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November 18, 2005

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**By Hand Delivery**

Hon. Derick Berlage, Chair  
and Members of the Montgomery  
County Planning Board  
Maryland-National Capital Park  
and Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910

Re: Clarksburg Town Center – Supplement to Record

Dear Chairman Berlage and Members of the Planning Board:

On behalf of Newland Communities LLC and NNPII Clarksburg LLC (collectively, “Newland Communities”), this letter transmits additional materials to be included in the public Record of the Planning Board’s proceedings concerning alleged site plan violations at Clarksburg Town Center. Please include this letter and the attachments in the public Record.

The following summarizes the additional materials attached to this letter and provides a brief explanation of their significance to these proceedings.

**Attachment 1.**

Attachment 1 consists of the Montgomery County Office of Legislative Oversight report dated November 8, 2005 (“OLO Report”). The OLO Report substantially confirms the sequence of events and decision-making process of MNCPPC and County staff with respect to the Clarksburg Town Center as presented to the Board in these proceedings by Newland Communities and its consultants. For example, the OLO Report confirms:

a. Through Condition 38 the Planning Board authorized staff to review and approve certain requests by the applicant for changes to the approved site plan (p.56).

b. In 2000 the MNCPPC site plan reviewer (Wynn Witthans) distributed a memorandum [July 17, 2000] and attached Concept Plan and Memorandum from the developer’s

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architect to an internal staff review team, consisting of both MNCPPC and County staff, which discussed how amendments would be processed under Condition 38 (pp. 56, 87). The site plan reviewer worked with this team to address several facets of the project (p. 87). The memorandum from the architect (SKG Architects & Planners) stated, *inter alia*: the revised plan envisioned a variety of housing types on the same block; a diagonal road had been added from the Town Square to the church; and the proposed changes were envisioned to be administered by staff pursuant to Condition 38 (p. 87).

c. Between August 2001 and March 2005, ten actions were taken by MNCPPC staff and two actions were taken by the Planning Board to amend the approved site plans for Phases 1 and 2 (p. 57). Staff used the authority established under Condition 38 to review and approve a series of amendment requests between August 2001 and January 2005 (p. 89).

d. The Development Review Committee reviewed at least four (4) of these amendments (pp. 57, 86).

e. MNCPPC staff made an internal decision to allow the approval of Phase 2 record plats for properties that would not be impacted by any potential changes to the school site, even though the Phase 2 signature set had not been signed because of issues related to the school site (p. 60).

f. For each building permit issued at Clarksburg Town Center, MNCPPC staff reviewed and signed off that the building permit application complied with the zoning standards established by the Planning Board (p. 62).

g. MCDPS conducted close to 14,000 inspections at Clarksburg Town Center, including 6,740 building inspections and 2,309 public right-of-way inspections since August 2000 (p. 63)<sup>1</sup>. These inspections included a wall-check to determine whether setback requirements were being met. Despite thousands of building permit inspections, it was not until early 2005 that any setback discrepancy was identified by the government (p. 97).

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<sup>1</sup> To the best of our knowledge, none of the issues currently under review were identified by any governmental agency as a potential site plan violation until late 2004, notwithstanding the thousands of inspections conducted prior to that date.

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h. The site plan reviewer (Wynn Witthans) was interviewed by OLO and reported that she amended the site plan data table to read "4 stories" by reference to Condition 38 and to make the height standard consistent with the height standard of 4 stories approved in public session by three full votes of the Planning Board on three separate occasions (the Phase 1 Site Plan approval, the Phase 2 Site Plan approval and the Site Plan Amendment for the Manor Homes). Further, the RMX-2 Zone has no height limit and the Clarksburg Master Plan recommends a height limit of four stories for apartments (multifamily buildings), or in areas non-adjacent to the historic district, 6-8 stories (p. 67).

i. Staff in at least three different divisions of MNCPPC (Development Review, Transportation Planning and Legal) reviewed the signature set for the Phase 1A amendment for compliance with the Planning Board Opinion and approved the signature set submitted by the developer (p. 88).

j. For record plats that have inconsistencies with the site plans, Park and Planning staff reported that the record plats do accurately reflect the houses that have been constructed on the ground (p. 91).

k. As part of the interagency Development Approval Process, staff in the Development Review Division conducted reviews of building permit applications to determine whether a proposed application complied with the terms of a site plan approved by the Planning Board. When MNCPPC staff realized the setbacks illustrated in the building permit application were shorter than the data table standard on the applicable signature set, staff compared the setback measurements from the permit application drawings with the signature set drawings and found they matched consistently. Staff then determined that the proposed applications matched the Planning Board's intent for a "neo-traditional design" and signed off that the building permits complied with the site plan (pp. 91-92).

l. The decision documents that the Planning Board and staff approved are ambiguous and lack a clear statement of the building height and setback standards for the project (p. 138).

m. *The lack of a reliable record of the amendment requests and associated decisions makes it impossible to confidently track all of the changes the agency approved for the project, which in turn compromises the government's ability to determine developer compliance (p. 139).*

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Finally, the OLO Report suggests the developer should have requested Planning Board clarification of inconsistencies that appeared in the various documents and plans. The Board should know that soon after the extent of the inconsistencies became known, Newland Communities met with MNCPPC staff in late 2004 and early 2005 and thereafter directed its consultants to prepare a detailed application to amend the existing Project Plan. The Project Plan Amendment application was filed with the Planning Board on May 9, 2005, two months before the County Council on July 12, 2005 directed OLO to conduct its fact-finding investigation. The cover letter filed with the application stated one of the purposes of the amendment was to "provide a clear set of development standards applicable to the project." The Planning Board will review the Project Plan Amendment at a public hearing that will require advance notice and an opportunity for any interested persons to testify. Therefore, the determination of appropriate and consistent development standards for the project will be determined, as requested by Newland Communities, in a completely transparent manner as advocated by the CTCAC.

**Attachment 2-4.**

Attachments 2-4 consist of materials previously submitted by Newland Communities into the Record of these proceedings at the October 6, 2005 and November 3, 2005 hearings and are provided here again for ease of reference and recordkeeping. Some of the principal points demonstrated by these materials are:

a. Before the developer (Terrabrook) requested any revision to the approved Phase 1 Site Plan, there were a series of meetings with members of the development team and key MNCPPC and County personnel. The principal site plan reviewer distributed the developer's overall Concept Plan to the Clarksburg Town Center Site Plan Review Team (comprised of Wynn Witthans, DRD; Cathy Conlon, EPD; Ron Welke, TPD; Sara Navid, DPS; Jeff Riese, DPWT; Greg Leck, DPWT; Leo Galenko, DPS; Karen Kumm, CBP; Tanya Schmeiler, PPRA; Lyn Coleman, PPRA; Janice Turpin, MCPS; Greg Cooke, MDSHA; Gwen Marcus, HPC; and John Carter, CBP) along with a two different memoranda prepared by the site plan reviewer (Wynn Witthans) dated April 13, 2000 and July 17, 2000 that described how many of the proposed changes would be handled as staff level approvals as allowed in the earlier approval (*i.e.*, Condition 38).

b. In a memorandum dated August 17, 2000, SKG Architects & Planners, the new developer's (Terrabrook) planners, identified proposed revisions to previously approved streets,

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including a specific diagram showing the realignment of Street "O" with a 90 degree turn between the Church and the Town Square. This proposed revision was also reflected on the 2000 Concept Plan.

c. Not less than 165 meetings were held between Charles P. Johnson & Associates personnel and MNCPPC staff and others between March 23, 2000 and October 8, 2004 to review the proposed changes to the previously approved design. Significantly, the list of meetings included in the November 3, 2005 PowerPoint did not identify a comparable number of meetings between CPJ and MCDPS personnel during the same timeframe. MNCPPC meeting attendees varied, but at times included Malcolm Shaneman, Larry Ponsford, Cathy Conlon, Richard Weaver, Bill Gries, Doug Powell, Lyn Coleman, Karen Kumm Morris, Ron Welke, Sue Edwards, Nellie Maskal, Rachel Newhouse and Robin Ziek.

d. Except for four (4) revisions, all of the changes to the initial March 24, 1999 Phase 1 and October 14, 2004 Phase 2 signature sets, including unit types, MPDU locations, and lot/parcel/street configurations, are reflected on an approved, signed signature set of documents. The four (4) revisions not shown on a signed signature set involved very limited areas of the development and were discussed and authorized to be implemented through the record plat process at a meeting between the developer's representatives and Malcolm Shaneman, Richard Weaver and Wynn Witthans on October 8, 2003. The subdivision plats were submitted, reviewed by staff, presented to the Planning Board as appropriate for recordation, approved by the Planning Board, signed by the Chairman and the Director of MCDPS and recorded by MNCPPC.

e. The realignment of Street "O" (now Clarksridge Road) was consistent with the 2000 Concept Plan distributed by Wynn Witthans to the Clarksburg Town Center Site Plan Review Team and was reviewed by the Development Review Committee on July 31, 2001. The replacement of the pedestrian mews between "O" Street and the Town Square was also consistent with the approved Project Plan that envisioned a street in this area, not a pedestrian mews. The realignment of "O" Street facilitated a more neo-traditional design, a new pedestrian mews (Dowden Mews), a new tot lot instead of several townhouses and surface parking, a strong visual connection to the church as indicated in the Project Plan approval, a new park area for the Clark memorial, preservation of a significant buffer between the church property and the Town Center, and a stronger pedestrian connection to the church (discussed *infra* at 11-12). We further note a MCDPS comment at the July 31, 2001 DRC meeting as reflected in the official DRC minutes (appended to our September 7, 2005 submission) required a modification to the

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proposed intersection design of Clarksridge Road (where it replaced the mews) with Public House Road, thus clearly demonstrating regulatory review of the realignment of "O" Street. This redesign in fact occurred and is reflected on the signed signature set dated May 30, 2003.

f. At the February 10, 2005 hearing on the Manor Home site plan amendment, staff advised the Planning Board that a current MPDU shortfall would be made up in Phase 1 when a pending amendment (Section 1A-4) came before the Board. The staff report for the initial Phase 2 site plan review (dated May 2, 2002) and the staff report for the Manor Home site plan amendment (dated February 2, 2005) also advised the Board of the MPDU status, and the Board's Opinion approving the Manor Home site plan amendment also referenced testimony related to the overall MPDU status of the project (dated March 21, 2005).

g. The staff approved site plan revisions resulted in a greater dispersal of MPDUs throughout the project. For example, the initial March 24, 1999 Phase 1 site plan signature set would have located 40 MPDUs in only three (3) buildings in Section 1B-3 alone (*See Sheet 12 of 13, March 24, 1999 Signature Set*). The subsequent revisions dispersed these units significantly.

h. MPDUs should be included in the Phase 3 retail development consistent with traditional town design and thoughtful planning doctrine for mixed-use centers. However, if the Planning Board does not permit residential uses in Phase 3, a total of only an approximate 6 additional MPDUs would have to be added to the other undeveloped sections of the project to assure compliance with the 12.5% MPDU requirement. This is the case because the market-rate units that would have generated a greater MPDU requirement within Phase 3 would not be provided under a "no residential" scenario, and the associated MPDUs would therefore not be required.

i. Three separate street alignment site plans for the project were approved and signed by Malcolm Shaneman and Wynn Witthans, and the Planning Board itself approved an amendment to the Preliminary Plan by its Opinion dated February 28, 2002 (No. 1-95042A) to remove previously dedicated public streets consistent with the street alignment plan.

j. Private street widths of 14 feet were approved by the MCFRS in its letter dated July 20, 2001. Approved site plan signature sets clearly indicate paving street widths, as do the Private Paving And Storm Drain Plans for the project (*see discussion infra at 10*).

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k. The design and grading for the school/park site was discussed during at least 49 meetings between Charles P. Johnson & Associates personnel, MCPS and MNCPPC personnel between July 16, 2002 and April 5, 2005. Meeting attendees varied, but at times included Janice Turpin, MCPS; Mary Pat Wilson, MCPS; Michael Shpur, MCPS; Doug Powell, MNCPPC; Cathy Conlon, MNCPPC; and Wynn Witthans, MNCPPC. The project engineers advised that the park/school site is being graded in accordance with the approved signature set, approved sediment control plans, approved street grade plans, approved stormwater management plans and the associated permits, including the approved MNCPPC Parks approval and permits.

l. The design and configuration of streetscapes, amenities and recreation facilities were discussed and reviewed by MNCPPC staff and Land Design, the project landscape architectural consultant, during at least 29 separate meetings between May 20, 1997 and May 20, 2004. MNCPPC Meeting attendees varied, but at times included Lyn Coleman, Karen Kumm Morris, Wynn Witthans, Cathy Conlon, and Ron Welke. All recreation facilities and amenities are shown on approved signature set site and landscape plans (*see discussion infra* at 8-9).

m. There are 35 single-family lots that contain less than 4,000 square feet. However, all lot sizes are consistent with the approved site plan drawings and the approved recorded subdivision plats. All townhome lots meet the 1,120 square foot standard that appears in the site plan data tables.

**Attachment 5.**

Attachment 5 consists of a composite plan that was presented to the Planning Board as Slide No. 58 of Newland Communities November 3, 2005 Power Point presentation. Attachment 5 has been annotated to identify the applicable approved signature set, record plats and other pertinent information.

**Attachment 6.**

Attachment 6 consists of the July 17, 2000 memorandum from Wynn Witthans to the Clarksburg Town Center Site Plan Review Team and the attached Concept Plan prepared by SKG Architects & Planners and SKG's memorandum dated July 13, 2000 summarizing the design concepts proposed for revision. The Board will recall the staff distributed all this information to key personnel at MNCPPC, MCDPS, MCDPWT and MCPS prior to any formal request for revision

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by the developer along with the statement that anticipated some changes would be handled as staff level approvals.

**Attachment 7.**

Attachment 7 consists of the recorded subdivision plats referred to in Newland Communities November 3, 2005 Power Point and Attachment 5. These are the plats that Malcolm Shaneman, Richard Weaver and Wynn Witthans authorized the developer to prepare and process at a meeting with the developer's representatives on October 8, 2003 to accomplish the lot, unit and MPDU changes referenced in "Revisions 1-4" of the November 3, 2005 Power Point.

**Attachments 8 – 15.**

Attachments 8-15 consist of reduced copies of the signature site and landscape plans approving revisions to the initial March 24, 1999 Phase 1 and October 14, 2004 Phase 2 site plans. Newland Communities submitted full size copies of each plan at the November 3, 2005 hearing.

**Attachment 16.**

Attachment 16 consists of a letter dated November 15, 2005 from Land Design, the developer's landscape architect consultant. Two tables are attached to the letter. The first attachment identifies each recreation facility to be provided at Clarksburg Town Center and the degree to which each facility complies with the 1992 Recreation Guidelines. The second attachment is an Analysis of Recreation Facilities that documents compliance of the project as of November 15, 2005 with the demand/supply requirements set forth in the Recreation Guidelines.

As indicated in Land Design's letter, the Recreation Guidelines provide "Except where noted, none of the specified guidelines are an absolute requirement, nor does any of the criteria necessarily carry any greater weight than another in the evaluation of the adequacy of the recreational facilities." As further stated in the letter, Land Design worked throughout the site plan review process with MNCPPC staff to develop the design of the recreation facilities, and at Staff's direction additional landscaping buffers and fencing were provided with some facilities to compensate for modified setbacks consistent with the flexibility provided by the Recreation Guidelines. Land Design also emphasizes that all the recreation facilities are shown on the approved signature set of site plans and landscape plans (except for Section 1A-4, Phase 3 and Piedmont Woods for which review is still pending).



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The Analysis of Recreation Facilities demonstrates the on-site demand/supply ratio (percent) for all demand categories (*i.e.*, tots, children, teens, adults and seniors) ranges from 86% to 119% for the facilities, or portions thereof, completed as of November 15, 2005. The Recreation Guidelines require a minimum on-site ratio (percent) of only 65%. Thus, the Recreation Guideline requirement is substantially exceeded in all demand categories.

**Attachments 17 and 18.**

Attachments 17 and 18 consist of an MNCPPC memorandum from Cathy Conlon to Wynn Witthans dated July 10, 2001 and an email from Richard Gee, MCDPS, to Wynn Witthans dated July 10, 2001 indicating their respective approval of the revised signature set of plans for 1B-2 and 1B-2/1B-3, respectively.

**Attachment 19.**

Attachment 19 consists of a memorandum prepared by Wynn Witthans dated November 22, 2002 identifying her comments on the Phase 1 revision signature set. Her comments include the statement in Comment No. 9: "*Play areas look good - add path sheet 3*"

**Attachment 20.**

Attachment 20 consists of a Charles P. Johnson transmittal to Wynn Witthans dated January 13, 2003 transmitting, *inter alia*, the original Phase 2 signature set of plans for approval and the draft site plan enforcement agreement for Phase 2. The document confirms the date these materials were first submitted to MNCPPC. As the Board is aware, the Phase 2 signature set and site plan enforcement agreement were not approved until October 14, 2004 – twenty-one months later.

**Attachments 21 – 23.**

Attachments 21-23 consist of the street alignment plans for 1B-2 and 1B-3 approved by Malcolm Shaneman and the street alignment plan for the entire project approved by Wynn Witthans on April 17, 2001, September 11, 2001 and February 26, 2003, respectively.

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**Attachments 24 – 27.**

Attachments 24-27 concern the street width and fire access issue. The sequence of events was as follows:

1. By letter dated June 12, 2001, MCFRS advised Charles P. Johnson & Associates (i) the items discussed in the letter were *not* violations of the fire code; (ii) roads in the project were proposed at *12 to 14* feet in width; (iii) fire department access roads are required to be *20* feet in width; and (iv) the narrow roads prohibited use by fire fighting apparatus and ambulances.

2. On July 13, 2001 Les Powell of Charles P. Johnson & Associates sent an email to Wynn Witthans referencing the wording of the MCFRS letter and his frustration over potentially conflicting requirements that should have been addressed through the Development Review Committee process. Powell also references a meeting that was being set up with MCFRS to discuss the matter.

3. By letter dated July 20, 2001 MCFRS advised Wynn Witthans (i) the letter is in response to a meeting on July 19, 2001 concerning fire department access; (ii) the fire code *exempts* single family homes as stated at the meeting and in the MCFRS letter dated June 12, 2001; (iii) street widths of *14* feet were proposed at all locations save one, where a fire hydrant had already been installed and the curb would be cut back as far as possible (iv) all locations would be accessible from multiple locations; (v) although streets of these dimensions were not desirable, the improvements made make the proposal *acceptable*; and (v) the MCFRS appreciated the efforts of staff and Terrabrook to provide a *reasonable solution*.

4. On July 24, 2001 Wynn Witthans sent an email to David O'Bryan of Charles P. Johnson & Associates stating: "I have a letter from the Fire Marshall. It good for me to go with."

The result of this exchange between the MCFRS, MNCPPC and the developer's representatives was the establishment of a 14-foot wide private street standard for the Town Center. As indicated previously, the approved site plan signature sets and Private Storm Drain and Paving Plans indicate road widths of 14 feet in accordance with the above documented consultation and agreement with MCFRS and MNCPPC.

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**Attachment 28.**

Attachment 28 is a table summarizing the nearly 14,000 inspections of the Clarksburg Town Center project by the Department of Permitting Services. These inspections included 6,740 building permit inspections, including wall checks, and 2,309 public right-of-way inspections. The approval by MCDPS of thousands of inspections before any discrepancy was identified overwhelmingly supports Newland Communities' position, as stated by David O'Bryan of CPJ in his July 18, 2005 letter to Rose Krasnow (incorporated herein by reference) that *all the involved regulatory agencies determined compliance through reference to the drawings themselves and not the inconsistent data tables*. Newland Communities' position is further supported by the OLO Report's confirmation that *MNCPPC reviewed and approved permit applications by reliance on the drawings themselves notwithstanding staff's contemporaneous recognition of inconsistent setbacks shown in a data table (See OLO Report at 91-92)*. In other words, the evidence demonstrates staff reviewed and approved the Site Plans based on the decisions and not the data table and staff reviewed and approved the building permits based on the drawings and not the data tables.

**Attachments 29 and 30.**

Attachments 29 and 30 consist of Memoranda of Law prepared by Linowes and Blocher on the matters of the Planning Board's authority to delegate site plan review and approval authority to staff, the invalidity of retroactive application of Planning Board changes to policy and procedure, and the applicability of estoppel doctrine to preclude a finding of site plan violations in this matter.

We have also enclosed additional full size plans of several of the documents referenced above, including enlargements of the "O" Street area as shown on the March 24, 1999 initial signature set for Phase 1 and the May 30, 2003 signature set for the Phase 1 revision (see Volume 2 of Submission). As discussed above, the revision to Phase 1 (i) facilitated a more neo-traditional design to accommodate unit changes that included rear loaded units with detached garages; (ii) replaced the pedestrian mews with a street consistent with the Project Plan approval and the 2000 Concept Plan; (iii) replaced several townhouses and surface parking with a new lot; (iv) added a new open space parcel for the Clark memorial; (v) created a new pedestrian mews (Dowden Mews); (vi) maintained a strong visual connection between the church and the Town Square consistent with the Project Plan approval; (vii) preserved significant green space and

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buffer between the church property and the Town Center property; and (viii) provided a stronger, more attractive pedestrian connection between the Town Center and the church.

In this latter regard, the initial March 24, 1999 Phase 1 signature set included only a short sidewalk stub extending about 18 inches towards the church property from the proposed sidewalk along "O" Street. The sidewalk stub ended short of the church property line. The sidewalk stub also ended at the base of an approximate 3:1 slope on the Town Center property and the church property and would have required significant grading on the church property to accomplish a reasonable connection. On the other hand, the approved May 30, 2003 revision to the Phase 1 signature set included a more aesthetic pedestrian link with the church comprised of a curvilinear walkway from the public sidewalk on Clarksridge Road ("O" Street) through the new Clark memorial park to an existing asphalt parking area used by the church for parking. Construction of the pathway connection will not require grading on the church property.

The enclosed full size plans also include a composite Clarksburg Town Center Parking Plan prepared in response to comments made at the October 25, 2005 CTCAC presentation. The Parking Plan demonstrates the approved site plans for Phases 1 and 2 (including all staff level approvals, but excluding Section 1A-4 and Phase 3 which have pending site plan applications) provide 900 on-street parking spaces. The Parking Plan further demonstrates that 2,595 total parking spaces (including off-street and on-street spaces as permitted by the Project Plan Opinion dated June 12, 1995) (p.7) are provided to meet a requirement of 1,768 total parking spaces.

The enclosed plans also include a composite Clarksburg Town Center Green Space Plan prepared in response to comments made at the October 25, 2005 CTCAC presentation. The Green Space Plan identifies the total green area provided by the approved signature set of plans (including the staff level approvals) for Phases 1 and 2 and Section 1A-4 and Phase 3 which are the subject of site plan applications pending before the Planning Board. The Green Space Plan demonstrates compliance with the 50% "Green Area or Outside Amenity Area" requirement in the RMX-2 Zone for the residential portion of the site and compliance with the 15% "Green Area or Outside Amenity Area" requirement for the commercial portion of the Site. *see* Section 59-C-10.3.3 of the Zoning Ordinance.

The Green Space Plan also compares the amount of green area shown on the current signature set of plans (including all staff level approvals) with the green area approved by the Planning Board in the initial Phase 1 and Phase 2 site plan approvals as reflected on the approved March 24,

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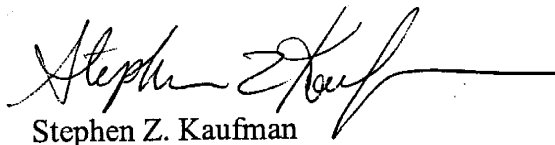
1999 and October 14, 2004 signature set of plans for Phase 1 and Phase 2, respectively. In this regard, the initial site plan approvals for Phases 1 and 2 indicated 59.6% of the total residential portion of the site would be "Green Area or Outside Amenity Area". The current approved signature set of plans (including all staff level approvals) and the pending Section 1A-4 site plan amendment indicate 52.4% of the residential portion of the site will be "Green Area or Outside Amenity Area". In this regard, the Green Space plan notes the October 14, 2004 Phase 2 signature Set included in the Green Area calculations areas that ultimately would be dedicated to public use, while the calculations shown on the Green Area Plan for the current approved/pending site plans do not include such areas.

Lastly, based on the current and more complete record now before the Planning Board, this letter also formally requests reconsideration of all the Planning Board's prior rulings in this matter where the Board found either the existence of site plan violations and/or established a standard inconsistent with the four story building height standard approved by the Board in connection with the Phase 1, Phase 2 and Manor Home site plan approvals or the setbacks shown on the site plan drawings themselves (as opposed to the inconsistent data table). The prior rulings included findings as to building height, setbacks, and the phasing of amenities.

Thank you for your consideration.

Sincerely

LINOWES AND BLOCHER LLP



Stephen Z. Kaufman



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