formed by the image presented by Gateway Commons. Therefore, they argue that the design, unit type and mix, and architecture will be viewed as a prelude to the town center and other Clarksburg developments. They feel that changes are necessary to the units that front on Stringtown Road, to the stormwater management facilities that are visible from Stringtown, and to the gateway features themselves, because they are suburban in nature, refer only to Gateway Commons, and fail to provide a welcome to the greater Clarksburg community.

Staff Position

There are two gateway issues. One is the gateway sign, and the other is the appearance of the units along Stringtown Road.

While the Site Plan does provide a gateway element, the design is typical of a massive suburban subdivision monument sign and neither represents nor appropriately defines the character of the overall community of Clarksburg.

If the Planning Board wished to improve the character of the gateway features, a condition could be crafted that would require the applicant to redesign the main gateway at the western corner of the site with an appropriately historic village character using design elements that reflect the historic and unique character of Dowden's Ordinary and historic Clarksburg. The sign could include "welcome to Clarksburg" language. The other gateways could repeat the same design vocabulary on a smaller scale. An additional gateway feature could be provided on the east side of Stringtown Road.

The 2 over 2 units along Stringtown Road will be the first residential units visible to drivers entering the Clarksburg community from I-270, and as such they should rely on Traditional Neighborhood Design with the maximum level of compatibility and attractiveness. Although ownership is condominium-style, they should appear to be single-family attached homes that might be found in a village, with differences in massing and color and a high degree of variation in architectural detail, to appear as if they were built over time. They should appear to have individual front yards to create an appropriate public/private transition and streetscape design, expressed through front porches, stoops, and picket fences or hedges. An excellent example of this can

be seen in Falls Grove, where condominiums front directly onto the main street and have been successfully designed to appear to have small front yards defined by hedges and brick lead walks. These design elements create the streetscape that is an essential element of the new urbanist design approach, discussed further below. If the Board wished to improve the appearance of the units along Stringtown Road, a condition could be crafted that would require changes such as those described above.

2. Concerns over inadequate recreation facilities, specifically for teens in the general area.

The Planning Board expressed concerns over the proposed recreation facilities and the ability for these facilities to satisfy the overall needs of the broader community. Staff noted during the hearing that the recreation facilities provided within the development more than satisfy the demand requirements set forth in the Recreation Guidelines. Although off-site credit was given for ball fields at the adjacent school, this credit is not needed for this development. Staff noted this during the hearing, stating that the Applicant was “taking credit for the school, for the facilities on the school, for the soccer field”, but “they didn’t need to, they shouldn’t have” because “they stand alone with their recreational requirements”.

Description of Applicant’s Position

The Applicant argues that they are providing recreational facilities that conform to the M-NCPPC Recreation Guidelines in terms of activities, location and applicable standards. The site plan includes 6 sitting areas integrated into the site, specifically in the play areas and gathering spaces, 2 tot lots, 1 play lot and 1 multiage play facility, open space play areas and natural areas and trails. The multi-age play area provided in Dowden’s Ordinary is in addition to the provided facilities and was not included in the overall recreation calculations. The facilities are dispersed within the development, centrally located within each of the three development pods and appropriately targeted for the various age groups.

CTCAC Position

CTCAC does not believe that the recreation facilities provided within the development are appropriate for all age groups, specifically teens. The open play areas in Dowden’s Ordinary are too far removed from the central development and separated by a grade difference not amenable to many families.

Staff Position

Given the size of the community, and the many recreational facilities available at nearby schools and parks, staff believes that it is not necessary for specific teen activities, such as tennis courts, basketball courts, or ball fields to be provided within Gateway Commons itself. The development is contributing to open play areas in the Dowden’s Ordinary Special Park and paths and seating areas that can be used by teens. Moreover, active recreational amenities are located within adjacent developments and local and regional park facilities, such as the Town Center, Kings Local Park, Ovid Hazen Park, Black Hill Regional Park, and Little Bennett Park,

respectively. It should be noted that Dowden's Ordinary is a ("Special Park") historic and archeological resource draw specific users for local gathering and historic events that befit the history of the park, and activated by recreational elements, in a broader sense, to provide opportunities for various age groups, and to keep the park from becoming a hangout.

3. Concerns over the areas dedicated toward community gathering space for the development.

CTCAC representatives voiced concerns about inadequate area being dedicated to community gathering space, because there is no pool, clubhouse, or other meeting facility. The pros and cons of enclosed gathering spaces were discussed during the hearing, but no conclusion was reached.

Applicant's Position

The site plan proposes gathering spaces that attempt to address the concerns regarding the locations and types of community features and spaces.

CTCAC Position

CTCAC expressed the need for more enclosed spaces that would provide meeting areas for adults.

Staff Position

There are two trellised gathering spaces, a major one with a fountain, plaza and multi-age lot at the wooded edge of the project, and a minor one behind the houses at the Latrobe Court entrance, also with an adjacent tot lot. The major gathering space consists of approximately 12,000 square feet, and is separated from most units by streets, and from one stick of townhouses by a 50-foot landscaped area. The smaller gathering space consists of approximately 7,000 square feet. It is extremely close to the units – approximately 20 feet from the rears of the units, and the edge of the tot lot is 15 feet from the rears of the units. There is no clear demarcation between the "public" space and the dwelling units. This could lead to a potential conflict between users and owners, and in all likelihood would be little used, as it would be perceived as private space or a yard if the units had yards. The community gathering space adjacent to the wooded area is attractively designed and will be well-used.

If the Board wanted to improve the gathering space at the Latrobe Court entrance, a condition could be crafted that would require a larger space, more distance between the gathering space/tot lot and the units. In order to create a more compatible and attractive entrance to the site, the gathering space could be placed in front of the units so as to be visible at the site entrance. In addition, the units flanking the gathering space could be pulled further apart to create more room, and could be re-oriented so that the garage is entered from Bluebird Terrace. The current orientation creates a massive garage streetscape at the entrance. This recommendation may result in the loss of a few units and parking spaces. .

Additional Hearing Issues

Other concerns discussed during the hearing but not specifically cited by the Planning Board for further review included parking for Dowden's Ordinary Special Park, the lack of certain development standards, review of the architecture and streetscape to ensure compatibility and attractiveness, and the validity of the site and preliminary plans.

Lack of certain development standards

At the hearing, considerable discussion ensued regarding whether the lack of a complete set of development standards rendered the underlying plan invalid. The site is zoned R-200/TDR-7 which requires that certain development standards be established as part of the site plan process. Setbacks were identified for all of the units adjacent to the four public roads in the development; however, specific setbacks for side, rear and fronts for the private streets were not established. Building locations were shown, but these setbacks were not dimensioned on the plan or shown in a table.

The Applicant provided building elevations in the original submittal and for the amendment to depict the style and configuration of the units. The '03 staff report provides copies of two of the architectural elevations in the Proposal section of the staff report (pages 14-16) with a height notation of 45 feet for the units fronting Stringtown Road. This elevation was submitted to provide a contextual relation of the units to the street and to stress the visual aspects as residents enter the site. Setbacks were established for the primary public roads, including MD 355, Observation Drive, Stringtown Road, Roberts Tavern Drive, Woodport Road and Latrobe Lane. The units that front onto the private streets and courts have not been identified with specific setbacks.

Applicant's Position

The drawings submitted as part of the approved signature set showed the location of all units. Thus the setbacks would have been "as depicted or graphically shown on the approved site plan." Moreover, although height standards were not officially set at the time of approval, elevations of various units were viewed by the Board and the height of all the units proposed is very much in keeping with the heights found in nearby communities. The applicant has included a complete set of development standards as part of the amendment to "cure" any deficiencies in the previously approved plan.

CTCAC's Position

CTCAC believes that the lack of standards renders the originally approved plan invalid and that the Board cannot approve an amendment to an invalid plan. CTCAC also made it clear that, in their opinion, the prior approval was not in compliance with the Master Plan.

Staff's Position

The lack of standards has been a problem encountered with several projects reviewed recently as a part of the Site Plan Audit. Staff has consistently recommended that the lack of standards be viewed as a deficiency, not as a violation. Staff believes that

approval of a full set of standards as set forth in the proposed amendment could be viewed as correcting this deficiency, particularly since none of the units have been constructed nor have any building permits been issued by the respective agencies.

Dowden's Ordinary Special Park

When this development was originally laid out, houses were proposed for the area that is now identified as Dowden's Ordinary Park. However, the Parks Department quickly weighed in, stressing the historical importance of this piece of ground. Therefore, the applicant agreed to donate the land, consisting of 2.84 acres, to MNCPPC. At the hearing, issues were raised regarding the lack of parking for this historical park, the steep grades that would make access difficult for the handicapped, for mothers with strollers, or for those on bicycles. There was also confusion as to why a tot-lot was being provided, if the Parks Department perceived Dowden's Ordinary as a "special" park that was designed to be used differently from other, more people-oriented parks.

Applicant's Position

Throughout the entire approval process, the applicant had striven to meet whatever requests the Parks Department put forth. The applicant agreed to dedicate the land and to construct or provide numerous improvements, including a "ghost structure" of the historic Dowden's Ordinary, an entrance feature and park identification sign, trails, benches, bike racks, trees and play areas. If the Parks Department no longer wants a tot-lot, the applicant will be happy not to provide it.

CTCAC Position

CTCAC voiced great concern about the complete lack of parking, even for the handicapped. Furthermore, they pointed out that the lack of parking means it will be more of a neighborhood park, but there is not way to reach it from the neighborhood except to hike up a 30 foot incline.

Staff Position

The park is accessible to the handicapped, if one enters from Stringtown Road. The Parks Department was well aware of the lack of parking but deemed this to be acceptable, given that Dowden's Ordinary is an active archeological site, or "special" park, and not a traditional neighborhood park. The reason Parks recommended the placement of a play structure in the special park was to produce just enough traffic to prevent the site from becoming a hangout for those engaged in unwelcome activities.

Streetscape and Architecture

At this time, it appears that the Planning Board did not have all of the necessary information before it at the time of the original site plan approval. In addition to a lack of information about height and setback standards, it did not adequately review the details of the layout. The units along Stringtown Road and Observation Drive face the major arterials. Actually, their backs are to the arterials, but the backs are designed to look like fronts. This arrangement will provide an

attractive view for drivers along the arterials, but it creates problems with the interior of the site.

All of the units interior to the site have front-loaded garages. Interior sidewalks are obstructed by driveways, and all of the interior streetscapes are dominated by garages which are very close together. In some cases, there is no front door accessible from the interior street, and in other cases the front door is obscured by the garage. Garages are so closely spaced, and there is so little room for cars to park in front of the garages, that there will be numerous cars parked over the sidewalk, completely obstructing pedestrians.

The lack of attention to this issue may be attributable in part to the lack of setbacks provided in the original site plan. There was no discussion in the staff report or in the transcript concerning this issue. We know very well, however, that people frequently park their cars in front of their garage, whether parallel or perpendicular. Many of the front yard setbacks from the private interior streets are about 4 feet from the building line, or 9 to 10 feet from the face of the curb. In addition to providing an unattractive appearance, the cars will block pedestrians from using the sidewalks.

New Urbanist design places a strong emphasis on the importance of the streetscape. The idea is to have the buildings along a residential street create a wall, or sense of enclosure, enlivened by street trees, sidewalks, small lawns with fences, porches, front doors, and windows. This is necessary to make walking desirable. (As is a lack of obstruction.) This is necessary to create the sense of community, and the social interaction that is the primary goal of the New Urbanism. This is what makes density a good thing, and it is the trade-off or exchange for creating high-density small-lot subdivisions. The buildings are generally close together or joined, and parking is in the rear, accessed by an alley, either in a freestanding garage or underneath the unit. The houses are designed with great attention to detail, are architecturally distinct (as opposed to repetition of a few models) and housing types (such as single family detached and townhouses) are frequently interspersed, rather than grouped into large blocks.

The original site plan staff report focused on the density, and the fact that the density called for in the master plan was constrained by environmental regulations, the need for major roads through the site, and the dedication of Dowden's Ordinary Park. However, it is also very clear from the master plan that developments in Clarksburg are intended to follow Traditional Neighborhood Design guidelines, and to be shaped by the principles of New Urbanism. While the Clarksburg Master Plan does not address architecture specifically, it does include numerous references to TND-type and New Urbanist development. It notes the importance of an interconnected streets system as typically found in older towns, the need to place buildings near the street with the parking behind, and the need for strong pedestrian orientation. This is not just a site plan issue. The layout of the roads and units was approved as part of the subdivision, where conformance to the master plan is a required finding.

It is not possible to go back and redesign the architecture for Gateway Commons with rear-loaded garages without completely changing the layout of the roads and buildings. The rears of the buildings are often 18 feet apart. This does not allow for an alley or rear-loaded opportunity to be created now without major revision to the subdivision

E. Issues Regarding Validity Raised by CTCAC After the Hearing

CTCAC met with staff on November 6, 2006 and raised a number of questions about the validity of the Preliminary Plan, Site Plan and Record Plat approvals with respect to the appropriate timeline of approval documents. They followed up on this conversation with a letter and a more complete list of issues and questions dated November 19, 2006 (Attachment H). Staff has spent a great deal of time investigating these allegations and finds that, for the most part, they do not appear to be well-founded. This analysis is presented below.

1. CTCAC alleges that post approval documents were not completed in the proper order.

Preliminary Plan

120020480	Approved	7/18/02
	Opinion Mailed	8/13/02
	Plan Signed	9/12/02

Site Plan

820030230	Approved	7/24/03
	Opinion Mailed	11/18/03
	Plan Signed	8/10/04
	SPEA Signed	8/31/04

Preliminary Plan Amendment

12002048A	Approved	8/04/05
	Opinion Mailed	2/09/06
	Plan Signed	Not Necessary

Preliminary Plan Extension

12002048A	Approved	9/29/05
	Opinion Mailed	Extension Approvals are not mailed
	Plan Signed	Not Necessary

Site Plan Amendment

82003023A	Deferred	7/20/06
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Response: In light of the above, staff finds that the SPEA was signed three weeks after the Signature Set was signed. This does not follow proper procedure. All other documents appear to be in order.

2. CTCAC alleged that the record plats were not recorded before the Expiration Date of the Preliminary Plan.

Record Plats for Gateway Commons

	<u>Recorded</u>	<u>Submitted</u> <u>(entry in Hansen)</u>	<u>Signed by</u> <u>MNCPPC</u>
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220042800(Plat 624-101)	1/27/05	6-16-04	6-24-04
220040440(Plat 624-106)	2/10/05	9-10-03	9-11-03
220040580(Plat 625-10)	4/10/05	9-25-03	10-2-03
220042770(Plat 625-115)	9/12/05	6-16-04	6-24-04
220042780(Plat 625-116)	9/12/05	6-16-04	6-24-04
220042790(Plat 626-4)	10/12/05	6-16-04	6-24-04

Response: The validity period for the original Preliminary Plan expired on September 13, 2005. However, in a timely manner, the applicant sought an extension that was approved by the Board on September 29, 2005. The extended the validity period until March 13, 2006. As shown above, all plats were recorded prior to the March date.

3. Preliminary Plan Details

I. Condition (2) a. ...”The applicant is satisfying policy area review by paying the DAP under the FY 02 Annual Growth Policy staging ceiling capacity.

Condition (2) b “A traffic study (to analyze the traffic impact at nearby intersections is required”...

CTCAC Issues & Questions

Did this occur? We would like to see the records of the DAP payment and the traffic impact study.

Response: Records of the DAP (Development Approval Process) are not available due to the fact that DAP payments are paid upon the issuance of a building permit. Building permits have not been issued for this development.

A traffic study was prepared by Wells and Associates, LLC on February 21, 2002 and accepted by our Transportation Planning department a few weeks later. The memorandum from M-NCPPC Transportation Planning dated July 10, 2002 approves the study and the entire LATR review for the subject site.

II. Condition (5) “For the first 200 building permits as a condition of site access, construct the outside lanes of MD 355 by-pass through the property as a two-lane arterial road including a five foot sidewalk, an eight foot bike path, street trees, and grading for a future four-lane divided roadway.”

CTCAC Issues and Questions:

To the best of our knowledge, this condition has not been met.

Response: Condition No. 5 was revised as part of the Preliminary Plan Amendment 12002048A to permit termination of the on-site portion of the By-Pass roadway a distance of 45 feet from the eastern property line (measured from the centerline of the roadway), as the off-site portion of the By-Pass is presently not planned for construction.

Staff advised the Board that such a termination is necessary to provide a logical terminus to the roadway.

III. Condition (6) “Prior to issuance of the 201st building permit, but not later than eighteen (18) months after approval of the Preliminary Plan, obtain two (2) appraisals of the fair market value of the right-of-way for the By-Pass (“ROW”) and make a cash offer to the owners of this ROW of up to 110 percent of the highest appraised value (“maximum cost”) via certified letter.”

CTCAC Issues and Questions:

To fulfill condition #6, by the required date of (18) months after approval of the Preliminary Plan (February 13, 2004), the two appraisals and cash offer, via certified mail had to have been made. If the letters were not sent to the owners of the property by this date, then the applicant did not comply with Condition #6. If the applicant did not notify the County of a negative response from the owners of the property, then the applicant did not comply with Condition #6.

Response: Condition #6 was deleted pursuant to the preliminary plan amendment 12002048A, which removed the Applicant’s obligation to construct the off-site portion of the By-Pass. It appeared that the second part of Condition #6 had previously been satisfied, as noted in the letter dated July 27, 2005 from Barbara Sears (Linowes & Blocher) to Shahriar Etemadi (M-NCPPC-Transportation). The letter includes acknowledgements of letters indicating the attempt to acquire the right-of-way from the affected property owners, and a certified return receipt, signed and dated by the property owners on or about February 17 and 18, 2004. Two separate appraisal reports were prepared for each of the affected properties, as required in condition #6. The appraisals for 23110 Frederick Road (property owned by Leo E. & F. Stone) were prepared on January 12, 2004 by Philip R. Lamb & Co., Inc. and Reality Valuation & Engineering, Inc. on January 31, 2004. The appraisals for 23024 Frederick Road (property owned by Hal E. McCord, Jr.) were prepared on January 28, 2004 by Real Property Consultants, Inc. and on January 12, 2004 by Philip R. Lamb & Co., Inc. The appraisals for Parcels N780 and N888 Frederick Road (property owned by Sang Y & B.N Choi) were prepared on January 28, 2004 by Real Property Consultants, Inc. and Reality Valuation & Engineering, Inc. on January 31, 2004. The appraisals for 23100 Frederick Road (property owned by Ms. Jacqueline R. Chesser Trust) were prepared on January 12, 2004 by Philip R. Lamb & Co., Inc. and Reality Valuation & Engineering, Inc. on January 31, 2004. The postmark date inscribed on the certified return receipts is February 11, 2004.

IV. Condition (8) “At the time of site plan address issues of transition and compatibility of height of units along Stringtown Road with existing and proposed development to create the “gateway” to the Town Center. Maintain 25-foot building setbacks along Stringtown Road and 20 feet along Observation Drive to achieve an appropriate “gateway” transition from I-270 into Clarksburg’s Town Center. ...to better implement street oriented development as per Master Plan recommendations.”

CTCAC Issues and Questions:

MEMORANDUM

DATE: July 7, 2006
 TO: Montgomery County Planning Board
 Rose Krasnow, Chief
 Michael Ma, Supervisor
 Development Review Division
 FROM: Robert A. Kronenberg
 Development Review Division
 (301) 495-2187



REVIEW TYPE: Site Plan Review
 CASE #: 82003023A
 PROJECT NAME: Gateway Commons
 APPLYING FOR: Approval of amendment to Site Plan 820030230 to 1) reflect minor adjustments to building locations and footprints and removal of the basements of some units; 2) the adjustment of certain grades, 3) the deletion and addition of certain retaining walls; 4) the relocation of a driveway and historical marker in Dowden's Ordinary; 5) modifications to curbs and sidewalks and the deletion of the Latrobe Lane traffic circle and median; 6) the provision of emergency access driveways to private streets; 7) the reduction in the overall number of dwelling units from 292 to 286 and 8) the clarification of the development notes and tables to reflect the proposed changes and clarify and define items.

REVIEW BASIS: Div. 59-D-3 of Montgomery County Zoning Ordinance

ZONE: R-200/TDR-7
 LOCATION: Southwest quadrant of the intersection of Stringtown Road and MD 355 (Frederick Road)
 MASTER PLAN: Clarksburg Master Plan
 APPLICANT: Gateway Commons, LLC, c/o U.S. Home Corp.
 FILING DATE: March 31, 2006
 HEARING DATE: July 20, 2006

STAFF RECOMMENDATION: Approval of Site Plan amendment 82003023A to reflect minor adjustments to building locations and footprints and removal of the basements of some units; the adjustment of certain grades, the deletion and addition of certain retaining walls; the

windows, porch with overhead roof frame/support posts, and an outline doorframe entrance. M-NCPPC Park Development Staff shall approve final architectural design. Three interpretive panels shall be provided with photos and wording selected and approved by M-NCPPC historic preservation staff; panels shall be located at a) the Dowden's Ordinary original tavern structure site, b) the Dowden's Ordinary ghost structure site, and c) the cannon replica site. *[This modified condition replaces condition 4(b) 1 from site plan 820030230].*

- c. Applicant to construct on dedicated park property the following amenities: Appropriate sculptural recreational pieces or other recreational amenities to serve the park, historic and neighborhood needs in the play area shall be acceptable to M-NCPPC staff and Applicant. The pieces may be historic in nature and be compatible with the history surrounding the Dowden's Ordinary. A 3 lb. metal cannon replica and companion metal carriage, as approved by M-NCPPC staff, shall be provided adjacent the main pathway (securely anchored according to cannon manufacturer specifications) and shall include a secure welded stack of cannon balls which shall be placed in the park with coordinating interpretive signage as an amenity. An interpretive sign (including historic photos and text) shall be located at the cannon replica site. *[This modified condition replaces condition 4(b) 7 from site plan 820030230].*
- d. Applicant to construct on dedicated park property the following amenities: A bike rack shall be located near the park entrance off Route 355 which shall consist of four (4) cannon carriage wheels (secured or direct buried into pavement) to compliment the historic cannon carriage and blend with the historic site context. The cannon wheel bike rack shall include small signage that states "bike rack use". Bike rack design to be approved by M-NCPPC staff. *[This modified condition replaces condition 4(b) 8 from site plan 820030230]*
- e. Applicant to construct on dedicated park property the following amenities: Native trees consistent with the Dowden's Ordinary historic period shall be used in selected locations throughout the park site. Final choice of tree locations and species to be determined in coordination with M-NCPPC staff and acceptable to staff and the applicant. Existing trees and shrubs along the property line shall be selectively cleared along with exotic and invasive species as determined by M-NCPPC staff. New plant material shall be provided to define park boundary edges along the proposed historic fence line. *[This modified condition replaces condition 4(b) 10 from site plan 820030230]*
- f. Grading of the park site to result in slopes of no greater than 3:1 unless necessary to avoid grading on or near any locations that M-NCPPC staff determines may contain archeological artifacts. Staff to advise applicant of any grading restrictions in park site based on archeological artifacts within 90 days of the site plan approval. All 3:1 slope areas along Frederick Road (355) and Stringtown Road shall be sodded as well as the high activity area adjacent the playground area. Final sod limits to be determined by M-NCPPC staff.

6. Lighting
 - a. Provide a lighting distribution and photometric plan with summary report and tabulations to conform to IESNA standards for residential development.
 - b. All light fixtures shall be full cut-off fixtures or able to be equipped with shields, refractors or reflectors.
 - c. Deflectors shall be installed on all fixtures causing potential glare or excess illumination, especially on the perimeter fixtures abutting the adjacent residential properties.
 - d. Illumination levels shall not exceed 0.5 footcandles (fc) at any property line abutting adjacent residential properties.
 - e. The height of the light poles shall not exceed 16 feet including the mounting base.
7. Recreation Facilities

Revise the Recreation calculations to be consistent with the total number and mix of units.
8. Fire and Rescue

The Applicant shall comply with the memorandum of approval from the Fire Marshall dated March 1, 2006 [Appendix C].
9. Moderately Priced Dwelling Units (MPDUs)
 - a. The Applicant shall provide 43 Moderately Priced Dwelling Units (12.5% of the total number of units) within the building, consistent with Chapter 25A.
 - b. The MPDU agreement shall be executed prior to the release of the first building permit.
 - c. If all of the required MPDUs are not provided on-site, a Site Plan amendment application shall be filed by the applicant and approved by the Planning Board prior to issuance of any building permit.
10. Transferable Density Rights (TDRs)

Prior to issuance of any building permit, the applicant shall provide verification of the availability of the required 128 transferable development rights (TDRs) for the proposed development.
11. Stormwater Management (SWM)

The proposed development is subject to Final SWM and Sediment Control Plans approved on October 14, 2004 and reconfirmation of the Stormwater Management Concept dated March 24, 2006 [Appendix C], unless amended and approved by the Department of Permitting Services (DPS).
12. Development Program

Applicant shall construct the proposed development in accordance with the Development Program and Site Plan Enforcement Agreement. The Development Program and Site Plan Enforcement Agreement shall be reviewed and approved by M-NCPPC staff prior to approval of the certified site plan. The Development Program and revised Site Plan Enforcement Agreement shall include a phasing schedule as follows:

 - a. Recreation facilities on the east side of Observation Drive, shall be completed prior to issuance of building permits for the 112th unit based upon the units on the east side of Observation Drive.
 - b. Recreation facilities on the west side of Observation Drive, shall be completed prior to issuance of building permits for the 89th unit, based upon the units on the west side of Observation Drive.

Summary of the Proposed Amendment to the Original Site Plan

The original site plan application (820030220) was approved by the Planning Board on July 24, 2003 for Gateway Commons for a total of 292 dwellings including 27 one-family detached units and 93 townhouses, 88 multi-family units and 84 attached units, inclusive of 44 MPDUs and 128 TDRs on 45.24 acres. An opinion was issued on November 18, 2003. The signature set was approved on August 10, 2004.

Site Plan issues were extensive during the original review and approval of this project. The bulk of the issues were generated from attempting to achieve the Master Planned densities on a site that had several significant constraints, including special protection area storm water management treatment that increased the SWM facility size; new forest conservation legislation that increased the tree preservation areas on site; the presence of two major roads and one minor road intersecting at the center of the site; the park dedication and developing an appropriate entry into Clarksburg given the topographical constraints. All of these issues were resolved with the approval of the original site plan.

The majority of the site is under construction, including the public roads and their associated bike paths, the private roads and courts, parking areas, utility connections and stormwater management facilities. Permits for the buildings have not been signed off by M-NCPPC nor have they been issued by the Montgomery County Department of Permitting Services.

The subject "A" amendment to Gateway Commons was initiated by the Applicant to address architectural, engineering and construction changes, as well as changes requested by county agencies.

The following narrative identifies the requested change to the approved plan followed by a point-by-point response of why the change occurred, who initiated the change and the recommendation by staff:

1. Minor adjustments to building locations and footprints and removal of the basements of some units.

The Applicant has modified the design of the one-family detached and multi-family units. The new architectural plans include the revisions to first floor elevations of some of the unit types, which in turn necessitated modifications to the site such as lead walks, driveway slopes and lot grading.

Many of the unit revisions accurately reflect the builders' architectural prototypes. The lots have all been recorded and the pad sites for all of the units have been rough graded.

2. Adjustment of certain grades

Proposed grades associated with the units have changed due to final engineering and selection of models appropriate for the selected lots. The lot grading shown on the amended plans is intended for the construction and drainage of the specific lot only.

4. The relocation of a driveway and historical marker in Dowden's Ordinary

The original site plan included a dedication of the Dowden's Ordinary Park (Gateway Commons Special Park) and initial design that included a number of recreational and historic amenities, such as seating walls, interpretive panels and art elements. The historical marker was initially shown on the site plan along the frontage of MD 355 and listed as Braddock Monument #1915. At the request of our Parks Department through the park permit process, the Applicant agreed to change the location of the proposed monument to move it near the front of the existing Dowden's Ordinary, a pre-revolutionary war historic tavern site.

A 10-foot-wide grasscrete driveway from Stringtown Road was also requested by our Parks Department through the park permit process. A vehicular entrance to the park site did not previously exist. The apron will be constructed in accordance with Montgomery County standards as noted on the site plan amendment.

The Applicant was conditioned to provide numerous amenities and facilities on the subject park site. Condition 4 (e) specifically allows the *"final design of the park site, including facilities and plantings therein, to be coordinated with M-NCPPC staff and to be acceptable to staff and the Applicant"*.

Staff recommends approval of this request because the Applicant is still required to satisfy the above noted condition and original site plan conditions. Furthermore, the Applicant is required to continue processing the park permit to satisfy the original conditions of approval.

5. Modifications to curbs and sidewalks and the deletion of the Latrobe Lane traffic circle and median

Modifications to the curbs and sidewalks were necessary as a result of the reduction to the units, which were necessitated by the inclusion of the emergency access roadways from Stringtown Road and Latrobe Lane. Dual 3-foot-wide lead-walks from the two-over-two units have been consolidated into a single 8-foot-wide lead-walk. In addition to the changes predicated by the Fire Marshall, the Applicant has made changes to the sidewalks to the units due to architectural revisions to the builder's models being proposed with the application.

The deletion of the Latrobe Lane traffic circle and median is a result of a requirement by the Fire Marshall to maintain a 20-foot-wide emergency access roadway to the proposed units. The initial median design included two 13-foot-wide travel lanes separated by a 6-foot-wide landscaped median. The amendment would eliminate the median and provide for full pavement within the road section. The traffic circle was also required to be eliminated because of the width of the travel lanes.

Staff recommends that the plans be modified to reflect as-built conditions based upon requirements by the Fire Marshall.

Staff views the changes as mandatory as a result of the failure by the Fire Marshall to adequately review the original plans during the mandated review period and believes the loss of units adequately addresses the concerns.

The change in unit numbers has been correctly revised in the data table, development charts, green space computations and the recreation tabulations to be consistent with the total number of units.

8. Clarification of the development notes and tables to reflect the proposed changes and clarify and define items.

The original site plan did not adequately address the development standards for each use, specifically maximum building heights and clarification of setbacks for many of the units on the private streets. Setbacks were established for the primary public roads, including MD 355, Observation Drive, Stringtown Road, Roberts Tavern Drive, Woodport Road and Latrobe Lane. The units that front onto the private streets and courts have not been identified with specific setbacks. The setbacks would have been "as depicted or graphically shown on the approved site plan". Staff does not believe this is a violation because none of the units are constructed and permits have not been issued by the respective agencies.

The Site Plan deficiencies have been clarified with the proposed amendment. The neighboring site plans such as Clarksburg Village and Greenway Village that incorporated R-200/TDR standards with a PD underlying standard, have been studied for consistency.

The following table shows the maximum height limitations proposed for this project and the corresponding site plans that also did not include specific development standards:

Unit Type	Gateway Commons Amendment 82003023A	Clarksburg Village Amendment 82003003A	Greenway Village Amendment 82003
One-family detached	35 feet	35 feet	35 feet
Townhouse (one-family attached)	35 feet	35 feet	35 feet
One-over-one (one-family attached)	35 feet	35 feet	35 feet
Two-over-two (multi-family)	45 feet	45 feet	45 feet
Multi-family	45 feet	55 feet	55 feet

PROJECT DESCRIPTION: Site Vicinity and Description

The proposed development spans the intersection of new Observation Drive, the extension of Stringtown Road and new alignment of MD Route 355 (Frederick Road). Stringtown Road forms the northwestern boundary of the site.



The site is northeast of the Gateway Industrial Parkway and the industrial office park. Northeast of the site are existing homes and lots in the R-zone. The lots are over 180 feet deep and have over 125 foot rear yards. Immediately north of the site is the Clarksburg

Elementary School and the Clarksburg Historic District within the perimeter of the town.

The Highlands of Clarksburg community is located directly opposite MD 355. The northeast corner of the site contains Dowden's Ordinary, a pre-revolutionary war historic tavern site. The site was dedicated to M-NCPPC for use as a specialty park and preservation site for archeological artifacts.

The property has been completely cleared and graded within the parameters of the forest conservation plan and sediment and erosion control plan. All of the roads and associated facilities, both public and private, have been constructed.



Additionally, all of the sediment control facilities have been installed consistent with the Clarksburg SPA standards and guidelines.

PROJECT DESCRIPTION: Prior Approvals

Preliminary Plan

Preliminary Plan 120020480 for the site was approved on July 25, 2002 by the Planning Board for a total of 292 dwelling units, including 44 MPDUs and 128 TDRs.

Site Plan

Site Plan 820030230 was approved on July 24, 2004 (Opinion mailed November 18, 2003) for 27 one-family detached, 93 townhouses, 88 multi-family, and 84 attached units, inclusive of 44 MPDUs and 128 TDRs on 45.24 acres.

ANALYSIS: Conformance to Development Standards

PROJECT DATA TABLE

R-200/TDR 7 - utilizing PD Standards per Section 59-C-1.394(b) and as determined at Site Plan approval.

R-200/TDR-7 Development Standards				
Zoning Ordinance Development Standards	Permitted/Required	Approved with Site Plan 8200030230	Proposed with Site Plan Amendment 82003023A	Change
Gross Site Area (ac):		45.2463	45.2463	No Change
Less dedication of Roads with 100' or greater right-of-way		10.700	10.700	No Change
Less Floodplain		0.00	0.00	No Change
Net Site Area:		34.5463	34.5463	No Change
Density Tabulations:				
Max. Density with MPDU density bonus:	295 dwelling units (8.54 du/ac x 34.5147 ac.)	295 dwelling units (8.54 du/ac.x 34.5147 ac.)	294 dwelling units (8.54 du/ac x 34.5147 ac.)	(1 dwelling unit)
Proposed Units		292 dwelling units	286 dwelling units	(6 dwelling units)
MPDU Calculations	45	44	43	(1 MPDU)

Townhouse (one-family attached)	Not Specified	Not Specified		
One over One (one-family attached)	Not Specified	Not Specified		
One-family detached	Not Specified	Not Specified		
Two over two multi-family	Not Specified	Not Specified		
Rear yard setbacks (ft.):				
Townhouse (one-family attached)	Not Specified	Not Specified		
One over One (one-family attached)	Not Specified	Not Specified		
One-family detached	Not Specified	Not Specified	20	
Two over two multi-family	Not Specified	Not Specified		
Setbacks for accessory buildings for the one-family detached units (ft.):				
From public street right-of-way	Not Specified	Not Specified	20	
From rear lot line	Not Specified	Not Specified	2	
From side lot line	Not Specified	Not Specified	2	
Max. Building Height (ft.):				
Townhouse (one-family attached)	Not Specified	Not Specified	35	
One over One (one-family attached)	Not Specified	Not Specified	35	
One-family detached	Not Specified	Not Specified	35	
Two over two multi-family	Not Specified	Not Specified	45	
Accessory building for the one-family detached units	Not Specified	Not Specified	25	
Min. Green Area (%/sf.):	40% of Gross Site Area (788,371 sf)	58.4% of Gross Site Area (1,150,761 sf)	67.3% of Gross Site Area (1,326,173 sf)	+8.9% of Gross Site Area (175,412 sf)

RECREATION CALCULATIONS:

	Tots	Children	Teens	Adults	Seniors
Demand Points					
28 SFD III	3.78	5.13	6.21	34.29	3.51
171 Townhouse	29.07	37.62	30.78	220.59	11.97
88 Multi-family	9.68	12.32	10.56	103.84	14.08
TOTAL DEMAND	42.53	55.07	47.55	358.72	29.56
Supply Points					
<u>On-Site Facilities:</u>					
Tot Lot (2)	18	4	0	8	2
Multi-age area (1)	9	11	3	7	1
Pedestrian System (1)	4.88	12.68	10.79	169.25	9.95
Natural Area (1)	0	3.17	5.4	37.61	1.11
Nature Trail (1)	2.44	6.34	8.09	56.42	3.32
Play Lot (1)	0	9	3	4	1
Sitting Areas	6	6	9	30	12
Open Play Area I (2)	12	18	24	60	4
On-Site Total	52.32	70.19	63.28	372.28	34.38
<u>Off-Site Facilities @ 35% Credit:</u>					
@ Elementary school	17.08	22.19	18.87	131.64	7.74
TOTAL SUPPLY	69.40	92.38	82.15	503.92	42.12

1. MD 355 should be reclassified from a major through fare to an arterial street (maximum four lanes with a planted median).
2. An alternative north-south thoroughfare (Observation Drive) is recommended to help accommodate anticipated traffic.
3. MD 355 (Frederick Road) should be renamed Old Frederick Road.

The proposed site plan achieves this by providing the Bypass through the subject property.

Provide housing at designated areas along the transitway near significant employment uses.

The proposed site plan cannot provide the Master Plan recommended density (up to 7 units per acre) due to environmental requirements to satisfy the Forest Conservation Law and to meet the Special Protection Areas guidelines. This plan represents an example of competing requirements that result in less than desirable density at a transit location.

Establish strong pedestrian and bicycle linkages to the greenway.

The proposed site plan incorporates the Master Plan's recommended bikeways into the cross sections of Stringtown Road and Observation Drive. Both roadways provide connections to the Greenway Park system and to transit stations.

Improve east-west roadway connections.

One of the transportation challenges in this area is how to improve east-west access. While MD 355, Observation Drive, and Midcounty Arterial (A-305) will facilitate north/south movements through the area, east-west access is more difficult to provide because of environmental constraints (tributaries of Little Seneca Creek in particular) and existing development patterns.

The proposed plan improves east-west connections by dedicating the right-of-way for Stringtown Road.

Encourage an interconnected street system as typically found in older towns.

It is essential that the character of the roadway network is supportive of the Master Plan's vision for the Town Center. The guideline below will help assure that streets and highways are built in a manner that is compatible with land use and urban design objectives for the Town Center.

Because the arterials of Stringtown Road and Clarksburg Road serve as entrance to the Town Center, extensive landscaping, including medians, bikeways, and bus transit access facilities, must be provided.

Staff also recommends a 25-foot setback along Stringtown Road and 20 feet along Observation Drive to achieve this Master Plan objective. This recommendation is based on the King Farm

FINDINGS: For Site Plan Review

1. *The Site Plan conforms to all non-illustrative elements of a development plan or diagrammatic plan, and all binding elements of a schematic development plan, certified by the Hearing Examiner under Section 59-D-1.64, or is consistent with an approved project plan for the optional method of development if required, unless the Planning Board expressly modifies any element of the project plan;*

An approved development plan or a project plan is not required for the subject development.

2. *The Site Plan meets all of the requirements of the zone in which it is located.*

The approved site plan (820030020) was deficient in the requirements of the R-200/TDR-7 Zone, with respect to development standards for each zoning category. The amendment to the site plan fully addresses and provides the necessary development standards for all of the uses in the zone.

The Site Plan meets all of the requirements of the R-200/TDR-7 Zone as demonstrated in the project Data Table on page 12.

3. *The location of the building and structures, the open spaces, the landscaping, recreation facilities, and the pedestrian and vehicular circulation systems are adequate, safe and efficient.*

- a. Buildings and Structures

The neo-traditional form that is characteristic of many of the new developments in Clarksburg, including Clarksburg Town Center and Clarksburg Village. The blocks create an interactive neighborhood with accommodating open space areas and an interconnecting pedestrian system. The orientation of the front doors of units onto the streets creates a more inviting view from the streets and more accommodating pedestrian environment. The tighter placement of units is a result of the constraints of the site, including stormwater management, stream valley buffer, extensive road dedications, grades and the historic park dedication. The unit massing and layout is compensated by the additional plantings provided within the open spaces, special pavement, and foundation plantings. The site grading has been adjusted for Stringtown Road to bring the units close to street grade, improving the relationship of the units to the adjacent sidewalk and entry drive to Clarksburg.

The overall unit alignment and design for Gateway Commons did not change significantly with this amendment. Consequently, the number of units was reduced based upon external agency comments.

Many of the retaining walls have been deleted based upon final engineering and grading. The series of walls by the Dowden's Ordinary park site will be deleted if

Recreation facilities still include sitting areas, tot lot multiage play facilities and within the historic site, open space play areas and natural areas and trails.

e. Vehicular and Pedestrian Circulation

As amended, vehicular and pedestrian circulation is safe, adequate and efficient.

The street connections to the site are in accordance with the approved Preliminary Plan, and the layout provides an interconnecting system of sidewalks and bike paths. The road network through the site is permitted by the County and complete, with the exception of a portion of Stringtown Road.

The pedestrian paths complement the public street walks and bike paths to create a well integrated pedestrian system. The staircase and various connections provided to the future M-NCPPC Park and the path connection to the school to the north will further connect the future residents with nearby recreation opportunities.

Accessibility by the Fire Marshall during the permit review process resulted in additional connections to the public roads and to the private streets. The additional emergency access roadways resulted in the loss of 6 units. Additionally, the review by the Fire Marshall resulted in modifications to turning radii and appropriate turnaround on dead-end streets.

4. Each structure and use is compatible with other uses and other Site Plans and with existing and proposed adjacent development.

The proposed residential development is compatible with adjacent residential development because of the provision of setbacks and landscaped buffers and gradation in density.

The evergreen and mixed landscape buffers provided adjacent to housing and the public school will provide for a buffering of views of the new development and the maintenance of the views within the project.

The activity associated with the proposed residential will not cause any negative effect on the adjacent industrial park and residential uses.

5. *The Site Plan meets all applicable requirements of Chapter 22A regarding forest conservation, Chapter 19 regarding water resource protection, and any other applicable law.*

The applicant is proposing an optional method of development for this site. Under Section 22A-12(f) of the Montgomery County code, developments using an optional method of development must meet the appropriate forest conservation threshold on-site. Environmental Planning compared the forest conservation threshold with the amount of

ATTACHMENT B

LINOWES |
AND | BLOCHER LLP
ATTORNEYS AT LAW

December 22, 2006

Barbara A. Sears
301.961.5157
bsears@linowes-law.com

Mr. Royce Hanson
Chairman, and Members of the
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910-3760

BY HAND

Re: Gateway Commons; Site Plan Amendment No. 82003023A
(the "Site Plan Amendment")

Dear Chairman Hanson and Members of the Board:

On behalf of Gateway Commons LLC ("Applicant"), the purpose of this letter is to request a waiver of the compatibility requirements of Section 59-C-7.15(b) of the Zoning Ordinance to allow a proposed attached building (one-over-one) to be within 25 feet of the northern property line of the subject property, adjacent to the Clarksburg Elementary School. Section 59-C-1.394(c) of the Zoning Ordinance permits the Board to waive the compatibility requirements of Section 59-C-7.15(b) upon a finding that:

"1) the immediate adjoining property is recommended for institutional use on the approved and adopted master plan or sector plan; and 2) the immediately adjoining property will not be adversely affected by the waiver for present or future use. Under the waiver, the Board may not permit any building other than a one-family detached residence to be constructed within 25 feet of the adjoining land for which the area master plan recommends a one-family detached zone."

As discussed at the December 14, 2006 hearing on the Amended Site Plan, the site plan before the Planning Board showed an attached building within the 100 feet, and one building containing two units within 25 feet of this property line. The abutting property is owned by Montgomery County and is improved with the Clarksburg Elementary School. Although

Mr. Royce Hanson and Members
of the Montgomery County Planning Board
December 22, 2006
Page 2

recommended by the Clarksburg Master Plan for institutional use, this property is zoned and designated in the Master Plan for a one-family detached zone. The Board has, therefore, determined that Section 59-C-7.15(b) is applicable and Applicant's Amended Site Plan does not conform to this setback requirement. In response, Applicant has removed one one-over-one building, or two units, to provide a minimum 25-foot setback from the northern property line. This reduces the proposed density of the Amended Site Plan by two units, or two from 286 total units to 284 total units. Applicant requests a waiver to permit this setback line to be reduced from 100 feet to a minimum of 25 feet. As grounds for this waiver, Applicant notes that the Clarksburg Master Plan recommends the adjoining property, which is improved with the elementary school, for an institutional use and that the property will not be adversely affected by the proposed residential development which would be set back a minimum of 25 feet.

Specifically, Applicant calls the Board's attention to Condition 7 of the Approved Site Plan, added by Staff at the original July 24, 2003 hearing on the site plan. We note that this Condition was added with the consultation of the Montgomery County Public Schools ("MCPS") to ensure the coordination and compatibility of the proposed residential development with the elementary school. Condition 7 reads as follows:

- "A. Applicant to provide a five-foot wide concrete pedestrian sidewalk connection to Clarksburg Elementary School in a location to be determined by staff with Montgomery County Public Schools.
- B. Along the common property line with the school, Applicant to install six-foot high chain link fencing (black vinyl coated) and adequate landscape buffing."

Thus, MCPS participated in the hearing procedure as evidenced by their letters of record and the Planning Board responded through accommodating their request for a pedestrian connection, landscaping and fencing. As clearly demonstrated from the aerial and other photographs that were submitted into the record on December 14, 2006 by Applicant's PowerPoint presentation, the adjoining school property is improved in the area along the common property line with the school structure and other improvements. The landscaping and setback proposed will ensure that the adjoining school property will not be adversely affected by the residential development in this area of Gateway Commons. We, therefore, respectfully request that the Board grant the requested waiver.

Mr. Royce Hanson and Members
of the Montgomery County Planning Board
December 22, 2006
Page 3

Thank you for your attention to this matter. Should you need further information, please feel free to call me.

Very truly yours,

LINOWES AND BLOCHER LLP


Barbara A. Sears

cc: Ms. Faroll Hamer
Mrs. Rose Krasnow
✓ Mr. Robert Kronenberg
David Lieb, Esquire
Ms. Amy Presley
Mr. Robert Jacoby
Mr. Marty Collier
Mr. Bruce Harvey

ATTACHMENT C

LINOWES
AND BLOCHER LLP
ATTORNEYS AT LAW



December 22, 2006

Mr. Royce Hanson
Chairman, and Members of the
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910-3760

BY HAND

Re: Gateway Commons; Site Plan Amendment No. 82003023A
(the "Site Plan Amendment")

Dear Chairman Hanson and Members of the Board:

As a follow-up to the December 14, 2006 Planning Board hearing on the above-referenced Site Plan Amendment, enclosed please find the responses of Gateway Commons LLC ("Applicant"). These responses include the following:

1. Written request for a waiver of the compatibility standards of Section 59-C-7.15(b) to allow an attached structure within 100 feet (but not less than 25 feet) of the common boundary line of the property with the adjoining Clarksburg Elementary School property.
2. Modifications to the Site Plan Amendment to reduce the density by two units to accommodate the waiver request, reduce the right-of-way width of the northern portion of Latrobe Lane, provide landscaping along the northern portion of Latrobe Lane to compensate for the loss of landscaping in the former median of Latrobe Lane removed at the request of the Fire Marshal and provide certain other landscaping details in the area of the added grasscrete access points also provided at the request of the Fire Marshal.
3. Modifications to the design of the attached units to recess the garages so that the driveways are lengthened.

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We are delivering six sets of plans showing the above modifications to Rose Krasnow, Chief of the Development Review Division, as requested. These plans consist of the following:

1. Site Plan Sheets 1-7 (12/21/06)
2. Exhibit for Parking in Front of Town Houses (Page 2 of 7)
3. Modified Landscape Plan (Sheets 1-14)

Thank you for your attention to this matter. Should you require further information, please feel free to contact me.

Very truly yours,

LINOWES AND BLOCHER LLP


Barbara A. Sears

cc: Ms. Faroll Hamer
Mrs. Rose Krasnow
✓ Mr. Robert Kronenberg
David Lieb, Esquire
Ms. Amy Presley
Mr. Robert Jacoby
Mr. Marty Collier
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DAVID W. BROWN

December 19, 2006

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

Mr. Royce Hanson, Chair, and
Members of the Montgomery County Planning Board
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Gateway Commons; Site Plan Amendment No. 82003023A

Dear Chairman Hanson and Members of the Planning Board:

This letter is written on behalf of the Clarksburg Town Center Advisory Committee ("CTCAC"). As CTCAC counsel, I have been asked to respond to the December 6, 2006 letter to the Board concerning the above-referenced Site Plan Amendment from counsel for the developer, Gateway Commons, L.L.C. ("Gateway"), hereafter referred to as the "Sears Letter."

The Board, in its preliminary deliberations on the Site Plan Amendment on December 14, 2006, has thus far declined the opportunity presented to address and take corrective action on mistakes that were made in the course of initial approval of the Site Plan. The Board's inaction to date must be contrasted with the fact that, in the December 14th deliberations, not one of the members of the Board was prepared to defend the Site Plan as an exemplar of projects that fulfill the purposes of the increased zoning density awarded to developments such as Gateway. While the rationales advanced at the hearing by Board members to justify inaction are varied, they all appear to be heavily influenced by the misleading and erroneous analysis of the Board's power and responsibility and locked-in developer rights, as set forth in the Sears Letter.

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The Board has made only a preliminary ruling on the scope of what will be required for approval of the Site Plan Amendment. Final judgment on what should or should not be changed in order to grant approval of the Site Plan Amendment should not be pursued unless and until the Board has fully considered the errors in the Sears Letter. The reason the Board did not have the benefit of this response before the hearing is that Ms. Sears failed to provide a copy of her legal analysis to CTCAC or me prior to the hearing, even though CTCAC's legal rights are adversely characterized in the Letter (at p. 11), even though she was well aware that CTCAC was an active (or, more accurately, principal) opposition party in the review of the Site Plan Amendment, and even though she was well aware of my legal representation of CTCAC in Clarksburg land use matters.

The Board should also understand that unlike Gateway, CTCAC has extremely limited resources and cannot, as a matter of course, afford to be represented by counsel at every hearing involving Clarksburg-related development that comes before the Board. This does not mean, however, that CTCAC attends such hearings without legal preparation, and the Board was in fact provided by CTCAC with the proper legal authority for its position. Nevertheless, if a copy of the Sears Letter had been sent to CTCAC at the time it was sent to the Board, this letter correcting much of the misleading legal analysis therein would have been submitted to the Board prior to the hearing. If it was Ms. Sears' intention in bypassing CTCAC to have the Board consider the issues before it with a one-sided, misleading and erroneous appraisal of the applicable law, she appears to have temporarily succeeded. But since the matter has been continued, the Board should give as much consideration to this response as it may have given to the Sears Letter.

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**I. THE BOARD DOES HAVE AUTHORITY TO RECONSIDER PRIOR
SITE PLAN APPROVALS UNDER PRESCRIBED STANDARDS**

Some Board members have expressed concern that it is too late to correct the unwarranted approval of the original Site Plan. Of course, if the original approval was justified, then the “too late” question is irrelevant. Hence, those expressing this concern are, implicitly if not explicitly, acknowledging that the original Site Plan warranted disapproval. Some said that the Board cannot simply “change its mind” about the approval. Others said that the approval was a “matter of judgment” rather than a “mistake of fact,” and that, therefore the Board could not correct its actions at this juncture. None of these statements reflect a complete and correct appraisal and application of the Board’s revisory power in this case.

There is no statutory provision explicitly defining the circumstances under which the Board can revise its site plan approval decisions. In such a situation, the Board

may reconsider an action previously taken and come to a different conclusion upon a showing that the original action was the product of fraud, surprise, mistake, or inadvertence, or that some new or different factual situation exists that justifies the different conclusion. What is *not* permitted is a “mere change of mind” on the part of the agency.

Calvert County Planning Commission v. Howlin Realty Management, Inc., 364 Md. 301, 772 A.2d 1209, 1223 (2001). *See Redding v. Board of County Commissioners*, 263 Md. 94, 282 A.2d 136, 146 (1971). Any doubt about the applicability of this standard to the Board was settled long ago by *Schultze v. Montgomery County Planning Board*, 230 Md. 76, 185 A.2d 502 (1962), cited with approval in *Howlin*, and prominently featured in CTCAC’s testimony before the Board on December 14th. *Schultze*, applying this same standard, confirmed the legitimacy of a reversal by the Board of a subdivision decision following discovery of an error, and confirmed the illegitimacy of a further reversal that was predicated not on prior error, but rather “a mere change of mind on the part of the board.” 185 A.2d at 505. In *Howlin*, the Court of Appeals upheld the Calvert County Planning Commission in rescinding a subdivision approval when, long after the right to appeal the subdivision had expired, evidence was presented that the approval was based on a mistaken belief that proper consents from other landowners had been obtained. As

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in *Howlin*, CTCAC has presented ample evidence to support the conclusion that the original decision in this case was based upon error.

What constitutes an improper “mere change of mind,” rather than grounds for correcting a prior decision is well-illustrated by *Kay Construction Co. v. County Council for Montgomery County*, 227 Md. 479, 177 A.2d 694 (1962). In *Kay*, the Court examined and found no merit in the various allegations of legal error in the original rezoning decision, and further found that the explanation for the reversal of position was “a shift of majority opinion occasioned by the substitution of a councilman of one conviction for a councilman of another conviction.” 177 A.2d at 700. The *Kay* “change of mind” rule has no applicability here, because any change in the Board’s decision will not be on the basis of a change in the composition of Board (four of whom voted in favor of the original Site Plan being still members of the Board). In addition, this is not a *Kay* situation where the claims of legal error in the original decision are baseless, as CTCAC has already detailed. *Kay* effectively rejects the notion that prior legal errors are not correctable when a plan comes back before the Board. If legal error in the original decision were irrelevant to the exercise of revisory power, there would have been no reason for the *Kay* Court to actually examine whether the legal claims had any merit.¹

¹ The Sears Letter also refers to *Woodlawn Area Citizens Ass’n v. Board of County Commissioners for Prince George’s County*, 241 Md. 187, 216 A.2d 149 (1966). That case has no relevance here, where the question is whether there is a basis for correction of an existing site plan. In *Woodlawn*, the question was whether there had been significant change in a neighborhood between the time one proposed rezoning of the property was denied and the second application for the same rezoning. Such cases are controlled by the “change-mistake” rule of rezoning, grounded in State zoning enabling legislation, which creates a strong presumption of correctness of the original zoning. Under the rule, a piecemeal change is prohibited, absent strong evidence of mistake in the original zoning or of substantial change in the character of the neighborhood. 216 A.2d at 152. This rule places an onerous burden of proof on the one seeking a rezoning. *Cabin John LP v. Montgomery County Council*, 259 Md. 661, 271 A.2d 174, 179 (1970). By contrast, as noted in section II of the text, the Board in this case can correct its prior decision based on a preponderance of the evidence on the question of whether the earlier decision was in error.

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II. WHETHER THE ORIGINAL SITE PLAN WARRANTS CORRECTION SHOULD BE BASED ON A PREPONDERANCE OF THE EVIDENCE STANDARD

The Sears Letter (at p. 9) erroneously advises the Board that it should adjudicate the issues before it by changing nothing concerning the original Site Plan approval absent “strong and massive substantial evidence” of fraud, surprise, mistake or inadvertence. This is simply incorrect. In *Howlin*, the Court of Appeals addressed the precise question of the burden of proof in a case where, as here, a planning commission was reconsidering its prior decision under the legal grounds for reconsideration set forth in that case, as discussed in part I, *supra*. In that case, where the Court found neither fraud nor fundamental liberty interests at stake, it ruled that the “standard of proof normally applicable in civil and administrative proceedings” would apply, i.e., “the preponderance of evidence.” 772 A.2d at 1224. The issue here is akin to the one presented in *Howlin*: CTCAC has presented evidence that the Board committed legal error in approving the Site Plan; there is no claim of fraud and no one’s liberty is at stake in the outcome. Further, as explained in footnote 1, this is not a rezoning matter before the District Council, where the law recognizes a heightened burden of proof.

III. GATEWAY HAS NO VESTED RIGHT TO COMPLETE THE GATEWAY COMMONS PROJECT AS APPROVED IF THE APPROVAL WAS IN ERROR

The Sears Letter (at p. 10) claims that “Gateway has achieved a vested contractual interest in completing the buildout of the project.” This claim is supported by citation to several wholly inapposite cases. Before discussing those cases, it is worth noting that Gateway’s reliance on “vested rights” principles comes into play only if it is apparent that Gateway’s proposed buildout is not in compliance with the applicable law. The Board should therefore understand the argument for what it is: essentially a claim that even if the Gateway Commons project is unlawful, there is nothing the Board can do about it. Fortunately, this offensive argument, and equally offensive result, is not called for under the present circumstances.

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The cited cases involve contractual agreements regarding development that arise in the course of either (a) annexation of land by the jurisdiction prescribing the zoning of the property or (b) acquisition of land by the jurisdiction. In the principal case relied upon, for example, *Mayor and City Council of Baltimore v. Crane*, 277 Md. 198, 352 A.2d 786 (1976), the landowner conveyed to the City nearly half of his tract of land, at no cost to the City, on the understanding that the remainder of the land could be developed with density as if no land had been conveyed.. The Court held the City could not later vitiate the agreement by changing the terms of the zoning ordinance. 352 A.2d at 791-92.

Unlike in *Crane*, there are no contractual agreements in this instance of the type recognized in Maryland law as creating contractual rights that override compliance with zoning requirements.² What Gateway points to is roadway and other public improvement dedications that were imposed on it in conjunction with obtaining subdivision approval. But only a year after *Crane*, the Court of Appeals rejected *Crane*'s applicability to the kind of dedications that are required for subdivision approval under Montgomery County's subdivision ordinance. *WSSC v. TKU Associates*, 281 Md. 1, 376 A.2d 505 (1977). As the *TKU* Court explained, *Crane*

involved a conveyance of land by a property owner to the city for highway purposes in reliance upon an ordinance which provided that after such conveyance the property owner could develop his remaining property at a particular density. We there held that the ordinance constituted an offer which the property owner accepted when he conveyed

² The existence of a site plan enforcement agreement in this case does not change this assessment. Such agreements, previously (but no longer) required by code, § 59-D-3.4(c)(1) (2001), are not bargained-for contracts, but rather merely the fulfillment of a statutory requirement that the "applicant agree[] to execute all the features and requirements that are part of the site plan." *Id.* The Sears Letter (at p. 11) also invokes Gateway's "Road Participation Agreement with Montgomery County." The Sears Letter fails to identify any provision of such agreement that would be violated by action of the Board in correcting its prior Site Plan approval. Indeed, unless such agreements are improperly drafted to immunize approved Site Plans from further scrutiny and correction, their existence is not even an issue, let alone an obstacle to the Board's exercise of its revisory power. In any case, if there is any tension between what has been agreed to in such an agreement and what the Board deems necessary to correct the Site Plan, such issues can and should be addressed in specific detail as the Board works through the problems and concerns CTCAC has identified with the original Site Plan. Such a process is a far cry from the Board's abject surrender (thus far) to Gateway's demand for blanket immunity from corrective Board action.

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his property, thus creating a vested contractual interest which could not be affected by any subsequent zoning change. **No such statutory provision is involved here and no contractual interest was created. Nothing in the County's subdivision regulations guaranteed [the applicant] that its project would be approved, and unlike *Crane*, they do not constitute an offer.** As [the lower court] held, there was no evidence that any public official offered [the applicant] any assurance that its project would be approved if it made the requisite dedications....

376 A.2d at 516 (emphasis added). This Board approves subdivision plats on a regular basis that involve dedications of land for road and other public purposes, as required by statute. These are not contracts and do not constitute a "vested contractual interest." If they did, it would mean that the Board is powerless to ever correct errors in its myriad subdivision approvals at any later time after initial finality. This would include, of course, the situation where the site plan is reviewed at a later time. In effect, Gateway is claiming that street dedication precluded any changes at the site plan review stage to what was approved at the preliminary plan stage—an absurd result. As detailed in Part I *supra*, that is not the law in Maryland.

The Sears Letter (at p. 10) also claims immunity of the Site Plan from correction due to "the overall course of dealing" between Gateway and the Board "in the processing, review and approval of the approved plans...." No authority is cited for this remarkable claim, because there is none. Under the applicable case law, discussed *supra*, if the "overall course of dealing" has led to erroneously approved plans, they can be corrected under the standards set forth in those cases. All CTCAC seeks from the Board is an appropriate level of scrutiny of its prior approvals under established law.

Notably, the Sears Letter does not invoke traditional vested rights law—the kind of vesting that arises from actual construction on the ground, and now described by the Court of Appeals as "per se vested rights." *Marzullo v. Kahl*, 366 Md. 158, 783 A.2d 169 (2001). For per se vested rights to apply to "completing the buildout of the Project," Sears Letter 10, Gateway would need to (1) have obtained building permits for each and every one of the housing units to be built, (2) have commenced substantial construction

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of those units in good faith, and (3) find its right to complete and use the structures foreclosed by a change in the zoning law. 783 A.2d at 188-89. This situation does not apply with respect to any housing unit because no such units have been permitted or had construction started. It does not apply even as to the infrastructure already constructed because if the Board requires corrective action, it will be based not on any change in the zoning ordinance, but rather on interpretation and application of the law "as it was already enacted." *Id.*

It should also be noted that the absence of any per se vested rights makes completely irrelevant the fact that the Site Plan was approved over three years ago, a fact on which Gateway attempted to place much emphasis during the December 14th hearing. Maryland vested rights law attaches no significance to the amount of time that has transpired between the original approval and its reexamination. Whether the agency has been effectively divested of its right to correct errors in prior decisions is not an issue of either agency power or time passage, but rather one of reliance, as reflected in Maryland's law of vested rights.

Notwithstanding the harsh reality of vested rights law, the Board should not understand CTCAC's position as urging the Board to wreak such havoc on the approved Site Plan that all the sums invested by Gateway to date are lost. To the contrary, when CTCAC sat down with staff and Gateway representatives during the summer of 2006 to discuss their concerns, CTCAC had in mind revisions that would fulfill the vision of the Clarksburg Master Plan and the requirements of the PD zone, as applicable to Gateway's R-200/TDR project, with minimal impact on infrastructure investment to date. Those discussions quickly broke down, however, due to the obdurate reliance by Gateway on the indefensible legal positions, repeated and embellished in the Sears Letter, to the effect that Gateway is legally entitled to build out the Project exactly as approved, no matter the deficiencies in the original Site Plan or its approval process. CTCAC emphatically disagrees, but nonetheless remains willing to work with staff and Gateway in the same cooperative spirit that CTCAC brought to the meetings last summer.

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IV. ANY DISABILITY OF CTCAC TO CHALLENGE THE ORIGINAL SITE PLAN IS IRRELEVANT TO THE BOARD'S EXERCISE OF ITS RESPONSIBILITY TO CORRECT ITS MISTAKES

The Sears Letter (at p. 11-12) argues that CTCAC cannot now collaterally attack the original Site Plan, either directly or through the vehicle of the Site Plan Amendment before the Board. This argument is a red herring. Nothing in any case cited by Gateway stands for the proposition that (1) an interested party cannot bring to the attention of the Board errors in a prior decision, particularly when the Board is considering amending that decision, or (2) the Board cannot consider whether, as claimed, it has erred. Such a rule could not exist, because it would mean, contrary to public policy, that the Board cannot avail itself of the assistance of the public in learning of and correcting mistaken approvals. What Gateway relies upon is caselaw that limits in various ways the ability of parties to administrative proceedings to challenge the results outside of the process of those proceedings, including judicial review thereof. Whether and to what extent CTCAC may be disabled from itself challenging in court any action or inaction of the Board in this case simply has no relevance to CTCAC's unqualified First Amendment right to petition the Board, urging the Board that it properly and faithfully discharge its duty to address and correct errors in its decisionmaking when appropriate to do so, consistent with the public interest and the rights of the parties. CTCAC seeks nothing more from the Board than this, which has nothing to do with CTCAC's actual, prospective or arguable rights, if any, on judicial review. Indeed, the scope of CTCAC's judicial review right following the conclusion of this proceeding is an issue that will never even arise if the Board does not shirk its responsibility to address and correct the errors in its approval of the original Site Plan—a responsibility that exists independent of whether CTCAC is around, present and able to bring problems with prior approvals to the attention of the Board.

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V. THE ORIGINAL SITE PLAN VIOLATES § 59-D-3.23(a) DUE TO ITS FAILURE TO SHOW THE "LOCATION, HEIGHT, GROUND COVERAGE AND USE OF ALL STRUCTURES."

The Sears Letter (at p. 12-14) claims that the original Site Plan, even though it fails to graphically show the "location, height, ground coverage and use of all structures," as required by § 59-D-3.23(a), nevertheless is not in violation of that provision because (1) building height can be "identified" by matching building elevation on one sheet with the grading plan on another; (2) building height (in some cases in feet and in other cases—improperly—in stories) can be found on the Preliminary Plan; and (3) setbacks can be "ascertained by dimensions graphically on the plan." This is amplified by the claim that at the time of Site Plan approval, there was no requirement for a separate data table setting forth development standards for site plans, and argument that it would be unfair and unconstitutional to retroactively invalidate the Site Plan for lack of such a data table.

The "separate data table" argument in the Sears Letter is simply another red herring. CTCAC's position is not that the only way to comply with § 59-D-3.23(a) is to establish a separate data table, even though such a table would suffice to ensure that construction will be subject to the standards set out in the table. If there is no table of general applicability, at least somewhere on the plan, the "location, height, ground coverage and use of **all** structures" must be explicitly shown. After all, the purpose of the requirement is to facilitate dissemination, both to the builders and those who must review and approve the buildings, what the development standards are for each structure. This express site plan requirement is not met by requiring builders or reviewers to piece together disparate and inferential information on various sheets in order to confirm compliance, structure-by-structure. Gateway's defense of the original Site Plan in this respect effectively concedes that the requisite development standards are not explicitly set out either in a format showing their applicability generally or in the form of readily demonstrable compliance, lot-by-lot and structure-by-structure.

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In the end, Gateway relies principally on the fact that other plans were approved in the same timeframe as the original Site Plan to establish an "accepted administrative practice" of accepting site plans with a paucity of the information required by § 59-D-3.23(a). Sears Letter 13. Once again, Gateway's argument is premised on noncompliance with the code, because without it there would be no need to conjure up a fanciful excuse for noncompliance. But assuming *arguendo* that the facts in other cases are as claimed, Gateway cannot defend its failure to comply with the code on the grounds that the Board has erred in applying it in other cases. See, e.g., *American Cas. Co. v. Department of Licensing and Regulation*, 52 Md. App. 157, 447 A.2d 484, 486 (1982)(prior erroneous administrative practice cannot nullify the statutory purpose "however long and generally it has been followed.").

VI. MARYLAND HAS REJECTED ZONING ESTOPPEL IN FAVOR OF VESTED RIGHTS AS THE BASIS FOR EVALUATING GATEWAY'S CLAIMS OF RELIANCE ON THE ORIGINAL SITE PLAN

Not content to argue vested rights, the Sears Letter (at p. 14-15) also claims that the Board is estopped from finding the original Site Plan invalid, and from altering either it or the Site Plan Amendment in any way that would "impair" the original Site Plan approval. This claim is supported by a highly misleading discussion of Maryland caselaw that ignores the principal current lead case from the Court of Appeals dealing with the doctrine of zoning estoppel, namely, *Sycamore Realty Co. v. People's Counsel of Baltimore County*, 344 Md. 57, 684 A.2d 1331 (1996). *Sycamore* reviewed in detail the development of caselaw in Maryland in relation to claims of zoning estoppel, and concluded as follows:

We have never adopted zoning estoppel in Maryland. Instead, we, like all of the other courts that have declined to adopt zoning estoppel "recognize a legal defense cast in terms of whether the property owner acquired 'vested rights' to use his land without governmental interference. Whereas zoning estoppel is derived from principles of equity and "focuses on whether it would be inequitable to allow the government to repudiate its prior conduct," vested rights is derived from principles of common and constitutional law and focuses upon "whether the owner acquired

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real property rights which cannot be taken away by government regulation.”

684 A.2d at 1336 (citations omitted) (emphasis added).

In *Sycamore*, in keeping with the foregoing appraisal, the Court again declined to accept any zoning estoppel theory as a basis for decision. *Id.* at 1337. Since *Sycamore*, there have been no developments in the Court of Appeals counter to *Sycamore* and suggesting receptivity to zoning estoppel as a basis for declining to revisit prior land use approvals. Indeed, the Board would be justified in discrediting as unreliable **anything** in the Sears Letter, given its intentional failure to address controlling authority on zoning estoppel, while indulging in an extended discussion of a 43-year old case from the Supreme Court of Florida.

The Sears Letter (at 14–15 n.7) also attempts to bring Gateway’s actions under the purview of *Permanent Financial Corp. v. Montgomery County*, 308 Md. 239, 518 A.2d 123 (1986). This case is explained in *Sycamore* as an exception to the general rule against imposing “estoppel against the government when it is acting in a government capacity.” 684 A.2d at 1335. The Court explained that it had held Montgomery County “equitably estopped from imposing [the County] zoning ordinance’s height controls where [the] builder designed and constructed [a] building in reliance on [a] building permit and [the] long-standing reasonable interpretation by [the] county as to how to calculate height.” *Id.* at 1335-36. In other words, when construction takes place in accordance with the standards as understood and applied when the construction took place, it cannot be ordered torn down when the application of the standard later changes. Overlooked in the Sears Letter’s discussion of the *Permanent* decision is the fact that other zoning requirements that were not found to be in any way ambiguous, in language or in enforcement policy, including a floor area ratio requirement, were held to be enforceable by the County, notwithstanding that the structure had already been built. 518 A.2d at 130. In this case, if *Sycamore* does not render *Permanent* a permanent dead letter, what is left favorable to Gateway it is of no moment here because CTCAC is not seeking to impose any retrofit on any construction based on any requirement that was ambiguous in substance or application in the zoning or subdivision ordinances at the time of original Site Plan approval.

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To conclude, it must be stressed again that even where there has been some infrastructure construction by Gateway in reliance on Site Plan approval, CTCAC's goal all along has been developer responsiveness to achieving zoning code compliance in a way that minimizes disruption to what has already been built. What CTCAC rejects, and what this Board is fully justified under the law in rejecting, is Gateway's obdurate claim that it is allowed to "stand pat" on approved plans notwithstanding how far they may fall short of compliance with the standards by which they should have been judged. For the most part, and in contrast to the earlier situation in the Clarksburg Town Center, what is to be built is still on paper, not on the ground. CTCAC's objections to the paper plans have been timely and properly raised. The Board should take heed of this opportunity to address them. Finally, whatever benefit of hindsight some Board members may experience in revisiting their prior votes on the project, any self-flagellation does not exonerate Gateway, and ought to be tempered (a) by the knowledge that it was Gateway's responsibility to proffer the Board a plan that was in compliance with the standards for approval in the first place, and (b) by the fact that Gateway was at all times represented by highly experienced counsel who know what the standards are and how to ensure that their developer clients comply with them.

Sincerely,



David W. Brown

cc:

Barbar A. Sears, Esquire
Linowes and Blocher LLP

Ms. Farroll Hamer, Acting Director

Ms. Rose Krasnow, Chief, Development Review

Amy L. Presley, President
CTCAC