

# **Fact-Finding Review of the Clarksburg Town Center Project**



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**OFFICE OF LEGISLATIVE OVERSIGHT REPORT 2006-3**  
**FACT-FINDING REVIEW OF THE CLARKSBURG TOWN CENTER PROJECT**

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## **Chapter I. Introduction**

### **A. Assignment**

On July 12, 2005, the Montgomery County Council assigned the Office of Legislative Oversight (OLO) the task of conducting an independent fact-finding review of the Clarksburg Town Center Project. The Council asked OLO to:

- Describe how the project development approval and implementation process is intended to work, as outlined in law and procedures;
- Develop a chronology of the events related to the development approval and implementation of the Clarksburg Town Center Project;
- Identify inconsistencies, flawed processes, lack of coordination, or other problems that occurred in the development and implementation of the Clarksburg Town Center Project; and
- Provide the Council with a list of recommended next steps to address the issues raised by OLO's fact-finding review.

OLO's fact-finding review is one among many recent Council efforts to better understand "what went wrong" with the Clarksburg Town Center Project. It is intended to help the Council provide policy guidance and recommendations for the government agencies, developers, and builders who participate in the County's land development process.

### **B. Methodology**

This Office of Legislative Oversight (OLO) fact-finding review was conducted between mid-July and October 2005 by Karen Orlansky and Sue Richards, with invaluable assistance provided by Craig Howard, Scott Brown, Aron Trombka, Kristen Latham, Suzanne Langevin, Teri Busch, and Karen Yoskowitz.

OLO's methodology combined interviews, consultations, and an extensive document review.

- A list of the names and affiliations of the 125 individuals who provided information to OLO during the study period is on pages 6-9.
- A list of the 342 source documents used by OLO during its fact-finding review is can be viewed in the Appendix (see page A-1).
- To make arrangements for viewing paper copies of all documents that OLO reviewed in the course of conducting this fact-finding, contact OLO directly at 240-777-7987.

A description of OLO's methodology regarding interviews/consultations, document review, parameters and focus of the study, and process for review of draft chapters follows.

## **1. Overview of Interviews/Consultations**

Between mid-July and October 2005, OLO solicited factual information, opinions, and advice from 125 individuals who hold a range of views on the Clarksburg Town Center Project.

From the public sector, OLO interviewed management and staff (including some former employees) from M-NCPPC, County Government Executive Branch departments and offices, and Legislative Branch offices. OLO interviewed all nine members of the County Council and the Planning Board Chairman.<sup>1</sup>

From the Clarksburg community, OLO interviewed representatives from the Clarksburg Town Center Advisory Committee and the Clarksburg Civic Association. OLO also listened to the public testimony presented to the Planning Board and the County Council at hearings concerning the Clarksburg Town Center Project.

From the private sector, OLO interviewed representatives of the developer and builders involved with the CTC Project. This included corporate representatives as well as the attorneys, planners/engineers, and architects retained by Newland Communities, Inc. the current developer of the CTC Project, and Terrabrook Clarksburg, LLC, the owner of the CTC Project between 1999 and 2003. OLO interviewed representatives of the five builders who constructed single-family detached, townhouses, and multifamily homes at the CTC Project: Bozzuto Homes, Inc.; Craftstar Homes, Inc.; Miller and Smith at Clarksburg, LLC; NV Homes; and Porten Homes.

In addition to conducting formal interviews, OLO consulted on specific legal, procedural, policy, and management issues with the Montgomery County Inspector General, the County Council's Senior Legislative Attorneys, the Office of the County Attorney, the Hearing Examiner, and management consultant Doug Katz of Wasserman/Katz. OLO also met with representatives from the Maryland-National Capital Building Industry Association, who are familiar with the land use development process in the County, but not directly involved with the CTC Project.

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<sup>1</sup> In July, OLO sought to schedule interviews with each of the Planning Board members. M-NCPPC's General Counsel raised concerns about ex parte communication and requested that OLO not meet with Planning Board members to discuss the CTC Project "during the pendency of the Clarksburg cases." A series of meetings were held to try and resolve this issue. The on-line Appendix contains an October 10, 2005 letter from M-NCPPC's General Counsel to the County Council's Senior Legislative Attorney explaining his views on this situation "on behalf of the Board." (Exhibit H 112) The Planning Board Chairman directly contacted OLO in the last week of October, indicating his availability to be interviewed, and OLO met with the Chairman on October 28. On November 4, OLO received an e-mail from the Office of the Chairman that stated the other four Planning Board members would "be happy to talk to you at any time." Time did not permit OLO to interview the other four Planning Board members.

## **2. Overview of Documents**

OLO reviewed hundreds of documents to establish a factual basis for its chronology of the Clarksburg Town Center Project and the description of the related decision documents and management activities. OLO obtained documents from the Director of the Department of Park and Planning and the Director of the Department of Permitting Services in response to a formal request for copies of their Clarksburg Town Center Project files and current management procedures and practices. During its interviews, OLO obtained copies of additional documents from representatives of the community, the developers, and some builders.

The collection of documents that OLO logged in and reviewed include copies of: State and County laws, regulations, and guidelines; reports and studies conducted for components of the Clarksburg Town Center Project; hearing transcripts, minutes, and decision documents for the Clarksburg Town Center Project; policies, procedures, forms, and instructions; memorandums, letters, and copies of e-mail messages; and plans, maps, and drawings. As indicated earlier, the 342 source documents used by OLO can be viewed in the Appendix.

During the course of conducting this fact-finding review, OLO received documents from the sources listed below:

- **Maryland-National Capital Park and Planning Commission<sup>2</sup>**  
Department of Park and Planning  
Central Administrative Services
- **County Government – Executive Branch**  
Department of Environmental Protection  
Department of Housing and Community Affairs  
Department of Permitting Services  
Department of Public Works and Transportation  
Montgomery County Fire and Rescue Services  
Office of the Chief Administrative Officer
- **County Government – Legislative Branch**  
Office of the County Attorney  
Office of the County Council  
Office of the Board of Appeals  
Office of the Hearing Examiner  
Office of the People's Counsel
- **Community**  
Clarksburg Town Center Advisory Committee

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<sup>2</sup> The documents OLO received from Park and Planning did not include extensive records of the Environmental Planning Division's management and review of Forest Conservation issues; nor did they include records of the Transportation Planning Division's management and review of the Adequate Public Facilities Ordinance.

- **Clarksburg Town Center Project Developer and Builders**  
Charles P. Johnson and Associates  
Linowes and Blocher, LLP  
Miller and Smith  
Newland Communities, Inc.  
Porten Homes  
Shulman, Rogers, Gandal, Pordy, and Ecker, P.A.

### **3. Parameters and Focus of OLO's Fact-Finding Review**

The Council asked OLO to conduct a fact-finding review of a complex, interagency process within a relatively short time frame. To fully address the particular concerns that initiated the Council's request, OLO focused its efforts in two specific areas of the development approval process: those responsibilities assigned to Planning Board and the Planning staff; and those responsibilities assigned to the Department of Permitting Services and the Department of Housing and Community Affairs.

Within these two areas, OLO spent most of its time examining the Planning Board and Planning staff's actions related to the preparation, adoption, and use of the decision documents for the Clarksburg Town Center Project, i.e., the Project Plan, the Preliminary Plan of Subdivision, and the Site Plans for Phase I and Phase II. To determine what occurred during these steps in the process, OLO supplemented a comprehensive document review with extensive interviews.

In comparison, OLO's review of the Department of Permitting Services activities relied more on a review of the extensive documentation the Department submitted, supplemented with some staff interviews.

OLO's review did not include an in-depth review of several issues, such as the establishment of the Clarksburg Town Center Development District, the Adequate Public Facilities review for the project, the Forest Conservation review for the project, or the dedication and co-location of the park and elementary school for the CTC project. As described in more detail on page 134, some of these issues are being reviewed through other Council review and oversight efforts.

### **4. Review of Draft Chapters**

OLO circulated final drafts of Chapters II, III, IV, and V for technical review to the appropriate parties, e.g., community representatives, CTC Project Developer, CTC builders, Councilmembers, and government staff. OLO asked reviewers to check the accuracy of OLO's facts and its descriptions of the actions and events. OLO incorporated all of the technical comments received within OLO's review time frame into its final report.

## **C. Organization of Report**

This report organizes the results of OLO's fact-finding review of the Clarksburg Town Center Project into seven chapters. Tables that list the sources for the information presented are included at the end of Chapters II, III, and IV and at the end of each section in Chapter V.

**Chapter II, Legal Framework**, provides an introduction to the government's authority to regulate land use and an overview of the legal framework for the land use decisions in Montgomery County made on the Clarksburg Town Center Project.

**Chapter III, Chronology of the Clarksburg Town Center Project**, reports the progression of the Clarksburg Town Center Project (CTC) development based upon the different stages of government review, approval, permitting, and enforcement.

**Chapter IV, Management Responsibilities Related to the Clarksburg Town Center Project**, provides additional information about the management procedures and practices that supported the review, approvals and permitting for the CTC Project.

**Chapter V, Different Views on the Clarksburg Town Center Project**, presents information on the roles and views on the CTC Project from the vantage points of the CTC Project Developer and builders, Clarksburg community representatives, and the County Council.

**Chapters VI and VII** contains OLO's findings and recommendations for the Council's next steps.

## **D. Acknowledgements**

OLO appreciates the cooperative spirit and efforts of the many people who helped us with this study. Many individuals willingly spent time tracking down documents, responding to questions, sharing recollections of events, and offering candid opinions about the Clarksburg Town Center Project as well as the law and management practices that define County's development approval process. Everyone's input was greatly appreciated.

The following table includes the names and affiliations, listed alphabetically, of all individuals who provided information to OLO during the study period.

**Table 1: Individuals Who Provided Information to OLO for the Clarksburg Town Center Fact-Finding Review**

\*Provided information to OLO based upon former employment with the organization.

<b>Name</b>	<b>Affiliation</b>
Curt Adkins	Craftstar Homes
Kim Ambrose	Newland Communities, Inc.*
Chris Anderson	Department of Housing and Community Affairs
Phil Andrews	Councilmember, Montgomery County Council
Bobby Bell	Department of Permitting Services
Derick Berlage	Chair, Montgomery County Planning Board
Perry Berman	Department of Park and Planning, M-NCPPC*
Kathleen Boucher	Office of the County Council
Angela Brown	Department of Park and Planning, M-NCPPC
Todd Brown	Linowes and Blocher, LLP
Rick Brush	Department of Permitting Services
Jim Caldwell	Department of Environmental Protection
Nellie Carey	Department of Park and Planning, M-NCPPC
Francoise Carrier	Office of Zoning and Administrative Hearings
John Carter	Department of Park and Planning, M-NCPPC
John Clarke	Elm Street Development
Joyce Coleman	Department of Park and Planning, M-NCPPC
Cathy Conlon	Department of Park and Planning, M-NCPPC
Wayne Cornelius	Department of Park and Planning, M-NCPPC
Rick Croteau	Newland Communities, Inc.
Lou D'Ovidio	Office of the County Council
Tom Dagley	Office of the Inspector General
Delvin Daniels	Department of Permitting Services
Minna Davidson	Office of the County Council
Joe Davis	Department of Park and Planning, M-NCPPC*
Elizabeth Davison	Department of Housing and Community Affairs
David Deal	NV Homes
Tim DeArros	Clarksburg Town Center Advisory Committee
Howard Denis	Councilmember, Montgomery County Council
Norman Dreyfus	IDI Group Companies
Colleen Dwelley	Miller and Smith
Sue Edwards	Department of Park and Planning, M-NCPPC
Charles Ellison, Jr.	Miller and Smith
Michael Faden	Office of the County Council
Lynn Fantle	Clarksburg Town Center Advisory Committee

<b>Name, cont.</b>	<b>Affiliation, cont.</b>
Steve Farber	Office of the County Council
Justina Ferber	Office of the County Council
Robin Ferro	Department of Permitting Services
Kurt Fischer	DLA Piper
Peggy Fitzgerald-Bare	Office of the County Council
Nancy Floreen	Councilmember, Montgomery County Council
Katherine Freeman	Board of Appeals
Joyce Fuhrman	Office of the County Council
Marco Fuster	Department of Park and Planning, M-NCPPC
Joel Gallihue	Department of Park and Planning, M-NCPPC
Adrian Gardner	Central Administrative Services, M-NCPPC
Esther Gelman	Gelco Consultants
Carlton Gilbert	Department of Park and Planning, M-NCPPC
Joe Giloley	Department of Housing and Community Affairs
Larry Gordon	Shulman, Rogers, Gandal, Pordy, & Ecker, P.A.
Tracey Graves	Terrabrook, LLC*
Dale Hall	Miller and Smith
Robert Harris	Holland + Knight
Ken Hartman	Office of the County Council
Rick Hawthorne	Department of Park and Planning, M-NCPPC
Robert Hubbard	Department of Permitting Services
Kathy Hulley	Clarksburg Civic Association
Dan Janousek	Department of Park and Planning, M-NCPPC
Reginald Jetter	Department of Permitting Services
Trudye Johnson	Central Administrative Services, M-NCPPC
Doug Johnson	Department of Park and Planning, M-NCPPC
Doug Katz	Wasserman/Katz
Stephen Kaufman	Linowes and Blocher, LLP
Martin Klauber	Office of the People's Counsel
Mike Knapp	Councilmember, Montgomery County Council
Karen Kumm-Morris	Department of Park and Planning, M-NCPPC
Sharon Koplan	Newland Communities, Inc.
Rose Krasnow	Department of Park and Planning, M-NCPPC
Robert Kronenberg	Department of Park and Planning, M-NCPPC
Eric Larsen	Department of Housing and Community Affairs*
Tom Laycock	Department of Permitting Services
George Leventhal	Councilmember, Montgomery County Council
Charlie Loehr	Department of Park and Planning, M-NCPPC*
Mike Love	Montgomery County Fire and Rescue Service

<b>Name, cont.</b>	<b>Affiliation, cont.</b>
Michael Ma	Department of Park and Planning, M-NCPPC
Paul Majewski	Clarksburg Civic Association
Cathy Matthews	Upcounty Regional Services Center
Marlene Michaelson	Office of the County Council
Bill Mooney	Department of Park and Planning, M-NCPPC
Jacqueline Mowrey	Bozzuto Homes, Inc.
Sarah Navid	Department of Permitting Services
David Niblock	Department of Permitting Services
Joy Nurmi	Office of the County Council
David O'Brien	Charles P. Johnson & Associates
Marybeth O'Quinn	Department of Park and Planning, M-NCPPC
Glenn Orlin	Office of the County Council
Dan Parr	Office of the County Council
Tom Perez	Councilmember, Montgomery County Council
Nancy Porten	Porten Homes
Les Powell	Charles P. Johnson & Associates
Marilyn Praisner	Councilmember, Montgomery County Council
Amy Presley	Clarksburg Town Center Advisory Committee
Scott Reilly	Offices of the County Executive
Michele Rosenfeld	Department of Park and Planning, M-NCPPC
Cliff Royalty	Office of the County Attorney
Greg Russ	Department of Park and Planning, M-NCPPC
Susan Scala-Demby	Department of Permitting Services
Matt Shea	Newland Communities, Inc.
Kim Shiley	Clarksburg Town Center Advisory Committee
Steven Silverman	Councilmember, Montgomery County Council
Carol Smith	Clarksburg Town Center Advisory Committee
Stephen Smith	Department of Park and Planning, M-NCPPC
Ray Sobrino	Porten Homes
Robert Spaulding	Miller and Smith
Sid Starliper	Miller and Smith
Merle Steiner	Office of the County Council
Charles Stuart, Jr.	Miller and Smith
Nancy Sturgeon	Department of Park and Planning, M-NCPPC
Sharon Suarez	Department of Park and Planning, M-NCPPC
Michael Subin	Councilmember, Montgomery County Council
Christina Tadler Contreras	Department of Permitting Services
Kevin Tankersley	Land Design, Inc.
Rich Thometz	Hailey Development



<b>Name, cont.</b>	<b>Affiliation, cont.</b>
Clark Wagner	Bozzuto Homes, Inc.
Roger Waterstreet	Department of Permitting Services
Rich Weaver	Department of Park and Planning, M-NCPPC
David Weiss	Design-Tech
Cameron Wiegand	Department of Environmental Protection
David Wigglesworth	Department of Park and Planning, M-NCPPC
Ralph Wilson	Office of the County Council
Wynn Witthans	Department of Park and Planning, M-NCPPC*
Stan Wong	Department of Permitting Services
Gwen Wright	Department of Park and Planning, M-NCPPC
Patricia Wynkoop	Miller and Smith
Sandra Youla	Department of Park and Planning, M-NCPPC

## **Chapter II. Legal Framework**

The phrase “land development” refers to the activities a developer follows to construct buildings and related infrastructure (such as utilities, roads, stormwater facilities) on a parcel of land. To develop a parcel of land, a property owner must seek a series of interrelated approvals from government authorities.

This chapter provides an introduction to the government’s authority to regulate land use, and an overview of the legal framework for the land use decisions in Montgomery County that are reviewed in Chapter III, Chronology the Clarksburg Town Center Project Based on the Government’s Records. This chapter is organized as follows:

- **Part A** provides general background on the government’s authority to regulate land use and development, and briefly explains terms and procedures referenced throughout this report, such as zoning, subdivision, site plan, permits, inspections, complaint-handling, and enforcement.
- **Part B** reviews the laws and regulations that govern Montgomery County’s authority to zone and regulate land development activities. The focus is on the current structure for making the land use decisions that appear in the Clarksburg Town Center Project chronology.
- **Part C** explains OLO’s process for soliciting views on key legal issues from the Department of Park and Planning and the Office of the County Attorney. It also contains a memo from the Council’s Senior Legislative Attorney that reviews the agencies’ responses.

### **A. Introduction to the Government’s Authority to Regulate Land Use<sup>1</sup>**

#### **1. Land Use Regulation as an Exercise of Police Power**

The term “police power” refers to the authority of government to regulate the rights of private citizens in order to further the health, safety and welfare of the general public. The authority to zone, subdivide and regulate land is derived from the State’s police power. Laws that determine whether a parcel of land can be developed, what density and what types of uses are allowed, and what construction specifications, methods, and materials must be followed are examples of the government’s exercise of police power.

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<sup>1</sup> The definitions and descriptions of general land use terms, procedures and documents in this section reflect information available from many sources in the public domain. The specific documents consulted by OLO include: “Land Use Training Program for Local Officials,” published by New York Municipal Insurance Reciprocal on their website at [www.nymir.org/zoning](http://www.nymir.org/zoning) and accessed 9/30/2005; Pace Law School, Land Use Law Center, L.U.C.A.S. Library on their website at [www.law.pace.edu/landuse](http://www.law.pace.edu/landuse) and accessed 10/2/2005; Jefferson County, WA Unified Development Code published on their website at <http://www.co.jefferson.wa.us/commdevelopment/udc/default.htm>, accessed between 9/1/2005 and 10/22/2005; and James A. Coon Local Government Technical Series, published by the New York Department of State Division of Local Government Services, 1998.

**Parameters on government authority to regulate land use.** State enabling legislation delegates broad decision-making authority to local governments in land use matters. The legal doctrines that limit the authority of local governments to enact and enforce land use regulations specify, among other things, that such regulations must serve a legitimate public purpose and cannot improperly discriminate among similar types of parcels.

The process of making land use decisions must abide by certain procedures that prohibit government from depriving a person of “liberty or property without due process of law.” To preserve a property owner’s constitutional rights, administrative bodies authorized to make land use decisions (including zoning/subdivision) must generally adhere to the following principles:

- **The proceeding must be fair in process and appearance.** As one means of implementing this principle, administrative bodies follow *ex parte* rules, which prevent a decision-maker from discussing the merits of a particular case in advance of or outside the hearing.
- **The administrative body must provide notice.** To implement this principle, administrative bodies may send hearing notices to interested parties, publish hearing notices in newspapers, or publish agendas of upcoming meetings. Providing notice of a pending action gives parties time to prepare for the hearing so they can participate intelligently in the hearing itself.
- **The hearing must be conducted in a manner that allows all parties to present factual evidence and that helps the decision-maker arrive at a fair, legal, and complete decision.** For a quasi-judicial process, the goal is conducting the hearing in a manner that results in a complete administrative record, meaning that all parties have the opportunity to present evidence and all salient legal points are addressed. To implement this principle, an administrative body will begin a hearing by explaining the guidelines and procedures for the hearing, followed by presentations by the applicant and other parties (if any), and then the decision.
- **The decision must be based on the official record of the hearing.** To implement this principle, an administrative body routinely has systems in place to record the hearing and to label and number any written exhibits. An official hearing record both provides the basis and support for the decision reached, and constitutes the official record for judicial review. Administrative bodies often refer to the “administrative record,” a concept that is somewhat broader than the “official record of the hearing” because it includes all materials that have been submitted into the record, not just those referred to during the hearing.
- **The decision must be based on findings of fact and conclusions of law.** To implement this principle, an administrative body must apply the legal criteria for the decision established by the legislative body in the relevant regulatory codes, and must reach a decision that is supported by findings of fact that are based on evidence in the official hearing record. Conclusions of law explain how the land development proposal in question satisfies or fails to satisfy applicable legal criteria, based on the findings of fact. Findings of fact and conclusions of law must be precise and understandable.

**Delegation of authority and standards.** A legislative body that authorizes an administrative body or official to administer the law must establish ascertainable standards to guide the process and decision-making.

The standards need to strike a balance. On one hand, they must be definite and specifically limit the discretionary authority of the administrative official. On the other hand, they must be flexible enough to allow some administrative discretion so that the design and construction of the development can take specific features of the site or project into account.

A legislature should balance the use of numeric versus flexible standards based on the subject of the regulations, local values, and the level of qualified design or technical assistance available at different points of the review process.

Law that establishes strict numeric standards usually includes a waiver process to provide relief from an unintended consequence or unanticipated situation. The waiver procedures typically require an applicant to prepare a written application that states the problem, describes the requested modification, and assesses the effects of not following the code. The law may also require the applicant to propose an action to mitigate or compensate for the effect of the waiver. The law usually assigns the authority for granting a waiver to an agency head, a committee of technical staff, or a board of appeals, and provides guidance concerning what findings must be made before a waiver may be granted. The law also specifies whether there can be an appeal of this decision, and to whom.

As the number and complexity of land use regulations evolves, it is not unusual for requirements in one law or part of a law to contradict or conflict with requirements in another law or part. These conflicts often emerge during a request for a zoning approval because a development proposal for a specific site must comply with multiple standards simultaneously. To address this situation, a law can establish rules to address conflicting requirements, authorize some person or entity to identify and resolve conflicts, and/or require a periodic comprehensive review and “clean-up” of the law.

**Land Use Hearings.** A jurisdiction’s land use law provides for hearings to assist land use authorities in gathering and deliberating facts as they apply to various land use questions. Depending on the law, authorities may employ hearings for various purposes.

Three common hearing purposes are:

- **A hearing on an application for a land use approval.** An administrative board or official conducts an application hearing to hear and decide a request for a subdivision or site plan approval or for other types of special permits. One of the primary purposes of an approval hearing is to give the public an opportunity to present evidence as part of the official record that becomes the basis for the final decision.

- **A hearing to respond to an alleged violation of an approval.** An administrative board or official may conduct a hearing to allow a party alleged to be in violation of an approval to answer that charge.
- **A hearing on an appeal from the action of an administrative official.** An administrative board or official conducts an administrative appeal hearing when someone disputes a decision by a zoning administrator or building official. A law can provide for an administrative hearing to hear an appeal of the issuance of a permit or a notice of violation. The opportunity for an administrative appeal of a decision to a local body creates a timely review procedure that is more accessible and less expensive than an appeal to court.

Land use laws address certain procedural questions for all types of hearings. These include:

- Who is authorized to conduct the hearing, such as a lay board or a professional hearing examiner;
- Who is authorized to decide the matter that is heard, such as a lay board or a professional hearing examiner;
- What level of public comment is allowed;
- Whether the authorized party's decision may be based on new evidence (i.e. de novo) or on the evidence available at the time of the original decision; and
- What specific criteria does the authorized party apply to reach its decision?

The procedural requirements established to address these questions will vary widely, both between jurisdictions and between types of hearings within a single jurisdiction. For example, some jurisdictions may open administrative appeal hearings to the public while others may be limited to the parties of record. Some jurisdictions may accept new testimony and evidence at these appeal hearings while others may not.

In making these decisions, a legislature works to balance competing interests, which include providing certainty to the applicant in the decision-making process, responsiveness to public concerns or complaints, and oversight of the decision itself. (See page 23 for a discussion of the rules of procedure that govern hearings on land use matters in Montgomery County.)

## **2. Explanation of Commonly Used Land Use Terms and Procedures**

Local government law that regulates land development activities typically includes a combination of policies, procedures, standards and restrictions designed to:

- Outline a coherent pattern of land use and development;
- Set up a fair and fact-based decision-making structure; and
- Establish standards to assure safe buildings and roads and implement other public policies such as forest conservation or water quality protection.

This section briefly explains the following terms and procedures often found in these laws: zoning, subdivision, record plat, site plan, amendments to land use approval, permit and inspection, complaint handling, and enforcement.

## **ZONING**

**Zoning** is a legal tool that a local government uses to regulate the use and density of private property to protect public health and safety. A zoning law consists of a code or ordinance and a map.

A **zoning code** creates a system of districts and zones that define an owner's permitted private property development rights. For each zone, it establishes allowable uses and development standards, such as building height, setbacks, and lot coverage; parking; signage; and landscaping. A zoning code also establishes an administrative system consisting of different permit types, such as use certificates, site plans, and the procedures a private property owner may pursue to develop a special use in a zone, modify a particular height or setback standard, increase the permitted density, or even change the zone itself.

A **zoning map** graphically displays the zone of each parcel of land in a jurisdiction. The zoning map can be changed comprehensively to implement a general land use plan or on a piecemeal basis after an administrative hearing procedure established in the zoning code.

A local legislative body enacts a zoning code and zoning map to establish development or land use controls for each parcel of land in a jurisdiction. Since a zoning code and zoning map regulate the allowable uses and density of land, the zoning process affects economic value. A local government often leverages the economic value that zoning creates to achieve other policies, such as affordable housing or preservation of open space.

**Zoning administration** refers to the collection of responsibilities that assure the smooth operation and administration of the zoning code. A zoning code generally has a separate chapter that addresses how to:

- Assign the authority, duties and responsibilities of zoning officials, zoning boards, hearing examiners, and other agencies that participate in reviews of zoning approvals.
- Establish rules and procedures to receive and review applications, conduct hearings and resolve questions of interpretation, unintended hardship, or regulatory conflict.

## **SUBDIVISION AND RECORD PLAT**

**Subdivision** is the process of dividing or assembling parcels of land for sale or development. Subdivision law establishes a set of approvals and procedures a property owner or developer must follow to assemble or subdivide a parcel of land. Subdivision law regulates the layout of land to assure adequate space for traffic and recreation; compatibility with surrounding land uses; preservation of forest land and steep slopes; and control of development in the floodplain.

A **record plat** is a picture of a parcel of land prepared by a surveyor or engineer that creates individual building lots, streets, and easements and sites for public dedication. A plat shows the boundaries, street lines, lot lines, and locations and widths of streets, alleys, sidewalks, and utility rights-of-way. A record plat also establishes a labeling and numbering system for the lots in a subdivision and names the streets it creates.

A record plat process consists of the steps a surveyor or engineer follows on behalf of a developer to prepare a document for review and sign off by a local official and recordation in the County land records. A developer must record a plat before selling finished lots.

Typically, a local legislative body delegates the authority to review and approve applications for subdivision and record plats to a planning board or a zoning board of appeals. Subdivision law may establish procedures to review an application for compliance with subdivision regulations and also establish rules for recording a plat.

## **SITE PLAN**

A **site plan** is a drawing that shows the arrangement, design, and the proposed use of a single parcel of land. Site plan regulations identify what a site plan drawing must include, such as the locations of buildings and accessory structures, access roads, parking lots, sidewalks, landscape, lighting, recreation areas, and buffering.

A local legislature can enact site plan requirements as a separate law or as part of the zoning code. A site plan approval cannot change the use and dimensional requirements that are included in the zoning code.

Local law determines the applicability of site plan requirements. A zoning code can require a site plan for development only in designated areas, such as an historic district or a commercial corridor, or to certain types of development, such as a shopping mall, an office park, or a townhouse residential project. Alternatively, a zoning code can require a site plan for all types of development, with certain exceptions. For example, a zoning law typically exempts the development of a single lot in an approved subdivision from site plan review.

If a legislature delegates the authority for site plan review to an administrative board, the law must establish adequate, specific standards to guide the findings of the board and limit the discretion of the board in reaching its decision. This can include establishing procedures for site plan approval, such as:

- A fair hearing;
- Maintenance of an official record;
- Accurate documentation of the approval, including findings of fact and conclusions of law;
- Site plan conditions of approval to state that applicants are bound by testimony and exhibits; and
- Administrative body certification of the final approved site plan.

In addition, the legislature can distinguish between projects with major versus minor impacts and authorize the reviewing agency to waive certain elements of site plan review for minor projects.

#### **CONDITIONS OF APPROVAL**

When delegated authority by the legislature, an administrative body can take any of three actions on a proposed project: approve an application as proposed, approve an application subject to conditions, or deny an application.

To receive an approval, an applicant must show that the project complies with all the required elements and standards in the law. As discussed above, an administrative body must make its decisions based on reliable evidence in the official record established during the hearing process. The administrative body must approve the project if the applicant shows the project has met all applicable standards.

If the applicant can meet the standards by modifying the proposal, the administrative body can approve the application with conditions. A condition is a requirement attached to a reviewing board's approval of a proposed project that the applicant must comply with before an administrator issues a certain permit, such as a grading permit, a building permit, or a certificate of occupancy. Typically, conditions give the reviewing body a mechanism to respond to concerns raised by those affected by the project.

A reviewing body must only impose conditions reasonably related to the impact of the proposed development on the community. Conditions must also be clearly articulated so they can be implemented as intended by the developer and the reviewing body. A court can invalidate a condition if there is no rational basis in the record for its imposition, if it is unreasonable, or if it is not related to the impact of the proposed project.



## **AMENDMENTS TO AN APPROVED LAND USE PLAN**

An **amendment** is a request by an applicant or an administrative body to modify an approved plan. The types of factors that may justify amending an approved plan include an opportunity to achieve improved compliance with applicable regulations, an unforeseen site condition, or a change in external circumstances such as market conditions.

In addition to defining who can apply for an amendment, a local zoning code may address the:

- Form, content, and fees associated with an amendment application;
- Procedures, criteria, and authority for classifying an amendment as major or minor; and
- Review procedures for various types of amendments.

Some jurisdictions assign a Planning Director or Zoning Administrator the authority to classify an amendment application as major or minor, and some further establish criteria in the law to guide that determination. The criteria may direct the decision-maker to consider whether the scope of the proposed change affects more than 5 or 10 percent of the approved floor area, exceeds a numeric threshold, significantly impacts the surrounding external area, or adversely affects compliance with other regulatory requirements.

It is common for a zoning code to require a major amendment to undergo a new review and a new hearing before the decision-making body. The law may establish an alternative procedure to address minor amendments administratively, or it may require public notice and hearing for all amendments.

## **PERMITS AND INSPECTIONS**

A **permit** is a legal tool that allows the administration and enforcement of building and construction requirements. Local authorities establish a system of permits to determine whether proposed construction complies with relevant zoning and building codes. Requiring a permit before construction establishes a mechanism for local authorities to receive notice that a property owner intends to begin construction activity on a certain parcel.

As specified in local law, a permit application typically consists of an application form and a plan or drawing of the proposed construction for the road, stormwater management structure, building, or public utility. After a property owner submits a permit application, local staff must review the proposed project to assure that it meets code requirements.

A local law can establish several types of permits to regulate different aspects of the land development process. At minimum, most jurisdictions link the issuance of a **building permit** to a requirement that the construction proceed in accordance with reviewed and approved building plans.

Some jurisdictions require a separate zoning permit or site plan permit to show compliance with local zoning regulations. Other jurisdictions combine the determination of compliance with zoning law with the issuance of a building permit. The applicable zoning requirements for each permit application can vary widely, depending on the set of zoning approvals a proposed project requires, as established in local law.

For example, a building permit application to construct a single-family detached house on an approved lot may only need to comply with the lot size and setback requirements of an established zone. In another case, a building permit application to construct a house in a zone that requires a subdivision or site plan approval may need to comply with a more detailed set of zoning regulations, plus other conditions of approval.

A **use and occupancy certificate** is a permit for a building to be occupied after construction is complete. By issuing an occupancy certificate, a local government acknowledges that construction is complete and complies with all relevant zoning and building requirements, and grants permission for the structure to be used for its intended purpose. A zoning law can also require other permits (e.g., sediment control permit, grading permit, storm drain permit or utility permit) as part of a plan review process for different types of development activities.

A local law may require **periodic monitoring inspections** of construction activity after a permit is issued to assure that the construction of a specific facility, such as a road, storm drain, or building, complies with the approved plan.

An effective inspection system typically consists of an initial meeting to review the approved plans; periodic inspections to observe critical systems, such as the foundation or the ventilation and air conditioning system before they are hidden from view; and one or more final inspections that precede issuance of the use and occupancy permit.

## **COMPLAINT HANDLING AND ENFORCEMENT**

A code enforcement process in a local law typically empowers an administrative officer and establishes the procedures that officer must follow to respond to alleged violations or complaints. Generally, these enforcement procedures are intended to encourage the voluntary correction of violations in a timely manner to protect the public health and safety.

A local code enforcement process typically consists of a complaint intake system, an initial inspection and determination of a violation, notice to the property owner so that s/he can take steps to abate the violation or appeal the determination, and a procedure to resolve the violation either before the administrative or regulatory body that approved the project or in court.

**Intake Process for Citizen Complaints.** An enforcement process begins with a complaint or observation of an alleged violation or problem. Many parties can initiate a complaint, including a neighbor, another citizen, or an official inspector. An effective program will have a form to capture information about the complaint, as well as an intake system that allows complaints to be reported easily, such as by telephone, e-mail, or in person.

**Response Process for a Citizen Complaint.** An effective program often includes a follow-up letter or phone call so that the complainant knows the complaint has been received. The letter may also provide the complainant with an estimate of how long it will take to resolve the complaint, based on prior experience with similar complaints.

**Staff Fact Finding Inspection/Investigation.** After a complaint is reported an inspector visits the site to investigate the situation and make a preliminary determination of whether a code violation exists. An inspector typically maintains an activity log that reports the date of the initial inspection, the details of the activities the inspector observed, and whether or not a violation exists.

A local law may give an inspector the express authority to enter private property to conduct an inspection. A law may require that an initial inspection occur within a certain number of days after a complaint is reported to assure that all complaints are investigated in a timely manner.

**Administrative Remedies.** Land use regulations are complex to administer and enforce. Especially with respect to zoning enforcement, it is common for local law to establish a system of administrative remedies that a property owner can pursue. The law typically provides a property owner who receives a notice of violation with some alternative courses of action besides modifying his behavior to comply with a notice of violation.

One option is to appeal the code enforcement official's determination that a violation exists. Many local laws provide a process for an aggrieved property owner to file an administrative appeal with an administrative body, such as a board of appeals. Another option, particularly for violations of zoning law, is to seek administrative relief by applying for an interpretation or a variance.

**Corrective Enforcement Actions.** If an inspector finds that a code violation exists, the inspector will notify the property owner so that the owner can take action to correct the violation. An inspector may contact the owner informally to explain the violation, or more formally by a letter requesting voluntary compliance by a specified date.

A local law typically gives the inspector the authority to issue a **notice of violation**. This notice serves as a written finding that a violation exists and directs the property owner to take action by a specific date to correct the violation.

A local law can also establish a process for administrative actions to stop the landowner from continuing a violation. These administrative actions include:

- Revoking or suspending a permit;
- Denying new permits until the violation is resolved; or
- Issuing a stop work order to halt construction until the violation is addressed.

Usually a property owner can resume operations after an inspector verifies that the owner has corrected the violation.

Many local laws authorize a code enforcement official to issue a civil citation, in addition to any administrative remedies established in law. Typically, a code enforcement officer can issue a citation if a property owner continues a violation without pursuing any resolution beyond a specified period of time after a complaint is filed.

A property owner who receives a citation has the option of paying the fine or notifying the jurisdiction of his/her intent to stand trial. Some local laws require a property owner to exhaust all administrative remedies before pursuing judicial review.

## **B. Overview of Laws and Regulations Governing Land Use in Montgomery County**

The State Constitution gives the General Assembly the authority to enact laws to protect the public health, safety, and welfare. The General Assembly, in turn, enacts enabling legislation that establishes the parameters of local governments' authority.

This section lists the key provisions in the State Constitution and Code that grant authority to the County to regulate land use. Second, this section details the County laws that exercise this authority. Finally, this section identifies other documents (such as master plans, the Growth Policy) adopted by County government or the Planning Board that provide policy guidance on land use decision-making in Montgomery County.

Collectively, all of these different elements provided the framework for the government actions taken (or not taken) on the Clarksburg Town Center Project.

### **MARYLAND CONSTITUTION AND CODE**

The Maryland Constitution and Code establish Montgomery County's authority to regulate land use.

As a "home rule" charter county under Article XI-A of the Maryland Constitution, Montgomery County may exercise local legislative power granted by Article 25A, Section 5 of the Maryland Code, the Express Powers Act. The Express Powers Act

authorizes charter counties to “enact local laws relating to zoning and planning” and to establish Boards of Appeals to hear and determine zoning variances, special exceptions, and other matters. However, the County’s zoning and planning authority derives from the Regional District Act, rather than the Express Powers Act.

**The Regional District Act establishes the Planning Board.** Article 28 of the Maryland Code, known as the Regional District Act (RDA), establishes the bi-county Maryland-National Capital Park and Planning Commission (M-NCPPC). The Commission consists of the five members of the Montgomery County Planning Board and the five members of the Prince George’s County Planning Board.

State law generally assigns responsibilities to the two Planning Boards. Specifically, the RDA states that the Planning Boards are:

... responsible for planning, platting, and zoning functions primarily local in scope, as distinguished from the regional planning functions of the Commission relating to or affecting the regional district as a planning unit. The local functions exclusively within the jurisdiction of the respective planning boards include, but are not limited to, the administration of subdivision regulations, the preparation and adoption of recommendations to the district council with respect to zoning map amendments, and the assignment of street names and house numbers within the regional district. (Article 28, Section 7-111)

The RDA also lists responsibilities related to mandatory referrals of certain government actions and submitting recommendations to the county governing body on the annual capital budget, and performing surveys, studies, and “other planning duties” the governing bodies assign to the Planning Boards. The RDA specifies that, in Montgomery County, to the extent authorized by County law, ordinance, or resolution, the Planning Board may administer and enforce any adopted growth policy or forest conservation program, and provide staffing assistance on matters related to the promotion of historic preservation.

In Montgomery County, the Planning Board consists of a full-time Chairman and four part-time Board members. The County Council appoints the Chairman and the other Board members. The law does not distinguish between the responsibilities of the Chairman and those of the other Planning Board members.<sup>2</sup>

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<sup>2</sup> The most recent advertisement for Planning Board Chairman, issued by the County Council in March 2002, described the Chairman’s responsibilities as follows: “To perform a leadership role with respect to the Montgomery County portion of the Commission as well as to chair the meetings of the Planning Board; to assist in developing overall vision and direction for the Commission; to oversee the functioning of the Montgomery County Planning Board staff; to provide guidance on preparation of budgets by Park and Planning Department staff for presentation to the Board; to represent the Board at official meetings; to present the Planning Board’s position, especially before the County Council; and to serve as Chairman or Vice Chairman of the M-NCPPC as well as to carry out other customary duties of the office.”

**State law assigns zoning and subdivision powers.** The Regional District Act establishes a shared arrangement for the exercise of zoning and subdivision powers in Montgomery County.

The RDA assigns the following **zoning powers** to the County Council as its designated District Council:

- The authority to divide land into districts and zones to regulate the “erection, construction, reconstruction, alteration, and uses of buildings and structures and the uses of land”;
- The authority to impose different regulations in different districts or zones;
- The authority to adopt and amend the zoning code text and maps;
- The authority to delegate decision-making on special exceptions and variances to the Board of Appeals or an administrative office, or to decide such matters at the District Council level;
- The authority to authorize the Board of Appeals to interpret zoning maps; and
- The authority to provide in zoning regulations for the issuance of use and occupancy permits and for certificates by means of which zoning questions may be raised before preparation of all structural specifications of a building as may be required for a complete building permit. (Article 28, §§8-102; 8-101; 8-110; and 8-119)

State law directly authorizes the Planning Board to prepare and adopt recommendations to the District Council with respect to zoning map amendments. Both the Commission and the Planning Board are authorized to make recommendations to the District Council concerning amendments to the zoning code and subdivision regulations. (Article 28, §7-111)

State law’s assignment of **subdivision power** to the District Council includes the authority to adopt regulations and amendments. Subdivision plats must be approved by the Commission, which has authority to require dedication of streets and roads in connection with the approval of plats of subdivision in accordance with the standards and limits in the subdivision regulations. As a local planning entity, the Planning Board has responsibility to administer the subdivision regulations. In addition, the District Council may adopt ordinances to protect historic sites. (Article 28, §§7-115; 7-111; 8-101)

Additional **regulatory powers** assigned directly to the Planning Board include the authority to administer and enforce any adopted growth policy or forest conservation program, and to provide staffing assistance on matters relating to historic preservation. (Article 28, §§7-111; 8-101)

## **MONTGOMERY COUNTY CHARTER AND CODE**

Section 110 of the County Charter, “Exercise of Zoning, Planning, and Other Powers,” requires that the Council’s exercise of power relating to zoning, planning, or subdividing follow what is prescribed by the State Constitution and state law.

The rest of this section provides an overview of provisions in the County Code that address the exercise of zoning, planning and subdivision powers. It also identifies a number of other documents that provide policy guidance on land use decisions in the County.

### **1. Administrative Structure and Rules of Procedure**

Chapter 2 of the County Code, “Administration,” establishes the functions and duties of the departments and offices that make up the Executive and Legislative branches of government. It further states that “the procedures for the Council to exercise its zoning, planning, or subdivision powers” must be as prescribed by:

- The Regional District Act;
- Other applicable law enacted by the General Assembly of Maryland;
- County zoning or subdivision ordinances; or
- Other applicable County laws. (Sec. 2-76)

**Roles and Rules for Hearing and Deciding Land Use Matters.** In addition to the County Planning Board, the County Code establishes two other administrative bodies with responsibilities for hearing and deciding land use matters not decided by the County Council: the County Board of Appeals and the Office of Zoning and Administrative Hearings.

The Board of Appeals (BOA) may hear and decide applications for variances and special exceptions, and appeals from a variety of licenses, orders, and permits, including building permits. The Office of Zoning and Administrative Hearings (OZAH) may hear and make recommendations on applications for local map amendments and development plan amendments ultimately decided by the District Council, on all special exception applications, and on other matters referred by the Board of Appeals. OZAH can also conduct public hearings on any appeal or other matter assigned by law, the County Council, or the County Executive

**Administrative Hearing Procedures.** The County Code allows for varying administrative procedures depending on the type of hearing and the administrative body that conducts the hearing.

The County’s Administrative Procedures Act (APA) governs hearing procedures for administrative appeals heard by the Board of Appeals, such as building permit appeals; and the Zoning Ordinance governs the hearing procedures for local map amendments, special exceptions and variances. (Chapter 2A; 59-H-5; 59-A-4)

The Council's stated policy intent in establishing the Administrative Procedures Act is to:

- Protect those legal rights afforded to affected parties who use and are subject to the administrative hearing processes established by County laws and ordinances;
- Provide for administrative due process with respect to matters which are subject to hearings before enumerated boards, commissions, offices, and other administrative agencies performing quasi-judicial functions; and
- Provide, where feasible, uniformity in procedures and regulations governing the processing of administrative appeals and other matters which require administrative and/or quasi-judicial hearings. (Sec. 2A-1)

In addition, the Council approves specific Rules of Procedure for the Board of Appeals to follow in its hearings on variance and special exception cases. It also approves specific Rules of Procedure for the Hearing Examiners (as the Office of Zoning and Administrative Hearings is generally known), to follow in local map amendment cases and in special exception cases. Both sets of Rules of Procedure are published as appendices to the County Code.

These procedural rules applicable to local map amendments, special exceptions, and variances are designed to achieve the same goals as the APA, and include the following elements:

- Notice and pre-hearing procedures to assure a fair hearing, including requirements for reasonable notice;
- Requirements for pre-hearing submissions to give all parties the opportunity to inspect documents; and
- Requirements that all applicants, and any community members acting as a group or represented by counsel, provide copies of any expert reports, names of witnesses and summaries of their expected testimony, and expected time to present the case. (59-H-5; 59-A-4)

Preliminary plan and site plan applications are heard by the Planning Board. The Planning Board adopts its own Rules of Procedure that are intended to provide procedural due process in matters such as preliminary and site plan hearings.

## **2. Chapter 50, Subdivision of Land**

County Code Chapter 50, combined with provisions in the Regional District Act, addresses subdivision application requirements, design standards, timing, and procedural requirements.



Chapter 50 establishes general procedures for the submission of subdivision plans and a two-phase process for the consideration of plans: a **preliminary plan** that receives a conditional approval and a **final plat for recordation**. It also contains a section that outlines the enforcement authority of the Planning Board.

**Preliminary Plan.** In a preliminary plan, the Planning Board approves lot location and block layout; identifies road locations; and designates property that must be dedicated to public use, such as roads, school sites, and parks. The Planning Board must:

- Refer a concept plan “to each or any of the public agencies which has a direct interest in any feature of the plan for its review and recommendations which shall be returned to the board in writing within thirty (30) days.” Furthermore, “within the same period of time, the application shall also be placed on the agenda of the subdivision review committee for its review and advice.”
- Receive the recommendations of the public agencies and “the advice of the subdivision review committee” before the staff of the Board presents the application to the board, together with its recommendations for approval, disapproval or approval with conditions. The law further states that “to the extent practicable, the staff must present the plan to the board within forty-five (45) days from the date on which the application was received.”
- Take one of the following actions: (i) approve the concept plan; (ii) disapprove it, stating in writing to the applicant the reasons for the disapproval; or (iii) approve it, subject to such conditions or modifications as the Planning Board finds are necessary, with respect to those features of the concept plan on which its decision is requested by the applicant, or recommended by a public agency.

In practice, the “subdivision review committee” is known as the Development Review Committee (DRC). The DRC reviews and comments on requests for zoning approvals, such as project plans and site plans, in addition to requests for subdivision approvals. County law does not contain additional rules concerning the membership, duties or authority of this committee.

Chapter 50 also governs the sequence of subdivision approval as it relates to other reviews and actions in the development process. For example:

- The law prohibits approval of a building permit unless the lot is shown on a recorded plat;
- The Planning Board must not approve a subdivision unless it makes a determination of adequate public facilities;
- If a site plan is required, then the preliminary plan of subdivision must specify that no clearing or grading can occur before the site plan is approved unless otherwise specified preliminary plan approval;

- If a forest conservation plan is required, the Planning Board must not approve a preliminary plan until all requirements of the forest conservation law for plan approval are satisfied; and
- If a water quality plan is required, the Planning Board must not approve a preliminary plan or any extension until all requirements of the County water quality law are satisfied. (Sec. 50-20; Sec. 50-35)

**Subdivision Record Plats.** In order for an applicant to have a preliminary plan validated, the applicant must file record plats within 30 days of the mailing of the Planning Board opinion. A plat is “filed” when it is submitted to Planning Board staff, along with an application for approval. Chapter 50 outlines the procedures for filing, approval and recording of plats. (Sec. 50-35; 50-37).

A record plat must comply with the approved preliminary plan, except that the Planning Board may allow “minor modifications” which do not alter the intent of its previous approval. Chapter 50 provides that if a site plan is required, the Planning Board “may refuse” to approve a record plat until the site plan is approved.<sup>3</sup> (Sec. 50-37)

Staff may reject the plat within five days if it does not conform to the approved preliminary plan, except for “minor modifications.” The law does not define “minor modification.”

An applicant may resubmit a rejected plat for consideration directly by Planning Board after ten days. The Planning Board may grant a waiver to reconsider a rejected plat earlier than ten days. It may also reconsider a rejected plat earlier than ten days if the applicant removes the cause of staff rejection.

The Planning Board may hold a hearing before acting on any record plat. It may approve a record plat conditioned on the applicant delivering supporting data. The record plat is automatically approved unless the Planning Board approves or disapproves it within 30 days after its submission.

**Enforcement of Planning Board Authority.** Chapter 50, Subdivision of Land, authorizes the Planning Board (or its designee) to enforce a “Planning Board Action.” That term is defined to include a final decision on a preliminary plan, site plan, project plan, supplementary plan, or water quality plan.

The Planning Board’s enforcement agent (designee responsible for determining compliance with terms, conditions, requirements, agreements, and any other obligations or limitations associated with a Planning Board Action) may deliver a citation to a person believed to be in violation of a Planning Board Action. The citation may impose a civil

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<sup>3</sup> Sec. 59-D-3.5 of the Zoning Ordinance states that the Planning Board “must not” approve a record plat unless “it is in strict compliance” with an approved site plan. See page 31.

fine or penalty of up \$500 for each day the violation has occurred. A party receiving a citation may elect to stand trial in District Court for the offense, if that party notifies the Planning Board Chairman no less than five days before payment of the fine or penalty is due.

Additionally, the Planning Board's designated enforcement agent may issue a stop work or corrective order if it reasonably determines that a party is violating a Planning Board Action, and that the violation threatens public health, safety or welfare. If its enforcement agent issues a stop work or corrective order, the Planning Board must schedule a review hearing at the Board's next available regular session. If the Planning Board can not schedule a hearing by the full Board in a reasonable period, the Chairman or Vice-Chairman may review the matter in lieu of the entire Board.

The Planning Board, or the Chairman or Vice-Chairman acting in lieu of the full Board, may decide that a stop work or corrective order should continue. This has the effect of revoking the underlying Planning Board approvals for the entire project, or portions of the project, as determined by the Board, until the violation is corrected.

A party may appeal the Planning Board's decision to continue or not to modify a stop work or corrective order by filing an appeal with the Circuit Court. The Board of Appeals does not have jurisdiction to review these appeals.

In addition to fines, penalties, stop work orders and corrective orders, the law authorizes the Planning Board to pursue other available remedies, as the Board deems appropriate. The Planning Board has exclusive authority to enforce violations of a Planning Board Action. No other County agency can exercise this authority. (Sec. 50-41)

### **3. Chapter 59, Zoning Ordinance**

As outlined in State law, Chapter 59 of the County Code, Zoning Ordinance, "govern[s] the location, height, bulk, and size of buildings and other structures; building lines, depths and areas of lots; density and distribution of population; and the location and uses of buildings and structures for trade, industry, residence, recreation, agriculture, etc." (Article 28, Section 8-101)

The County Council, sitting as the District Council, adopts the Zoning Ordinance and the related Zoning Map for the Maryland-Washington Regional District in Montgomery County.<sup>4</sup> The Council amends the Zoning Ordinance by enacting "Zoning Text Amendments." The Council amends the Zoning Map either comprehensively through a sectional map amendment, after adopting a land use master plan, or on a piecemeal basis through a local map amendment.

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<sup>4</sup> The Regional District excludes the municipalities of Brookeville, Poolesville, Laytonsville, Rockville, Barnesville, Gaithersburg and Washington Grove.

The Zoning Ordinance defines zone standards and permitted uses, and governs permitted uses, special exceptions, variances, and nonconforming structures in those zones. It also establishes procedures for development approval and map amendments. Finally, it mandates off-street parking and loading standards, and regulates signs.

**Methods of Development.** In Chapter 59, the Central Business District and Residential Mixed Use zones both allow two methods of development:

- Standard method, which requires compliance with a specific set of development standards and permits a range of uses and a density compatible with these standards; and
- Optional method, under which “greater densities may be permitted and there are fewer specific standards, but certain public facilities and amenities must be provided by the developer.” (Sec. 59-C-6.215)

As part of an application for optional method development, the law requires the developer to submit both a project plan and a site plan. The law also requires the Planning Board to approve the site plan before any building permits are issued. (Sec. 59-D-2.11)

**Project Plans and Site Plans – Applications, Approvals, and Amendments.** The Zoning Ordinance specifies statutory requirements for the application and approval of project plans and site plans, as well as procedures to amend approved project plans and site plans.

## **PROJECT PLANS**

**Application.** The law requires that a project plan application clearly indicate how the proposed development meets the standards and purposes of the applicable zone. The application must include certain information, such as a natural resource inventory, a land use plan, and a development program showing the sequence in which all structures, amenities, and public facilities will be developed. (Sec. 59-D-2.12)

**Hearing and Required Findings.** The Planning Board must hold a public hearing on a proposed project plan between 60 and 90 days after its filing. Planning Board staff must submit to the Board its analysis of the application no later than 15 days before the public hearing date. (Sec. 59-D-2.41)

The law also states in general terms what the Planning Board must find to grant approval. The Board must find that the Project Plan :

- Complies with the zone;
- Conforms with the sector plan<sup>5</sup>;
- Is compatible with existing or potential development; and
- Conforms with requirements for adequate public facilities, forest conservation, and water quality. (59-D-2.42)

**Approval Procedures.** Within 30 days after the record of the public hearing is closed, the Planning Board must approve, approve subject to modifications and conditions, or disapprove a project plan application, by majority vote of those Board members present and voting. The Planning Board must base its action on the evidence and testimony contained in the record. (Sec. 59-D-2.4)

**The Clarksburg Town Center Project is an optional method development project on a parcel zoned Residential Mixed Use-2.**

In 1989, the District Council created the RMX-2 zone. Mirroring the approach established in the CBD zones, the regulations for this zone establish maximum commercial and residential density limits. The regulations eliminated specific development standards in place of a more flexible standard that allows, "general commercial uses and higher density residential uses...provided that they are in accordance with the provisions of 59-C-10.3, as well as the density, numerical limitations, and other guidelines contained in the applicable master plan approved by the District Council." The regulations also require the developer to seek two development approvals from the Planning Board: a project plan approval and a site plan approval. (59-C-10.2.2)

## **SITE PLANS<sup>6</sup>**

**Application.** The law requires a site plan application to include certain information, such as location, height, ground coverage, and use of all structures; the number and type of dwelling units; the location of green and recreational areas; parking; public facilities; roads; and a grading plan. (59-D-3.23)

A site plan can cover all or any part of a lot or tract. If it covers only a part of a tract it must show how it is related to and coordinated with other site plans either approved, under consideration, or yet to be submitted. (59-D-3.1)

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<sup>5</sup> A sector plan is a comprehensive plan for part of a master plan area, such as a central business district.

<sup>6</sup> Site plans are required in some zones under standard development methods, as well as under the optional method described here.

**Hearing and Required Findings.** The law requires the Planning Board to hold a public hearing on each site plan application. The law further indicates in general terms what the Planning Board must find to grant approval. The required findings fall into two categories: regulatory and qualitative.

Regulatory findings required by the law are that the proposed site plan meets the requirements of the zone in which it is located, and also meets the requirements of the County's forest conservation and water resource protection laws.

The Planning Board must also make the following qualitative findings of the proposed site plan:

- The proposed site plan is consistent with a project plan;
- The locations of the buildings, open spaces, landscaping, recreation facilities, and pedestrian and vehicular circulation systems are adequate, safe, and efficient;
- Each structure and use is compatible with other uses and other site plans and with existing and proposed adjacent development; and
- The proposed development achieves a maximum of compatibility, safety, efficiency and attractiveness.

The law further specifies that:

...the fact that a site plan complies with all of the stated general regulations, development standards or other specific requirements of the zone shall not, by itself, be deemed to create a presumption that the proposed site plan is, in fact, compatible with surrounding land uses and, in itself, shall not be sufficient to require approval of the site plan. (Sec. 59-D-3.4)

**Approval Procedures.** Chapter 59 requires the Planning Board to approve, approve subject to modification and conditions, or disapprove a site plan application no later than 45 days after receiving the site plan application.

The law requires both the applicant and Planning Board Chairman (or the Chairman's designee) to sign the site plan upon approval. By signing the site plan, the applicant is agreeing to execute all the features and requirements while the Planning Board Chairman (or the Chairman's designee) is certifying Planning Board approval. The signed site plan has been commonly referred to as a "signature set."

The Planning Board must forward a copy of the approved site plan to DPS "for reference in issuing building permits." The law requires that no sediment control, building, or use-occupancy permit be issued unless it is in strict compliance with the approved site plan.

The Zoning Ordinance states “a record plat ....must not be approved unless it is in strict compliance with a site plan” approved by the Planning Board.”<sup>7</sup> (Sec. 59-D-3.4; 3.5)

#### **AMENDING PROJECT PLANS AND SITE PLANS**

Chapter 59 allows amendments to an approved project plan and site plan. Minor amendments to an approved project or site plan may be approved (in writing) by Planning Board staff. Major amendments must be approved by the Planning Board itself.

A **Minor Plan Amendment** is “a revision to a plan or any findings, conclusions, or conditions associated with the plan that does not entail matters that are fundamental determinations assigned to the Planning Board.” A minor amendment “does not alter the intent, objectives, or requirements expressed or imposed by the Planning Board in its review of the plan.” (Sec. 59-D-2.6)

A **Major Plan Amendment** is “[a]ny action taken by the Planning Board to amend or revise a previously approved plan, whether such amendment is limited or comprehensive in scope.” (Sec. 59-D-2.6)

#### **4. Other County Code Provisions that Govern Development**

Montgomery County’s development approval and implementation process is complex and sophisticated. Development in the County not only addresses many basic safety issues; it also implements progressive and important public policies. In addition to Chapter 50 and Chapter 59, several other chapters in the County Code address the design, approval and permitting of new development.

The relevant County Code provisions for the Clarksburg Town Center Project include:

- Chapter 8, Buildings;
- Chapter 14, Development Districts;
- Chapter 19, Erosion, Sediment Control and Stormwater Management;
- Chapter 22, Fire Safety Code;
- Chapter 22A, Forest Conservation;
- Chapter 25A, Housing, Moderately Priced; and
- Chapter 49, Streets and Roads.

Many of these laws incorporate international or national standards by reference, as well as additional standards set by the County. The table on page 33 summarizes the purposes of these chapters and references their implementing regulations.

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<sup>7</sup> This language conflicts with the language in Chapter 50, Subdivision of Land, which states that the Planning Board “may refuse” to approve a record plat until the site plan is approved. (Sec. 50-37) See page 26.

In some cases, department staff have adopted additional documents to supplement and clarify the standards established in the County Code and applicable regulations.

Examples include:

- **Design Standards** adopted by the Department of Public Works and Transportation to provide technical drawings detailing standard dimensions and materials for roadways, driveways, drainage, and landscaping.
- **2000 Stormwater Design Manual** published by the Maryland Department of the Environment in two volumes. The first volume provides a general overview on selecting, locating, sizing, and designing best practices for stormwater management, while the second volume provides technical details on landscaping, construction specifications, detailed design examples, and other design tools.

The source table at the end of this chapter includes a list of these additional guidelines.



**TABLE 2: OTHER COUNTY CODE CHAPTERS THAT GOVERN DEVELOPMENT AND ASSOCIATED REGULATIONS**

County Code Chapter	Purpose	Code of Montgomery County Regulations
Buildings (Chapter 8)	Chapter 8 includes those rules and regulations known as the building code of Montgomery County. This chapter controls all matters concerning the construction, alteration, addition, repair, removal, demolition, use, location, occupancy and maintenance of all existing or proposed buildings and structures in the County.	Buildings - Regulations (Chapter 8)  Electricity - Regulations (Chapter 17)  Individual Water Supply and Sewage Disposal Facilities – Regulations (Chapter 27A)
Development Districts (Chapter 14)	Chapter 14 authorizes the County to create development districts in which the county may levy special assessments or taxes to finance infrastructure improvements. In addition, it specifies the procedures for creating a development district, issuing bonds and enforcing collection of special assessments or taxes.  Development Districts encompass areas of high priority for development or redevelopment in which an approved master plan recommends significant development in a specific area of the county; the infrastructure needed to serve that development includes extensive and long-term facilities; and the market for and availability of land will permit significant development within the life of a development district.	
Erosion, Sediment Control and Storm Water Management (Chapter 19)	Chapter 19 establishes procedures, standards and requirements for obtaining a county sediment control permit authorizing land-disturbing activities and controlling the adverse impacts associated with increased stormwater runoff from developed and developing lands.	Erosion, Sediment Control and Stormwater Management - Regulations (Chapter 19)
Fire Safety Code (Chapter 22)	Chapter 22 prescribes minimum requirements and controls to safeguard life, property and the public welfare from the hazards of fire and explosion.	Fire Safety Code – Regulations (Chapter 22)
Forest Conservation – Trees (Chapter 22A)	Chapter 22A establishes procedures, standards, and requirements to minimize tree loss as a result of development, protect trees and forests during and after construction or other land disturbing activities, and afforest and reforest land subject to an application for development approval or a sediment control permit.	Forest Conservation – Trees – Regulations (Chapter 22A)
Housing, Moderately Priced (Chapter 25A)	Chapter 25A establishes procedures, standards and requirements for building, and selling or leasing Moderately Priced Dwelling Units. It also addresses optional increases in density and requests for alternative location or payment agreements for builders.	Housing Moderately Priced – Regulations (Chapter 25A)
Streets and Roads (Chapter 49)	Chapter 49 governs the use, care, construction, reconstruction, improvement, grading, repairing and maintenance of the county roadways.	Streets and Roads – Regulations (Chapter 49)

Source: OLO, based on the Montgomery County Code and Code of Montgomery County Regulations

## **5. Laws that Address the Authority to Waive Code Requirements**

Many of the County laws that govern land development grant authority to County government or the Planning Board to waive certain legal requirements. This authority is sometimes, but not always, limited by detailed procedural and substantive requirements.

### **EXAMPLES OF WAIVER PROVISIONS THAT APPLY TO THE PLANNING BOARD**

**Chapter 59, Zoning Ordinance.** Chapter 59 allows many waivers or partial waivers by exempting certain structures or types of structures from compliance with various provisions. For example, section 59-E-4.5 authorizes DPS, the Planning Board or the Board of Appeals to waive any provision parking requirements included in Chapter 59-E, such as the number of parking spaces, setbacks or landscaping.

Chapter 59-C establishes similar waivers by allowing exemptions from zoning development standards that are linked to master plan guidelines or other decision-making guidelines. For example, the RMX zone established under Section 59-C-10.3.8 includes a table that contains the setback requirements for residential and commercial buildings. The table specifies a setback requirement for these buildings from “any street.” However, this requirement is accompanied by a footnote that states: “no minimum setback is required if in accordance with master plan.” The effect of this language is to establish “in accordance with master plan” as a criterion to vary (in effect waive) the setback requirement in the law.

**Chapter 50, Subdivision of Land.** This chapter establishes the authority and procedures for the Planning Board to waive the requirements of the Chapter. The Planning Board may waive the requirements of Chapter 50 if the Board finds that “practical difficulties or unusual circumstances exist that prevent full compliance with the requirements.” (Sec. 50-38) Chapter 50 includes six substantive and five procedural criteria that the Board must follow to waive a requirement of the chapter. Examples of the substantive criteria are:

- The waiver is the minimum necessary to provide relief from the requirements;
- The waiver is not inconsistent with the purposes and objectives of the General Plan; and
- The waiver is not adverse to the public interest. (Sec. 50-38)

Examples of the procedural criteria are:

- The applicant must apply for the waiver in writing;
- The Planning Board must refer the waiver application to the Chief Planning Engineer, the Department of Public Works and Transportation, the Washington Suburban Sanitary Commission, and the Board of Education for their recommendations; and
- The Planning Board must decide on the waiver application by adopting a resolution. (Sec. 50-38)

## **EXAMPLES OF WAIVER PROVISIONS THAT APPLY TO COUNTY GOVERNMENT**

**Chapter 8, Building.** This Chapter allows the Director of the Department of Permitting Services (DPS Director) to grant modifications of structural or mechanical code requirements applicable under the Chapter, if the DPS Director follows specified procedural criteria.

For example, a property owner must apply in writing to the DPS Director. While the law doesn't directly state that the DPS Director must hold a hearing on the application, it does require him to mail copies of the application, and "the date, time and place fixed for the hearing" to all surrounding property owners. The DPS Director may also mail notices to "other interested parties, organizations or agencies."

The Chapter provides substantive guidance to the DPS Director by establishing that he may approve a modification if an applicant would otherwise face "practical difficulties and undue hardship." The modifications must preserve the "spirit and intent of the law" and assure public welfare and safety. (Sec. 8-15)

**Chapter 19, Erosion, Sediment Control, and Stormwater Management.** This Chapter authorizes the DPS Director to waive several requirements. For instance, without specifying procedural criteria, Chapter 19 allows the Director to waive required engineered erosion and sediment control plans and required full or partial performance bonds.

The DPS Director may also waive on-site stormwater management requirements and water quality review requirements in special protection areas if the application meets several substantive and procedural criteria. There are 11 combined procedural and substantive criteria related to on-site stormwater management requirements outlined in the law, and six combined criteria related to water quality review in special protection areas. (Sec. 19-4; 19-10; 19-24; 19-66)

## **6. Other Documents that Guide Land Use Decisions**

Administrative bodies responsible for hearing and making decisions on land use in Montgomery County routinely consult other policy documents. Of particular importance are the land use elements in adopted master plans and the County Growth Policy approved by the Council.

The Planning Board has adopted its own documents to guide its decision-making. Examples discussed in this section include the MPDU Policy, Planning Board guidelines on Trees, Traffic Mitigation, and Recreation Amenities.

## **POLICY DOCUMENTS APPROVED BY THE COUNCIL**

Following are examples of documents that guide land use policy that the Council officially considers and approves.

**Master Plans.** Master plans articulate the vision of development in a given geographic area and guide the development and use of land toward that vision. Currently, there are 29 adopted master plans in Montgomery County. Master plans typically address:

- Land use;
- Transportation;
- Community facilities;
- Environmental resources; and
- Historic resources.

Working with area citizens and other stakeholders, the Planning Board and its staff prepare the master plans, which are subject to revision and approval by the County Council. After Council approval, each master plan is then formally adopted by the Maryland-National Capital Park and Planning Commission. The Planning Board submits a revision to each individual master plan for Council approval every 10-20 years.

The land use element of each master plan reflects the Council's policy guidance on the review and approval of development plans, such as site plans and project plans, as well as zoning changes. The Council often approves the guidelines in a Master Plan before enacting a zoning text amendment or sectional map amendment to establish regulatory standards for the zone.

**Growth Policy.** Since 1973, Montgomery County has managed the pace of development through an Adequate Public Facilities Ordinance (APFO). (Sec. 50-35) The APFO prohibits the Planning Board from approving a new subdivision unless the Board finds that public facilities (transportation, schools, water and sewer) are adequate to support the new subdivision.

Initially, the Planning Board developed its own guidelines for its review of proposed subdivisions under the APFO. In 1984, the Council enacted legislation under which the Planning Board was required to submit its recommendations for implementing the APFO annually to the Council for its review and approval. This was called the Annual Growth Policy (AGP). In 2003, the Council adopted changes in how the APFO is implemented, which included moving to a biennial review of the County Growth Policy. The Growth Policy requires testing proposed new subdivisions for adequacy of the following public facilities:

- Transportation;
- Schools;
- Water and sewage; and
- Police, fire, and health services.

Once a proposed new subdivision receives APFO approval, that approval remains valid for a period of 5-12 years, not including possible extensions. (Section 50-20)

## **POLICY DOCUMENTS ADOPTED BY THE PLANNING BOARD**

Following are examples of documents that were created by Planning staff and adopted by the Planning Board to guide its land use decision-making.

**The MPDU Guidelines.** In 1995, the Planning Board approved guidelines that address the type of units constructed as Moderately Priced Dwelling Units (MPDUs). Developers are generally required to sell or rent 12.5% to 15% of their newly constructed units at moderate prices under this program.

These guidelines address the types of units that can be constructed as MPDUs and where they may be constructed in a subdivision, and require that any site plan phasing accommodate MPDU units in accordance with County Code Chapter 25A.

**Traffic Mitigation Guidelines.** In 1993, the Planning Board approved guidelines for traffic mitigation programs. Traffic mitigation programs are available to subdivision applicants who wish to offset automobile trips caused by the subdivision that would otherwise be above acceptable levels. In some circumstances, applicants may opt for a traffic mitigation program instead of a road improvement under the Growth Policy.

These guidelines explain the process of reviewing a traffic mitigation proposal; detail the method of calculating the number of trips to be mitigated, timeframes for achieving the projected mitigation level, maintenance of the mitigation; and establish the procedures for evaluating and monitoring program compliance and enforcing the traffic mitigation agreement.

**Tree Guidelines.** In 1992, M-NCPPC published *Trees: Approved Technical Manual* for developers. The Manual assures that development applications comply with the state and county forest conservation program, and outlines how regulators will review this information. The Manual specifies the necessary qualifications of a preparer who submits a forest conservation plan, the required elements of the plan, technical standards for tree planning and protection, worksheets to assist preparers in meeting these standards, and includes examples of acceptable plans.

**Recreation Guidelines.** In 1992, the Planning Board approved *Guidelines for Recreation Amenities in Residential Development*, which establishes methods to determine adequacy of recreation facilities in a proposed site plan, design criteria for those facilities, and specifications and standards that assure the facilities' safety, ease of maintenance, and durability.

The methodology for estimating recreation facility demand and supply includes specific quantitative data, based on the type of housing and number of units. The site design guidelines offer broad guidance on elements such as location, accessibility, safety, and landscaping. The facility design guidelines include specific guidance on recreation amenities, such as setbacks, dimensions or square footage, orientation, and screening or landscaping.

## **STREAMLINING THE DEVELOPMENT AUTHORIZATION PROCESS**

In the early 1990's, the County Council established a high level, inter-departmental Steering Committee to address problems with the land use development authorization process (DAP). The Council directed the Steering Committee to find ways to streamline the DAP, which was characterized as being time consuming, complex, lacking predictability, and duplicative.

In 1992, the Committee issued its report to the Council: "The Implementation Report: Streamlining Montgomery County's Development Authorization." A summary described the DAP report as follows:

The Implementation Report was organized around ten recommendations designed to improve the DAP by streamlining the review where appropriate and by identifying specific areas where interagency cooperation could result in an improved and more efficient review process for both applicants and the reviewing agencies. (April 3, 2001, Highlights from the 1992 Report)

Specific recommendations addressed issues such as clear assignment of responsibilities; clear, current, and consistent published development standards, guidelines, and submission requirements; concurrent reviews where feasible; certainty of review times; and effective systems to resolve conflicts.

Between 1992 and 1998, the Council's Planning, Housing, and Economic Development Committee held periodic meetings with the Steering Committee to track the progress made in achieving the recommendations of the 1992 report. During this period, the Steering Committee also submitted an annual progress report to the Council.

### **C. Agency Responses to OLO's Legal Questions**

OLO adopted a three-step process for soliciting views on key legal issues related to the fact-finding review of the Clarksburg Town Center Project.

- First, OLO sent a list of questions on legal issues to the Park and Planning staff
- Second, OLO transmitted the Park and Planning staff's answers to the County Attorney for comment
- Finally, OLO requested the Council's Senior Legislative Attorney to review and comment on the answers provided by Park and Planning staff and the comments by the Office of the County Attorney. His views are presented in the memo that begins on the next page.

## MEMORANDUM

TO: Karen Orlansky, Director, Office of Legislative Oversight

FROM: Michael Faden, Senior Legislative Attorney

SUBJECT: Legal Issues related to Clarksburg Town Center review

DATE: October 31, 2005

You asked me to review the answers submitted by the staff of the Park and Planning Department (Planning staff) to 9 legal questions, and the comments of the County Attorney's office (County Attorney) on the Planning staff's answers. In my view, with a few exceptions, noted by the County Attorney and discussed below, the Planning staff accurately described the development approval and implementation process. For the issues where the County Attorney differed substantively with the Planning staff, in general the County Attorney more completely and accurately summarized the governing law. The major issues where the County Attorney supplemented the Planning staff's answers, and my views on them, are:

**1) Can a site plan signature set incorporate more restrictive development standards than the site plan approved by the Planning Board?**

In answering OLO Question 4, the Planning staff noted that "the Planning Board's Opinion and the subsequent signature set are binding on the applicant," and that County Code Chapter 59 "establishes the signature set as a legally binding document." The Planning staff also said that an applicant can submit a "signature set with features that are more restrictive than established by the Board (e.g., lower heights, greater setbacks)" and those more restrictive standards are then "binding on the applicant." Last, the Planning staff concluded that if an applicant wants to return to a less restrictive standard established by the Board, it must submit a "revised signature set for staff approval."

The County Attorney commented that, while it may be a long-standing practice, no law permits an applicant to adopt more restrictive standards, the relevant provisions of Chapter 59 do not allow such a practice, and Chapter 59 nowhere defines "more restrictive." The County Attorney noted that "Having both a Board-approved site plan and a staff-approved 'signature set' is apt to generate confusion about which plan controls", and without "robust" lines of communication this confusion could extend to DPS in its issuance of building permits. In the County Attorney's view, the "signature set should not vary from the Board-approved site plan which...should control development at the relevant site."<sup>8</sup>

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<sup>8</sup>Curiously, the Planning staff seemed to take a different approach -- the same approach as the County Attorney would take for site plans -- in its answers to OLO Question 6 with respect to project plans and preliminary subdivision plans. The staff pointed out that "Conflicting information in a Project Plan

I think the criticisms offered by the County Attorney of this 2-tier approval custom (in which the Planning Board effectively approves a site plan more or less in concept, and the Chairman or a designee later signs off on the actual plan) are valid and reveal fundamental weaknesses in the approval process that were so clearly exposed in the Clarksburg Town Center case. Just as a legislative body is not supposed to enact a bill without having the final text before it (although as we know it occasionally happens), in the future the Planning Board should not finally approve a site plan without having the entire document reduced to writing and laid before it.

Having said that, I part company with the County Attorney in that I do not believe the current practice is totally unsupported by Chapter 59. §59-D-3.4(c) does not specify how soon after Board approval that the Chairman or a designee must sign the plan – unlike, for example, County Charter §208, which requires the Council to deliver legislation to the Executive (and the Council President first to sign it) within 3 days after enactment. In this situation the plan eventually signed by the Chairman should not differ substantively from the plan that the Board approved. Whether any specific difference is substantive, or merely intended to clarify the Board's intent, is a case-by-case question, one that will always require close analysis of the intent of the parties (applicant and Board) to resolve. While under the current practice these questions must be dealt with, the better approach outlined in the preceding paragraph – making sure the Board always has a final text before it acts -- would avoid them altogether.

**2) What are the Planning staff's responsibilities with regard to building permit issuance and enforcement in site plan zones?**

In its response to OLO Question 2, the Planning staff noted that the Planning Board does not have the authority to enforce the issuance of building permits. Rather, this authority is only given to the Director of the Department of Permitting Services, whether a permit is issued in an RMX zone or elsewhere. The Planning staff cited language from Article 28, §8-119 of the Maryland Code and Chapters 8 and 59 of the County Code as the basis for this view.

The County Attorney responded that the Planning staff's conclusion is technically correct, but requires a "fuller response." The County Attorney noted that all optional method developments in RMX zones are subject to site plan review and approval, and the Planning Department is responsible for the site plan process under Chapter 59. These responsibilities include inspection and enforcement for site plan compliance, and the authority to revoke a site plan approval if not in compliance. Revoking a site plan approval would, under Chapter 59, invalidate any building permit previously issued pursuant to that approval. The County Attorney concluded that, through the site plan process, the "Planning Board has exclusive authority over important components of land development with the RMX zones."

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drawing, which may have been edited after the hearing" and is approved by a staff member does not overrule the Board's action as memorialized in its opinion. In their view, the same standard applies to any preliminary plan drawing that conflicts with the Board's opinion. The larger question, of course, is why these conflicts are tolerated at all, rather than being resolved before each plan is approved.



I agree with the County Attorney's more complete summary of this issue.

**3) What are the Planning staff's responsibilities to inspect and enforce site plan conditions after building permits are issued?**

In its response to OLO Question 8, the Planning staff said that under County Code Chapter 8, "DPS is statutorily required to reject a building permit application that does not comply with all development standards associated with a Planning Board site plan approval." The Planning staff concluded that Chapter 8 "does not require that the Planning Board conduct any post permit approval inspections of a site or building that is the subject of a building permit approval."

The County Attorney noted that part of the Planning staff's response is "true but misleading." The County Attorney observed that under County Code Chapter 50, the Board has the "exclusive authority to enforce violations of a Planning Board Action," which includes site plan approvals. The Board may take several actions (including issuing stop work orders, issuing citations, and revoking a site plan approval) to assure compliance with all conditions of a site plan. The County Attorney noted that a "Planning Board revocation of a site plan invalidates any applicable building permits."

I agree with the County Attorney's additions to the Planning staff's answer.

## CHAPTER II: SOURCES OF INFORMATION

Document	Exhibit Number (see Appendix)
Annotated Code of Maryland: Article 28, Regional District Act	F 002
Charter of Montgomery County, Maryland: Sec. 110	F 003
Montgomery County Code: Sec. 2-76 and Sec. 2A	F 004
Montgomery County Code: Sec. 8-15	F 005
Montgomery County Code: Chapter 19 <ul style="list-style-type: none"> <li>• Sec. 19-4</li> <li>• Sec. 19-10</li> <li>• Sec. 19-24</li> <li>• Sec. 19-66</li> </ul>	F 006
Montgomery County Code: Chapter 50 <ul style="list-style-type: none"> <li>• Sec. 50-38</li> <li>• Sec. 50-41</li> <li>• Sec. 50-41</li> </ul>	F 007
Montgomery County Code: Chapter 59 <ul style="list-style-type: none"> <li>• Sec. 59C-6.215</li> <li>• Sec. 59C-10.3.8</li> <li>• Sec. 59C-10.2.2</li> <li>• Sec. 59D-2.6</li> <li>• Sec. 59D-2.11</li> <li>• Sec. 59D-2.23</li> <li>• Sec. 59D-2.4</li> <li>• Sec. 59D – 2.41</li> <li>• Sec. 59D-2.42</li> <li>• Sec. 59D-3.1</li> <li>• Sec. 59D-3.23</li> <li>• Sec. 59D-3.4</li> <li>• Sec. 59D-3.5</li> <li>• Sec. 59D-3.6</li> <li>• Sec. 59H-5</li> </ul>	F 008
DPWT Book of Design Standards, February 2001	E 022
Department of Park and Planning public information brochures	H 159
Site Plan Guidelines for Projects containing MPDUs, June 1, 1995	H 098
PB Traffic Mitigation Guidelines	H 139

**CHAPTER II: SOURCES OF INFORMATION CONT.**

<b>Document</b>	<b>Exhibit Number (see Appendix)</b>
Department of Park and Planning – Trees Approval Technical Manual	H 147
Introduction to Montgomery County’s Adequate Public Facilities Ordinance and Growth Policy	H 158
Department of Park and Planning Recreation Guidelines, September 1992	H 149
Highlights from the 1992 Report ‘The Implementation Report, Streamlining Montgomery County’s Development Authorization Process, April 3, 2001	H 087
Memo from Park and Planning staff to OLO re: response to legal questions 2, 6, and 7 related to CTC Fact-Finding Review, August 8, 2005	H 107
Memo from Park and Planning staff to OLO re: response to legal question 2, August 15, 2005	H 108
Memo from Park and Planning staff to OLO re: legal response to OLO question 1, September 7, 2005	H 109
Memo from Park and Planning staff to OLO re: legal response to OLO question 3, September 8, 2005	H 110
Memo from Park and Planning staff to OLO re: legal response to OLO questions 4 and 8, September 22, 2005	H 133
Memo from County Attorney to OLO re: legal questions 1, 2, 3, 6, and 7, September 26, 2005	G 005
Memo from Associate County Attorney to OLO responding to legal questions 4, 8, and 9, October 7, 2005	G 006
<b>Interview</b>	<b>Exhibit Number</b>
Senior Legislative Attorney, County Council	NA
Director, Office of Zoning and Administrative Hearings	

Complete Annotated Code of Maryland available at: [www.mlis.state.md.us/#stat](http://www.mlis.state.md.us/#stat)

Complete Montgomery County Code available at: [www.amlegal.com/montgomery\\_county\\_md/](http://www.amlegal.com/montgomery_county_md/)

### **Chapter III. Chronology of the Clarksburg Town Center Project**

The chronology presented in this chapter reports the progression of the Clarksburg Town Center Project (CTC) Project based upon the different stages of government review: approval, permitting, and enforcement. The sequence of sections presented in the chapter parallel the sequence of activities required to develop land in Montgomery County.

The source table at the end of the chapter lists the documents and interviews that OLO used to compile this chronology. For some actions, OLO examined approval documents provided by multiple sources. All documents used are available for reference in the on-line Appendix.

The chapter is organized as follows:

- **Part A** describes the location of the Clarksburg Town Center Project; and
- **Part B** reviews the different government review, approval, permitting, and enforcement activities related to development of the Clarksburg Town Center Project.

#### **A. The Location and Ownership of the Clarksburg Town Center Project**

The Clarksburg Town Center (CTC) Project sits on approximately 268 acres located in the northern part of Montgomery County, one mile east of I-270. The site is bounded by Frederick Road (MD Route 355) to the West, Clarksburg Road (MD Route 121) to the north, and Stringtown Road (Route A-260) to the south. The site's western boundary abuts Clarksburg's Historic District.

Clarksburg Joint Venture<sup>1</sup> purchased the property with the intent of developing a “neo-traditional” community, consisting of a mix of multifamily units, townhouses, and single-family detached homes, as well as a commercial area. Neo-Traditional Neighborhood Design is a town planning principle that provides compact communities, reminiscent of 18th and 19th century American and European towns. The design features narrow streets, alleys, closely spaced street lamps, and no minimum building setbacks.<sup>2</sup> The approach has gained considerable popularity among home buyers in recent years.

The CTC Project site changed ownership twice in the past six years. In 1999, Terrabrook L.L.C purchased the site from Clarksburg Joint Venture. In October 2003, NNPII–Clarksburg, LLC (referred to as Newland Communities) became the owner of the CTC Project. Newland Communities, Inc. retained some of the CTC Project's lawyers, engineers, and on-site project managers who had been employed by Terrabrook. Newland Communities remains today as the developer of the CTC Project.

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<sup>1</sup> The name of the initial CTC Project Developer varies among different CTC Project documents. For consistency purposes, this chapter refers to the initial developers as Clarksburg Joint Venture.

<sup>2</sup> Source: [http://safety.fhwa.dot.gov/ped\\_bike/univcourse/swless06.htm](http://safety.fhwa.dot.gov/ped_bike/univcourse/swless06.htm)

## **B. The Chronology of the Clarksburg Town Center Project Based on Government Records**

This section provides a chronology of the Clarksburg Town Center Project based on the different government actions related to plan review, approval, permitting, and enforcement. It tracks the dates of key actions taken by the County Council, Montgomery County Planning Board, Department of Park and Planning, Department of Permitting Services, Department of Environmental Protection, Department of Housing and Community Affairs, and Department of Public Works and Transportation.

The chronology includes government actions related to the following steps in the development process:

- Master Plan
- Zoning Map
- Water and Sewer Plan
- Creation of a Development District
- Water Quality Plan
- Project Plan
- Preliminary Plan of Subdivision
- Project Plan and Amendments to the Project Plan
- Site Plan and Amendments to the Site Plan
- Signature Set Certifications
- Site Plan Enforcement Agreement
- MPDU Agreement
- Public Improvements Agreement
- Stormwater Management Agreements
- Recordation of Plats
- Issuance of Building and other Permits
- Inspection activities
- Enforcement activities

## **1. County Council Actions**

The County Council does not have a direct role in the approval or implementation of plans for individual development projects. However, the Council's actions on the Master Plan, Zoning Map, and Comprehensive Water Supply and Sewerage Systems Plan established general parameters and policy guidance on the development of the CTC Project site. With the CTC Project, the Council also adopted a resolution to create a Development District.

A land use Master Plan articulates the County Council's policies for private property owners and developers to follow. The Clarksburg Master Plan and Hyattstown Special Study Area, approved by the Council and adopted by M-NCPPC in 1994, envisions Clarksburg as a town (consisting of a transit-and pedestrian-oriented community surrounded by open space) along the I-270 corridor. The Clarksburg Master Plan includes seven staging principles to guide the development of Clarksburg:

- **Principle #1:** Recognize that the Clarksburg limited sewage treatment capacity limits the pace of development.
- **Principle #2:** Require private developers to fund a significant portion of the capital improvements required in Clarksburg.
- **Principle #3:** Coordinate land development with major capital improvements, e.g., the sewerage system and the transportation network.
- **Principle #4:** Encourage the early development of the Clarksburg Town Center to develop a strong community identity.
- **Principle #5:** Ensure staging responds to near term market demand for single-family housing and long-term demand for employment.
- **Principle #6:** Recognize the unique environmental qualities of the area and mitigate development impacts to the environmentally sensitive stream valleys.
- **Principle #7:** Prepare for the potential impact of a federal Food and Drug Administration relocation in Clarksburg.

Specific to the Clarksburg Town Center Project property, the Master Plan recommends:

- A concentration of civic uses to help define the Town Center as the focal point of public activities, e.g., library, post office, elementary school, community center, and a fire station;
- A street system facilitating pedestrian as well as automobile movement;
- A transit stop in the Town Center;
- A buffer around the historic district to protect its character;
- A mix of housing types throughout the Town Center; and
- A pattern of development similar to traditional “town squares.”

In October 1994, following the approval of the Clarksburg Master Plan, the County Council adopted a zoning map amendment to rezone the CTC Project site. The Council rezoned 198 acres in the western portion of the site to Residential-Mixed Use-2 (RMX-2) and rezoned the 70 acre eastern section to Rural Density Transfer (RDT).

In April 1995, the County Council approved amendments to the County’s Comprehensive Water Supply and Sewerage Systems Plan. The amendments were largely consistent with the staging recommended in the approved Master Plan.

In March 2003, the Council adopted Resolution No. 15-87 to create the Clarksburg Town Center Development District. This action authorizes the County to levy special assessments and/or special taxes to help finance the cost of infrastructure improvements in the Clarksburg Town Center.

**TABLE 3: COUNCIL POLICY GUIDANCE AND PARAMETERS FOR THE CTC PROJECT**

Date	Montgomery County Council Action
May 1994	Sitting as the District Council, adopted Resolution 12-1632 to approve the Clarksburg Master Plan and Hyattstown Special Study Area. In June 1994, M-NCPPC formally adopted the Clarksburg Master Plan by Resolution 94-10.
October 1994	Sitting as the District Council, adopted Resolution 12-1844, an opinion to approve Application No. G-710, filed by the M-NCPPC, for the Sectional Map Amendment covering the area of the Clarksburg Master Plan and Hyattstown Special Study Area.
April 1995	Adopted Resolution No. 13-89 to approve amendments to the Comprehensive Water Supply and Sewerage Systems Plan. These amendments included the site of the CTC Project.
March 2003	Adopted Resolution No. 15-87 to create the Clarksburg Town Center Development District.

Source: Council Records and Department of Park and Planning

## 2. Water Quality Plan Approvals

The Council's adoption of the Clarksburg Master Plan included designation of the County's first Special Protection Area to protect the water quality of Little Seneca Creek and the east side of Ten Mile Creek.<sup>3</sup> As a result of this designation, development of the CTC Project needed to comply with the water quality requirements for Special Protection Areas, as established by County Code Chapter 19, Article V.

As part of the development application, County law requires the developer to submit a Final Water Quality Plan to the Department of Permitting Services (DPS). The law also specifies that the Planning Board cannot approve any plans for development until DPS approves the Final Water Quality Plan. The table below lists the official water quality approvals for the CTC Project.

**TABLE 4: DEPARTMENT OF PERMITTING SERVICES' WATER QUALITY PLAN APPROVALS**

Date	Water Quality Plan Approvals
January 1998	DPS approved the Final Water Quality Plan for the Clarksburg Town Center Project (Phase IA and IB) with conditions.
May 2002	DPS approved the Final Water Quality Plan for the Clarksburg Town Center Project for Phase II (IIA, IIB, IIC, & IID) with conditions.

Source: Department of Permitting Services

By law, a Final Water Quality Plan must include a stormwater management concept plan, an erosion and sediment control concept plan, a proposed maintenance of stormwater management facilities plan, and if necessary a copy of a valid water quality certification approved by state and federal agencies.<sup>4</sup>

The Final Water Quality Plan for the CTC Project includes an Ecological Covenant (dated November 1997 and revised May 2001) prepared for the Clarksburg Homeowners Association. The covenant provides residents and business owners of CTC with guidelines to maintain a "sound environmentally-friendly community."

Chapter 19 also requires that the Department of Environmental Protection prepare a stream monitoring plan/program to "measure baseline conditions and to assess any impairment of the biological, chemical, and physical integrity of the stream over time related to development impacts in any special protection area." In November 1997, the CTC Project Developer's consultants prepared a plan to address water quality goals and to establish a recommended water quality program for the site.<sup>5</sup>

<sup>3</sup> The SPA also included portions of Wildcat Branch and Cabin Branch.

<sup>4</sup> Water Quality Certification means State authorization required under section 401 of the Clean Water Act for federally permitted activity impacting jurisdictional waters of the United States, certifying that the activity complies with Maryland's water quality standards.

<sup>5</sup> The plan also addresses hydro-geologic conditions, stormwater management, streams, wetlands, erosion and sedimentation, and includes the ecological covenant.



Each year, the Department of Environmental Protection and Department of Permitting Services submit an annual report to the County Council and County Executive (with a copy to the Planning Board) that summarizes the results of the Special Protection Area program. DEP and DPS issued the annual report for the 2004 monitoring period in late October 2005. In sum, with respect to the Clarksburg Special Protection Area, the report finds that:

Stream conditions in the Town Center tributary degraded sharply in 2003 in response to several possible factors including a) a water main break in April 2003 and associated sedimentation, b) droughts of 1999 and 2002, c) thermal impacts from water released from sediment ponds, and d) sediment deposition on the stream bottom, apparently related to ongoing construction activity upstream. In addition, some degradation has occurred in an unnamed tributary which receives storm runoff from the now developed Greenway Village areas and the Clarksburg Village development project now under construction. This tributary was not affected by the 2003 water main break and the degradation has not been as great.

As more construction begins in the Clarksburg SPA, it is likely that some biological degradation will continue to occur, at least over the period until development stages are fully stabilized and permanent stormwater controls become operational. Even the most effective sediment controls are not 100% effective and some level of sediment discharge from construction activity will reach and impact stream channel habitat at least over the short term. In addition, once construction has been completed and the Clarksburg area stabilized, it now appears that the levels of imperviousness planned for Clarksburg will also cause long term impacts to the streams beyond which the SPA SWM controls can mitigate. (Special Protection Area Program Report for 2004 issued October 2005)

### **3. Forest Conservation Plan**

Chapter 22A of the County Code requires that a developer's application for a Preliminary Plan of Subdivision include a Forest Conservation Plan that "governs conservation, maintenance, and any afforestation or reforestation" of a site. In March 1996, the Planning Board approved the Forest Conservation Plan for the CTC Project as part of the Board's approval of the Project's Preliminary Plan of Subdivision (see section on Preliminary Plan, page 51).

### **4. Project Plan Approval**

The Zoning Code (County Code Chapter 59) requires a developer to obtain a Project Plan approval from the Planning Board for optional method development projects in the RMX-2 zone. The Project Plan is the first formal review of the proposed development by the Planning Board. The Project Plan assures that the development includes adequate public facilities, amenities, and other design features. Table 5 lists the key dates related to the Planning Board's approval of the Project Plan for the CTC Project.

**TABLE 5: CTC PROJECT PLAN AND PROJECT PLAN EXTENSION**

Date	Planning Board Approvals
June 1995	Montgomery County Planning Board issued an Opinion for Project Plan No. 9-94004 for Clarksburg Town Center that approved the Project Plan, subject to 14 conditions.
January 1997	Montgomery County Planning Board approved a Project Plan Extension (9-94004E) to extend the validity of Project Plan No. 9-94004 by six months.

Source: Department of Park and Planning

The Planning Board's approval of the Project Plan for the CTC Project contained 14 "conditions of approval" in the following eight categories: development ceiling, transportation and roadways, environmental conditions, park/school site, historic preservation and compatibility, amenity staging, landscaping, and maintenance.

The Planning Board's approval specifically established a development ceiling of 1,300 dwelling units, 150,000 square feet of retail space, and 100,000 square feet of office space. The amenity package included: a town square; sites for a future civic building and school; large private recreation areas; four tot lots; three tennis courts; two swimming pools; and an indoor fitness facility.

In January 1997, the Board approved an extension of the validity period for the Project Plan to address unavoidable difficulties the developer encountered in filing for a site plan approval.

In May 2005, the developer submitted an application to the Department of Park and Planning to amend the Project Plan (Project Plan 9-94004A) by:

- Relocating the library,
- Reconfiguring land uses,
- Providing mix use area, and
- Revising the development standards.

As of this writing, the application to amend the Project Plan is pending Planning Board approval.

In September 2005, OLO asked the Department of Park and Planning to prepare a report on the implementation status of the original 14 "conditions of approval" attached to the Project Plan. According to this staff report: four of the conditions are met or completed, eight are ongoing or partially completed, and two did not have enough information to determine completion status. However, certain conditions cannot be considered met or completed until the entire CTC Project is finished. The on-line Appendix contains the full status report.

## 5. Preliminary Plan of Subdivision

County Code Chapter 50, Subdivision of Land, requires a developer to obtain a Preliminary Plan of Subdivision (Preliminary Plan) approval from the Planning Board for optional method development projects in the RMX-2 zone.

By law, the Preliminary Plan must include the location of existing and proposed streets, the boundary outline of property, existing and proposed utilities, proposed building lots, areas of stormwater management, open space, recreation, trails and sidewalks, existing topography, conceptual grading/limits of disturbance, staging schedules, and the developer's MPDU plans. Other documents/plans that must accompany the application include:

- An approved Natural Resources Inventory/Forest Stand Delineation;
- An approved Forest Conservation Plan;
- An approved stormwater management concept plan;
- A traffic study; and
- Storm drainage plan

Table 6 lists the dates related to the Planning Board's approval of the Preliminary Plan of Subdivision for the CTC Project.

**TABLE 6: CTC PROJECT PRELIMINARY PLAN APPROVALS**

Date	Approvals
March 1996	Montgomery County Planning Board issued an Opinion for the Preliminary Plan of Subdivision 1-95042 for the Clarksburg Town Center Project. The Planning Board approved the Preliminary Plan, subject to 17 conditions.
August 2001	Montgomery County Planning Board approved Preliminary Plan of Subdivision 1-95042R to revise Preliminary Plan 1-95042.
November 2001	Montgomery County Planning Board approved Preliminary Plan of Subdivision 1-95042A to amend Preliminary Plan 1-95042.

Source: Department of Park and Planning

The Planning Board's approval of the Preliminary Plan for the CTC Project contained 17 "conditions of approval" in the following seven categories: development ceiling, environmental conditions, agricultural uses, transportation and roadways, park/school site, moderately-priced dwelling units, and plat recordation.

The Planning Board's approval limited development to a maximum of 1,300 dwelling units, 150,000 square feet of retail uses, and 100,000 square feet of commercial office uses.

In August 2001, the Planning Board approved a revision to the Preliminary Plan (Preliminary Plan 1-950442R) allowing the use of dirt from the future Phase II area of the development for construction of Phase IB per approved Site Plan 8-98001.

In November, 2001, the Planning Board approved an amendment to the preliminary plan to abandon recorded, unimproved rights-of-way previously shown for dedication on the approved preliminary plan and site plans. The letter of explanation for this amendment provided by the project engineer at the time states that “this amendment was needed because some of the roadways from the previously submitted site plan were recorded by the previous engineers.” It also states that a “revised layout has been submitted and an amendment to the site plan and was reviewed by the Development Review Committee on May 21, 2001.”

In September 2005, OLO asked the Department of Park and Planning to prepare a report on the implementation status of the original 17 “conditions of approval” attached to the Preliminary Plan of Subdivision approved in March 1996. According to this staff report: eight of the conditions are met or completed, seven are ongoing or partially completed, and two did not have enough information to determine completion status. Certain conditions cannot be considered met or completed until the entire CTC Project is finished. The on-line Appendix contains the full status report.

## **6. Site Plan Approvals**

The Zoning Code (County Code Chapter 59) requires a developer to seek a site plan approval for optional method development projects in the RMX-2 zone. A site plan is a drawing that shows the arrangement, design, and use of a single parcel of land.

The initial CTC Project Developer proposed that development of the site occur in four phases, packaged into three site plan applications:

Site Plan Phase I:      Phase IA – located south of Piedmont Road  
                                 Phase IB – located north of Stringtown Road

Site Plan Phase II:      Phase II – located in the northwest quadrant of site

Site Plan Phase III:      Includes the retail section of the site.

Table 7 lists the dates related to the Planning Board’s approval of the Phase I and Phase II Site Plans for the CTC Project. As of this writing, the developer’s application for Phase III has been submitted and is pending Planning Board review. The record of amendments to the Phase I and Phase II Site Plans is reviewed in a later section, beginning on 56.

**TABLE 7: CTC PROJECT SITE PLAN APPROVALS**

<b>Date</b>	<b>Approvals</b>
March 1998	Montgomery County Planning Board issued an Opinion for Site Plan Review #8-98001 for Clarksburg Town Center Project Phase I. The Planning Board approved the Site Plan, subject to 44 conditions.
June 2002	Montgomery County Planning Board issued an Opinion for Site Plan Review #8-02014 for Clarksburg Town Center Project Phase II. The Planning Board approved the Site Plan, subject to seven conditions.

Source: Department of Park and Planning

**Site Plan Phase I Approval.** The Planning Board approved Phase I Site Plan with 44 “conditions of approval” in the following seven categories: environmental conditions; transportation and roadways; park/school site; historic preservation and compatibility; site planning, landscaping, and lighting; community planning; and project administration.

The Planning Board approved the construction of 768 dwelling units (75 single-family dwellings, 295 townhouses, and 398 multifamily units) in Phase I. The unit count included 96 Moderately Priced Dwelling Units (MPDUs).

As part of the site planning, landscaping, and lighting section, the Planning Board Opinion on CTC Project Site Plan Phase I included the following provision, listed as Condition #38:

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

In September 2005, OLO asked the Department of Park and Planning to prepare a report on the implementation status of the original 44 “conditions of approval” attached to the Planning Board’s approval of Site Plan Phase I in March 1998. According to this staff report: 25 of the conditions are met or completed, 10 are ongoing or partially completed, eight did not have enough information to determine completion status, and one condition was not met. Certain conditions cannot be considered met or completed until the entire CTC Project is finished. The on-line Appendix contains the full status report.

**Site Plan Phase II Approval.** The Planning Board approved the Phase II Site Plan with seven “conditions of approval” in the following five categories: park/school site, transportation and roadways, environmental conditions, landscape and lighting, and project administration. The Planning Board approved the construction of 487 dwelling units (153 single-family dwellings, 202 townhouses, and 132 multifamily units) in Phase II. The unit count included 46 MPDUs.

In September 2005, OLO asked the Department of Park and Planning to prepare a report on the implementation status of the seven “conditions of approval” attached to the Planning Board’s approval of the Site Plan Phase II in June 2002. According to this staff report: six of the conditions are met or completed and one is ongoing or partially completed. The on-line appendix contains the full status report.

**Site Plan Phase III Application is Pending Approval.** In June 2004, the CTC Project Developer submitted an application for Site Plan Phase III. As of this writing, the application for Phase III is pending the Planning Board’s review and approval.

## 7. Signature Set Certifications

The County Code (Chapters 50 and 59) requires that after the Planning Board issues an Opinion that approves a Site Plan, the applicant must submit a signed set of development and landscape drawings that conform to conditions of the Planning Board’s decision. Department of Park and Planning staff then review these documents and sign them as designee(s) of the Planning Board Chairman certifying Planning Board approval. These signed drawings are known as the “Signature Set”. The Department of Park and Planning also follow this practice for a preliminary plan and project plan.

Table 8 lists the dates that the Department of Park and Planning staff certified the Signature Set of drawings for the CTC Project Plan, the CTC Preliminary Plan of Subdivision, the CTC Site Plan for Phase I, and the CTC Site Plan for Phase II.

**TABLE 8: CTC PROJECT’S SIGNATURE SET DRAWING CERTIFICATIONS**

Date	Certifications
April 1996	Department of Park and Planning staff certified the Signature Set for the CTC Project Plan
Not dated	Department of Park and Planning staff certified the Signature Set for the CTC Project Preliminary Plan of Subdivision
March 1999	Department of Park and Planning staff certified the Signature Set for the CTC Project Site Plan Phase I
October 2004	Department of Park and Planning staff certified the Signature Set for the CTC Project Site Plan Phase II

Source: Department of Park and Planning

In addition to the Signature Sets listed in Table 8, Department of Park and Planning staff also stamped and signed several sets of Site Plan drawings to approve amendments to the CTC Project Site Plan Phase I and Site Plan Phase II. A chronology of these amendments is reviewed beginning on page 58.

## **8. Additional Project Agreements**

County Code (Chapters 25A, 49, 50, and 59) requires that a developer and the County enter into a number of agreements. The various County agencies involved in the CTC Project provided OLO with the agreements listed below. The list may not represent all of the agreements made between the CTC Project Developer and the County.

- **Site Plan Enforcement Agreements (SPEAs).** The Department of Park and Planning used SPEAs as the primary enforcement mechanism for the CTC Project Site Plans for Phase I and Phase II. Separate Site Plan Enforcement Agreements were signed by a Park and Planning staff member (as a designee of the Montgomery County Planning Board) and the CTC Project Developer for the CTC Project Site Plan Phase I (May 1999) and Site Plan Phase II (October 2004).<sup>6</sup>
- **Moderately Priced Dwelling Units (MPDU) Agreement.** The CTC Project Developer and the County Department of Housing and Community Affairs (DHCA) executed an MPDU Agreement in June 2002. The MPDU Agreement specifies the number, location, and phasing of moderately priced dwelling units (MPDUs) to be constructed in a subdivision, as required by Section 25A-5 of the County Code.
- **Public Improvements Agreement** – Signed by the CTC Project Developer and the Department of Permitting Services, the Public Improvements Agreement outlines the developer's obligations regarding the installation of street grading, paving, curb and gutter, sidewalks, traffic signals, and erosion and sediment control measures as required by Section 50-37 of the County Code.
- **Stormwater Management Agreements.** Signed by the CTC Project Developer and DPS, these agreements outline the developer's responsibilities regarding the maintenance of stormwater management facilities, easements, and right-of-ways for the project. Due to the size of the CTC Project, DPS and the CTC Project Developer signed several of these agreements.

For each of these CTC Project agreements obtained by OLO, Table 9 on the next page lists the date of execution.

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<sup>6</sup> M-NCPPC's practice of entering into SPEAs ended in July 2004. M-NCPPC now possesses enforcement authority under State law (Regional District Act) and County law (59-D-3.6) to impose civil fines, penalties, and stop work orders.

**TABLE 9: OTHER AGREEMENTS FOR THE CTC PROJECT**

<b>Date</b>	<b>Agreement</b>
February 1999	The Department of Permitting Services and Clarksburg Joint Venture signed Public Improvements Agreement No. 99.027. This is the first of eight Public Improvement Agreements for the CTC Project.
May 1999	A Park and Planning staff member (as a designee of the Montgomery County Planning Board) and Clarksburg Joint Venture signed the Phase I Site Plan Enforcement Agreement.
April 2002	The Department of Permitting Services and Terrabrook Clarksburg, LLC signed the Declaration of Covenants Inspection/Maintenance of Stormwater Management Facility and the Grant of Stormwater Management Easement and Right-of-Way. Several more of these agreements are signed during the construction of the CTC Project.
June 2002	The Department of Housing and Community Affairs and Terrabrook Clarksburg, LLC signed the MPDU Agreement. The Agreement indicated that the developer would build 163 MPDUs, an amount equal to 12.5% of the 1,300 units planned for the subdivision at that time.
October 2004	A Park and Planning staff member (as a designee of the Montgomery County Planning Board) and Terrabrook Clarksburg, LLC signed the Phase II Site Plan Enforcement Agreement.

Sources: Department of Park and Planning and Department of Permitting Services

## 9. Site Plan Amendments

The Zoning Code (Section 59-D-2.6) establishes the authority for the Planning Board and Department of Park and Planning staff to amend a project plan or a site plan. The law provides general definitions of “major” vs. “minor” amendments. As defined in Chapter 59, a minor amendment is a change that “does not alter the intent, objectives, or requirements expressed or imposed by the Planning Board in its review of the plan.” A major amendment is defined as any action taken by the Board to change or revise a plan, regardless of its scope.<sup>7</sup>

As reviewed earlier, the Planning Board Opinion on the CTC Project Phase I Site Plan included Condition #38, which authorized staff to review and approve certain requests by the applicant for changes to the approved Site Plan (For the exact language of Condition #38, see page 53). In the spring of 2000, the Site Plan Reviewer for CTC distributed a memo with an attached Concept Plan from the CTC Project Developer to an internal staff review team. The memo discussed the processing of CTC Project amendments under Condition #38.

<sup>7</sup> See page 31 for further details on amendments to Project Plans and Site Plans.



The records that the Department of Park and Planning maintained for the CTC Project do not contain adequate documentation of all amendment actions associated with the CTC Project Site Plans. The lack of complete documentation in the official record makes it difficult to itemize the specific changes each amendment approved. As a result, OLO is unable to compile a complete and accurate chronology of all CTC Project Site Plan amendment actions.

However, in order to provide as much information as possible about the chronology of the CTC Project, OLO pieced together a “composite” record of CTC Project Site Plan amendment actions. This composite is based upon the Department of Park and Planning records for the CTC Project supplemented with additional documentation obtained from the CTC Project Developer’s engineer (Charles P. Johnson & Associates).

Specifically, the Department of Park and Planning and the CTC Project Developer’s engineer provided OLO with the information contained in Table 10 on the next page. The Developer’s engineer provided OLO with specific amendment details, shown in Table 11 on page 59.

The chronology outlined in Table 10 shows that between August 2001 and March 2005, there were ten actions taken by Department of Park and Planning staff and two by the Planning Board to amend the approved CTC Project Site Plans for Phase I and Phase II. The Development Review Committee reviewed at least four of these amendments. Table 11 on page 59 shows that the scope of changes included in the different amendments varied significantly.

**TABLE 10: OLO'S COMPOSITE RECORD OF CTC PROJECT SITE PLAN AMENDMENT ACTIONS**

<b>Date</b>	<b>Amendment Action</b>
August 2001	The Site Plan Reviewer approved an amendment to the CTC Project Site Plan Section IB2. Members of the Development Review Committee discussed the proposed changes at a meeting in May 2001.
October 2001	The Site Plan Reviewer approved an amendment to the CTC Project Site Plan Phase IB2. Members of the Development Review Committee discussed the proposed changes at a meeting in May 2001.
December 2001	The Site Plan Reviewer approved an amendment to the CTC Project Site Plan Phase IB3. Members of the Development Review Committee discussed the proposed changes at a meeting in May 2001.
March 2002	The Site Plan Reviewer approved an amendment to the CTC Project Site Plan Phase IB2.
June 2002	The Site Plan Reviewer approved an amendment to the CTC Project Site Plan Phase IB2.
October 2002	The Site Plan Reviewer approved an amendment to the CTC Project Site Plan Phase IB3.
May 2003	The Site Plan Reviewer approved an amendment to CTC Project Site Plan Phase IA1, IA2, and IA3. Members of the Development Review Committee discussed proposed changes to this section of the project at a meeting in July 2001.
November 2003	The Site Plan Reviewer approved an amendment to the CTC Project Site Plan Phase IIA. The application for this amendment was filed in June 2003.
January 2005	The Site Plan Reviewer approved two amendments to the CTC Project Site Plan Phase IA. The builder filed the application for this amendment in December 2004.
March 2005	The Planning Board issued an Opinion approving two CTC Project Site Plan amendments. The Planning Board approved Site Plan Amendment 8-02014B for Phase IIA and Site Plan Amendment 8098001G for Phase IA1.

Sources: Department of Park and Planning, Charles P. Johnson & Associates.

**TABLE 11: DETAILS OF CTC PROJECT SITE PLAN SIGNATURE SET AMENDMENTS**

<b>Amendment Approval</b>	<b>Site Plan Details</b>	<b>Details of Amendment</b>
August 3, 2001 & October 23, 2001	Phase IB2 – Blocks C,D,E	<ul style="list-style-type: none"> <li>• Changed townhouse layout to a “neo-traditional layout” with parallel parking and rear garages accessed from an alley</li> <li>• Changed single-family detached lots from a larger lot with front loaded garages to a neo-traditional smaller lot with rear-detached garages accessed from an alley</li> <li>• Extended Murphy Grove Terrace to Clarks Crossing Drive</li> </ul>
December 17, 2001	Phase IB3 – Blocks F,O	<ul style="list-style-type: none"> <li>• Changed the multifamily layout to a “neo-traditional” layout with some interior garages</li> <li>• Created an area for a large recreation facility and seating area</li> </ul>
March 7, 2002	Phase IB2 – Blocks C,D,E	<ul style="list-style-type: none"> <li>• Revised single-family detached units incorporating an integral garage instead of a detached garage</li> <li>• Revised the path fronting townhouse units</li> </ul>
June 10, 2002	Phase IB2 – Block E	<ul style="list-style-type: none"> <li>• Revised townhome architecture with a rear integral garage</li> </ul>
October 31, 2002	Phase IB3 – Block F	<ul style="list-style-type: none"> <li>• Added a five car parking garage and associated parking area changes in the multifamily area</li> <li>• Updated the footprint for multifamily buildings 1, 2, 3, &amp; 4</li> </ul>
May 30, 2003	Phase IA – Blocks AA, DD, EE, FF, GG	<ul style="list-style-type: none"> <li>• Changed townhouse layout with parking lots to a “neo-traditional” layout with parallel parking and rear garages accessed from an alley</li> <li>• Relocated the mews and reintroduced elements from the road layout in the Project Plan and Preliminary Plan</li> </ul>
November 12, 2003	Phase II	<ul style="list-style-type: none"> <li>• Incorporated new pool concepts and revised deck areas</li> <li>• Revised retaining walls associated with the pool</li> <li>• Modified club room to match architectural elements on nearby homes</li> <li>• Changed the roadway in front of the clubhouse from a public right-of-way to a private roadway</li> <li>• Changed Sinequa Square Park layout with a fountain to a natural pond and waterfall feature</li> </ul>
January 19, 2005	Phase IA – Block FF	<ul style="list-style-type: none"> <li>• Removed dumpster pad and surrounding fence and added landscaping back into the green area</li> </ul>
January 25, 2005	Phase IA – Block FF	<ul style="list-style-type: none"> <li>• Reduced front yard setback on Lot 15</li> <li>• Increased the landscaping on Lots 14-16</li> </ul>
February 10, 2005	Phase IA	<ul style="list-style-type: none"> <li>• Changed Manor House #9 from a nine unit building with three MPDUs to a 12 unit building with two MPDUs</li> <li>• Added six parallel parking spaces to the private roadway adjacent to Clarksburg Road</li> </ul>
February 10, 2005	Phase II	<ul style="list-style-type: none"> <li>• Changed Manor Homes #7, #10, #11 from nine dwelling units with three MPDU's to 12 dwelling units with two MPDUs</li> <li>• Reconfigured parking garage and parking lot adjacent to Manor Home #7</li> <li>• Added an integral garage to Manor Home #11</li> <li>• Modified the detached garage and dumpster locations and associated landscape plans</li> </ul>
Under Review	Phase IA4	<ul style="list-style-type: none"> <li>• Changed from garden style multifamily residences and its associated parking lots, to a combination of various size townhomes, and 2/2 multifamily units all incorporating rear alley accessed garages</li> </ul>

Source: Charles P. Johnson &amp; Associates

## 10. Record Plats

A record plat is a picture of a parcel of land prepared by a surveyor or engineer that creates individual building lots, streets, and established easements and sites for public dedication. A developer must record a plat before selling individual building lots.

Two provisions in the County Code address the sequencing of record plat approval. Section 50-37 states that “where a site plan is required, the Board may refuse to approve a final (record plat) until a site plan is approved.” Chapter 59-D-3.5 states that the Planning Board must not approve a record plat unless it is in strict compliance with an approved site plan.

Table 12 shows a chronology of the initial record plats approved for each phase of the CTC Project. 49 record plats are recorded covering both Phase I and Phase II of the CTC Project, including seven plats that “re-record” all or a portion of earlier plats to reflect changes.

The chronology also shows that the Department of Park and Planning approved Phase II record plats before signing the Phase II Signature Set Site Plan. Park and Planning staff report that the signing of the Phase II Signature Set was being held up by issues related to the school site, so staff made an internal decision to allow the approval of Phase II record plats for properties that would not be impacted by any potential changes to the school site. In total, 25 Phase II record plats were approved prior to the signing of the CTC Phase II Signature Set Site Plan.

**TABLE 12: RECORD PLAT APPROVALS FOR THE CTC PROJECT**

Date	Approvals
March 1999	First record plats approved for Phase I of the CTC Project. As of October 2005, 23 record plats have been approved related to Phase I of the CTC Project, including 4 re-recordings.
February 2003	First record plat approved for Phase II of the CTC Project, prior to the October 2004 signing of the CTC Phase II Signature Set Site Plan. As of October 2005, 26 record plats have been approved related to Phase II of the CTC Project, including 3 re-recordings.

Source: Department of Park and Planning

In addition to the sequencing issues with the Phase II record plats, Park and Planning staff report that as of October 2005, 19 out of the 49 CTC record plats exhibit inconsistencies with the applicable signed site plans or site plan amendments. The information that the Department of Park and Planning provided for OLO’s review includes a copy of each approved CTC record plat and data that shows the plat recordation number, the approved site plan or site plan amendment the record plat is based on, and whether there are any inconsistencies between the approved record plat and

the approved site plan. According to the Department of Park and Planning, of the CTC 19 record plats exhibiting inconsistencies:

- Nine CTC record plats have inconsistencies between the lot sizes in the plats and the lot size minimum in the Site Plan Signature Set data table (4,000 square feet);
- Nine CTC record plats have inconsistencies between the number or type of units shown in the plats and the number or type of units shown in the Site Plan (one of the nine re-records a previously recorded inconsistency); and
- One CTC record plat has both lot size and unit number or type inconsistencies with the Site Plan.

For the ten unit number or types inconsistencies, Table 13 below summarizes the specific differences between the CTC Record Plats and the approved Site Plan Signature Set.

**TABLE 13: SUMMARY OF SELECTED CTC PROJECT RECORD PLAT INCONSISTENCIES**

Plat No.	CTC Project Phase	Differences Between Approved Site Plan Signature Set and Approved Record Plat
22761	Phase II	<ul style="list-style-type: none"> <li>• Re-records Plat 22534</li> <li>• Site Plan and original plat show four market townhouses and two single-family detached. Record Plat shows five market townhouse and two single-family detached</li> </ul>
22766	Phase I	<ul style="list-style-type: none"> <li>• Site Plan shows 13 market townhouses. Record Plat shows eight market townhouses and seven MPDU townhouses</li> </ul>
22785	Phase II	<ul style="list-style-type: none"> <li>• Site Plan shows three single-family detached. Record Plat shows five market townhouses</li> </ul>
22865	Phase II	<ul style="list-style-type: none"> <li>• Re-records plat 22632</li> <li>• Site Plan and original plat show five market townhouses, four MPDU townhouses, and two condominium parcels. Record Plat shows eight market townhouses, one reconfigured condominium parcel, and one condominium parcel (of 2/2 townhouses) converted to eight market townhouses</li> </ul>
22907	Phase II	<ul style="list-style-type: none"> <li>• Re-records Plat 22633</li> <li>• Site Plan and original plat show seven single-family detached. Record Plat shows six single-family detached</li> </ul>
23038	Phase I	<ul style="list-style-type: none"> <li>• Re-records Plat 22766 for a lot line adjustment, but maintains the same Site Plan inconsistency as Plat 22766</li> </ul>
23047	Phase II	<ul style="list-style-type: none"> <li>• Site Plan shows nine market townhouses. Record Plat shows five market townhouses and five MPDU townhouses</li> </ul>
23048	Phase II	<ul style="list-style-type: none"> <li>• Site Plan shows five single-family detached on 50' wide lots. Record Plat shows nine single-family detached lots on 28' wide lots</li> </ul>
23049	Phase II	<ul style="list-style-type: none"> <li>• Site Plan shows six market townhouses. Record Plat shows five market townhouses and three MPDU townhouses</li> </ul>
23094	Phase I	<ul style="list-style-type: none"> <li>• Re-records Plat 22369</li> <li>• Site Plan and original plat show five market townhouses, two MPDU townhouses, and a Manor House. Record Plat shows three market townhouses and a community pool parcel</li> </ul>

Source: Department of Park and Planning

## 11. Permits

As described in the previous chapter (page y), a permit is a legal tool that allows the administration and enforcement of technical building and construction requirements. State and County law establish responsibilities for both the Department of Permitting Services (DPS) and M-NCPPC in the permitting process.

Table 14 shows the chronology of permits DPS issued for the CTC Project through September 1, 2005. OLO compiled these data based upon information that DPS provided from its automated permitting system. DPS' data shows that the 2,405 permits issued for the CTC Project included 798 building permits, 182 public right-of-way permits, 54 sediment control permits, and 31 use and occupancy permits. The 798 building permits included 455 for townhouses, 166 for single-family dwellings, 129 for other building related structures (e.g., construction of decks), and 48 for multifamily dwellings.

For the CTC Project, DPS forwarded every building permit application to the Department of Park and Planning. For each, Park and Planning staff reviewed and "signed-off" that the building permit application complied with the zoning standards established by the Planning Board. This process is described in greater detail in Chapter IV.

**TABLE 14: RECORDS OF PERMITS ISSUED FOR THE CTC PROJECT  
(THROUGH SEPTEMBER 1, 2005)**

Date	Permits
July 2000	DPS issued the first sediment control permit for the CTC Project. As of September 1, 2005, DPS issued 54 sediment control permits for the CTC Project.
August 2000	DPS issued the first public right-of-way permit for the CTC Project. As of September 1, 2005, DPS issued 182 public right-of-way permits for the CTC Project.
August 2001	DPS issued the first building permit for the CTC Project. As of September 1, 2005, DPS issued 798 building permits for the CTC Project: 455 for townhouses, 166 for single-family dwellings, 48 for multifamily dwellings, and 129 for other building related structures.
July 2002	DPS issued the first use and occupancy certificate for the CTC Project. As of September 1, 2005, DPS issued 31 use and occupancy certificates for the CTC Project.

Source: Department of Permitting Services

## 12. Inspections

Agency records show that DPS and Park and Planning staff conducted inspections to monitor activities at the CTC Project construction site. In general, DPS staff conducted inspections to assure compliance with the County's building code and road code as well as the approved Final Water Quality Plan for the CTC Project.

Park and Planning staff conducted inspections to monitor compliance with conditions established in the approved Forest Conservation Plan for the CTC Project. Park and Planning staff also conducted inspections of other site plan conditions, primarily to ensure that construction of the amenities in the approved site plans, such as landscaping, design details, and recreation amenities, were in compliance with the conditions in the Planning Board's Site Plan approvals.

Table 15 contains information on the number and type of inspections conducted by DPS at the CTC Project site through September 1, 2005. OLO compiled this summary based on records provided by DPS. In sum, the data show that DPS staff conducted close to 14,000 inspections at the CTC Project. A majority of these were building-related inspections. The second largest category was electrical-related, followed by public right-of-way inspections.

**TABLE 15: SUMMARY OF INSPECTIONS CONDUCTED BY DPS OF THE CTC PROJECT  
(THROUGH SEPTEMBER 1, 2005)**

Type of Inspection	Number Conducted
Sediment Control	170 inspections, first inspection conducted in August 2000.
Building	6,740 inspections, first inspection conducted in August 2001.
Electrical	3,301 inspections, first inspection conducted in October 2001.
Public Right-of-way	2,309 inspections, first inspection conducted in February 2002.
Use & Occupancy	127 inspections, first inspection conducted in June 2002.
Mechanical	1,140 inspections, first inspection conducted in July 2003.

Source: Department of Permitting Services

Table 16 contains information on the number and nature of inspections conducted by the Department of Park and Planning at the CTC Project site through July 20, 2005. OLO compiled this summary based on the Site Plan Inspectors' inspection log records provided by the Department of Park and Planning. The data show that the Site Plan Inspectors conducted 51 inspections of the CTC Project.

The inspection logs indicate that the majority of the site visits involved compliance with the Forest Conservation Plan approved for the CTC Project. In 2005, the log shows that Park and Planning staff conducted 12 inspections on other activities; general project progress, recreational amenities, site grading, and potential height and setback violations. According to Park and Planning staff, the Site Plan Inspectors measured setbacks for a sample of buildings in July 2005 and determined that all of the setbacks matched the specifications shown in the certified Signature Set Site Plan drawings for the CTC Project.

**TABLE 16: SUMMARY OF CTC PROJECT INSPECTIONS CONDUCTED BY PARK AND PLANNING STAFF (THROUGH JULY 20, 2005)**

<b>Year</b>	<b>Number of Inspections</b>	<b>Subject(s) of Inspection as Recorded in Inspection Log*</b>
2000	1	Forest conservation
2001	2	Forest conservation
2002	11	Forest conservation (10 inspections) Grading (1 inspection)
2003	6	Forest conservation
2004	16	Forest conservation
2005 (through July 20)	15	Forest conservation (3 inspections) Project progress (5 inspections) Roads (2 inspections) Grading (1 inspection) Recreation amenities (3 inspections) Height and setback (1 inspection)
<b>Total</b>	<b>51</b>	

\*"Forest Conservation" refers to inspecting field conditions for compliance with the approved Forest Conservation Plan. Examples of forest conservation inspection activities include tree protection, tree save areas, limit of disturbance, silt fences, and tree protection fences.

Source: Department of Park and Planning

### 13. Enforcement

State and County law give both the Planning Board and DPS the authority to enforce compliance with the County Code and plans approved by the Planning Board. In addition, the County Code (Chapter 25A) authorizes the Department of Housing and Community Affairs (DHCA) to enforce compliance with the MPDU Agreement. The table on the next page summarizes the enforcement action taken by the Planning Board, DPS, and DHCA during the build-out of the CTC Project.



**TABLE 17: ENFORCEMENT ACTIONS ON THE CTC PROJECT  
(THROUGH OCTOBER 12, 2005)**

Date	Enforcement Action
April 14, 2005	Montgomery County Planning Board held a public hearing on alleged height violations. The Planning Board found no violations.
June 17, 2005	Department of Park and Planning staff e-mailed the developer's attorneys with instructions that construction of the five Manor Homes must stop until Park and Planning staff certify the associated Signature Set of drawings for the Site Plan Amendment and the required permits are issued by the County Government.
July 7, 2005	Montgomery County Planning Board held a public hearing on alleged height and setback violations. The Board found 433 height violations and 102 setback violations.
September 20, 2005	Department of Park and Planning staff issued a stop work order for all land disturbing and construction activities within the CTC Project Phase IID; Phase IA3; and Parcel A, Block H within Phase IIA.
October 6, 2005	Montgomery County Planning Board held a public hearing on alleged violations concerning the phasing and provision of amenities, phasing and clustering issues related to MPDU's, and inspections related to the Site Plan Enforcement Agreement. The Board found violations on the phasing and provision of community-wide amenities, found no violations in inspections related to the Site Plan Enforcement Agreement, and deferred action on the phasing and clustering issues related to MPDU's.
October 11, 2005	DHCA Director informed the CTC Project developer that they are in violation of the MPDU Agreement. The DHCA Director requested that DPS not issue any additional building permits for market rate units at the CTC Project until the MPDU issues are resolved.
October 12, 2005	Per Chapter 25 of the County Code, DPS ceased issuing residential building permits for the CTC Project pending the execution of a valid MPDU Agreement between the CTC Project Developer and DHCA.
October 25, 2005	Montgomery County Planning Board held the first part of a hearing to hear testimony from CTCAC on the remaining alleged CTC Project violations.
November 3, 2005	Montgomery County Planning Board held the second part of a hearing to hear testimony from the CTC Project Developer on the remaining alleged CTC Project violations.

Sources: Department of Park and Planning, Department of Permitting Services, Department of Housing and Community Affairs.

## **PLANNING BOARD AND DEPARTMENT OF PARK AND PLANNING**

As reviewed in Chapter II, State and County law establish the authority and procedures the Planning Board and its staff must follow to pursue enforcement action if a developer/builder does not comply with the conditions of a Planning Board action. These laws give the Planning Board the authority to conduct hearings and enforce compliance with Board decisions, such as imposing civil monetary fines and penalties, and issuing stop work orders.

The following pages discuss the Planning Board's April 14, July 7, October 6, October 25, and November 3 enforcement hearings on the CTC Project.

**April 14, 2005 Threshold Hearing.** On April 14, the Planning Board held their first CTC Height Violation Threshold Hearing.<sup>8</sup> The Planning Board's April 14 hearing examined a complaint filed by the Clarksburg Town Center Advisory Committee (CTCAC) alleging that the height of four buildings did not comply with Planning Board approvals. The complaint filed by CTCAC alleges that the subject buildings exceeded the height limit of 45 feet listed in the data table on the Project Plan drawings.

The transcript from the April 14 hearing shows that Planning Board Members determined that a Site Plan Signature Set is the controlling document that "regulates" development, not the Project Plan. Based on the Site Plan Signature Sets before the Board and the information provided by Park and Planning staff at the time of the hearing, the Planning Board (on a 4-1 vote) reached a decision of "No Violation."

Before making their decision, the April 14 hearing's transcript shows that the Planning Board acknowledged the Department's "ambiguous" record on height standards for the CTC Project. Board members also criticized the use of "stories" as a development standard for height. Furthermore, Board members expressed:

- Concern that the approved Phase II Site Plan Signature Set does not establish a height limitation;
- Surprise that the zoning law did not set height standards for RMX-2 zones; and
- Confusion about which Signature Set (Phase I or Phase II) applied to the specific buildings subject to the alleged height violations.

The table on the next page shows the sequence of events associated with the staff level amendment to the data table on the Phase I Site Plan Signature Set, as described by the Site Plan Reviewer for the CTC Project.

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<sup>8</sup> The Planning Board originally scheduled the CTC Building Height Violation Threshold Hearing for March 17. However, because Park and Planning staff fail to send out public notices within the required time frame, the March 17 CTC Height Violation Threshold Hearing was re-scheduled for April 14.

**Sequence of Events Associated with the Staff Level Amendment to the Phase I Site Plan Signature Set Data Table**

In an interview with OLO, the Site Plan Reviewer for the CTC Project reported the following sequence of events:

1. Throughout her tenure with the Department of Park and Planning, the Site Plan Reviewer understood that the Site Plan Signature Set (comprised of the Staff Report, the Planning Board Opinion and Site Plan drawings) established and controlled standards for site plan approvals in the County. She understood that the site plan is to be "consistent" with the Project Plan approvals per the Montgomery County Zoning Ordinance.
2. The Planning Board's Site Plan Opinion (March 1998), by reference to the Site Plan Staff Report, established a height limit of four stories for Phase I of development at CTC. Identical development standards were approved by the Planning Board in public session for the Phase II Site Plan and the Site Plan Amendment for the Phase I 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.
3. In early April 2005 – while reviewing the staff report she had prepared for the April 14 hearing – the Site Plan Reviewer saw a data table on a back page of the Phase I Site Plan Signature Set that contained numeric height standards (35' for single-family residences and 45' for multifamily units) in contrast to all other approval language reciting "4 stories." The multifamily buildings were labeled "4 stories" on the drawing.
4. The Site Plan Reviewer reviewed with concern the discrepancy between the Planning Board's Site Plan Review Staff Report and the Signature Set data table. The Reviewer referred to Condition #38 of the approved Site Plan Staff Report which allows for staff level amendments.
5. The Site Plan Reviewer edited the data table on the Phase I Site Plan Signature Set and staff level amendments to make the height standards consistent with the other Site Plan Signature Set documents as approved by three full votes of the Planning Commission on three separate occasions. She crossed out the numeric height limits in the data table and wrote in "four stories" in such a way that the edit was obvious and the conflicting data table numbers were legible.
6. Based on the Site Plan Signature Sets before the Planning Board and the information provided by Park and Planning staff at the April 14 hearing (including the edited and non edited versions of the Site Plan data table), the Planning Board (on a 4-1 vote) reached a decision of "No Violation" for the buildings subject to alleged height violations. In her presentation to the Planning Board, the Site Plan Reviewer admitted she "missed" the erroneous Site Plan data tables during her earlier signature set reviews.
7. Approximately two weeks after the hearing, the Site Plan Reviewer advised her Supervisor (who specifically asked her when she made the amendment) that she amended the data table "years ago." The very next day, the Site Plan Reviewer called her supervisors to clarify her statement to reveal that she amended the data table shortly before the April 14 hearing.

Source: Site Plan Reviewer for CTC Project (former M-NCPPC employee)

**July 7, 2005 Reconsideration Hearing.** On May 5, 2005, The Planning Board voted to hold a reconsideration hearing on the alleged height violations after receiving a formal request for a reconsideration hearing from CTCAC in April and learning of the CTC Site Plan Reviewer's admission of when she made the staff level amendment on building heights. The Planning Board held a hearing on July 7 to reconsider their decision, and also to consider whether setback violations exist.

After hearing presentations from Park and Planning staff, the complainants, the respondents, and testimony from members of the public, the Board found site plan violations for all buildings that exceed the Site Plan Signature Set height restrictions of 35' for single-family residences and 45' for multifamily buildings. The Board also found multiple front-yard setbacks violations.

Before reaching these findings, the Planning Board sought clarification from their legal counsel and Park and Planning staff on:

- The Planning Board approval process for land development projects;
- The purpose of the various plans (Project Plan and Site Plan) approved by the Planning Board;
- The term "Signature Set" and the Board's enforcement authority;
- The function and significance of a Site Plan Enforcement Agreement;
- Which Department of Park and Planning documents are legally binding (e.g., Project Plan, Site Plan, Planning Board Opinion, Site Plan Enforcement Agreement); and
- The staff's authority to make changes to an approved Site Plan.

The Planning Board decided to grandfather built and occupied units, units under construction, and units under contract. The Planning Board schedules a sanctions hearing for July 28 to determine the penalties for the violations, but the hearing was subsequently rescheduled (multiple times) for the fall pending the full review of other alleged CTC Project violations.

**October 6, 2005 Violation Hearing.** On October 6, the Planning Board held another hearing to consider additional alleged violations for the CTC Project on the phasing and provision of community-wide amenities, phasing and clustering issues related to MPDUs, and inspections related to the Site Plan Enforcement Agreement.

After hearing presentations from Park and Planning staff, the complainants, the respondents, and testimony from members of the public, the Board:

- Found violations on the phasing and provision of community-wide amenities;
- Found no violations in inspections related to the Site Plan Enforcement Agreement; and
- Deferred action on the phasing and clustering issues related to MPDU's until the next CTC Project violation hearing scheduled for October 25.

**October 25 and November 3, 2005 Violation Hearings.** On October 25 and November 3, the Planning Board held hearings on the remaining alleged CTC violations. On October 25, the complainant, CTCAC, provided testimony on alleged violations related to:

- Development standards;
- Road and parking issues;
- Record plats;
- Environmental issues;
- Street and unit type changes;
- Manor homes;
- Document alterations;
- Adequacy of amenities; and
- Patterns of developer violations.

On November 3, the CTC Project Developer and the CTC Project builders provided testimony in response to each of the violations alleged by CTCAC. The Planning Board did not accept public testimony at either of the hearings.

As of this writing, the Planning Board will keep the hearing record open for input from CTCAC, the CTC Project Developer, the CTC builders, and the public until November 18, 2005. Park and Planning staff will then prepare its own findings on the alleged violations and schedule Planning Board hearing to adjudicate the allegations.

#### **DEPARTMENT OF PERMITTING SERVICES**

DPS records provided to OLO show that in June 2005, DPS zoning enforcement staff issued 15 civil citations that found Craftstar Homes had occupied buildings without obtaining the necessary use and occupancy certificates. In response, Craftstar's attorneys sent a letter to DPS that enclosed documentation of their approved inspections and temporary certificates. DPS staff investigated this response and determined that the final use and occupancy certificates had not been issued by DPS. After the Planning Board's July 2005 violation hearing – where the Planning Board grandfathered the height and setback violations – DPS acted to void the citations and issued the final use and occupancy certificates.

In addition, as a result of action taken by the Department of Housing and Community Affairs (see next section on DHCA), on October 12, 2005, DPS temporarily ceased issuing residential building permits for the CTC Project.

#### **DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS**

An MPDU Agreement is the agreement between a developer and the County Department of Housing and Community Affairs (DHCA) specifying the number, location, and phasing of moderately priced dwelling units (MPDUs) to be constructed in a subdivision as required by Section 25A-5 of the County Code. Section 25A-5 requires that:

“the MPDU staging plan must be consistent with any applicable land use plan, subdivision plan, or site plan. The staging plan included in the MPDU agreement for all dwelling units must be sequenced so that:

- (1) MPDUs are built along with or before other dwelling units;
- (2) no or few market rate dwelling units are built before any MPDUs are built;
- (3) the pace of MPDU production must reasonably coincide with the construction of market rate units; and
- (4) the last building built must not contain only MPDUs.”

In May 2002, the Planning Board issued an opinion for the Phase II Site Plan predicated upon the assumption that the developer would build 1,300 units including 163 MPDUs. A May 2002 “MPDU Location Plan” attached to the Phase II Site Plan Staff Report indicated the proposed distribution of MPDUs among project phases at that time.

In June 2002, DHCA approved an MPDU Agreement for the CTC Project. The agreement indicated that the developer would build a total of 163 MPDUs, equivalent to 12.5% of the 1,300 units planned for the CTC Project at that time. While the document states that the builder will determine the exact date for unit construction, the Agreement assumed:

- Construction of market rate units in six stages extending from November 2001 through May 2004;
- Construction of MPDUs in each of the last five stages extending from June 2002 through September 2004; and
- A disproportional staging of MPDUs with 42 percent of the required MPDUs planned for the final construction stage that included 27 percent of total project units.

In September 2005, DHCA learned that the MPDU Agreement the Department had signed with the developer in 2002 had not kept pace with subsequent amendments to the CTC Project Site Plan. (DHCA’s discovery of this violation occurred, in part, as a result of a meeting that OLO conducted as part of its fact-finding review.)

DHCA notified the CTC Project Developer that they were in violation of the MPDU Agreement, and asked the developer to submit an amended construction schedule no later than October 3, 2005. The CTC Project Developer responded to DHCA that they would “endeavor to assemble the requested information as soon as possible; and also stated that “due to the extensive nature of your request, it is unlikely that it will be completed by October 3.”

On October 11, 2005, the DHCA Director sent a letter to the CTC Project developer stating that the response was insufficient and that the developer was in violation of the MPDU Agreement. The DHCA Director further informed the developer that she was requesting that DPS not issue any additional building permits for market rate units at the CTC Project until she was satisfied the MPDUs would be delivered as required under the MPDU Agreement.

### CHAPTER III: SOURCES OF INFORMATION

<b>Document</b>	<b>Exhibit Number (see Appendix)</b>
<b>County Council Actions</b>	
Approved and Adopted Clarksburg Master Plan & Hyattstown Special Study Area, June 1994	H 001
Resolution No. 12-1844, Clarksburg Sectional Map Amendment	C 002
Resolution No. 13-89, Amendments to the Comprehensive Water Supply and Sewerage Systems Plan, adopted April 4, 1995	C 001
Resolution No. 15-87, Clarksburg Town Center Development District, adopted March 4, 2003	C 003
<b>Water Quality Plan Approvals</b>	
CTC Final Water Quality Plan Phases IA and IB, July 1997, Revised November 1997 and December 1997	E 054
Letter from DPS staff to CPJ re: Stormwater Management Concept Request for CTC Phase II, May 9, 2002	E 090
Attachment to the Final Water Quality Plan for Clarksburg Town Center Phase II, May 2002	E 059
CTC Ecological Covenant for Declaration for Clarksburg Homeowners Association from Linowes and Blocher	E 034
Application for Stormwater Management Concept CTC Phase II, September 28, 2001	E 070
Letter from Department of the Army to Terrabrook Communities, October 26, 2000	E 087
Application for Stormwater Management Concept Phase IA, July 19, 2002	E 071
Stormwater Management Concept Application 1-95042 by Loiderman Associates, November 18, 1994	E 072
Stormwater Management Concept Application 8-98001 by MK Enterprises, July 31, 1997	E 073
Developer's Water Quality Monitoring Quarterly Report: October – December 1997	E 029
Developer's Water Quality Monitoring Quarterly Report April 1997 – June 1997	E 030
Clarksburg Town Center Water Quality for Phase IIC/IID prepared by CPJ Associates, August 2003	E 055
Clarksburg Town Center Phase IA Part I Water Quality Control Comps prepared by CPJ Associates, November 2002, revised January 2003	E 057
Special Protection Area Program Annual Report 2004, October 2005	E 010

**CHAPTER III: SOURCES OF INFORMATION, CONTINUED**

<b>Document</b>	<b>Exhibit Number (see Appendix)</b>
<b>Project Plan Approvals</b>	
Project Plan 9-94004 Project Application	H 004
Project Plan 9-94004 Staff Report	H 005
Project Plan 9-94004 Planning Board Opinion	H 006
Project Plan 9-94004 Approved Signature Set	H 007
Project Plan Extension 9-94004E Staff Report	H 009
Project Plan Extension 9-94004E Planning Board Opinion	H 010
Project Plan Amendment 9-94004A Project Application	H 011
<b>Preliminary Plan Approval</b>	
Preliminary Plan 1-95042 Project Application	H 012
Preliminary Plan 1-95042 Staff Report	H 013
Preliminary Plan 1-95042 Planning Board Opinion	H 014
Preliminary Plan 1-95042 Approved Signature Set	H 015
Preliminary Plan Revision 1-95042R Planning Board Opinion	H 016
<b>Site Plan Approvals</b>	
Site Plan – Phase I 8-98001 Project Application	H 019
Site Plan – Phase I 8-98001 Staff Report	H 020
Site Plan – Phase I 8-98001 Planning Board Opinion	H 021
Site Plan – Phase I 8-98001 Site Plan Enforcement Agreement	H 022
Site Plan – Phase I 8-98001 Approved Signature Set	H 023
Site Plan Project Application 8-02014B	H 054
Site Plan – Phase III 8-04034 Retail Project Application	H 049
Site Plan – Phase II 8-02014 Project Application	H 040
Site Plan – Phase II 8-02014 Staff Report	H 043
Site Plan – Phase II 8-02014 Planning Board Opinion	H 044
Site Plan – Phase II 8-02014 Site Plan Enforcement Agreement	H 041
Site Plan – Phase II 8-02014 Approved Signature Set – Includes MPDU location map	H 042
<b>Additional Project Agreements</b>	
Declaration of Covenants for Inspection/Maintenance of Stormwater Management Facility, July 2003	E 063



## CHAPTER III: SOURCES OF INFORMATION, CONTINUED

Document	Exhibit Number (see Appendix)
Declaration of Covenants Inspection/Maintenance of Stormwater Management Facility, April 2002	E 045
Grant of Stormwater Management Easement and Right-of-Way to Montgomery County, MD, April 2002	E 046
Grant of Stormwater Management Easement & Right-of-Way to Montgomery County MD, September 2002	E 051
Declaration of Covenants for Inspection/Maintenance of Stormwater Management Facility, September 2002	E 047
Grant of Stormwater Management Easement and Right-of-Way to Montgomery County, MD, September 2002	E 048
Deed of Dedication, Easements, and Public Utility Easements (Stringtown Road), March 2003	E 049
Grant of Stormwater Management Easement and Right-of-Way to Montgomery County, MD, June 2001	E 044
Public Improvements Agreement No. 990027, October 20, 2005	E 050
<b>Site Plan Amendments</b>	
Site Plan Amendment – Phase I 8-98001A Project Application	H 024
Site Plan Amendment – Phase I 8-98001A Approved Signature Set	H 025
Site Plan Amendment – Phase I 8-98001B Project Application	H 027
Site Plan Amendment – Phase I 8-98001B Approved Signature Set	H 028
Site Plan Amendment Phase I 8-98001C Project Application	H 029
Site Plan Amendment Phase I 8-98001C Approved Signature Set	H 030
Site Plan Amendment Phase I 8-98001D Project Application	H 031
Site Plan Amendment Phase I 8-98001D Approved Signature Se	H 032
Site Plan Amendment - Phase I 8-98001E Project Application	H 033
Site Plan Amendment - Phase I 8-98001F Project Application	H 034
Site Plan Amendment - Phase I 8-98001F Approved Signature Se	H 035
Site Plan Amendment Phase I 8-98001G Manor Homes Project Application	H 036
Site Plan Amendment Phase I 8-98001G Manor Homes Planning Board Opinion for Site Plans 8-98001G	H 037
Site Plan Amendment Phase I 8-98001G Manor Homes Staff Report for Site Plans 8-98001G and 8-02014B	H 038

**CHAPTER III: SOURCES OF INFORMATION, CONTINUED**

<b>Document</b>	<b>Exhibit Number (see Appendix)</b>
Site Plan Amendment – Phase I 8-98001H Approved Signature Set	H 039
Site Plan Amendment – Phase II 8-02014A Pool Project Application	H 045
Site Plan Amendment – Phase II 8-02014A Pool Approved Signature Set	H 046
<b>Permits</b>	
DPS Record of Public Right-of-Way Permits	E 075
DPS Right-of-Way Construction Permit Approval with Bond Estimates issued October 24, 2003	E 064
New impervious area computations for the CTC Project	E 040
Summary table of DPS permits and inspection for CTC Project	E 053
Sample CTC building permit applications	E 069
Working CTC data table prepared by Park and Planning staff	H 026
Draft new Department of Park and Planning permit review checklist	H 105
<b>Inspections</b>	
DPS computer print out of CTC sediment control applications	E 042
DPS computer print out of CTC sediment control inspections	E 043
List of CTC inspections & field comments from August 3, 2000 to July 20, 2005	H 091
DPS record of right-of-way inspections	E 041
<b>Enforcement</b>	
E-mail from Park and Planning staff to Linowes and Blocher re: Manor Homes construction, June 17, 2005	H 125
Department of Park and Planning Stop Work Order issued September 20, 2005	H 095
DHCA correspondence to Newland Communities, Inc. regarding MPDU violations	G 007
Memo from Park and Planning staff to PB re: Reconsideration of Alleged Height Violations and Consideration of Alleged Setback Violations Case #8-98001 & amendments and #8-02014 & amendments, July 7, 2005	H 063
Attachments to PB Packet for July 7, 2005 Hearing: Staff Report for the CTC Project Plan 9-94004, March 22, 1995	H 064
Attachments to PB Packet for July 7, 2005 Hearing: PB Revised Opinion of Preliminary Plan #1-95042, March 26, 1996	H 065

## CHAPTER III: SOURCES OF INFORMATION

Document	Exhibit Number (see Appendix)
Attachments to PB Packet for July 7, 2005 Hearing: Memo from Park and Planning staff to PB re: Site Plan Review CTC Phase I 8-98001, January 16, 1998	H 066
Attachments to PB Packet for July 7, 2005 Hearing: Site Plan Enforcement Agreements Site Plan #8-98001, March 18, 1999	H 067
Attachments to PB Packet for July 7, 2005 Hearing: Memo from Park and Planning staff to PB re: Final Water Quality Plan and Site Plan Review CTC Phase II Site Plan #8-02014, May 2, 2002	H 068
Attachments to PB Packet for July 7, 2005 Hearing: Memo from Park and Planning staff to PB re: Site Plan Compliance pursuant to Montgomery County Code (for Site Plans #8-98001, 8-98001B and 8-02014)	H 069
Attachments to PB Packet for July 7, 2005 Hearing: Park and Planning staff handout at April 14, 2005 Violation Meeting	H 070
Attachments to PB Packet for July 7, 2005 Hearing: Correspondence from Lerch, Early and Brewer (on behalf of Miller and Smith) re: CTC	H 071
Attachments to PB Packet for July 7, 2005 Hearing: Correspondence from Citizens re: CTC	H 072
Attachments to PB Packet for July 7, 2005 Hearing: CTCAC Correspondence with Park and Planning staff	H 073
Attachments to PB Packet for July 7, 2005 Hearing: Correspondence from Knopf & Brown (on behalf of the CTCAC) re: CTC	H 074
Attachments to PB Packet for July 7, 2005 Hearing: Correspondence from Linowes and Blocher (on behalf of Newland and Bozzuto) re: CTC	H 075
Attachments to PB Packet for July 7, 2005 Hearing: Correspondence from Shulman Rogers (on behalf of Craftstar) and Craftstar, Inc. re: CTC	H 077
Approved Planning Board minutes from April 14, 2005	H 058
Approved Planning board minutes from July 7, 2005	H 076
PB Public Hearing notice: February 10, 2005 Manor House (Site Plan #8-98001G & #8-02014B)	H 056
PB Public Hearing notice: April 14, 2005 Failure to Comply/Violation Hearing (Bldg Height) & Failure to Comply (Building Setback)	H 057
PB Public Hearing notice: July 7, 2005 Reconsideration of Failure to comply (Height), Failure to Comply (Setback) & Failure to Comply & Enforcement)	H 061
PB Public Hearing notice: July 14, 2005 Site Plan Review (#8-03002B) & Removal of Site Plan Hearing from Agenda	H 081
PB Public Hearing notice: Project Plan Review – extension of review period (#9-94004A)	H 008
PB Public Hearing notice: July 28, 2005 Preliminary Plan extension (#1-95042)	H 083
Transcript of Reconsideration Request CTC before the PB, May 5, 2005	H 060

**CHAPTER III: SOURCES OF INFORMATION, CONTINUED**

<b>Document</b>	<b>Exhibit Number (see Appendix)</b>
Approved Planning Board Minutes from January 22, 1998; September 13, 2001; May 9, 2002; February 20, 2003; January 8, 2004; October 21, 2004	H 052
Memo from Park and Planning staff to members of the Clarksburg Town Center Concept Plan Review Team re: Concept Plan Review, July 17, 2000	H 116
CTC Concept Plan prepared by Terrabrook, SKO Architects and Planners and CPJ Engineers	H 117
<b>Interview</b>	<b>Exhibit Number</b>
Representatives from: <ul style="list-style-type: none"><li>• Department of Park and Planning (including the former Site Plan Reviewer for the CTC Project)</li><li>• Department of Permitting Services</li><li>• Department of Housing and Community Affairs</li><li>• Newland Communities, Inc.</li><li>• Charles P. Johnson &amp; Associates</li><li>• Site Plan Reviewer for the CTC Project</li></ul>	NA

## **Chapter IV. Management of the Clarksburg Town Center Project**

This chapter provides additional information about the management practices associated with the approval and implementation of the Clarksburg Town Center (CTC) Project. It describes the responsibilities and related management practices of the individuals and organizations that had primary decision-making roles. It is organized as follows:

- **Part A**, Planning Board
- **Part B**, Planning Board Chairman
- **Part C**, Department of Park and Planning Director and Staff
- **Part D**, Department of Permitting Services
- **Part E**, Department of Housing and Community Affairs
- **Part F**, CTC Project Developer

This chapter is based on interviews and a review of documents listed in the source table that begins on page 107. All documents used are available for reference in the on-line Appendix.

### **A. Planning Board**

The Planning Board is charged with hearing, deciding and enforcing certain regulatory land use matters established in State and County law. The Board is responsible for conducting hearings, issuing decision documents, establishing development standards in certain zones, and monitoring and enforcing compliance with Board decisions.

The Planning Board's responsibilities for hearing, deciding and enforcing regulatory approvals are a joint effort among Planning Board members and Department of Park and Planning staff. For example, although the Planning Board makes the decision to approve or reject a project, Board members depend heavily on the information and analysis that staff prepares. For its part, the staff is responsible for producing a report based on their own independent professional judgment and analysis.

Because the CTC Project decisions are the result of a process that involves both the Planning Board and Department of Park and Planning staff, the following review of the Planning Board responsibilities for the CTC Project incorporates descriptions of the supporting staff report and analysis. Additional information about the Department of Park and Planning staff's management responsibilities for the CTC Project begin on page 84.

**Conducting Hearings and Preparing a Hearing Record.** The Planning Board conducted ten public hearings for CTC Project approvals, extensions, and revisions beginning with three hearings for the CTC Project Plan in 1995.

The Planning Board's own Rules of Procedure (most recently revised in January 2005) establish procedures for the conduct of hearings "in all cases in which a final decision is made by the Planning Board after a hearing required by law." The Rules of Procedures include suggested time guidelines, rules of evidence, rules for closing the record, and rules to address other matters. The Planning Board also has "Approved and Adopted Guidelines and Interim Policies for the Administration of Preliminary, Project and Site Plan Extensions," adopted in September 1992.

The Planning Board's current practices for preparing a hearing record consist of taping the hearing itself and assembling the staff report and attachments for the case file. The record also includes all documents prepared by staff, other agencies, or submitted by the applicant or other interested parties relative to the project. For the CTC Project, the Planning Board also had transcripts made of many of the Board's hearings and worksessions.

The Planning Board's current practices do not include procedures for systematically labeling exhibits or other evidence presented during a hearing and subsequently referred to in its Opinion. The Board also has no procedures for marking-up exhibits or drawings presented during a hearing to document a Planning Board's decision to change or modify a specific aspect of a proposed project that is before them.

**Decision Documents for the CTC Project.** As required by Chapters 50 and 59 of the County Code, the CTC Project Developer had to obtain Planning Board approval of a Project Plan and a Preliminary Plan of Subdivision for the entire site as well as Site Plan(s) for each phase of project.

The set of decision documents associated with the Planning Board's approvals for the CTC Project includes:

- The Planning Board's Opinion (which routinely incorporates the Staff Report);
- Signature Sets of drawings;
- Site Plan Enforcement Agreements (one for Phase I and one for Phase II);
- Other documents associated with amendments to the approved plans.

The Planning Board and its staff's practices for issuing Board opinions for the CTC Project and developing the staff recommendations that went to the Board are described below. Given the current controversy over the height and setback standards for the CTC Project, focus is given to the practices surrounding how the development standards were established and reported.

**Issuing Planning Board Opinions.** A Board Opinion reports a decision of the Planning Board for a particular project application. It is a key document because it identifies the specific issues the Planning Board addressed, including the evidence it considered, and explains why the Board arrived at its decision.

M-NCPPC's Legal Department has developed "opinion templates" for decisions to track the requisite findings for each Board approval. The staff member who attends the Planning Board hearing prepares an initial draft of the Board's Opinion, including a description of the property and the proposed development, technical standards, and conditions of approval. The staff member forwards the draft to staff in the Legal Department who review the public hearing tape and add a discussion of the evidence of record and testimony at the hearing, as well as finding of fact and conclusions of law raised by the Board.

After the Legal Department's input is incorporated into the Opinion, it is circulated to Planning Board members for review. If a Planning Board member recommends a change and it is supported by the record, the change is then incorporated into a draft for a second review. The Board formally adopts its Opinions in public session. The Development Review Division mails Board Opinions to all parties on the project mailing list.

**Establishing Development Standards for the CTC Project.** One key product of the regulatory process that the Planning Board manages is a customized package of decisions to establish the layout, design and development standards for a project. These standards are intended to control how the initial project is built; and to establish the foundation for staff to use in the implementation process.

In response to OLO's request for procedural information, the Department of Park and Planning stated that there are no written procedures, checklists, or training materials that define and address how staff review plans and establish recommendations for development standards.

The CTC Project documents show that the Park and Planning staff's general practice was to base its recommendations for development standards on the requirements of the zone and guidance contained in the Master Plan. Then, the staff prepared a data summary table or project data table that displayed a side-by-side comparison of the standards that the zone required (or Master Plan recommended) with the standards proposed by the applicant. The staff report also contained supporting text to show the relationship between what was proposed and the need for a determination of development standards.

The text of the Planning Board's Opinions for the CTC Projects makes broad, declarative statements that the proposed project complies with the zone. The broad statement is supported by a data summary table that contains a list of required standards and a list of proposed standards, but not a list of approved standards. The Board Opinions do not include a specific listing of the established development standards or the basis the Board used to establish a development standard.

For example, Finding #1 in the Planning Board Opinion for the CTC Project Plan is titled “Conforms with the Requirements and Intent of the RMX-2 Zone.” The text below this finding states that “The Planning Board finds that Project Plan #9-94004, as conditioned, meets all of the purposes and requirements of the RMX-2 Zone. A summary follows that compares the development standards shown with the development standards required in the RMX-2 Zone.” The summary table that follows to support this finding:

- Contains two side-by-side lists of development standards: one labeled “required” and a second labeled “proposed”; it does not display a list of items that the Board “approved.”
- Does not contain references to document the sources of the list of “required” items. In practice, the sources could be a mix of required standards (e.g. items required by law) and guidelines (e.g. items recommended in an approved master plan).

In sum, none of the Planning Board’s Opinions for the CTC Projects contain a sentence that simply states, “The Planning Board establishes the following set of development standards for the CTC Project based on the Board’s consideration of the following evidence presented during the hearing.”

**Reporting Development Standards for the CTC Project.** OLO’s review of CTC Project documents show that different development standards are reported in multiple places and in different formats. Overall, the Planning Board and Park and Planning Staff created a set of decision documents with multiple sets of non-identical standards.

The tables, attached at pages 100-106, summarize the development standards established for setbacks and building height, as they are displayed in the various CTC project decision documents located by Park and Planning Staff.<sup>1</sup> The data show that the multiple decision documents for the CTC Project establish and report four different variations on height standards (ranging from a specific maximum height in feet to a complete absence of height standards). Similarly, the data show that the multiple decision document for the CTC Project establish six different variations on setback standards.

The lack of a clear method to establish CTC Project development the standards combined with the reporting of different variations of the standards blurred the intent of the Planning Board’s decisions, and contributed to the current controversy about the controlling document.

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<sup>1</sup> OLO asked members of the CTC Project development team to provide copies of project Site Plan amendments located in their files. The CTC Project developer’s attorney and engineer provided sets of documents that included some signed Site Plan amendments not found in the files of the Department of Park and Planning. For the purpose of this report, OLO limits its description of development standards to documents submitted by the Department of Park and Planning.



**Ensuring Compliance with County Codes and Reporting Conditions of Approval.**

Another key element of a Planning Board decision is to review a proposed project to determine whether it complies with other County Code requirements. Depending on the nature and scope of the proposed project, the Planning Board needs to make determinations that address sections of Chapter 19, Erosion, Sediment Control and Storm Water Management; Chapter 22A, Forest Conservation – Trees; Chapter 22, Fire Safety Code; and Chapter 49, Streets and Roads.

The Planning Board Opinions for the CTC Project do contain an analysis of issues related to compliance with the County Code. For example, the Planning Board Opinions for the CTC Project Plan, Preliminary Plan, and Site Plans attach conditions of approval to address transportation improvements, environmental improvements, park/school issues, historic preservation, compatibility and design issues, and phasing requirements. The Planning Board also attached standard conditions of approval to each opinion.

The text of the Planning Board Opinions for the CTC Project, however, contain an incomplete list of references to the sections of the County Code the conditions are intended to address. The Planning Board Opinions for the CTC Project routinely reference the regulations for Chapters 19 and 22A, but not for Chapters 22 (Fire Safety Code) and 49 (Streets and Roads). Department of Park and Planning staff report that the Planning Board does not find compliance with the Fire Code or Road Code. Park and Planning staff report that conditions of approval related to those provision of the Code are included in an Opinion only if other agencies require them.

The record shows that Park and Planning staff prepare updates on the status of the conditions of approval on an “as needed” basis. For example, in the staff report for the Phase II Site Plan, the Site Plan Reviewer provided a summary of prior approvals that showed how the applicant’s proposed site plan for Phase II addressed the conditions of the adopted Project Plan.

**Practices for Approving Waivers.** The Council gives the Planning Board the authority to waive certain sections of the Code to address unforeseen circumstances or unintended consequences. As described in Chapter II, some of the Code sections that provide waiver procedures require the decision-making body to make a determination to grant a waiver based on the review of a specific case. Other sections of the Code, especially Chapter 59, authorize the Planning Board to grant waivers more generally. Also, some waivers require offsetting mitigation measures.

In the CTC Project Plan Opinion, the Planning Board approved three waivers to County Code requirements:

- To allow the use of closed section streets (Chapter 49);
- To allow the use of on street parking to reduce the off street parking requirements (Chapter 59); and
- To “reduce setbacks along the streets and boundary lines as permitted in the Zoning Ordinance if designated in a master plan” (Chapter 59).

The Planning Board's approval of the first two waivers, for closed section streets and on-street parking, addressed procedures for subsequent review. For example, the Planning Board Opinion itself states the waivers to use "some" on-street parking will be subject to final review at the Site Plan hearing. Similarly, the staff report acknowledges that roadway waivers must receive final approval from the County's transportation department; and it contains a description and justification of the waiver for closed section streets.

The Opinion does not contain similar language to describe a subsequent review procedure for the waiver to reduce setbacks. Instead, it appears that with setbacks, the Planning Board relied on the authority in the Zoning Ordinance that a waiver would be permitted if it was designated in a Master Plan.

The Planning Board's CTC Project Plan Opinion also does not address a waiver to the Fire Safety Code regulations in Chapter 22, although this issue had been raised during project reviews at the staff level (see page 87).

## **B. Planning Board Chairman**

The Planning Board Chairman is a full-time position. The County Council's most recent advertisement for Planning Board Chairman (March 2002) described the responsibilities of the position as follows:

The Chairman's responsibilities are to perform a leadership role with respect to the Montgomery County portion of the Commission as well as to chair the meetings of the Planning Board; to assist in developing overall vision and direction for the Commission; to oversee the functioning of the Montgomery County Planning Board staff; to provide guidance on preparation of budgets by Park and Planning Department staff for presentation to the Board; to represent the Board at official meetings; to present the Planning Board's position, especially before the County Council; and to serve as Chairman or Vice Chairman of the M-NCPPC as well as to carry out other customary duties of the office.

Specific to the CTC Project, the Planning Board Chairman's management responsibilities included determining the format and agenda for violations hearings and developing plans to improve the Department of Park and Planning's regulatory process. Under Sec. 59-D-3.6 of the Zoning Ordinance, a hearing on an alleged violation may be scheduled on the Board's own motion or after a complaint is filed.

**Clarksburg Town Center Violation Hearings.** The Planning Board Chairman reports that there was no pre-existing process for determining whether a citizen-alleged violation warranted a Planning Board hearing. The process the Planning Board Chairman followed for the CTC Project is described below.

In a letter dated December 8, 2004 to the Planning Board Chairman, the Clarksburg Town Center Advisory Committee (CTCAC) alleged three specific examples of “violations of height restrictions” of the CTC Project Plan. CTCAC’s letter requested that Park and Planning take immediate action and also requested a meeting with the Chairman. In an e-mail to Park and Planning staff on December 14, 2004 that is also copied to the Planning Board Chairman, CTCAC requested “M-NCPPC to issue a violation to the developer and establish a Board hearing specifically on this issue.”

The Planning Board Chairman referred the correspondence to the Director of the Development Review Division. The Director of the Development Review Division’s response to CTCAC (in a letter dated December 30, 2004) stated that staff found no basis for building height violations at the CTC Project. The letter cites the height standard as “four stories”, which was the standard contained in the staff report for the CTC Phase I Site Plan. The staff report was incorporated into the Planning Board’s Opinion on the Phase I Site Plan, which also determined that the Site Plan was consistent with the Project Plan.<sup>2</sup>

Dissatisfied with the staff’s response, CTCAC again requested a meeting with the Planning Board Chairman. The Chairman met with CTCAC representatives on January 10, 2005. After reviewing the information provided by the CTCAC representatives, the Planning Board Chairman reportedly commented that he could see the potential for different interpretations of the Planning Board’s decision on the height standard. At the end of the meeting, he advised CTCAC to file a formal complaint with the Planning Board.

On January 26, 2005, the Planning Board received a letter from CTCAC outlining its formal complaint regarding height violations at the CTC Project and requesting a Planning Board hearing. The Board subsequently held its first violation hearing on April 14, 2005.

In May 2005, after the Planning Board voted to reconsider the alleged height and setback violations, the Planning Board Chairman directed Park and Planning staff to attempt to develop a “mitigation package” between CTCAC and the CTC Project Developer. This process ended when CTCAC informed Park and Planning staff they were no longer interested in pursuing a mitigation package.

For the chronology and a summary of the Board’s series of violation hearings on the CTC Project, see pages 66 through 68.

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<sup>2</sup> According to Department of Park and Planning staff, M-NCPPC’s Legal Department reviewed and edited this letter before it was sent out.

**September 2005 Improvement Plan.** In September 2005, the Planning Board Chairman set forth an action plan “to improve the regulatory process for development in Montgomery County”. The plan (described in a September 2, 2005 letter to the Council President) states that the Planning Board Chairman:

- 1) In conjunction with the County Executive, issued a temporary building permit freeze for site plan zones;
- 2) Ordered a review of the 118 site plans approved since 2003;
- 3) Removed a planner’s unilateral authority to approve amendments to site plans;
- 4) Restricted last-minute changes to site plan proposals by developers;
- 5) Reallocated resources within M-NCPPC, including:
  - Appointing a new acting deputy director of M-NCPPC to devise a strategy for moving forward;
  - Reallocating two planning staff and three inspectors from the Countywide Planning Division to the Division of Development Review; and
  - Hiring an on-site inspector (paid for by the developer) for the CTC Project.
- 6) Placed all development-related documents on M-NCPPC’s website; and
- 7) Assured compliance with investigations by outside agencies.

### **C. Department of Park and Planning Director and Planning Staff**

The Department of Park and Planning consists of a director, a deputy director, a superintendent of parks, an enterprise division, and five planning divisions. The Director of Park and Planning is a non-merit, contractual position. The most recent advertisement (October 1998) included the following description of the Director’s job:

This Commission is seeking for the Montgomery County Department of Park and Planning a consummate leader to be responsible for the varied functions of the department: acquiring, conserving, developing, and maintaining the Commission’s 29,000 acres of park land in Montgomery County and in planning for a maturing and diverse County of approximately 841,000 residents. The position will report directly to a full-time Chairman and four part-time board members. The successful candidate is responsible for the smooth integration of the 1,000 member parks and planning staff, which includes a full range of professions and occupations, and must have the ability to cooperate with local, state, and federal agencies, special interest groups, and citizens.

The Development Review Division had lead responsibility for staffing the review, approval, and implementation of regulatory approvals for the CTC Project. As currently structured, the Development Review Division manages the following programs:

- **Subdivision and Record Plat Review** conducts reviews of preliminary plans, applications for record plats, and implements the Annual Growth Policy.

- **Site Plans/Project Plans** conducts reviews of applications for conformance with the Zoning Ordinance, conditions of preliminary plan approval, the Forest Conservation Law, and other guidelines.
- **Inspection/Enforcement** conducts site inspections to monitor and enforce the Forest Conservation law and Planning Board conditions of approval. They also respond to citizen complaints.
- **Zoning Review** conducts research and analysis for the preparation of particular and comprehensive zoning text amendments, and serve as staff for the Hearing Examiner and the Board of Appeals with respect to zoning cases and special exceptions.
- **Public Information Services** provides intake services and processes application fees for development review applications; assigns addresses and street names; administers the final stages of plat recordation; and answers zoning questions for telephone and walk-in customers.

This section summarizes the Development Review Division's responsibilities and related management practices related to the CTC Project.

#### **PLAN REVIEW PROCEDURES AND PRACTICES**

**The Packager Protocol.** The Department of Park and Planning has no written guidelines for plan reviews. However, staff who review a proposed application are guided by what is known within the Department of Park and Planning as the "Packager Protocol". In addition, staff routinely coordinate their review through the Development Review Committee (described in the next section).

The Packager Protocol is a written internal policy developed in the early 1990's. It defines a packager as "a staff person designated to lead a project that involves other divisions." The Packager Protocol states that the responsibilities of the packager are to develop a technically sound, unified staff position to present to the Planning Board "through evaluation of the alternatives, negotiation, and compromise."

The Protocol states that packager is also responsible for developing "a thorough and fair analysis of competing viewpoints when a unified staff position is not achievable. In those instances the report presented to the Planning Board should include not only the packager's recommendation, but also a discussion of the other opinions so that the Planning Board members can analyze the issues and arrive at their own conclusions."

**Development Review Committee.** The Development Review Committee (DRC) is an interagency group that convenes weekly to provide comments on applications for plan approvals. DRC meetings are open to the public.

According to information prepared at OLO's request by the Department of Park and Planning, the current roster of DRC members (21 in total) includes:

- Representatives from the different units within Park and Planning: Development Review Division, Environmental Planning, Transportation Planning, Park Planning, Community-Based Planning, and Historic Preservation;
- Representatives from County Government Departments: Department of Permitting Services, Department of Environmental Protection, Department of Public Works and Transportation, Department of Housing and Community Affairs, and Montgomery County Fire and Rescue Services; and
- Representatives from other organizations involved with the development authorization process, such as the State Highway Administration, Pepco, WSSC, and Washington Gas.

Each Committee member is responsible for reviewing proposed applications and submitting comments to identify and address compliance with the codes or programs they administer. For example, a DPS representative reviews the stormwater management concept plan and the sediment and erosion control plan; a different DPS representative reviews traffic circulation and parking requirements; and a Community-Based Planning representative reviews an application for compliance with adopted master plans. The DRC prepares meeting minutes and individual representatives are asked to submit forms that contain their comments for each individual project. The packager will assemble and refer to these comments while preparing the staff report and conditions of approval.

OLO obtained minutes of DRC meetings for the CTC Project from the Department of Park and Planning and the Department of Permitting Services. These records show that the DRC discussed applications for the CTC Project at ten meetings, beginning with a meeting in November 1994 to discuss the Master Plan staging recommendations. The minutes also show that the DRC considered both initial project applications as well as amendments that were later approved administratively by staff.

**TABLE 18: DEVELOPMENT REVIEW COMMITTEE MEETINGS FOR THE CTC PROJECT**

Date	Type of Approval	Plan Number	Project Phase
November 18, 1994	Staging Discussion	N/A	Staging
January 17, 1995	Preliminary Plan	1-95042	Entire Project
January 31, 1995	Project Plan	9-94004	Entire Project
September 8, 1997	Site Plan Phase I	8-98001	Phase I
September 25, 2000	Site Plan Amendment	8-98001A	Not noted
May 21, 2001	Site Plan Amendment	8-98001B	Phase IB2 and IB3
July 31, 2001	Site Plan Amendment	8-98001C	Phase IA1
November 19, 2001	Site Plan Phase II	8-02014	Phase II
June 28, 2004	Site Plan Phase III	8-04034	Phase IIIA
July 26, 2004	Site Plan Amendment	8-98001E	Phase IA4

Source: Department of Park and Planning, Department of Permitting Services

A review of the attachments to the DRC meeting minutes gives an idea of the issues that were addressed as the CTC Project moved through its approvals.

- A letter from MCPS, dated December 1997, discusses land dedication issues between MCPS and Parks on the school site.
- A letter from DPWT dated January 1998 shows that DPWT was working with the developer to approve waivers to the Road Code.
- A letter dated January 1998 from the Montgomery County Historic Preservation Commission raises concerns about protecting the character of the Historic District.

OLO also obtained a copy of a letter, dated September 5, 1997, that provides comments from Montgomery County Fire and Rescue Services (MCFRS). The letter notes that fire hydrant locations are inadequate and that several roads indicate the provision of on-street parking, which will reduce available road width below the 20 foot minimum required in the Fire Code for fire apparatus access.

The minutes of the September 1997 DRC meeting indicate the outcome was to incorporate MCFRS' comments "as much as possible" or "pursue waivers to avoid future removal of on-street parking." The minutes for May 21, 2001 show DPS requested that the proposed 18 foot width for Piedmont Trail Road be confirmed as adequate with the Fire Marshal.

According to OLO's interview with MCFRS staff, although the DRC minutes on the CTC Project show the issue of compliance with the Fire Code was discussed, there is no corresponding record of how the issue was resolved.

**Internal CTC Project Team.** OLO obtained documents that show the CTC Site Plan Reviewer set up an informal Clarksburg Town Center Site Plan Review Team. This team included representatives from both the Department of Park and Planning and County Government.

The CTC Site Plan Reviewer worked with this team to address several facets of the project. For example, in July 2000 after Terrabrook had purchased the CTC Project, the Site Plan Reviewer distributed a concept plan and a memo from Terrabrook's architect to members of the informal Clarksburg Town Center Review Team.

The concept plan prepared by Terrabrook's architect recommended several revisions to the adopted approvals. The memo from the architect states that:

- The revised plan envisions a variety of unit types and sizes on the same block, with the intent to increase the types of housing units;
- A diagonal road has been added from the town square to the church; and
- Pursuant to Condition #38 of the Site Plan Approval for Phases IA and IB, the proposed changes were envisioned to be administered by the staff.

**Signature Set Submission and Review.** Following issuance of a Planning Board Opinion, a project developer's engineer submits a signed set of development and landscape drawings to reflect development details that, in the perception of the developer, conform to the Planning Board's Opinion. In 2001, to assist developers in their preparation of these drawings, the Development Review Division established Site Plan Signature Set Preparation Guidelines. These guidelines inform developers how to draft and certify drawings and assemble documents for submission to the Department for review and sign-off.

The Development Review Division distributes proposed Signature Set drawings to various Park and Planning staff members to examine for consistency with the details of the Planning Board's Opinion and with other land use, environmental, transportation, and housing policies. The Development Review Division developed an internal routing slip used to track this staff-level review process.

In the course of their review of Signature Set drawings, Park and Planning staff routinely ask the developer to amend the drawings (In practice, this results in multiple copies of similar drawings being routed through the agency). Once all staff members have "signed-off" on a Signature Set, the Director of the Development Review Division stamps and signs the drawings to indicate formal agency approval.

For the CTC Project, OLO examined copies of the internal routing slips for the review of Signature Sets for the Site Plan Phase I, Site Plan Phase II, and Site Plan Phase IA Amendment. These routing slips show that staff in three different divisions (Development Review, Transportation Planning, and the Legal Department) reviewed these Signature Sets for compliance with the Planning Board Opinion and approved the Signature Sets submitted by the CTC Project developer.

Notwithstanding these review procedures, the Site Plan Phase I Signature Set contains both external inconsistencies and internal inaccuracies. Specifically, the development standards for maximum building heights shown in the Signature Set data table do not match height standards cited the Planning Board Opinion. While the written Opinion establishes maximum heights measured by the number of floors in building, the Signature Set data table establishes maximum heights measured in feet.

In addition, the scaled setbacks and the lot sizes shown in Signature Set drawings for multiple units do not conform to setback and lot size requirements displayed in the data table contained in the same document. See OLO's summary tables at the end of this chapter for more examples of similar errors and inconsistencies in several Signature Sets.

**Site Plan Amendment Process.** A Site Plan amendment is a change to an initial project approval proposed by an applicant. As defined in Chapter 59, a minor amendment is a change that "does not alter the intent, objectives, or requirements expressed or imposed by the Planning Board in its review of the plan." A major amendment is defined as any action taken by the Board to change or revise a plan, regardless of its scope.



In response to OLO's request for written procedures about amendments to the CTC Project Site Plans, the Department of Park and Planning provided the amendment language from Chapter 59 and the language for Condition #38, a condition the Planning Board attached to its Site Plan Phase I approval. This condition, which was drafted by staff and approved by the Board, authorized the applicant to propose "compatible changes to the units proposed, as market conditions may change, provided the fundamental findings of the Planning Board remain intact and in order to meet the Project Plan and Site Plan findings. Consideration shall be given to building type and location, open space, recreation and pedestrian and vehicular circulation, adequacy of parking etc. for staff review and approval."

During the course of this study, OLO obtained two memos that discussed staff procedures for processing requests for Site Plan amendments. These were both memos about the internal Park and Planning process in general and not specific to any one development project. One memo dated from the mid-1980's, while a more recent memo in draft form dated from 2003. OLO also found information on the project application forms that established a fee structure for four different types of amendments.

There were no written procedures or instructions established by the Department of Park and Planning for processing amendment requests submitted under Condition #38. OLO's review of documents for the CTC Project shows that, in practice, staff used the authority established under Condition #38 to review and approve a series of amendment requests between August 2001 and January 2005. These amendments varied in scope. Three approved a comprehensive set of changes to a particular phase of the project; others approved minor landscaping and design changes.

OLO's review of documents for the CTC Project also shows inconsistent practices for accepting the applications for requested changes, conducting the review, and documenting the outcome. For example:

- There were no amendment request letters attached to each application that defined the nature of the applicant's request;
- There were no staff memoranda documenting the nature of the review and the staff's decision; and
- The signature set's documenting approval of the amendments did not clearly show the location and nature of the changes that were approved.

#### **OTHER PROCEDURES AND PRACTICES**

**Site Plan Enforcement Agreements.** At the time of the CTC site plan approvals, a Site Plan Enforcement Agreement (SPEA) was required to create an enforcement mechanism that allowed the Planning Board to take a developer to court if they did not conform to the conditions of Site Plan approval. In August 2004, the County Council passed a text amendment to the Zoning Ordinance at the request of the Planning Board that eliminated the requirement for a SPEA. The Council's opinion attached to the amendment states that "the enforcement authority granted the Board by the State in 1992 to impose civil monetary fines and penalties, and issue stop work orders, is the more effective measure."

The Department of Park and Planning did not have written procedures, policies, or guidelines for the development of an SPEA. In practice, OLO found that SPEAs rely heavily on boilerplate language that was both ambiguous and not sufficiently tailored to the CTC Project. Examples include the requirements for on-site inspections and the wording on amenity phasing.

- The CTC Project Site Plan Enforcement Agreements (SPEA) included boilerplate language from earlier SPEAs regarding the number of and triggers for conducting inspections. As a result, the SPEAs require only three on-site inspections with the second triggered at “70% occupancy”, which were SPEA provisions initially written for smaller scale, less complex developments.
- The language triggering the phasing of community-wide amenities varied in the CTC Project Phase I and Phase II SPEAs, both by the specific phasing trigger (release of the 540<sup>th</sup> building permit in the Phase I SPEA; 70% occupancy in the Phase II SPEA) and the limitations of the requirement (“within Site Plan 8-98001” for the Phase I SPEA; “in that phase or section” for the Phase II SPEA). As a result, exactly when the amenities must be built is open to different interpretation.

**Record Plat Approval.** State and County law assign the authority for subdivision administration, including record plats approvals, to the Department of Park and Planning. The Zoning Ordinance states that “a record plat required by Chapter 50 of this Code, titled “Subdivision of Land,” must not be approved unless it is in strict compliance with a site plan approved” by the Planning Board.<sup>3</sup>

In the Development Review Division, the Subdivision Team is the lead packager for record plats. At the time the record plats for the CTC Project were being processed, there were no written step-by-step procedures for the agency’s approval of record plats. (The Department has now developed written procedures, which have been in place since September 2005.) Department of Park and Planning staff report that even though there were no written procedures at the time, the following review process for record plats occurred for the CTC Project.

Staff in the Subdivision Team distributed each plat for review to other units within the Department of Park and Planning (Environmental Planning Division, Research and Technology Division, Development Review Division, Park Planning and Resource Analysis Unit) and outside agencies (State Highway Administration, PEPCO). The different staff reviewed the record plat for compliance with their own approval documents. For example, staff in Environmental Planning checked the plat against the approved Forest Conservation Plan.

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<sup>3</sup> This language conflicts with the language in Chapter 50 which states that the Planning Board “may refuse” to approve a record plat until the site plan is approved. See page 26.

The Subdivision Team also forwarded a copy of the record plat to the Department of Permitting Services for a concurrent review by County Government. The Site Plan Reviewer was responsible for reviewing the plat for compliance with the approved Site Plan Signature Set. The Subdivision Team then collected and forwarded all comments back to the CTC Project Developer to make any changes, if necessary.

According to Park and Planning staff, there are rarely conflicting comments from reviewers because they are checking separate parts of the plan. Also, if the Development Review Committee functions effectively, any potential conflicts between agencies are worked out earlier in the process.

As detailed in the CTC Chronology, the Department of Park and Planning report two types of record plat process failures for CTC:

- Inconsistencies between 19 approved record plats and the corresponding approved Site Plan Signature Sets; and
- Approval of 25 record plats for Phase II of CTC prior to the signing of the Phase II Signature Set Site Plan.

For the record plats that have inconsistencies with the site plans, Park and Planning staff report that the record plats do accurately reflect the houses that have been constructed on the ground.

**Building Permit Reviews.** As part of the interagency Development Approval Process, staff in the Development Review Division conducts reviews of building permit applications to determine whether a proposed application complies with the terms of a Site Plan approved by the Planning Board. Before July 2005, no written procedures or guidelines existed for this process.

Based on OLO's interviews with Department of Park and Planning staff, the process in place at the time CTC Project building permits started coming through for review and approval is described below.

- The information transmitted to the Department of Park and Planning from the Department of Permitting Services included the building permit application, a single sheet drawing of the subject property, and any supplementary information attached by the builder
- A Principal Planning Technician was reviewing building permit applications for the CTC Project. The Technician's examination for "compliance with the Site Plan" was limited to determining whether building setbacks conformed to the Site Plan requirements.
- To accomplish this review, the Technician made a copy of the Phase I Site Plan data table to use as a reference document. This "cheat sheet" showed front-yard setbacks of 10 feet, rear-yard setbacks that ranged from six feet to 25 feet, and side-yard

setbacks that ranged from zero feet to ten feet. The rear-yard setback for single family detached units had been crossed out and replaced with a handwritten note that stated "As shown."

The permit applications do not usually indicate the setback dimensions. As a result, the Technician has to measure the proposed setbacks based on the drawing. This was the case when he conducted the reviews for the CTC Project. In the course of measuring the drawings, the Technician realized that the setbacks illustrated in the permit application drawings were shorter than the data table standard in the same CTC Project Signature Set.

When the Technician compared several of the setback measurements from permit application drawings with the signature set drawings, he found they matched consistently. In light of this pattern, the Technician made a determination 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.

The Principal Planning Technician also notes that the permit information provided to Park and Planning had not included proposed architectural elevations. Additionally, until the past several months, the Technician did not understand his responsibilities to include a review of plans for compliance with height limits.

In July 2005, the Department of Park and Planning established new procedures and created a new "Permit Review Check List." The procedures require the Technician to:

- Verify that the permit application provides building height and setback information;
- Compare the permit drawings to the approved site plan to confirm consistency for height, setback, building footprint, location, and other site features; and
- Review Planning Board opinions for approval conditions related to the issuance of building permits.

**Monitoring Inspections.** The Development Review Division currently employs three Site Plan Inspectors, who are tasked with conducting inspections to monitor compliance with an approved Site Plan and with Forest Conservation Plan requirements as construction proceeds. The Department of Park and Planning reports there are no written procedures for conducting these monitoring inspections, receiving or logging in complaints from the public, or for conducting investigations.

OLO's interviews with the Site Plan Inspectors indicate that they perform a minimum of three inspections to monitor the construction of a project. The three meetings are a pre-construction meeting (often arranged by DPS staff) to review the conditions of the Site Plan approval and determine the limits of tree disturbance; an inspection that occurs when 70% of the development is "occupied"; and an inspection that occurs when the project is completed. In addition, Park and Planning staff conduct inspections in response to complaints received or concerns flagged by DPS inspectors.

In practice, OLO's review of the Park and Planning staff inspection log for the CTC Project found the inspectors primarily conducted inspections to monitor compliance with the Forest Conservation Plan for the CTC Project. They also conducted three site plan amenity monitoring inspections and one height/setback inspection (see page 64).

**Complaint-Handling.** The same three Site Plan Inspectors responsible for inspecting development throughout the County also respond to complaints concerning individual projects. Interviews with these staff indicate that the Department of Park and Planning has no formal complaint intake and complaint-handling procedures. As of this writing, staff reported to OLO that they are working to develop formal complaint handling and enforcement procedures.

OLO's interviews with the Site Plan Inspectors indicate that they follow a general complaint-handling process:

- Upon receipt of a complaint, the inspectors review the Board's Opinion and the Site Plan Signature Set to gain an understanding of the approval conditions. Staff report that because the files are often in disarray, they often need to communicate with the individual Site Plan Reviewer about the complaint.
- The staff examine on-line aerial photos of the site, if applicable. This primarily occurs for forest conservation-related complaints.
- The staff then will conduct an on-site inspection and take appropriate enforcement action.

The inspectors advise that complaints arrive from multiple sources, e.g., other county inspectors, directly from residents, and from Park and Planning management. The majority of complaints they investigate concern encroachment of easement and disturbance of trees. Staff aim to respond to complaints within three days. The Inspectors may issue a citation of up to \$1,000 per day for Forest Conservation Plan violations and \$500 per day for Site Plan violations. Park and Planning staff also can impose remedial work through an Administrative Order and additional monetary penalties through a Civil Administrative Penalty.

OLO's interviews and review of documentation for the CTC Project found that the Department of Park and Planning had no written procedures to differentiate complaints about an approved project from concerns about a pending project. Staff also lacked written procedures on how to conduct a full Site Plan compliance investigation.

**Maintaining an Official Record.** In response to OLO's request for document management procedures, the Department of Park and Planning also provided OLO with a Records Management Manual for the M-NCPPC. This manual was published in December 1992 and applies primarily to the long-term storage and preservation of M-NCPPC's official records.

The Department of Park and Planning staff report that for projects such as the Clarksburg Town Center Project, case files are the responsibility of the “packager”. After a Site Plan Reviewer is assigned to a project, the Reviewer is responsible for keeping information in the correct folders. The files are available for viewing by the public but they must be viewed on site.

The copies of approval documents that OLO received from Park and Planning contained documents that were undated, documents that were missing pages, and documents that appeared to be composite versions of different sets of documents.

The record keeping for the CTC Project Site Plan amendments was particularly problematic, as reviewed earlier. Two of the amendments that had signature sets were missing application forms. Several of the application forms for site plan amendments were re-numbered, as were some of the stamps on the signature set amendments themselves.

#### **D. Department of Permitting Services**

In 1996, the County Council approved Emergency Bill 20-96 to create a new Department of Permitting Services (DPS). This legislation consolidated in one department management of the County government’s plan review, permitting, and inspection functions related to the development approval process.

DPS’s management responsibilities for the CTC Project were:

- Working in partnership with the Department of Environmental Protection, to manage the review, approval, permitting, and monitoring of the CTC Project’s compliance with the County’s water quality regulations;
- Working in partnership with Department of Public Works and Transportation, to manage the review, approval, platting, permitting, and inspections of the CTC Project’s grading, storm drain and road building activities to assure compliance with the County’s Road Code;
- Working in partnership with the Department of Park and Planning, to review the building permit applications for the CTC Project and conduct inspections of the CTC Project construction activities to assure compliance with the County’s building code and the Planning Board’s various plan approvals; and
- Working in partnership with the Department of Housing and Community Affairs, to ensure a signed MPDU Agreement was in place before the issuance of CTC Project building permits.

As described in the chronology of the CTC Project, to carry out these responsibilities DPS conducted multiple plan reviews, issued 2,400 permits, and conducted 14,000 inspections. This chapter reviews DPS' practices for managing its responsibilities.

**Water Quality Plan.** As a result of the designation in the Clarksburg Master Plan of the County's first Special Protection Area, DPS was required to approve a Water Quality Plan submitted by the CTC Project Developer for each phase of the CTC Project. The CTC Project was the first set of approvals processed by the County under the Special Protection Area law.

As the first Special Protection Area, the information reviewed by OLO indicates that DPS developed management procedures and processes for Water Quality Plan approvals. From a management perspective, DPS created formalized review procedures; determined the types of reports and studies required; and determined guidelines for approval and monitoring compliance with approvals.

Information reviewed by OLO that evidences these activities includes providing draft plans to DEP for review and comment, developing specific conditions the CTC developer needed to address or change before the plan would be approved, and developing (in conjunction with DEP) timelines for periodic water quality testing and reporting.

**Roads and Grading.** For the CTC Project, DPS was responsible for reviewing and permitting roads that would be dedicated to the public and maintained as County roads. To manage this process, DPS has a written "Policy and Procedure for Right-of-Way Plan Review and Permit Processing", developed in August 2002. DPS also has formal coordination procedures with DPWT for plan and permit review to assure that roads meet DPWT's public road standards. As of September 1, 2005, DPS had issued 182 public right-of-way permits and conducted 2,309 inspections associated with the public right-of-way permits in CTC.

In addition to its customary road permitting, inspection, and enforcement procedures, DPS also processed a variety of waivers to both road code and grading requirements in order to accommodate the CTC Project's neo-traditional design aspects. Information reviewed by OLO indicates that DPS performed "due diligence" under its management responsibilities to approve or decline these waivers, including requiring Park and Planning staff to provide stamped copies of Signature Set drawings to verify that the requested waiver complied with the approved Site Plans.

**Record Plat Reviews.** DPS was responsible for coordinating the County Government review of proposed record plats for CTC. The County Government review of record plats compares the submitted plat to approved plans for transportation rights-of-way, easements, and Public Improvements Agreements.

DPS has written procedures for: distributing the record plat application to the Department of Public Works and Transportation and the Department of Environmental Protection for their review and comments; collecting each department's comments on the plat; and forwarding those comments directly to the applicant and to Park and Planning staff.

**Building Permit Review.** For the CTC Project, DPS was responsible for issuing building permits and monitoring construction activities to assure compliance with the County's building code and some of the Planning Board's site plan approvals. As of September 1, 2005, DPS had issued 798 building permits – 166 for single-family dwellings, 455 for townhomes; 48 for multifamily dwellings, and 129 for other building-related structures (i.e. decks).

DPS' building permit review process includes a management structure intended to assure that building permit applications comply with all applicable standards prior to issuance. For building permits in what the Department refers to as "Site Plan zones",<sup>4</sup> DPS' automated system for processing permits is designed not to release any permits until Park and Planning staff indicates that the building permit is "in compliance with the approved Site Plan." The CTC Project is located on a parcel of land zoned RMX-2, which is a "Site Plan zone".

Because the CTC Project is in a "Site Plan zone", DPS did not check building height or setbacks as part of its building permit review process. DPS believed that Park and Planning staff were reviewing permit applications for those development standards as part of "signing-off" that permits complied with site plan approvals. As a result, DPS did not have a system in place to check whether the height specified in building permit applications for the CTC Project complied with the height standards approved by the Planning Board.

**Building Permit Inspections.** DPS has well-defined procedures for inspections to assure compliance with the County's building code, including written procedures that dictate when inspections occur. The timing of inspections is primarily tied to a permit recipient reaching a pre-determined point in their construction/development process. Once an inspection occurs, DPS has a defined procedure for any follow-up enforcement actions.

As of September 1, 2005, DPS had conducted 6,740 building permit inspections at the CTC Project site. One of the inspections required as part of building permit issuance is a wall check. A wall check is a review function that compares the footings displayed on a building location drawing to the zoning regulations (i.e., setback requirements) for the property. The purpose of a wall check review is to ensure that the location of the footings for a building under construction matches the location of the building shown on the approved building permit. If a wall check review indicates a problem, DPS either: issues a stop work order until the location of the building is rectified, or requires the applicant to get a waiver from Park and Planning. DPS does not provide a close-in inspection on a building until the wall check is approved.

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<sup>4</sup> DPS defines a Site Plan zone as any zone for which Chapter 59 requires a Site Plan be approved by the Planning Board before permits are issued.



DPS' wall check procedures identified setback discrepancies between the building location drawings and the CTC Project Phase I Site Plan data tables in early 2005 for a number of townhouses built in the CTC Project. DPS notified senior Park and Planning staff about the inconsistency between the setbacks shown in the construction drawings and the standards included in the Site Plan data table.

**Building Permits and MPDU's.** County Code (Chapter 25A) requires that DPS not issue building permits for structures located in a development that requires an MPDU Agreement before the developer and DHCA execute that agreement. In the case of the CTC Project, DPS violated this procedural requirement by issuing approximately 75 building permits without a signed MPDU Agreement between DHCA and the CTC Project Developer.

At the time of CTC, DPS had no system in place to ensure that it would not issue building permits until an MPDU Agreement was signed. DPS has implemented procedures as of September 26, 2005 to ensure, when applicable, that they have an executed MPDU agreement on file prior to issuing building permits.

**Use and Occupancy Permits.** DPS is responsible for issuing use and occupancy permits for each unit in a multifamily building. DPS has written procedures to guide the issuance of use and occupancy permits. A use and occupancy certificate, issued after a final inspection of a unit to assure compliance with safety code and health code requirements, serves as the permit. A multifamily unit may not be occupied until the certificate is issued. As of September 1, 2005, DPS has issued 31 use and occupancy certificates in CTC.

OLO's review of DPS records indicates that as part of their regulatory process, DPS issued use and occupancy violations for the CTC Project. DPS records show that in June 2005, DPS zoning enforcement staff issued 15 civil citations to a CTC builder finding that buildings were occupied without obtaining the necessary use and occupancy certificates. In response, the builder's attorney sent a letter to DPS that enclosed documentation of their approved inspections and temporary certificates. DPS staff investigated this response and determined that the final use and occupancy certificates had not been issued by DPS. After the July 2005 violation hearing where the Planning Board grandfathered the height and setback violations; DPS acted to void the citations and issued the final use and occupancy certificates.

**Complaint Intake Process.** DPS has a formal complaint-handling system in place through its Division of Casework Management. Complaints can be lodged with DPS by telephone (DPS maintains five separate 24-hour phone lines where complaints can be lodged), letter, fax, e-mail, or in person. Division staff enter complaint data into a computerized database, print out the details of each complaint, and refer each case to the appropriate staff for further investigation. DPS has written guidelines for the entire complaint handling process, including time frames for investigating complaints and reporting back to the individual who lodged the complaint.

Division of Casework Management staff refer sediment and erosion control complaints to the Division of Land Development, and refer land use complaints about illegal building activity to the Division of Building Construction. All other land use complaints remain in the Division of Casework Management.

#### **E. Department of Housing and Community Affairs**

As required by Section 25A of the County Code, the Department of Housing and Community Affairs (DHCA) and the CTC Project Developer entered into an MPDU Agreement for the CTC Project in June 2002. The MPDU Agreement approved reflected then-current projections regarding the number and location of MPDUs in the CTC Project.

DHCA does not conduct field inspections to determine whether a developer is constructing MPDUs as required by an approved site plan or MPDU agreement. Developers notify DHCA when they complete construction of each MPDU. Upon completion of an entire subdivision, DHCA verifies that the developer delivered all units required in the MPDU Agreement.

The CTC Project MPDU Agreement remained a stagnant document despite changes to the CTC Project Site Plan affecting the number, location, and phasing of MPDUs. Several site plan amendments approved either by the Planning Board or Park and Planning Staff from 2002 through 2005 modified the number of MPDUs in the project phases referenced in the MPDU Agreement. Despite these amendments, the CTC Project Developer, the CTC Project builders, and Park and Planning staff did not notify DHCA about the changed location of MPDUs.

In September 2005, DHCA learned that the MPDU agreement the Department had signed with the CTC Project Developer in 2002 had not kept pace with subsequent amendments to the CTC Project Site Plan. DHCA's discovery of this situation occurred, in part, as a result of a meeting that OLO conducted as part of its fact-finding review.

Neither DHCA nor Park and Planning staff routinely monitor compliance with MPDU construction phasing requirements. DHCA enforcement of MPDU requirements primarily focuses on activities related to the sale (or rental) and occupancy of completed units. DHCA procedures could only determine compliance with an MPDU Agreement after the developer had completed construction of the entire subdivision.

#### **F. Clarksburg Town Center Project Developer**

The CTC Project Developer contributed to problems with the management of the CTC Project by submitting documents that contained errors and inconsistencies for government approval.

The Phase I Site Plan Signature Set submitted by the CTC Project Developer for review and final approval by the Department of Park and Planning was a significantly flawed document. Specifically:

- The numbers in the Signature Set data table did not match the approvals in the Planning Board Opinion. For example, the maximum building heights of 35 and 45 feet listed in the data table did not precisely match the height limit of four stories (without numeric feet) reported in the Planning Board's Opinion.
- The setbacks in the Signature Set data table did not correspond to the setbacks depicted on the individual lot drawings. For example, the data table listed minimum front-yard setbacks of ten feet, while many of the setbacks were drawn at seven feet.

Professional members of the CTC Project Developer's team, including the project engineer who prepared it and the developer's attorneys who submitted it, share management responsibility for these mistakes. Also, to the extent the CTC Project Developer incorporated the Signature Set into builder purchase contracts, many others presumably reviewed and signed-off on the same flawed documents.

Another place where the CTC Project Developer contributed to problems with management of the CTC Project concerned the Phase II Site Plan Signature Set and the filing of record plats for approval. According to representatives of the CTC Project developer, the Phase II Site Plan Signature Set that Park and Planning staff certified was an outdated copy that did not reflect all of the staff approved revisions to the plan that had occurred since the Planning Board approval two years earlier. The Planning Board mailed the decision for the Phase II Site Plan on May 9, 2002. The review and signoff process for this Signature Set, which occurred over a two year period, produced multiple copies of the Signature Set to reflect updates and changes.

After Park and Planning staff signed the Phase II signature set in October 2004, the project engineer recognized that Park and Planning had inadvertently signed a print dated July 2003 instead of the most current print dated October 2004. The later print reflected a number of revisions that changed unit types and unit numbers which were not on the print that Park and Planning had signed. Despite recognizing this mistake, the CTC Project Developer's team did not take action to rectify this mistake.

**TABLE 19: CLARKSBURG TOWN CENTER BUILDING HEIGHTS  
(COMPARISON OF STANDARDS IN DECISION DOCUMENTS AS FOUND IN THE FILES OF THE DEPARTMENT OF PARK AND PLANNING)**

Document	
<b>Clarksburg Master Plan</b>	<p>“All apartment buildings in the future Town Center will be four stories or less except within walking distance of the transit stop, where a building height of six to eight stories may be allowed if Master Plan recommendations concerning compatibility with the historic district can be achieved.”</p> <p align="right">(June 1994) (Exhibit H 001, Page 46)</p>

  

Document	Board Opinion	Signature Set
<b>Project Plan</b> (9-94004)	<div> <div>Commercial</div> <div>Residential</div> <div>Required</div> <div>4 stories</div> <div>4 stories</div> <div>Proposed</div> <div>4 stories (50 ft.)</div> <div>4 stories (45 ft.)</div> </div> <p>(5/11/95) (Exhibit H 006, Page 9)</p>	<div> <div>SF Detach.</div> <div>35'</div> <div>Townhouse</div> <div>35'</div> <div>Courtyard TH</div> <div>35'</div> <div>Multi-Family</div> <div>45'</div> </div> <p>(4/26/96) (Exhibit H 007, Sheet 1)</p>
<b>Preliminary Plan</b> (1-95042)	<p>The Board opinion contains no explicit mention of maximum building heights</p> <p>(9/28/95) (Exhibit H 014)</p>	<div> <div>SF Detach.</div> <div>35'</div> <div>Townhouse</div> <div>35'</div> <div>Courtyard TH</div> <div>35'</div> <div>Multi-Family</div> <div>45'</div> </div> <p>(not dated) (Exhibit H 015, Sheet 1)</p>
<b>Site Plan Phase I</b> (8-98001)	<div> <div>Permitted/Required</div> <div>4 stories</div> <div>Proposed</div> <div>4 stories</div> </div> <p>The Board Opinion contains no explicit mention of maximum building heights, but incorporates the Staff Report that includes the following:</p> <p>(1/22/98) (Exhibit H 020, Page 32)</p>	<div> <div>SF Detach.</div> <div>35'</div> <div>Townhouse</div> <div>35'</div> <div>Courtyard TH</div> <div>35'</div> <div>Multi-Family</div> <div>45'</div> </div> <p>(3/24/99) (Exhibit H 023, Sheet B)</p>
<b>Phase I Site Plan Enforcement Agreement</b>	<p>The Phase One Site Plan Enforcement Agreement incorporates the “Certified Site Plan” by reference.</p> <p>(5/13/99)</p>	<p align="right">(Exhibit H 022, Page 2)</p>

**TABLE 19 (CON'T): CLARKSBURG TOWN CENTER BUILDING HEIGHTS  
(COMPARISON OF STANDARDS IN DECISION DOCUMENTS AS FOUND IN THE FILES OF THE DEPARTMENT OF PARK AND PLANNING)**

Document	Board Opinion	Signature Set
<b>Site Plan Phase I Amendment A</b>	This amendment was approved administratively by staff and therefore has no Board Opinion.	<p>SF Detach. <u>Townhouse</u> <u>Courtyard TH</u> <u>Multi-Family</u>  <u>35' 4 stories</u> <u>35' 4 stories</u> <u>35' 4 stories</u> <u>45' 4 stories*</u></p> <p>(8/3/01) (Exhibit H 025, Sheets 1, 3)</p> <p>-----</p> <p>SF Detach. <u>Townhouse</u> <u>Courtyard TH</u> <u>Multi-Family</u>  <u>35'</u> <u>35'</u> <u>35'</u> <u>45'</u></p> <p>(10/23/01, 6/10/02, 8/3/01) (Exhibit H 025, Sheets 2, 4, 5)</p>
<b>Site Plan Phase I Amendment H</b>	This amendment was approved administratively by staff and therefore has no Board Opinion.	<p>SF Detach. <u>Townhouse</u> <u>Courtyard TH</u> <u>Multi-Family</u>  <u>35' 4 stories</u> <u>35' 4 stories</u> <u>35' 4 stories</u> <u>45' 4 stories*</u></p> <p>(10/31/02) (Exhibit H 039, Sheets 1-3)</p>
<b>Site Plan Phase I Amendment C</b>	This amendment was approved administratively by staff and therefore has no Board Opinion.	<p>Data tables are modified version of those in Amendment A. Tables include no maximum building height limit.</p> <p>The signature set also includes the following disclaimer: "This Plan should not be used as a legal document for representation of bearings, distances, lot square footages, and easements. For recorded information, please see record plats or applicable recorded documents."</p> <p>(5/30/03) (Exhibit H 030, Sheets 1-11)</p>

\* Building heights with hand-written modifications as appearing in signature sets provided by the Department of Park and Planning to OLO in August 2005. A more detailed explanation of these modifications appears in Chapter 3.

**TABLE 19 (CON'T): CLARKSBURG TOWN CENTER BUILDING HEIGHTS  
(COMPARISON OF STANDARDS IN DECISION DOCUMENTS AS FOUND IN THE FILES OF THE DEPARTMENT OF PARK AND PLANNING)**

Document	Board Opinion	Signature Set
<b>Site Plan Phase II (8-02014)</b>	<p>The Board Opinion contains no explicit mention of maximum building heights but incorporates the Staff Report that includes the following:</p> <p><u>Permitted/Required</u> 4 stories <u>Proposed</u> 4 stories</p> <p>(5/9/02) (Exhibit H 044, Page 17)</p>	<p>Data tables are modified version of those in Amendment A. Tables include no maximum building height limit.</p> <p>The signature set includes the same disclaimer added to the Phase One Site Plan Amendment C.</p> <p>(10/14/04) (Exhibit H 042, Sheets 1-11)</p>
<b>Phase II Site Plan Enforcement Agreement</b>	<p>The Phase Two Site Plan Enforcement Agreement incorporates both the Phase Two Site Plan and the Board Opinion by reference.</p> <p>(10/14/04)</p>	<p>(Exhibit H 041, Signature Page)</p>
<b>Site Plan Phase I Amendment F</b>	<p>This amendment was approved administratively by staff and therefore has no Board Opinion.</p>	<p>Data table is modified version of those in Amendment A. Table includes no maximum building height limit. The signature set does not include the disclaimer included in previous signature sets.</p> <p>(1/25/05) (Exhibit H 034, Sheet 1)</p>
<b>Site Plan Phase I Amendment G / Site Plan Phase II Amendment B</b>	<p>Finding: "At three stories, the Manor Homes are consistent with the adjacent townhouse and single-family development in scale and placement."</p> <p>Condition: "The buildings shall not exceed 45 feet in height"</p> <p>(3/21/05) (Exhibit H 037, Pages 4 and 7)</p>	<p>The signature set for Amendment G is not yet signed.</p>

**TABLE 20: CLARKSBURG TOWN CENTER BUILDING SETBACKS  
(COMPARISON OF STANDARDS IN DECISION DOCUMENTS AS FOUND IN THE FILES OF THE DEPARTMENT OF PARK AND PLANNING)**

Document	Board Opinion	Signature Set																				
<p><b>Project Plan</b> <b>(9-94004)</b></p>	<p><u>Required</u>      <u>Proposed</u> From any street*      NA      10 ft. min.</p> <p>* No minimum setback is required if in accordance with an approved master plan.</p>	<table><tr><td><u>SF Detach</u></td><td><u>Townhouse</u></td><td><u>Courtyard TH</u></td><td><u>Multi-Fam</u></td></tr><tr><td>Front 10'</td><td>10'</td><td>10'</td><td>10'</td></tr><tr><td>Rear 25'</td><td>20'</td><td>6'</td><td>10'</td></tr><tr><td>Side (one) 0'</td><td>0'</td><td>0'</td><td>10'</td></tr><tr><td>Side (both) 8'</td><td>0'</td><td>0'</td><td>20'</td></tr></table> <p>and</p> <p><u>Residential</u> 30'</p> <p>From any street*</p> <p>* No minimum setback is required if in accordance with master plan.</p>	<u>SF Detach</u>	<u>Townhouse</u>	<u>Courtyard TH</u>	<u>Multi-Fam</u>	Front 10'	10'	10'	10'	Rear 25'	20'	6'	10'	Side (one) 0'	0'	0'	10'	Side (both) 8'	0'	0'	20'
<u>SF Detach</u>	<u>Townhouse</u>	<u>Courtyard TH</u>	<u>Multi-Fam</u>																			
Front 10'	10'	10'	10'																			
Rear 25'	20'	6'	10'																			
Side (one) 0'	0'	0'	10'																			
Side (both) 8'	0'	0'	20'																			
	<p>(5/11/95)      (Exhibit H 006, Page 9)</p>	<p>(4/26/96)      (Exhibit H 007, Sheet 1)</p>																				
<p><b>Preliminary Plan</b> <b>(1-95042)</b></p>	<p>“Final number and location of units to be determined at site plan.”</p> <p>(9/28/95)      (Exhibit H 014, Page 6)</p>	<table><tr><td><u>SF Detach</u></td><td><u>Townhouse</u></td><td><u>Courtyard TH</u></td><td><u>Multi-Fam</u></td></tr><tr><td>Front 10'</td><td>10'</td><td>10'</td><td>10'</td></tr><tr><td>Rear 25'</td><td>20'</td><td>6'</td><td>10'</td></tr><tr><td>Side (one) 0'</td><td>0'</td><td>0'</td><td>10'</td></tr><tr><td>Side (both) 8'</td><td>0'</td><td>0'</td><td>20'</td></tr></table> <p>and</p> <p><u>Residential</u> 30'</p> <p>From any street*</p> <p>* No minimum setback is required if in accordance with master plan.</p>	<u>SF Detach</u>	<u>Townhouse</u>	<u>Courtyard TH</u>	<u>Multi-Fam</u>	Front 10'	10'	10'	10'	Rear 25'	20'	6'	10'	Side (one) 0'	0'	0'	10'	Side (both) 8'	0'	0'	20'
<u>SF Detach</u>	<u>Townhouse</u>	<u>Courtyard TH</u>	<u>Multi-Fam</u>																			
Front 10'	10'	10'	10'																			
Rear 25'	20'	6'	10'																			
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**TABLE 20 (CON'T): CLARKSBURG TOWN CENTER BUILDING SETBACKS  
(COMPARISON OF STANDARDS IN DECISION DOCUMENTS AS FOUND IN THE FILES OF THE DEPARTMENT OF PARK AND PLANNING)**

Document	Board Opinion	Signature Set																																
Site Plan Phase I (8-98001)	<p>The Board Opinion contains no explicit mention of setbacks but incorporates the Staff Report that includes the following:</p> <table><tr><td><u>Permitted/Required</u></td><td><u>Proposed</u></td></tr><tr><td>From any street</td><td></td></tr><tr><td>Residential</td><td>n/a**</td></tr><tr><td></td><td>10 ft. min.**</td></tr></table> <p>** The Planning Board reviewed this setback during the Project Plan Review and found that no setback is necessary per the approved master plan.</p>	<u>Permitted/Required</u>	<u>Proposed</u>	From any street		Residential	n/a**		10 ft. min.**	<table><tr><td><u>SF Detach</u></td><td><u>Townhouse</u></td><td><u>Courtyard TH</u></td><td><u>Multi-Fam</u></td></tr><tr><td>Front</td><td>10'</td><td>10'</td><td>10'</td></tr><tr><td>Rear</td><td>25'</td><td>6'</td><td>10'</td></tr><tr><td>Side (one)</td><td>0'</td><td>0'</td><td>10'</td></tr><tr><td>Side (both)</td><td>8'</td><td>0'</td><td>20'</td></tr></table> <p>and</p> <p>From any street</p> <p><u>Residential</u> 10'</p> <p>(3/24/99) (Exhibit H 023, Sheet B)</p>	<u>SF Detach</u>	<u>Townhouse</u>	<u>Courtyard TH</u>	<u>Multi-Fam</u>	Front	10'	10'	10'	Rear	25'	6'	10'	Side (one)	0'	0'	10'	Side (both)	8'	0'	20'				
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Side (one)	0'	0'	10'																															
Side (both)	8'	0'	20'																															
Phase I Site Plan Enforcement Agreement	<p>The Phase One Site Plan Enforcement Agreement incorporates the "Certified Site Plan" by reference.</p>	(Exhibit H 022, Page 2)																																
Site Plan Phase I Amendment A	<p>This amendment was approved administratively by staff and therefore has no Board Opinion.</p>	<table><tr><td><u>SF Detach</u></td><td><u>Townhouse</u></td><td><u>Courtyard TH</u></td><td><u>Multi-Fam</u></td></tr><tr><td>Front</td><td>10'</td><td>10'</td><td>10'</td></tr><tr><td>Rear</td><td>25'</td><td>6'</td><td>10'</td></tr><tr><td>Side</td><td>0'8"</td><td>0'</td><td>10'/20'</td></tr></table> <p>and</p> <p>From any street</p> <p><u>Residential</u> 10'</p> <p>(8/3/01) (Exhibit H 025, Sheets 1, 3, 5)</p> <p>-----</p> <table><tr><td><u>SF Detach</u></td><td><u>Townhouse</u></td><td><u>Courtyard TH</u></td><td><u>Multi-Fam</u></td></tr><tr><td>Front</td><td>10'</td><td>10'</td><td>10'</td></tr><tr><td>Rear</td><td>As Shown</td><td>As Shown</td><td>As Shown</td></tr><tr><td>Side</td><td>3'</td><td>0'</td><td>10'/20'</td></tr></table> <p>and</p> <p>From any street</p> <p><u>Residential</u> 10'</p> <p>(10/23/01 and 6/10/02) (Exhibit H 025, Sheets 2, 4)</p>	<u>SF Detach</u>	<u>Townhouse</u>	<u>Courtyard TH</u>	<u>Multi-Fam</u>	Front	10'	10'	10'	Rear	25'	6'	10'	Side	0'8"	0'	10'/20'	<u>SF Detach</u>	<u>Townhouse</u>	<u>Courtyard TH</u>	<u>Multi-Fam</u>	Front	10'	10'	10'	Rear	As Shown	As Shown	As Shown	Side	3'	0'	10'/20'
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Front	10'	10'	10'																															
Rear	As Shown	As Shown	As Shown																															
Side	3'	0'	10'/20'																															



**TABLE 20 (CON'T): CLARKSBURG TOWN CENTER BUILDING SETBACKS  
(COMPARISON OF STANDARDS IN DECISION DOCUMENTS AS FOUND IN THE FILES OF THE DEPARTMENT OF PARK AND PLANNING)**

Document	Board Opinion	Signature Set
<b>Site Plan Phase I Amendment H</b>	This amendment was approved administratively by staff and therefore has no Board Opinion.	<p> <u>SF Detach</u>   <u>Townhouse</u>   <u>Courtyard TH</u>   <u>Multi-Fam</u>  Front   10'   10'   10'   10'  Rear   As Shown   As Shown   As Shown   As Shown  Side   3'   0'   0'   10'/20'    From any street   and  <u>Residential</u>  10'    (10/31/02)   (Exhibit H 039, Sheets 1-3) </p>
<b>Site Plan Phase I Amendment C</b>	This amendment was approved administratively by staff and therefore has no Board Opinion.	<p> <u>SF Detach</u>   <u>Townhouse</u>   <u>Courtyard TH</u>   <u>Multi-Fam</u>  Front   10'   NA   NA   10'  Rear   As Shown   As Shown   As Shown   As Shown  Side   3'   0'   0'   10'/20'    From any street   and  <u>Residential</u>  10'    (5/30/03)   (Exhibit H 030, Sheets 1-11) </p> <p>The signature set also includes the following disclaimer: "This Plan should not be used as a legal document for representation of bearings, distances, lot square footages, and easements. For recorded information, please see record plats or applicable recorded documents."</p>

**TABLE 20 (CON'T): CLARKSBURG TOWN CENTER BUILDING SETBACKS  
(COMPARISON OF STANDARDS IN DECISION DOCUMENTS AS FOUND IN THE FILES OF THE DEPARTMENT OF PARK AND PLANNING)**

Document	Board Opinion	Signature Set
<b>Site Plan Phase II (8-02014)</b>	<p>The Board Opinion contains no explicit mention of building setbacks but incorporates the Staff Report that includes the following:</p> <p align="center"> <u>Permitted/Required</u>      <u>Proposed</u>  From any street      n/a**      10 ft. min. **  Residential </p> <p>** The Planning Board reviewed this setback during the Project Plan Review and found that no setback is necessary per the approved master plan.</p> <p align="right">(5/9/02)      (Exhibit H 044, Page 17)</p>	<p>SF Detach    <u>Townhouse</u>    <u>Courtyard TH</u>    <u>Multi-Fam</u>  Front    10'    NA    NA    10'  Rear    As Shown    As Shown    As Shown    As Shown  Side    3'    0'    0'    10'/20'</p> <p align="center">and Residential 10'</p> <p>The signature set includes the same disclaimer added to the Phase I Site Plan Amendment C.</p> <p align="right">(10/14/04)      (Exhibit H 042, Sheets 1-11)</p>
<b>Site Plan Phase II Enforcement Agreement</b>	<p>The Phase Two Site Plan Enforcement Agreement incorporates the Phase Two Site Plan and the Board Opinion by reference.</p> <p align="right">(10/14/04)      (Exhibit H 041, Signature Page)</p>	
<b>Site Plan Phase I Amendment F</b>	<p>This amendment was approved administratively by staff and therefore has no Board Opinion.</p>	<p>SF Detach    <u>Townhouse</u>    <u>Courtyard TH</u>    <u>Multi-Fam</u>  Front    10'    NA    NA    10'  Rear    As Shown    As Shown    As Shown    As Shown  Side    3'    0'    0'    10'/20'</p> <p align="center">and Residential 10'</p> <p>The signature set does not include the disclaimer included in previous signature sets.</p> <p align="right">(1/25/05)      (Exhibit H 034, Sheet 1)</p>

## CHAPTER IV: SOURCES OF INFORMATION

Document	Exhibit Number (see Appendix)
Department of Park and Planning description of record plat approval procedures	H 157
Draft new Department of Park and Planning permit review checklist	H 105
Approved & Adopted Guidelines and Interim Policies for Administration of Preliminary, Project & Site Plan Extensions, Effective September 18, 1992	H 155
PB Public Hearing - Written transcript , April 14, 2005	H 059
PB Public Hearing - Speakers list and transcript, July 7, 2005	H 062
Park and Planning staff response to OLO information request re: procedures for drafting Planning Board opinions	H 152
Park and Planning procedures for review of plans and a written protocol for communication between DRD staff and other divisions	H 153
Pamphlet: Department of Park & Planning Packager Protocol	H 138
Preliminary Plan Amendment 1-95042A Project Application	H 018
Memo from Park and Planning staff to CTC Review Team re: review of Site Plan 8-98001 August 6, 1997	H 113
Memo from Park and Planning staff to other County Staff and Agencies requesting comments on proposed CTC site plan, October 25, 1997	H 114
Comments from DFRS inspection with attached DRC comments and sheet w/requirements, September 1997	G 001
MNCPPC memorandum re: outlining process for staff level approvals of changes to the original Terrabrook Site Plan, April 13, 2000	D 018
Memo from Park and Planning staff to members of the Clarksburg Town Center Concept Plan Review Team re: Concept Plan Review, July 17, 2000	H 116
CTC Concept Plan prepared by Terrabrook, SKO Architects and Planners and CPJ Engineers	H 117
Department of Park and Planning Records Management Manual, December 1992	H 154
Letter from MNCPPC Counsel to OLO re: Rules of Procedure for PB, August 9, 2005	H 128
Building Permit Release Routing sheet: Phase I Site Plan (8-98001)	H 101
Building Permit Release Routing sheet: Phase II Site Plan (8-02014)	H 102
Building Permit Release Routing sheet: Phase I, Amendment A (8-98001A)	H 103

## **Chapter V. Different Views on the Clarksburg Town Center Project**

Between mid-July and October 2005, OLO solicited factual information, opinions, and advice from many individuals who hold a range of views on the Clarksburg Town Center Project. OLO also received and reviewed hundreds of documents related to the Clarksburg Town Center (CTC) Project.

Based on the documents reviewed and interviews conducted, this chapter presents information on the roles and views on the CTC Project from the vantage points of the CTC Project developer and builders, Clarksburg residents, and the nine members of the County Council.

This chapter is organized as follows:

- **Part A** summarizes the roles and presents the views of the CTC Project developers and builders;
- **Part B** highlights key events of the CTC Project as viewed by representatives of the Clarksburg Town Center Advisory Committee (CTCAC); and
- **Part C** provides an overview of the County Council's role and actions in the CTC Project.

The source table at the end of each Part lists the documents and interviews that OLO used to compile that section of the chapter. All documents used are available for reference in the on-line Appendix.

### **A. Developers/Builders**

This Part provides an overview of the Clarksburg Town Center (CTC) Project from the perspective of the CTC Project Developer and builders, including:

- Summarizing the role of the developer and builders in the CTC Project; and
- Presenting the views of the CTC Project Developer and builders on specific events and activities of the CTC Project development approval and implementation process.

#### **1. Overview of the Role of the Developer and Builders in the Clarksburg Town Center Project**

The development of the Clarksburg Town Center Project began in 1994. Since that time, the project has involved three different developers. To date, homes located in the CTC Project have been constructed by five different builders. This section summarizes the general roles of the developers and builders in the CTC Project development process. It also explains the architectural and design guidelines established by the developer for the CTC Project.

## DEVELOPER

The developer is the entity that owns the parcel of land and initiates the land development process. In general, the developer is responsible for:

- Obtaining project approvals from the local governing body;
- Constructing the infrastructure and other approved project elements that are not housing units, e.g., roads, greenways, amenities, etc.;
- Preparing and selling finished lots to individual builders selected by the developer;
- Filing record plats for approval by the local governing body;
- Maintaining architectural and design consistency in a development; and
- Establishing a Home Owners Association (HOA), and at some point turning over responsibility for maintenance of the community's roads, stormwater facilities, open space, and recreation amenities to the HOA.

**CTC Project Developers.** The Clarksburg Town Center Project has had three different developers since the CTC Project approval process started in 1994. The table below shows the developers of the CTC Project, their dates of ownership during the development approval and implementation process, and the development approvals they received.

**TABLE 21: CLARKSBURG TOWN CENTER PROJECT DEVELOPERS**

Developer	Dates of Ownership	Received Approval for:
Clarksburg Joint Venture (Klebanoff and Montgomery)	1994 – 1999	<ul style="list-style-type: none"> <li>• Project Plan</li> <li>• Preliminary Plan</li> <li>• Site Plan Phase I</li> </ul>
Terrabrook Clarksburg, LLC (Terrabrook)	1999 – 2003	<ul style="list-style-type: none"> <li>• Amendments to Site Plan Phase I</li> <li>• Site Plan Phase II</li> </ul>
NNPII – Clarksburg, LLC <sup>1</sup> (Newland Communities)	2003 – Present	<ul style="list-style-type: none"> <li>• Amendments to Site Plan Phase I</li> <li>• Amendments to Site Plan Phase II</li> <li>• Site Plan Phase III (pending)</li> <li>• Project Plan Amendment (pending)</li> </ul>

Source: Department of Park and Planning, Newland Communities

<sup>1</sup> The rest of this chapter refers to the current CTC Project Developer, NNPII – Clarksburg, LLC as Newland or Newland Communities. Newland Communities, Inc. owns NNPII – Clarksburg, LLC.

**CTC Project Development Team.** Each of the developers employed a “team” of consultants who were (and still are, in some cases) involved with the CTC Project approval and implementation process. Some members of the CTC Project Developer’s team changed during the course of the CTC Project, while others stayed the same even as ownership changed. For the CTC Project, the development team consistently included one or more representatives of the following disciplines:

- Attorney;
- Architect/Land Planner;
- Landscape Architect;
- Engineer;
- Traffic Consultant;
- Environmental Consultant; and
- Geotechnical Environmental Consultant.

Of note, the law firm of Linowes and Blocher remained constant throughout the entire project while the engineering firm changed three times, from Loiederman Associates to MK Enterprises to Charles P. Johnson & Associates.

## **BUILDERS**

In the land development process, builders design and construct the types of housing that are built and sold to the community. In general, builders are responsible for:

- Contracting with the developer to construct specific building types on specific lots;
- Agreeing to abide by architectural and design guidelines established by the developer and by other project requirements established by the local governing body;
- Applying for and receiving approval for permits from the local governing body, including building permits;
- Requesting any desired “amendments” to plan approvals with the local governing body that are related to the construction of the builders’ individual housing units after purchasing lots;
- Passing building code inspections as required by the local governing body; and
- Selling the housing units to individual homeowners.

**CTC Project Builders.** Five different builders are constructing homes for the Clarksburg Town Center Project. Each of the five builders initially contracted with Terrabrook in the Spring of 2001 to build a specified number of units and unit types. Each builder subsequently contracted with Terrabrook and then Newland Communities to build more housing as various phases of the CTC Project were approved.

When the developer (Terrabrook or Newland) sold lots to individual builders, the sales contract included a condition that required the builder to submit building plans to the developer for review and approval prior to applying for a building permit. Another condition required the builder to comply with the Preliminary Plan, Site Plan, Design Guidelines, Homeowners Association documents, and any other applicable governmental requirements. These documents were attached “by reference” to the sales contract between the developer and the builder.

The table below lists the five CTC Project builders along with the number and type of units built at CTC as of October 1, 2005.

**TABLE 22: CLARKSBURG TOWN CENTER PROJECT BUILDERS**

<b>Builder</b>	<b>Number and Types of Units at CTC (built as of October 1, 2005)</b>
Bozzuto Homes, Inc.	<ul style="list-style-type: none"> <li>• 76 Condominiums in Multifamily Buildings</li> </ul>
Craftstar Homes, Inc.	<ul style="list-style-type: none"> <li>• 168 Townhomes</li> <li>• 26 Condominiums in 2/2 Townhomes</li> </ul>
Miller and Smith at Clarksburg, LLC	<ul style="list-style-type: none"> <li>• 124 Townhomes</li> <li>• 87 Single-Family Detached</li> </ul>
NV Homes	<ul style="list-style-type: none"> <li>• 141 Townhomes</li> <li>• 19 Single-Family Detached</li> </ul>
Porten Homes	<ul style="list-style-type: none"> <li>• 55 Single-Family Detached</li> </ul>

Sources: Bozzuto Homes, Crafstar Home, Miller and Smith, NV Homes, and Porten Homes

It is standard practice for a builder to contract with an engineering firm as part of their “team.” The builder’s engineering firm cites homes on the specific lots purchased from the developer. In total, three different engineering firms cited homes at the CTC Project.

#### **ARCHITECTURAL AND DESIGN GUIDELINES**

Following standard practice, the CTC Project Developer, (Klebanoff and Montgomery, Terrabrook, and now Newland Communities) maintains architectural and design control over the entire site. In fact, the developer’s sales contract with each of the builders contained a clause that approval of the developer is required for the “architecture, design, and exterior features” of a unit the builder intends to construct.

For the CTC Project, Terrabrook and Newland’s architectural and design intent is to create a neo-traditional mixed use community. Several builders’ report that when Terrabrook originally approached them about CTC, the developer was specifically looking for “boutique” builders that could adhere to strict guidelines on neo-traditional housing designs, in particular facade features.

To maintain design control for the CTC Project, Terrabrook published Design Guidelines and established an Architectural Review Committee. These two elements are briefly described below.

**CTC Project Design Guidelines.** Terrabrook published a 63-page booklet of detailed Design Guidelines for Clarksburg Town Center Project in January 2001. The guidelines, authored primarily by Terrabrook's Architect/Land Planner and Landscape Architect consultants, include block-by-block details for urban design (including development standards), architectural design standards, hardscape design standards, and landscape design standards. The booklet reflects a revised concept plan for the CTC Project.

Of note, the Design Guidelines list height standards as either three or four stories (without a numerical feet limit) and front-yard setback standards that range from six to ten feet. The Guidelines state that the "Design Review Process" does not include responsibility for... "Compliance with government regulations, laws or ordinances, building codes and safety requirements."

**CTC Project Architectural Review Committee.** The developer appointed this Committee to review each builder's plans for adherence to the Design Guidelines. The Committee reviewed all of the builders' architectural plans and approved the specifics before each builder applied for building permits. The Committee's membership included the CTC Developer's Project Manager and two design professionals.

## **2. Views of the Developer and Builders on the Clarksburg Town Center Project**

This section reviews events related to the approval and implementation of the Clarksburg Town Center (CTC) Project, as viewed by representatives of the CTC Project Developer and builders. This summary is based on written documents from representatives of the developer and builders, correspondence to and from the developer and builders to the Department of Park and Planning, and OLO's interviews with representatives from Newland Communities, Terrabrook, each of the CTC Builders, and members of the CTC Project Developer's team.<sup>2</sup>

### **GOVERNMENT APPROVALS**

As part of the CTC Project, the developers and builders obtained various approvals and/or permits for the project from the Planning Board, the Department of Permitting Services, and the Department of Housing and Community Affairs.

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<sup>2</sup> This section uses Newland, Terrabrook, and CTC Project Developer interchangeably dependent upon the specific timeframe or events being referenced. Additionally, the views and observations from Newland's attorney, Linowes and Blocher, are attributed to Newland except where specifically noted.



**Developer.** Newland Communities' view is that the CTC Project, as it is currently being developed, complies with the project approvals provided by Montgomery County agencies. Newland's position is that they never intentionally moved ahead with anything "of significance" without the prior approval of Park and Planning staff. Specific views of Newland and their development team regarding the government approval process for CTC include:

- The developer is responsible for submitting development and/or construction plans that are consistent with the government's approvals. If the government changes an approval standard or the government's regulatory agency changes their understanding of what an approval standard requires, the government needs to alert the developer to that change.
- Since development on the CTC Project began four years ago, the government gave the developer a continuous stream of "green lights." For example, permits were issued and inspections were conducted indicating that the regulatory process was functioning but nobody was finding any significant problems.
- Newland Communities assumed that the Planning Board would not have signed the Signature Set Site Plans if the plans submitted by the developer's team had incorrect information.
- The CTC Project Developer and builders acted in good faith and relied on the reasonable belief that the government had authorized construction to proceed based on its review and approval of applicable plans and applications.

**Builders.** Builders are responsible for obtaining building permits from the Department of Permitting Services (DPS) before they begin construction. For CTC, not one building permit application was rejected. The building permit applications included full disclosure on issues such as height and setbacks for the proposed structures.

The CTC builders assumed that:

- DPS issuance of building permits included approval from Planning Board staff that the proposed construction plans were consistent with the approved Site Plan.
- The government agencies involved (i.e., the Planning Board and DPS) coordinated their permit review.
- If a problem existed between the builder's proposal and the approved development requirements, then DPS would tell the builder that it would not issue the permit and explain why.

In addition to the building permit approvals, builders report that they consistently received approvals at the wall check review (which show setbacks) and at the issuance of Use and Occupancy permits (for multifamily structures).

## **AMENDMENTS/PROCESS OF MAKING CHANGES TO THE SITE PLANS**

In general, Newland and the CTC Project builders view the need to have a process for approving changes to an approved Site Plan as a normal course of business. This is particularly true for large new developments, where site conditions are not fully known before construction begins.

Both the CTC Project Developer and builders submitted Site Plan amendments and/or changes for CTC. The builders only submitted requests for amendments when there was an issue related to the citing and construction of housing units after the builder had purchased the lots. The CTC Project Developer submitted Site Plan amendment requests for specific properties prior to selling the lots to the builders. The engineer and/or attorney for the developer or builder were primarily responsible for obtaining the necessary approvals for changes to the Site Plan.

Newland and the builders' understanding of the CTC Project approval documents was that Condition #38 (both in the Board Opinion and CTC Phase I Site Plan Enforcement Agreement) authorized Park and Planning staff to review and approve changes in line with the general concepts endorsed by the Board. In turn, the developer and builders followed whatever amendment procedures staff required. Specific observations about the CTC amendment process and requirements include:

- According to the CTC Project Developer's engineer (Charles P. Johnson & Associates or CPJ), when Terrabrook took over the CTC Project in 1999, they wanted to make a lot of changes to the already approved Phase I Site Plan in order to (in Terrabrook's view) improve the design and enhance its traditional neighborhood design characteristics.
- Also according to CPJ, in their first meeting with Park and Planning staff about the CTC Project to discuss potential Phase I changes desired by Terrabrook, staff brought up the flexibility Condition #38 provided for the approval of site plan changes.
- On April 13, 2000, Terrabrook's counsel (Linowes & Blocher) attended a Development Review Committee meeting that, according to the written meeting agenda, discussed Terrabrook's desire to make changes and how staff intended to handle proposed changes.

- The CTC Project Developer and builders report that they consistently followed the process for obtaining approval for CTC amendments, as directed by staff. This process generally included: (1) a request from the developer/builder for a revised design, (2) Development Review Committee review of the proposed changes, (3) detailed negotiations with Park and Planning staff over design and landscaping issues, (4) review with DPS and DPWT staff, (5) submittal of final design to Park and Planning staff for sign-off.
- Newland reports they did not always receive signed copies of all drawings they submitted back from Park and Planning staff. However, they operated on the assumption that the approvals they received from staff (either in writing or verbally) were legitimate approvals. They also assumed that if staff processed an amendment administratively, staff had the authority to do so.
- Record-keeping at the Department of Park and Planning, especially with requested amendments, was often problematic for the CTC project. CPJ reports that it was common for Park and Planning staff to misplace final drawings and request multiple replacement copies from CPJ.
- Bozzuto's Manor Home amendment stands as an example of where, from the builder's perspective, they were following whatever amendment process Park and Planning staff advised them was required. The CTC Site Plan Reviewer originally told Bozzuto that its request to change the footprint of the Manor Homes could be processed administratively. Staff subsequently determined that it should be processed as a major amendment and heard by the Planning Board, so Bozzuto followed the process staff required.

### **CTC PROJECT PHASE III**

Phase III of the CTC Project, which includes the retail section of CTC, was initially shared with Park and Planning staff and members of the community in early 2004. Newland Communities submitted an application for a Phase III Site Plan approval to the Department of Park and Planning on June 3, 2004 (with revised retail plans submitted in April 2005); it is currently pending hearing and action by the Planning Board.

The design of the CTC retail section sparked some of the initial controversy over the CTC Project development. Newland's views and observations on the retail proposal are as follows:

- Newland reports receiving "little to no reaction" from CTC residents when the proposed CTC retail section (Phase III of the project) was first presented to the community in February 2004. When Newland later received negative reactions to the CTC retail plans in the summer of 2004, they were surprised at both the dislike of the proposal and the confrontational atmosphere that developed.

- While developing the Phase III proposal, Newland representatives met periodically with Park and Planning staff from Development Review and Community-Based Planning to receive comments and suggestions on the proposal.
- Newland was confused by the mixed messages it received from the Department of Park and Planning on the CTC retail section after a senior Park and Planning official, the Chief of Community-Based Planning, publicly stated his disapproval of Newland's retail design despite not attending any of Newland's Phase III design meetings with staff.
- Through the fall of 2004, Newland held a series of meetings with CTCAC and hired new consultants with traditional neighborhood design experience to help redesign the retail. Newland feels that the Phase III proposal as submitted reflects a substantial redesign of the retail section to address community concerns, but that the type of retail some community members want is something that the market will not support.

#### **ALLEGED HEIGHT AND SETBACK VIOLATIONS**

The Planning Board has held multiple CTC violation hearings. The primary focus of the initial hearings was building height and building setback issues. As described previously, it is the view of Newland and the CTC Project builders that they received the necessary approvals to develop the CTC Project as it is currently being developed. Specific observations on the height and setback issues from Newland, Charles P. Johnson & Associates (CPJ), and the CTC Project builders include:

- Newland and the CTC Project builders proceeded with the CTC development under the understanding that the building height limit was in stories, not feet. They feel that this understanding was repeatedly confirmed to them by Park and Planning staff, and that building permits provide a record of government approvals under a four story standard.
- Evidence of the CTC Project Developer's (first Terrabrook, then Newland) interpretation of the height limit in stories is that the CTC Design Guidelines from 2001 communicate height requirements to the builders in terms of three and four stories, not numerical feet.
- CPJ reports that the data table contained on the Phase I Site Plan Signature Set (which includes height limits in numerical feet) is an erroneous table that came from a prior engineering firm that worked on the CTC Project. According to CPJ, when they questioned the inclusion of the data table on the Signature Set, the CTC Site Plan Reviewer told them that it needed to remain for historical purposes despite that fact that it was not consistent with actual Site Plan drawings.

- At two separate meetings with Park and Planning staff in the Fall of 2004 (October 27 and December 10), representatives of Newland and the CTC Project builders confirmed with staff that: (1) four stories and not numerical feet was the relevant height standard for the CTC Project; (2) the multifamily buildings were four stories because a mezzanine does not qualify as a story; and (3) all existing approvals were in conformance with height requirements.
- CPJ reports that setbacks were specifically reduced with the knowledge and approval of Park and Planning staff to increase the CTC Project's feel as a neo-traditional community. The original CTC Project Developer received approval from the utility company to reduce the public utility easements early in the development process for this purpose. The appropriate Building Restriction Line's were those depicted in the Site Plan Signature Set drawings; and the design depicted in the drawings was the intent of all parties (public and private) involved in the review process.
- All the builders report that if they had been told to follow different development standards (i.e. the numerical height and setback limits shown in the Site Plan data table), they would have acted differently; including not purchasing certain lots if they could not properly site their housing units in them. In addition, no efforts were made to hide information as the actual building heights and setbacks were available as part of the building permit package.
- Newland and the builders feel that the entire process for discovering and determining alleged development violations was established "on-the-go." In fact, Park and Planning staff did not follow its own procedures in the Site Plan Enforcement Agreement for notifying Newland of potential violations.
- Builders feel that Park and Planning staff has not followed its own procedures for issuing Stop Work Orders, including not providing anything in writing to the affected builders about the Stop Work Orders they have issued.

**CHAPTER V, PART A: SOURCES OF INFORMATION**

<b>Document</b>	<b>Exhibit Number (see Appendix)</b>
Original Terrabrook sales brochure	D 001
2004 Newland sales brochure	D 002
Miller & Smith real estate sales contract Phase I-B Single-Family Lots, September 4, 2001	A 002
Miller & Smith real estate sales contract Phase I-B Townhouse Lots, September 4, 2001	A003
CTC Design Guidelines, January 17, 2001	A 001
Letter from CPJ to Park and Planning staff re: setbacks for CTC units, July 18, 2005	D 024
MPDU agreement between DHCA and Terrabrook Clarksburg LLC, May 31, 2002	H 100
Letter from Linowes and Blocher to Council re: response filed on behalf of Newland Communities to allegations of site plan violations, September 15, 2005	D 029
Letter to Park and Planning staff re: confirming Planning staff's position on heights, November 10, 2004	D 020
Attachments to PB Packet for July 7, 2005 Hearing: Correspondence from Linowes and Blocher (on behalf of Newland and Bozzuto) re: CTC	H 075
Letter from Linowes & Blocher to PB Chairman in response to September 19, 2005 letter from CTCAC's counsel, September 28, 2005	D 030
Attachments to PB Packet for July 7, 2005 Hearing: Correspondence from Shulman Rogers (on behalf of Craftstar) and Craftstar, Inc. re: CTC	H 077
<b>Interview</b>	<b>Exhibit Number</b>
Representatives from: <ul style="list-style-type: none"> <li>• Bozzuto Homes</li> <li>• Charles P. Johnson &amp; Associates</li> <li>• Craftstar Homes</li> <li>• Land Design, Inc.</li> <li>• Miller and Smith</li> <li>• Newland Communities, Inc.</li> <li>• NV Homes</li> <li>• Porten Homes</li> <li>• Terrabrook, LLC</li> </ul>	N/A

## **B. Community Representatives**

Montgomery County Government prides itself on its long standing commitment to community involvement. The County works especially hard to seek community input as part of the County Council's master plan decisions and the Planning Board's approval of proposed development projects.

The major opportunities for community input in the County's approval of planning, design, and construction in Clarksburg began more than 20 years ago when community members presented views and concerns as part of the Clarksburg Master Plan Citizens Advisory Committee.

In the many public hearings, worksessions, and hearings held specifically on the Clarksburg Town Center (CTC) Project, community members have testified individually and as organized groups to address both countywide issues and local concerns. Countywide organizations that have participated include the Historic Preservation Advisory Board and the Montgomery Bicycle Action Group. Organizations that have represented local concerns include the Clarksburg Civic Association, the Clarksburg Historical Society, and, most recently, the Clarksburg Town Center Advisory Committee.

The Clarksburg Town Center Advisory Committee (CTCAC) was formed in August 2004 to represent residents of the Clarksburg Town Center Project who were initially concerned about Newland Communities proposed plans for the CTC Project retail center. Since August 2004, CTCAC has identified several additional CTC Project issues. CTCAC has also been the formal complainant at the Planning Board's CTC violation hearings.

**The Clarksburg Town Center Advisory Committee's Involvement in the CTC Project.** This section highlights the key events related to the approval and implementation of the Clarksburg Town Center (CTC) Project as viewed by representatives of the Clarksburg Town Center Advisory Committee (CTCAC). It covers the time period between March 2004 and October 2005. This summary is based on the written chronology and associated documents provided by CTCAC, correspondence from CTCAC and their legal counsel, correspondence to and from CTCAC provided by Department of Park and Planning, and OLO's interviews with CTCAC representatives.

### ***MARCH 2004***

- At a quarterly meeting with residents held in March, Newland Communities presented designs for the Clarksburg Town Center (CTC) retail center to the community. Several CTC residents expressed their concerns about the retail proposal.

### ***JUNE 2004***

- At the next quarterly meeting with Newland, a group of CTC residents were extremely unhappy with Newland's presentation; they felt as though Newland's retail proposal differed significantly from the retail area they had been led to expect at the time they purchased their homes.

### ***JULY 2004***

- CTC residents met with Park and Planning staff (Community-Based Planning and Development Review) to discuss their concerns about the retail proposal and began to review CTC Project documents.
- Newland convened a community meeting (July 27) specifically to discuss the proposed retail center. With over 100 people in attendance from within CTC and the greater Clarksburg community, residents openly expressed dissatisfaction with the proposal. CTC residents pointed out what they felt were differences between the retail proposal and the Planning Board-approved CTC Project Plan. Park and Planning staff did not attend this meeting.
- Newland requested that the residents designate a small group of representatives to work with them on the retail issue. As a result of this request, the Clarksburg Town Center Advisory Committee (CTCAC) formed at a CTC community meeting attended by over 100 citizens (August 4).

### ***AUGUST 2004***

- CTCAC representatives spent time at Park and Planning studying the CTC Project file. They obtained copies of the Project Plan, Preliminary Plan, and staff report to the Phase I Site Plan. They found the many different documents confusing to follow and received only minimal technical assistance from Park and Planning Development Review staff.
- CTCAC representatives began to notice and discuss inconsistencies in height requirements among official CTC documents.
- On August 11, the Chief of Community-Based Planning expressed agreement with CTCAC's concerns about the retail center. According to CTCAC, the Chief advised that Newland's retail proposal was: "not in compliance with either the Master Plan or the Project Plan." (CTCAC August 11 meeting minutes)
- On August 16, CTCAC sent their first written communication to the Planning Board Chairman expressing dissatisfaction with the proposed CTC retail center. Copies of this letter were sent to the County Executive and Councilmember Knapp.
- CTCAC organized a meeting (August 26) to discuss the retail proposal and its conformance with the CTC Master Plan and Project Plan. The meeting was attended by the CTC developer, Park and Planning staff, representatives of County Government (Upcounty Regional Services Center, Libraries), and Councilmember Knapp's office. In addition to the retail proposal, CTCAC raised questions at the meeting about the height requirements contained in the different approval documents.
- At the August 26 meeting, the Chief of Community-Based Planning publicly expressed his agreement with CTCAC's view of the retail proposal. After that meeting, CTCAC felt that Park and Planning staff had validated many of the community's concerns.
- Newland agreed to revisit the designs for the proposed retail center and take into account CTCAC's comments and concerns.



#### **SEPTEMBER 2004**

- At a September 14 meeting with Park and Planning staff (Community-Based Planning and Development Review), the Site Plan Reviewer with lead responsibility for the CTC Project agreed to check into height issues raised by CTCAC. At this point, the height issues focused on understanding what the height limits were for the CTC Project and the height of Bozzuto condominium building #3. While discussing the various planning documents (Master Plan, Project Plan, and Site Plan), CTCAC representatives still did not receive a clear explanation as to which documents were legally binding.
- During September and October, CTCAC continued to seek answers to questions about the governing documents for the CTC Project, and became increasingly frustrated at the lack of response from Park and Planning staff.
- On September 27, CTCAC sent an e-mail to the CTC Site Plan Reviewer asking for: clarification of height discrepancies among data sheets and the approved Project Plan, changes relative to the church vista (including the absence of the pedestrian mews), changes in the location of certain unit types, and the proposed new location of a pool.
- After discussing its September 27 request with Park and Planning staff, CTCAC felt that they received conflicting information from Community-Based Planning and Development Review staff. CTCAC specifically requested clarification from the Chief of Community-Based Planning on the process for obtaining a building height inspection, determining which plan (Project Plan or Site Plan) should be used as the final reference for building height, and how the roles of the two staff divisions within Park and Planning differed. The Chief of Community-Based Planning referred CTCAC to the Development Review Supervisor for the requested information.

#### **OCTOBER 2004**

- On October 11, the Development Review Supervisor referred CTCAC to a Site Plan Inspector for answers on the height of the condominiums constructed by Bozzuto. The Site Plan Inspector responded directly to CTCAC that he did not have the tools to measure height.
- CTCAC met separately with Councilmember Knapp and Councilmember Floreen on October 20. CTCAC reported that both Councilmembers encouraged them to continue to take their concerns to Park and Planning staff.
- CTCAC met with Newland on two different occasions (October 12 and 26) to discuss the retail center. Newland provided revised retail plan drawings and asked for CTCAC's written comments. CTCAC also asked Newland to verify the heights on the multifamily condominium buildings and the 2/2 condominium townhomes.

#### **NOVEMBER 2004**

- In a meeting on November 5, the CTC Site Plan Reviewer informed CTCAC that the Bozzuto condominium building #3 was 57 feet tall, but indicated that the building complied with the development approval because four stories was the limiting height condition.
- Citing the Project Plan's height guideline of 45 feet, CTCAC communicated their disagreement with staff's interpretation that four stories was the limiting height condition. In an e-mail to Park and Planning staff (November 8), CTCAC requested that Park and Planning staff develop an action plan to address this "violation" of the Project Plan's 45 feet height guidelines.
- On November 8, CTCAC wrote to Newland to comment on the revised retail design options. CTCAC stated their consensus that neither revised design option was satisfactory and that each option contained the same concerns residents originally found objectionable. The letter also discussed height issues, stating that CTCAC had repeatedly asked but not received from Newland specific answers or drawings that clarified the heights of existing condominiums and proposed 2/2 townhomes.

#### **DECEMBER 2004**

- In a letter to the Planning Board Chairman (dated December 8), CTCAC identified three specific examples of "violations of height restrictions" of the Project Plan (Bozzuto building #3 and two sets of Craftstar 2/2 townhomes), indicated their view that this required immediate attention, and requested a meeting with the Chairman.
- CTCAC met with Newland to review revised retail center design options on December 8. In a follow-up letter (dated December 21), CTCAC expressed the aspects of the revised design they found to be positive (Overall Design, Library, and Grocery Store Location) and aspects they still had concerns about (Reduction of Retail/Office Space, Grocery Store Size, Mix of Retail/Office Space, and Planned Residential Within Retail).
- On December 14, after Park and Planning staff again told CTCAC that four stories was the only height limitation for the condominiums, CTCAC specifically made a request to Park and Planning staff that they issue a notice of height violation to the CTC developer and schedule a Planning Board hearing on the issue. A copy of an e-mail containing this request was sent to the Planning Board Chairman, Councilmember Knapp, and Upcounty Regional Services Center staff.
- The Director of the Development Review Division sent a letter back to CTCAC (dated December 30) stating that staff found no basis for building height violations at CTC. The letter based its finding on the staff report for the Phase I Site Plan, which recommended a four stories height limitation for residential buildings, without a numerical feet limit. The staff report was incorporated into the Planning Board's Opinion on the Phase I Site Plan, which also determined that the Site Plan was consistent with the Project Plan.

***JANUARY 2005***

- CTCAC representatives were angered and dissatisfied with the December 30 response from Park and Planning staff, and pursued a meeting with the Planning Board Chairman. According to CTCAC, Councilmember Knapp helped to arrange such a meeting.
- On January 10, CTCAC representatives met with the Planning Board Chairman. The Chief and staff from Community-Based Planning also attended. At that meeting, CTCAC representatives presented information on potential height violations and recounted their months of frustration trying to obtain answers and action from Park and Planning staff.
- According to CTCAC, the Chairman commented that from a legal perspective, the case on height violations could be argued either way. The Chairman asked CTCAC to respond in writing to the staff's letter of December 30 and to send him a formal written request for a Planning Board violation hearing.
- On January 24, the CTC Site Plan Reviewer informed CTCAC of a February 10 Planning Board hearing on a CTC Site Plan Amendment for Bozzuto's Manor Homes. The Site Plan Reviewer informed CTCAC that the hearing would be an "ideal time" to register their CTC height violation concerns with the Planning Board. CTCAC responded that they would request a separate Planning Board hearing on the height concerns.
- CTCAC sent a formal, written request (dated January 26) to the Planning Board Chairman that the Planning Board hold a hearing on height violations at CTC.

***FEBRUARY/MARCH 2005***

- On February 3, Newland met with CTCAC to discuss the retail center concerns and presented Newland's final design that they intended to submit to Park and Planning staff for Site Plan Review. CTCAC made clear that it still had many concerns, but was pleased with some changes.
- The Planning Board scheduled a CTC Building Height Violation Threshold Hearing for March 17.
- CTC continued to ask for but did not receive copies of CTC-related documents from Park and Planning staff. In particular, CTCAC still had not received a copy of the Signature Set of drawings for the CTC Phase I Site Plan.
- Because Park and Planning staff failed to send out public notices within the required timeframe, the March 17 CTC Height Violation Threshold Hearing was re-scheduled for April 14.
- Park and Planning staff informed CTCAC that they had discovered potential setback violations at the CTC Project.

**APRIL 2005**

- CTCAC continued to have difficulty obtaining documents and other Site Plan information from Park and Planning staff leading up to the violation hearing – CTCAC specifically noted disorganized and incomplete CTC files, a lack of stamped drawings for Site Plan amendments, and a lack of assistance from staff. On April 11, three days before the hearing, CTCAC finally received a copy of the Phase I Site Plan Signature Set.
- On April 14, the Planning Board held their first CTC Height Violation Threshold Hearing. CTCAC presented their case in favor of finding height violations. Their testimony cited a residential height limit of 45 feet contained in the Project Plan, Preliminary Plan, and drawing sets submitted by the developer; maintained that the four stories limit in the Site Plan did not negate the numerical feet requirement; and argued that there were no minor or major amendments on record that changed the height requirement.
- On a 4-1 vote, the Planning Board reached a decision of “No Violation” at the CTC Height Violation Threshold Hearing. The Board based their decision on the height limit of “four stories” contained in the Board’s Opinion on the Phase I Site Plan and reflected on the data table contained in the Phase I Signature Set. CTCAC reports that after persistent querying by a Commissioner, the CTC Site Plan Reviewer explained that she had revised the data table (crossed out numeric height limits and wrote in “four stories”) as a staff level amendment several years ago, to conform the Signature Set to the Board Opinion.
- This ruling frustrated CTCAC representatives, especially since they viewed the proceedings on April 14 as evidence that neither the Planning Board nor Park and Planning staff had a command of the process or decision documents.
- Based upon a statement made by the CTC Project Site Plan Reviewer on April 14 about having “cleared out” the CTC Project files, CTCAC made a request on April 15 to the Chief of the Development Review Division that all CTC documents be transferred from the CTC Site Plan Reviewer’s office into the Legal Department. Park and Planning agreed to this request.
- On April 22, CTCAC sent a letter to the Planning Board Chairman formally requesting a reconsideration based upon their view that the revised data table did not constitute a valid amendment to the Site Plan. CTCAC supplemented its request for reconsideration five days later with an unaltered version of the data table, obtained from the Department of Permitting Services, that contradicted information presented by Park and Planning staff at the April 14 hearing.

### **MAY 2005**

- CTCAC received a telephone call from the Director of Park and Planning that informed them the CTC Site Plan Reviewer admitted to lying about when she had altered the Site Plan documents. The Director told CTCAC that, as a result of this new information, the Planning Board would hold a reconsideration hearing. However, the Director indicated that before a reconsideration hearing is scheduled, Park and Planning staff would like CTCAC to sit down with the CTC Project developer to try and work out a mitigation package.
- On May 13, CTCAC met with the Director of Park and Planning, other Park and Planning staff, and the Montgomery County People's Counsel to discuss the process for handling alleged height and setback violations, and to discuss a mitigation package.
- CTCAC reached the decision not to participate in any further discussions of mitigation with the CTC Project developer at this time, and proceeded with preparation for the CTC Building Height Violation Reconsidering Hearing (set for July 7).

### **JUNE 2005**

- Knopf and Brown, writing on behalf of CTCAC, sent a letter to the Planning Board's Associate General Counsel (dated June 1). The letter charged that the April 8 staff report and its defense at the April 14 Planning Board hearing appeared to be fraudulent, and outlined multiple items (beyond height and setback) that CTCAC considered to be CTC Site Plan violations. The letter requested that the Planning Board promptly and thoroughly address all of the CTC Site Plan enforcement issues. The letter itemized specific additional documents and information needed by CTCAC to prepare a mitigation proposal.
- Knopf and Brown, writing on behalf of CTCAC, sent a letter to the Planning Board's Associate General Counsel (dated June 20). The letter reiterated CTCAC's request for documents and information needed to prepare a mitigation proposal.
- Knopf and Brown, writing on behalf of CTCAC, sent a letter to the Planning Board (dated June 21) detailing for the record why CTCAC believed that the Planning Board's April 14 CTC Building Height "no-violation" decision should be reversed at the rehearing.
- Knopf and Brown, on behalf of CTCAC, contacted all County Councilmembers to discuss CTCAC's concerns. CTCAC also met separately with Councilmember Perez, Councilmember Praisner, and Councilmember Silverman.

### ***JULY 2005***

- On July 7, the Planning Board held the CTC Height Violation Reconsideration Hearing. CTCAC presented their case on why the Planning Board should find height and setback violations, and testified about other CTC development issues that they consider to be violations.
- The Planning Board reached the decision that height and setback violations had been committed at the CTC Project. The Planning Board scheduled a sanctions hearing for July 28 to determine the penalties for the violations, but the hearing was subsequently rescheduled (multiple times) for the fall.
- CTCAC sent a letter to the Planning Board (dated July 14) that summarized what they considered to be “violations, issues, and discrepancies” at CTC other than height and setbacks. These included: “O” street and the pedestrian mews; phasing of amenities; MPDU plans; the Site Plan for Phase II; inspections related to the Site Plan Enforcement Agreement; altered documentation; a pattern of developer violation; and the grandfathering of units. CTCAC requested that the Planning Board hear and rule on all items prior to ruling on sanctions.

### ***AUGUST/SEPTEMBER 2005***

- CTCAC continued to review CTC Project documents and meet with Park and Planning staff. CTCAC’s work resulted in their continued discovery of what they believed to be significant numbers of additional violations. CTCAC’s list, itemized in a letter sent on September 19 to the Planning Board, included: changes to street and block layout; removal of essential plan features; violation of lot development standards; violation of code standards for private streets and alleys; problems with amenities; MPDU phasing and location; modification of environmental/storm water management features; discrepancies in open space; grading changes; and fraudulent or dubious documentation and practices.
- Knopf and Brown, writing on behalf of CTCAC, sent a letter to the Planning Board Chairman (dated September 26) responding to information provided to the Planning Board by Newland on the alleged violations. Citing County Code to substantiate the violations, the letter addressed the applicable CTC development standards and staff’s authority to approve project amendments; and information on provision of community-wide amenities, the provision of MPDU’s, the validity of the Phase II Site Plan, and the consistency of record plats with underlying Site Plans.

### ***OCTOBER 2005***

- On October 6, the Planning Board held a CTC violation hearing on the phasing and provision of amenities, phasing and clustering issues related to MPDU’s, and inspections related to the Site Plan Enforcement Agreement. CTCAC presented their case on why the Planning Board should find violations for each of the three issues.

- The Planning Board found violations on the phasing and provision of community-wide amenities, found no violations in inspections related to the Site Plan Enforcement Agreement, and deferred action on the phasing and clustering issues related to MPDU's.
- On October 25, the Planning Board held the first part of a hearing on the remaining alleged CTC violations. CTCAC provided six hours of testimony on violations of development standards, road and parking issues, record plats, environmental issues, street and unit type changes, manor homes, document alterations, adequacy of amenities, and patterns of developer violations.

### CHAPTER V, PART B: SOURCES OF INFORMATION

<b>Document</b>	<b>Exhibit Number (see Appendix)</b>
Attachments to PB Packet for July 7, 2005 Hearing: CTCAC Correspondence with Park and Planning staff	H 073
Attachments to PB Packet for July 7, 2005 Hearing: Correspondence from Knopf & Brown (on behalf of the CTCAC) re: CTC	H 074
Letter from Knopf & Brown to PB Chairman, September 19, 2005	B 003
Letter from Knopf & Brown to PB Chairman responding to September 7, 2005 letter sent by Newland communities to the PB, September 26, 2005	B 004
Memo from Knopf & Brown to PB Chairman, October 18, 2005	H 134
Department of Park and Planning copies of correspondence to and from CTCAC from August 16, 2004 to August 10, 2005	H 119
Correspondence to and from PB or Park and Planning staff related to CTC project since August 2004	H 122
CTC Issues and Discrepancies prepared by CTCAC, June 25, 2005	B 001
CTCAC presentation packet for July 7, 2005 PB Violation Hearing	B 002
Presentation from the CTCAC to the PB, October 25, 2005	B 006
<b>Interview</b>	<b>Exhibit Number</b>
Representatives from: <ul style="list-style-type: none"> <li>• Clarksburg Town Center Advisory Committee</li> <li>• Clarksburg Civic Association</li> </ul>	NA

## **C. County Council**

This Part provides an overview of the County Council's role in the Clarksburg Town Center (CTC) Project, summarizes when and how each of the nine Councilmembers learned of community concerns about CTC, and describes subsequent actions relating to the CTC Project taken by individual Councilmembers, the full Council, and Council Committees.

### **1. Overview of the County Council Role in the Clarksburg Town Center Project**

Although the County Council has no direct role in the approval and implementation of specific development projects such as Clarksburg Town Center (CTC), the Council does establish the land use policy and administrative and regulatory framework to approve proposed development projects like CTC. Specifically, sitting as the District Council, the County Council:

- Established the procedures for subdividing land, including the providing for adequate public facilities in Chapter 50, Subdivision of Land;
- Established the required findings and procedures to approve site plans and authorized the Planning Board to administer the hearing and approval process in Chapter 59, Zoning Ordinance;
- Established the Residential Mixed-Use (RMX) zone in 1989;
- Adopted the Clarksburg Master Plan and Hyattstown Special Study Area (1994) to establish land use, transportation, water quality, staging, and financing policies for Clarksburg, including the parcel of land on which the CTC Project is located;
- Adopted the Clarksburg Sectional Map Amendment in 1994 to zone the property for the CTC Project as Residential Mixed-Use, Community Center (RMX2), in accordance with the adopted Master Plan; and
- Amended the Comprehensive Water Supply and Sewerage Systems Plan to stage the provision of water supply and sewerage service in accordance with the Master Plan.

The County Council adopts other County laws that establish standards for land use development and construction in the County. These include: Chapter 8, Buildings; Chapter 22, Fire Safety Code; Chapter 19, Erosion, Sediment Control and Stormwater Management; Chapter 22A, Forest Conservation; Chapter 25A, Moderately Priced Housing; and Chapter 49, Street and Roads.



The Council also meets in public session with the Planning Board twice a year (October and April) to review and approve the Park and Planning Department's work program. In addition, the Council reviews and approves the annual budgets of the agencies and departments that participate in the technical review of the development proposals for the CTC Project and/or issue final approvals or permits. These entities are listed in Table 23.

**TABLE 23: AGENCIES/DEPARTMENTS INVOLVED IN DEVELOPMENT APPROVAL AND IMPLEMENTATION OF CLARKSBURG TOWN CENTER PROJECT**

<b>Agencies</b>
• Montgomery County Park and Planning Commission
• Montgomery County Public Schools
• Washington Suburban Sanitary Commission
<b>Executive Branch Departments</b>
• Department of Permitting Services
• Department of Public Works and Transportation
• Department of Housing and Community Affairs
• Department of Fire and Rescue Services
• Department of Environmental Protection

**The 1992 Report on Streamlining the Development Authorization Process.** In the early 1990's, the County Council established a high level, inter-departmental Steering Committee to address problems with the land use development authorization process (DAP). The Council tasked the Steering Committee with finding ways to streamline the DAP, which was characterized as being: too time consuming, too complex, lacking predictability, and duplicative.

In 1992, the Committee issued its report back to the Council, The Implementation Report: Streamlining Montgomery County's Development Authorization Report. (Exhibit X) A summary of the report, described the DAP report as follows:

The Implementation Report was organized around ten recommendations designed to improve the DAP by streamlining the review where appropriate and by identifying specific areas where interagency cooperation could result in an improved and more efficient review process for both applicants and the reviewing agencies. (April 3, 2001, Highlights from the 1992 Report)

Specific recommendations addressed issues such as: clear assignment of responsibilities, clear, current, and consistent published development standards, guidelines, and submission requirements, concurrent reviews where feasible, certainty of review times, and effective systems for resolving conflicts.

Between 1992 and 1998, the Council's Planning Housing and Economic Development Committee held periodic meetings with the Steering Committee to track the progress made in achieving the recommendations set forth in the 1992 report. In addition, during this time period, the Steering Committee provided an annual report of progress to the full Council.

## **2. When and How Councilmembers Learned of Community Concerns about the Clarksburg Town Center (CTC) Project**

OLO interviewed each of the nine Councilmembers about when they first learned of community concerns about the CTC Project, from what source(s), and within what context. Pages 131-132 summarize the Councilmembers' responses, listed in chronological order of when Councilmembers first became aware of community concerns about the CTC Project.

The responses indicate that Councilmembers learned of community concerns about the CTC Project from a range of sources over a 12-month period. In particular, Councilmembers first heard about the concerns from community members, the Planning Board Chairman, other Councilmembers, or newspaper accounts. The contexts in which different Councilmembers initially learned about the community's concerns about the CTC Project varied, including:

- Community members first mentioned concerns about the CTC Project as part of a longer list of complaints regarding how development in the entire Clarksburg area was proceeding;
- Community members raised questions about the height of several buildings in the CTC Project during a discussion about a proposed Zoning Text Amendment on building height in the CBDs;
- The Planning Board Chairman identified community concerns about the CTC Project as one of multiple planning and land use issues that the Council should be aware of; and
- Issues related to general problems and coordination among Executive Branch departments in Clarksburg (but not limited to the CTC Project) came up within the context of Council discussions about the FY06 budget.

## **3. Individual Councilmember Actions**

OLO also asked Councilmembers whether they took any specific action after learning about the community's concerns about the CTC Project. A summary of their responses appears on page 132.

In sum, before April 2005, the Councilmembers' various actions reflect the Council's longstanding practice of deferring to the Planning Board and agency staff on the details of individual development projects. Beginning in May, Councilmembers became more directly involved in the government's response to the alleged site plan violations at CTC.

Two Councilmembers (Councilmember Denis and Councilmember Leventhal) did not take any separate actions, but did fully participate in the deliberations and actions taken by the Council since July 2005 (described below).

TABLE 24: COUNCILMEMBER AWARENESS OF COMMUNITY CONCERNS AND SPECIFIC ACTIONS TAKEN

Councilmember	Who first informed you about community concerns about the Clarksburg Town Center (CTC) Project and within what context? To the best of your recollection, during what month did this occur?
Councilmember Knapp	C/M Knapp has had an ongoing dialogue with community members about problems with development in the Clarksburg area, e.g., construction of the road infrastructure, fire/rescue services. In <u>May/June 2004</u> , C/M Knapp heard from CTC residents who were displeased about the CTC Project Developer's retail proposal. He recalls first hearing about specific CTC Site Plan compliance issues between <u>October and December 2004</u> from representatives of Clarksburg Town Center Advisory Committee.
Councilmember Floreen	C/M Floreen first heard mention of building height concerns about multifamily buildings at CTC in <u>October 2004</u> from representatives of the Clarksburg Town Center Advisory Committee. The issue was raised during a meeting with community members about a pending zoning text amendment concerning building heights in central business districts. C/M Floreen learned the details of alleged site plan violations from newspaper articles published in <u>June 2005</u> .
Councilmember Silverman	C/M Silverman first heard mention of problems in Clarksburg (without details) in <u>February 2005</u> from the Planning Board Chairman, who indicated he would keep C/M Knapp apprised of details. The Clarksburg issue was mentioned along with others during an informal conversation on a range of topics before a Council public hearing. C/M Silverman learned the details of alleged site plan violations from newspaper articles published in <u>June 2005</u> .
Councilmember Praisner	In <u>April 2005</u> , C/M Praisner spoke with C/M Knapp about general problems in Clarksburg related to Executive staff management and coordination among departments; the discussion focused on funding in the FY06 budget for a Clarksburg "tzar". C/M Praisner first heard the details of alleged site plan violations at CTC in <u>June 2005</u> from representatives of the Clarksburg Town Center Advisory Committee.
Councilmember Subin	C/M Subin first heard about problems in Clarksburg (without details) in <u>April 2005</u> from C/M Knapp within the context of FY06 operating budget decisions before the Public Safety Committee. C/M Subin learned about the details of the alleged site plan violations at CTC from newspaper articles published in <u>June 2005</u> .
Councilmember Perez	C/M Perez first heard about alleged site plan violations at CTC in <u>May 2005</u> from the Planning Board Chairman. The issue was raised as part of a general information exchange about issues concerning Park and Planning of which the Council should be aware.
Councilmember Leventhal	C/M Leventhal first heard about alleged site plan violations at CTC in <u>May 2005</u> from C/M Perez. The issue was raised within context of a general information exchange about upcoming issues of which the Council should be aware.
Councilmember Andrews Councilmember Denis	C/M Andrews and C/M Denis first heard about alleged site plan violations at CTC in <u>June 2005</u> from a combination of newspaper accounts and a memo that outlined the alleged violations, which was written by the attorneys retained by the Clarksburg Town Center Advisory Committee and hand-delivered to Councilmembers.

TABLE 24 (CON'T): COUNCILMEMBER AWARENESS OF COMMUNITY CONCERNS AND SPECIFIC ACTIONS TAKEN

Councilmember	Specific Actions Taken by Councilmembers Upon Learning about Alleged Problems with the Clarksburg Town Center Project
Councilmember Knapp	<p>During the fall of 2004, C/M Knapp had frequent contact with community representatives about CTC issues, attended community meetings, and arranged a series of meetings among community members, the CTC Project developer, and Park and Planning staff.</p> <p>In November, C/M Knapp met with the Chief Administrative Officer to propose the appointment of a senior Executive Branch staff member to coordinate all local government activities related to growth and development in the Clarksburg area (a Clarksburg "tzar").</p> <p>In December 2004, C/M Knapp facilitated a meeting between Clarksburg Town Center Advisory Committee reps and the Planning Board Chairman.</p> <p>In April 2005, C/M Knapp sought central Council staff's advice on options for Council involvement if the community continued to find the Planning Board and staff dismissive. In April, C/M Knapp recommended to CTCAC representatives that they send the documentation of their concerns to Council staff for review, in part to consider whether the issue was appropriate for a PHED Committee discussion.<sup>3</sup></p> <p>During the Council's FY06 operating budget worksessions, C/M Knapp spoke with other Councilmembers about the "problems in Clarksburg", as part of rallying support for appointment of a senior Executive Branch staff member to serve as the Clarksburg "tzar".</p>
Councilmember Floreen	<p>In the fall of 2004, C/M Floreen advised CTCAC representatives to communicate their concerns about CTC building height and concerns about the developer's retail center proposal directly to Park and Planning staff.</p>
Councilmember Praisner	<p>In June 2005, C/M Praisner met with CTCAC representatives and learned about alleged site plan violations at CTC. C/M Praisner sent a memo (dated 6/28/05) to the Chair of the PHED Committee requesting that a Committee meeting be held to discuss the issues being raised by the community.<sup>4</sup></p>
Councilmember Silverman	<p>On June 25 2005, C/M Silverman met with CTCAC representatives. Following this meeting, C/M Silverman consulted with the Planning Board Chairman and urged him to investigate all of the concerns being raised by CTCAC.</p>
Councilmember Perez (Council President)	<p>In June 2005, after learning about the alleged site plan violations at CTC, C/M Perez convened a series of meetings with other Councilmembers, CTCAC representatives, other community members, the Planning Board Chairman, and the Chief Administrative Office to develop a recommendation for how the Council should proceed. The Council President's recommendation and subsequent Council actions are summarized below (see page 133).</p>
Councilmember Andrews	<p>After learning in June 2005 about the alleged site plan violations, C/M Andrews communicated his concerns to the Planning Board Chairman that the CTCAC charges be thoroughly investigated. In July, he met with CTCAC, other community members, and Council President Perez to discuss the most appropriate Council response.</p>
Councilmember Subin	<p>In July 2005, after obtaining some additional details about the alleged site plan violations, Councilmember introduced Emergency Legislation to place a freeze on the issuance of building permits.</p>

<sup>3</sup> After receiving the information from CTCAC, Council staff contacted the Park and Planning Director to discuss the issues identified in the material forwarded from CTCAC. Council staff reports being assured that Park and Planning was taking appropriate steps to address the alleged site plan violations.

<sup>4</sup> According to Councilmember Silverman, he decided not to schedule a PHED Committee meeting because discussion of issues related to CTC was proceeding as a full Council agenda item.

#### **4. Full Council Actions**

Beginning in early July 2005, the Council took a number of actions related to the alleged problems with the CTC Project. These actions are summarized below.

**July 12, 2005.** The Council assigned the Office of Legislative Oversight the task of conducting a fact-finding review of the CTC Project.

**July 18, 2005.** The Council introduced Expedited Bill 22-05, sponsored by Councilmembers Subin, Knapp, Floreen, and Denis, that would place a moratorium on the issuance of certain building permits. The Expedited Bill was scheduled for hearing and action on July 26, 2005.

**July 26, 2005.** At the Council's request, the Planning Board Chairman and DPS Director briefed the Council regarding the status of building permit and site plan review.

On July 26, the Council also held a public hearing and worksession on Expedited Bill 22-05. The Council defeated Expedited Bill 22-05 on a 4-3 vote. In lieu of passing legislation, the Council adopted Resolution 15-1125, *Short Term Measures to Assure Compliance with Site Plans*.

The Action statement in Resolution 15-1125 requires that the Chairman of the Planning Board and Director of the Department of Permitting Services must provide bi-weekly reports to the Council updating the Council on their progress in implementing the steps outlined in the Resolution. As of October 17, 2005, five bi-weekly reports have been provided to the Council.

#### **5. Follow-up Council Committee Actions**

**PHED Committee Oversight Sessions on Development Approval Issues.** On September 6, 2005, Councilmember Silverman, Chair of the PHED Committee, announced that the PHED Committee would be holding bi-weekly Committee oversight sessions on development approval issues.

On September 19, the PHED Committee held its first oversight session. The packet prepared by staff for this session lists four topics to be covered:

- Procedural and administrative changes adopted by Park and Planning;
- Status of their review of previously approved site plans;
- Personnel reassignments; and
- Updates on the schedule for Planning Board review and action on CTC issues.

On October 3, the PHED Committee focused on the development process as it relates to the Moderately Priced Dwelling Unit Program. The Committee also reviewed the bi-weekly status reports provided by the Chairman of the Planning Board and DPS Director. On October 17, the PHED Committee focused on DPS and Park and Planning's staffing

plans to increase the number of personnel dedicated to site plan inspection and enforcement duties. The Department's also provided an update on their review of site plans approved in the last two years. Additional PHED Committee oversight sessions are scheduled for October 31 and November 14.

**Other Committee Sessions on Clarksburg Issues.** Since the Council returned from summer recess, the T&E Committee, Public Safety Committee, and MFP Committee have held worksessions on issues that directly concern Clarksburg and the CTC Project.

On September 8, the T&E Committee held a session on the status of master-planned roads in Clarksburg. At the request of the Committee Chair, staff from the Department of Public Works and Transportation, Department of Permitting Services, and Park and Planning provided information on which roads have been completed, which are under construction, which are in planning and design, and which are not yet programmed for planning. A follow-up Committee session is scheduled for November 10.

On September 13, the Public Safety Committee received an update from the Fire Chief on fire and rescue service in Clarksburg. The focus of the session was on the status of implementing the additional services funded by a special appropriation of \$3.9 million, adopted by the Council in July (Council Resolution 15-1090).

On October 10, the MFP Committee held a session on the status of implementing development districts in the Clarksburg area. Staff from the Finance Department, Office of Management and Budget, and the attorneys representing the developers responded to the Committee's questions. The update included information on the status of the Clarksburg Town Center Development District, which was formed by Council Resolution 15-87 in March 2003.

## CHAPTER V, PART C: SOURCES OF INFORMATION

Document	Exhibit Number (see Appendix)
Approved and Adopted Clarksburg Master Plan and Hyattstown Special Study Area, June 1994	H 001
Council Resolution 15-87, Clarksburg Town Center Development District, adopted March 4, 2003	C 003
Park and Planning Quarterly and Bi-annual reports to the Council (FY98 through FY05)	H 160
Semi-Annual Report from the PB to the County Council for the meeting with Council on October 18, 2005	C 024
Highlights from the 1992 Report: <i>The Implementation Report, Streamlining Montgomery County's Development Authorization Process</i> ; April 3, 2001	H 087
Memo from the Council President to OLO assigning the independent fact-finding review of the Clarksburg Town Center Project, July 12, 2005	C 006
Memo from the Council Staff Analyst and Attorney to the County Council re: Briefing on the Status of Building Permit and Site Plan Review; July 22, 2005	C 007

**CHAPTER V, PART C: SOURCES OF INFORMATION, CONTINUED**

<b>Document</b>	<b>Exhibit Number (see Appendix)</b>
Memo from Council Staff Attorney re: Public Hearing/Action: Expedited Bill 22-05, Building Permits - Moratorium – Certain Areas, July 26, 2005	C 008
Supplementary Packet: Public Hearing/Action: Expedited Bill 22-05, Building Permits - Moratorium – Certain Areas, July 26, 2005	C 009
County Council Resolution No. 15-1125, Short-Term Measures to Assure Compliance with Site Plans, Adopted July 26, 2005	C 010
Memo from the Chief Administrative Officer to the Council President with attached staffing plans for DPS and M-NCPPC, as specified in Council Resolution #15-1125, August 2, 2005	C 011
Memo from the Chief Administrative Officer to the Council President forwarding the first biweekly report from DPS and M-NCPPC, as specified in Council Resolution #15-1125, August 12, 2005	C 012
Memo from the Chief Administrative Officer to the Council President forwarding the second biweekly report from DPS and M-NCPPC, as specified in Council Resolution #15-1125, August 26, 2005	C 013
Memo from the CAO to the Council President forwarding the third biweekly report from DPS and M-NCPPC, as specified in Council Resolution #15-1125, September 9, 2005	C 016
Memo from the Chief Administrative Officer and the Planning Board Chairman to the Council President forwarding the fourth biweekly report from DPS and M-NCPPC, as specified in Council Resolution #15-1125, September 27, 2005	C 019
Memo from the Chief Administrative Officer and the Planning Board Chairman to the Council President forwarding the fifth biweekly report from DPS and M-NCPPC, as specified in Council Resolution #15-1125, October 17, 2005	C 023
Statement by Councilmember Silverman announcing bi-weekly committee oversight sessions on development approval issues, September 6, 2005	C 015
Memo from Council Staff Analyst to PHED Committee re: Oversight Session on Developmental Approval Issues, September 15, 2005	C 018
Memo from Council Staff Analysts to PHED Committee re: Oversight Session on Developmental Approval Issues – MPDU and Other Issues, September 28, 2005	C 020
Memo from Council Staff Analysts to PHED Committee re: Oversight Session on Developmental Approval Issues, October 14, 2005	C 022
Memo from Council Deputy Director to T&E Committee re: Briefing – status of roads in Clarksburg, September 6, 2005	C 014
Memo from Council Staff Analyst to Public Safety Committee re: Update – Fire and Rescue Service in Clarksburg, September 13, 2005	C 017
Memo from Council Staff Attorney to MFP Committee re: Update – Development Districts in Clarksburg, October 10, 2005	C 021
<b>Interview</b>	<b>Exhibit Number</b>
Montgomery County Councilmembers and Representatives from the Office of the County Council Staff	NA

## **Chapter VI. Findings**

The Clarksburg Town Center (CTC) Project, developed on a parcel of land zoned Residential Mixed Use (RMX-2) under the optional method of development, was subject to a complex regulatory process that involved interactions among multiple local government agencies and the private sector.<sup>1</sup> The CTC Project is the product of a series of development reviews, approvals, and actions over the past 11 years.

This chapter presents the Office of Legislative Oversight's findings related to the development and implementation of the Clarksburg Town Center (CTC) Project. OLO's 16 findings are organized into three categories.

**Part A, Management:** Findings #1-8 address management of the regulatory process by the Planning Board and its staff, the Department of Permitting Services, and the Department of Housing and Community Affairs. Finding #9 concerns responsibilities and contributing actions taken by the CTC Project Developer.

**Part B, Legal:** Findings #10-14 address how the laws governing the regulatory approval process for the CTC Project contain ambiguities on the process to be followed and the assignment of agency responsibilities.

**Part C, Oversight:** Findings #15-16 address the County Council's oversight's role with respect to the regulatory process that governed the CTC Project and the CTC Project itself.

### **A. MANAGEMENT**

OLO's findings on the management of the regulatory process for the CTC Project are divided into three sections:

- **Planning Board and the Department of Park and Planning.** Findings #1-5 concern how the Planning Board and its staff managed the agency's responsibilities for the review, approval, permitting, and enforcement of the CTC Project's Preliminary Plan of Subdivision, Project Plan, and Site Plans.
- **Department of Permitting Services and Department of Housing and Community Affairs.** Findings #6-8 address how DPS and DHCA managed their respective responsibilities for the review, permitting, and enforcement of the CTC Project approvals.
- **The CTC Project Developer.** Finding #9 describes how actions of the CTC Project Developer contributed to problems with the government's management of the regulatory process.

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<sup>1</sup> Under the optional method of development, instead of establishing all zoning requirements in the law (Chapter 59, Zoning Ordinance), the County Council essentially delegates the authority to establish development standards and other conditions of approval to the Planning Board.



## **THE PLANNING BOARD AND DEPARTMENT OF PARK AND PLANNING**

By law, the County Council has delegated to the Planning Board the responsibility to manage a regulatory process for ruling on applications for Preliminary Plans of Subdivision, Project Plan, and Site Plan approvals. The regulatory process includes a staff review of applications, a public hearing, and a Board worksession that results in a decision. The regulatory responsibilities assigned to the Planning Board and its staff extend to project implementation, which includes assuring compliance with the conditions of the plans approved by the Planning Board.

Recognizing that the regulatory process is, in practice, a joint effort among the Planning Board members and the Department of Park and Planning staff, OLO's findings use the phrase "Planning Board and its staff." Although the Planning Board makes the decision to approve or reject a project plan or opinion, Board members depend heavily on the information and analysis that staff prepares.

In sum, OLO's fact-finding review of the CTC Project found that the regulatory process established by the Planning Board and its staff lacked:

- Predictability and reliability;
- The adoption of clear decision documents;
- A complete record; and
- Sufficient transparency.

OLO found that the management of the regulatory process assigned to the Planning Board and its staff was deficient in two different ways. In some respects, the process operated with a void of policies, procedures, and guidelines. In other respects, the process operated on "autopilot" with too much reliance on routine practices and boilerplate language that was ambiguous and not sufficiently tailored to the CTC Project.

OLO also identified significant problems with how the Planning Board and its staff handled questions and complaints from members of the Clarksburg community about CTC Project Plans, both approved and pending approval. The agency did not adequately comply with requests for documents and information, sent confusing and mixed messages to the community, and failed to carry out its own timely and thorough investigation.

Finally, OLO's review found gaps in interagency coordination. It demonstrated disconnects between the Planning Board and the Department of Permitting Services with respect to issuing building permits; and among Park and Planning, DPS, and the Department of Housing and Community Affairs with regard to the MPDU Agreement.

Findings #1-5 summarize the specific problems with the regulatory process evidenced by the chronology of the CTC Project. As reviewed in Chapter IV, the Planning Board and its staff are in the process of implementing a number of improvements to address problems that have already been identified.

**Finding #1: The decision documents that the Planning Board and its staff approved for the CTC Project contain ambiguous language and inconsistencies. As a result, the regulatory process failed to produce a single clear and certain set of approval conditions, including development standards.**

An essential product of an effective regulatory process is a set of decision documents that present in clear and certain language the terms and conditions of approval. Decision documents must be prepared and packaged with precise language and careful attention to detail. Effective decision documents, especially in a regulatory environment, promote a single interpretation by all stakeholders, including: the decision-makers and other parties who sign them; agency staff responsible for implementing them; and members of the public.

The set of decision documents associated with the Planning Board's approval of the CTC Project's Preliminary Plan of Subdivision, Project Plan, and Site Plans (Phases I and II) includes:

- Planning Board Opinions (which routinely incorporate the Staff Reports);
- Signature Sets of drawings;
- Site Plan Enforcement Agreements (one for each Phase); and
- Other documents associated with amendments to the approved plans.

OLO's review found that the set of decision documents that the Planning Board and its staff approved for the CTC Project contain ambiguous language and inconsistencies. The result is a lack of certainty regarding the conditions of the Board's approvals, including the development standards established for the project. Examples of the different ways the decision documents expressed height and setback standards are provided below.

- **The decision documents lack a clear statement of the building height standards for the CTC Project.** The multiple decision documents for the CTC Project establish and report four different variations on height standards, ranging from maximum height stated in exact feet by type of structure to a complete absence of height standards. Further, the format for the table of development standards in the Board's Opinion itself is confusing; instead of displaying what the Board "approved," it contains two side-by-side columns of development standards: one labeled "required" and one "proposed."
- **The decision documents lack a clear statement of the setback standards for the CTC Project.** The decision documents for the CTC Project establish and report six different variations on setback standards. Another discrepancy is that the setbacks shown on the Signature Set drawing for the Phase I Site Plan were not consistent with the data table contained in the same document. Further, while the Planning Board's Opinion for the Project Plan includes several sentences that recognize the Board's authority to reduce setback standards, the Opinion does not state whether or how the Board actually exercised this authority in establishing the standards for the CTC Project. It then proceeds to address setbacks three different ways.

For details on the different ways the height and setback standards are reported in the decision documents, see Chapter IV, including the table beginning on page 100.

**Finding #2: The Planning Board and its staff did not effectively prepare or maintain the official record of documents for the CTC Project. As a result, the agency cannot produce a complete and reliable set of CTC Project approvals.**

Preparing and maintaining an official record of documents is a core characteristic of any effective and enforceable regulatory process. Complete and accessible records are absolutely necessary to assure accountability and transparency.

Effective management requires an agency to establish practices to maintain a complete and secure set of records for each decision. For the Planning Board's regulatory responsibilities, this should include records of the application, records from the public hearing, records of the Board's decisions, and all supporting maps, pictures and exhibits. The records must be well organized and the different documents clearly labeled.

The official record for each project approval has several critical functions. It memorializes the facts and information that formed the basis for a decision. It provides the record of the decision, if the decision is appealed, and it forms the basis for future approval and enforcement actions. And, by making the complete record available for public inspection, it helps to assure the accountability and transparency of government decision-making.

In the course of conducting this fact-finding review, OLO learned that the Planning Board and its staff did not effectively prepare or maintain the official records for the CTC Project. In particular, the official agency records did not contain a complete set of:

- Initial approval documents; nor
- Documentation related to requests for amendments to the original plan approvals; nor
- Documentation related to the disposition of amendments to the original plan approvals.

Examples of the problems included undated documents, documents with missing pages, and documents that appear to be composite versions of others. The documentation available on amendments to approved plans is both confusing and incomplete. For details on the problems of the "official" record of amendments for the CTC Project, see Chapter III, page 59.

The Planning Board's failure to maintain complete and accurate records for the CTC Project had serious and negative consequences. In particular, 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 CTC project, which in turn compromises the government's ability to determine developer compliance. Further, the lack of a complete record made it difficult for the Planning Board staff to respond to residents' questions about the CTC Project, and impossible to comply with legitimate requests for a complete set of approval documents.

**Finding #3: The process for making changes to approved CTC Project Site Plans lacked sufficient parameters for tracking requests and making decisions.**

Based on documents from the Department and Park and Planning and the CTC Project Developer's engineers, OLO determined that 12 amendments were made to the approved Site Plans between August 2001 and March 2005. However, due to the lack of complete documentation in the "official" record, OLO is unable to account for other possible amendments.

OLO's review of documents for the CTC Project also shows inconsistent practices for accepting applications for changes, conducting the staff review, and documenting the regulatory outcome. For example:

- No letters attached to each application that defined the nature of the applicant's request exist;
- No staff memoranda documenting the nature of the review and the staff's decision exist; and
- The Signature Sets documenting approval of the amendments did not clearly show the location and nature of the changes that were approved.

A contributing factor to these problems was the Planning Board's decision, in its approval of the CTC Project Phase I Site Plan, to give its staff enhanced authority to amend the approved Site Plan. Specifically, the Planning Board's Opinion contained the following provision, listed as Condition #38:

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

When the Planning Board delegated this degree of decision-making authority to staff, the Board did not provide any guidance on the parameters of this authority. For example, some of the questions left open were:

- How did this delegation of authority to review and approve changes differ or overlap with the statutory (Sec. 59-D-2.6)) provisions governing minor and major amendments?
- Who would decide whether a proposed change could be processed for review and approval at the staff level?
- What would the review process consist of, and how would staff document changes that were approved or disapproved under Condition #38, in order to maintain a complete record of the CTC Project?

The lack of guidance from the Planning Board on the authority the Board members intended staff to exercise under Condition #38 has played a major role in the current debate over the status of changes to the CTC Project Site Plan. It allowed the Developer to implement a revised concept plan through a series of staff level amendments. Combined with the existence of incomplete records on the CTC Project, Condition #38 also contributed to a lack of transparency and concerns about the extent of changes approved without public input.

**Finding #4: The Planning Board and its staff did not institute effective management practices to administer the regulatory responsibilities associated with approval and implementation of the CTC Project.**

An effective regulatory process is characterized by management practices that are predictable, reliable, and transparent. Managers of a regulatory process must develop written policies and procedures to guide staff in carrying out their tasks. Further, managers must adequately supervise front-line staff to ensure that the organization's policies and procedures are being followed; answer questions, and resolve unanticipated problems.

OLO's review of the CTC Project identified two different types of management deficiencies within the Department of Park and Planning. In some respects, the regulatory process for the CTC Project operated with a lack of clear policies, procedures, and guidelines. In other respects, it operated on "autopilot" with too much reliance on routine practices and boilerplate language that was ambiguous and not sufficiently tailored to the CTC Project.

**Some of the critical steps in the regulatory process for the CTC Project operated in a void of adequate policies, procedures, and guidelines.** These included the process and parameters for Development Review Division staff to follow when:

- Reviewing building permit applications to assure compliance with the approved Site Plan;
- Reviewing record plat applications to assure compliance with the approved Site Plan;
- Processing applications for amendments to an approved plan;
- Conducting on-site inspections for compliance with an approved plan;
- Responding to inquiries and complaints from members of the public about a pending or approved plan; and
- Maintaining complete and secure records.

Execution failures in the regulatory process for the CTC Project that appear to have resulted from the absence of clear policies and procedures included Park and Planning staff's approving of building permits and signing of record plats before the Signature Sets were formally signed; and approving building permits without reviewing for compliance with the height standards established for the CTC Project.

**Some of the critical steps in the regulatory process operated on “autopilot” without sufficient attention paid to detail or to customizing the staff’s practices for the CTC Project. Examples of this type of management deficiency included:**

- Despite written procedures on how to prepare Signature Sets and an internal review process that required sign-offs from staff in three different divisions, the Development Review Division Director (on behalf of the Planning Board) signed Signature Sets that contained discrepancies and errors.
- The Site Plan Enforcement Agreements (SPEA) signed for the CTC Project included boilerplate language from earlier SPEAs regarding the number and timing of on-site inspections. As a result, the SPEAs for the CTC Project only required three inspections with the second triggered at “70% occupancy”; a provision used for much smaller scale, less complex developments.
- Staff reports and Board Opinions for the CTC Project repeatedly use a format for development standards that is not easily understood. For example, Instead of identifying what the Board “approved”, the table headings that list development standards are labeled: “required” or “permitted/required”, and “proposed”.

**Finding #5: When faced with questions and complaints from members of the public about the CTC Project, the Planning Board and its staff did not respond fairly or effectively. The agency did not adequately comply with requests for documents and information, sent mixed messages to the community, and failed to carry out a timely and thorough investigation.**

Starting in spring 2004, a group of Clarksburg residents raised questions and concerns about Newland Communities proposal for Phase III of the CTC Project, which includes the retail section of the Town Center. While conducting research on the history of the CTC Project approvals, Clarksburg Town Center Advisory Committee (CTCAC) representatives reviewed documents that raised additional questions and concerns about the CTC Project.

In fall 2004, CTCAC representatives articulated specific complaints about the height of structures already constructed at the CTC Project to Department of Park and Planning staff and the Planning Board Chairman. For more than 12 months since then, CTCAC representatives have continued to study CTC Project documents and identify what they believe are violations of various Planning Board actions.

The events of the past year demonstrate that the Planning Board and its staff did not have a structure in place to effectively respond to the public’s questions or request for documents. Further, and perhaps most significantly, when confronted with specific allegations of Site Plan violations and with knowledge that the CTC Project’s decision documents were open to more than one interpretation, the Planning Board and its staff failed to carry-out a timely and thorough fact-based investigation.

The problems created by the absence of a structure to respond fairly and effectively to public inquiries and concerns were exacerbated during the past year when agency staff provided different (and at times conflicting) answers to the Clarksburg residents about the CTC Project. From the residents' perspective, receiving different and sometimes conflicting answers from representatives of a single agency understandably created confusion and frustration. In turn, it also created a situation where residents began to lose confidence as to whether any answer was the "correct" answer.

## **THE DEPARTMENTS OF PERMITTING SERVICES & HOUSING AND COMMUNITY AFFAIRS**

The County Government, primarily the Department of Permitting Services (DPS) and the Department of Housing and Community Affairs (DHCA), also had management responsibilities in the regulatory process established for the CTC Project. This section outlines OLO's findings on how these two departments managed their respective tasks. As of this writing, DPS and DHCA have already taken steps to address the problems identified. (For more on the details of changes made, see Chapter IV.)

**Caveat on OLO's Findings.** OLO's findings in this section are based on a review of the working files that DPS and DHCA maintained on the CTC Project and interviews with Directors and staff from both departments. However, as explained in Chapter I, OLO allocated comparatively more staff time to examining the steps in the regulatory process for the CTC Project that are delegated to the Planning Board and its staff compared to those assigned to DPS and DHCA. As a result, OLO's findings on the work performed by DPS and DHCA are not based on the same level of detailed process review.

**Finding #6: The Department of Permitting Services (DPS) has well-defined procedures and practices related to the processing of permits, record-keeping, complaint handling, inspection, and enforcement. Even with these systems in place, a number of execution problems occurred with the CTC Project**

OLO's review of DPS' records for the CTC Project evidence well-defined policies and procedures for handling the following steps in the regulatory process:

- **Processing of permits** – DPS has written policies and procedures for each permit the Department issues. DPS data indicate that as of September 1, 2005, DPS had issued 2,405 permits for the CTC Project. These include 798 building permits, 182 public right-of-way permits, 54 sediment control permits, and 31 use and occupancy permits.

The 798 building permits issued for the CTC Project include: 455 for townhouses; 166 for single-family dwellings; 129 for other building-related structures (such as decks); and 48 for multifamily dwellings. DPS' system for processing permits for the CTC Project was designed not to release any permit until Park and Planning staff indicated that each building permit application was "in compliance with the approved Site Plan."

- **Inspections** – DPS also has well-defined procedures for the inspections the Department conducts to assure compliance with the County's building code, road code, and water quality plans. DPS has written procedures that dictate when inspections occur. The timing of inspections is primarily tied to a permit recipient reaching a pre-determined point in their construction/development process. After an inspection occurs, DPS has a defined procedure for any follow-up enforcement action.

As of September 1, 2005, DPS had conducted nearly 14,000 inspections at the CTC Project site. This included inspections associated with sediment control, public right-of-way, building, use and occupancy, electrical, and mechanical permits. One of the inspections required as part of building permit issuance is a wall check.<sup>2</sup>

In early 2005, while conducting wall checks for a number of CTC Project townhouses, DPS staff identified discrepancies between the building location drawings and the CTC Project Phase I Site Plan data tables. DPS notified senior Park and Planning staff about the inconsistency between the setbacks shown in the construction drawings and the standards included in the Site Plan data table.

- **Record-keeping** – DPS maintains an automated permitting system that includes data on each permit issued by the department. In conducting this fact-finding review, DPS staff provided OLO with a spreadsheet of detailed building permit data for the CTC Project that showed the application date, the date the permit was reviewed and "approved" by Park and Planning staff for Site Plan compliance, the permit issuance date, and the final inspection date.
- **Complaint-handling** – DPS records each complaint received by telephone, letter, fax, e-mail, or in person into a computerized database. Each complaint is then referred to a DPS staff member for further investigation. DPS has written guidelines for the entire complaint-handling process, including time frames to investigate complaints and report back to the individual who lodged the complaint.

**DPS issued building permits before the MPDU Agreement was signed.** Even with effective regulatory systems in place, DPS issued some building permits before the execution of an MPDU Agreement between the Department of Housing and Community Affairs (DHCA) and the CTC Project Developer. The County's MPDU law requires that DPS not issue building permits for structures located in a development that requires an MPDU Agreement before the developer and DHCA execute that agreement.

In the case of the CTC Project, DPS violated this procedural requirement by issuing approximately 75 building permits without a signed MPDU Agreement between DHCA and the CTC Project Developer. DPS had no system in place to ensure that it would not issue building permits until an MPDU Agreement was signed. DPS has implemented procedures as of September 26, 2005 to ensure, when applicable, that they have an executed MPDU Agreement on file prior to issuing building permits.

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<sup>2</sup> A wall check is a review function that compares locations of a building's footings displayed on an engineer-certified building location drawing to the zoning regulations (i.e., setback requirements) for the property.



**Finding #7: The CTC Project MPDU Agreement remained a stagnant document despite changes to the Site Plan affecting the number, location, and phasing of MPDUs.**

DHCA asks developers to demonstrate that a proposed MPDU Agreement conforms to the number, location, and phasing requirements established by an approved land use plan. In the case of the CTC Project, in May 2002, the Planning Board issued an Opinion for the Phase II Site Plan based on the assumption that the CTC Project Developer would build 1,300 units, including 163 MPDUs. An "MPDU Location Plan" attached to the Phase II Site Plan Staff Report indicated the proposed distribution of MPDUs among project phases at that time. DHCA approved an MPDU Agreement for the CTC Project in June 2002 based on the Phase II unit data.

Several Site Plan amendments approved either by the Planning Board or Department of Park and Planning staff from 2002 through 2005 modified the number of MPDUs in the CTC Project phases referenced in the MPDU Agreement. During this time, the CTC Project Developer, the CTC builders, and Park and Planning staff did not notify DHCA about the changed location of MPDUs.

In September 2005, DHCA learned that the MPDU agreement the Department had signed with the CTC Project Developer in 2002 had not kept pace with amendments to the CTC Project Site Plan. DHCA's discovery of this situation occurred partly as a result of a meeting that OLO conducted in its fact-finding review.

**Finding #8: DHCA did not interpret the Department's responsibilities to include enforcement of the MPDU location and phasing requirements outlined in the Agreement.**

The CTC Project MPDU Agreement approved by DHCA in June 2002 reflected then-current projections regarding the number and location of MPDUs in the CTC Project. DHCA and the Department of Park and Planning did not have a system in place to alert DHCA about any Site Plan changes that would alter MPDU Agreement compliance requirements for the CTC Project.

DHCA does not conduct field inspections to determine whether a developer is constructing MPDUs as required by an approved Site Plan or MPDU Agreement. Developers notify DHCA when they complete construction of each MPDU. When an entire subdivision is complete, DHCA verifies that the developer delivered all units required in the MPDU Agreement.

Neither DHCA nor Park and Planning staff routinely monitor compliance with MPDU construction phasing requirements. DHCA enforcement of MPDU requirements primarily focuses on activities related to the sale (or rental) and occupancy of completed units. DHCA procedures could only determine compliance with an MPDU Agreement after the developer had built the entire subdivision.

## **THE CLARKSBURG TOWN CENTER PROJECT DEVELOPER**

### **Finding #9: The CTC Project Developer contributed to problems with management of the regulatory process for the CTC Project.**

OLO's review finds that the CTC Project Developer prepared, submitted, and signed documents that contained errors and internal inconsistencies. Further, when members of the CTC Project Developer's team noticed discrepancies in the decision documents, they did not seek clarification from the Planning Board.

Specifically, OLO found that the Phase One Site Plan Signature Set submitted for review by Park and Planning staff was a significantly flawed document. In particular:

- The numbers in the Signature Set data table did not match the approvals in the Planning Board Opinion; and
- The setbacks in the Signature Set data table did not correspond to the setbacks depicted on the individual lot drawings.

Another problem to which the CTC Project Developer contributed concerns the Phase II Signature Set. According to a representative of the CTC Project Developer, the Phase II Site Plan Signature Set that Park and Planning staff certified was an outdated copy that did not reflect all of the staff approved revisions to the plan that had occurred since the Planning Board approval two years earlier.

After Park and Planning staff signed the Phase II Signature Set in October 2004, the project engineer recognized that Park and Planning had inadvertently signed a print dated July 2003 instead of the most current print dated October 2004. Instead of seeking to rectify the mistake, the CTC Project Developer's team continued to work with Park and Planning staff to keep the process moving through record plat approval to construction. These actions contaminated the official record of project approvals and left a trail of complex issues that now must be resolved.

## **B. LEGAL**

OLO's review found that the laws governing the process to approve and implement the CTC Project did not provide clear direction to the Planning Board on how to manage the associated regulatory process. Instead, the patchwork of relevant laws contains ambiguities on the process to be followed and the assignment of agency responsibilities. These problems with the law contributed to problems with the CTC Project.

**Finding #10: The law did not provide clear and certain direction to the Planning Board on how to administer the regulatory process for approval of the CTC Project.**

In delegating the authority to the Planning Board to hear and decide applications for optional method development (such as the CTC Project), County Code Chapters 50 and 59 prescribe the steps in the regulatory process, including approval of a Preliminary Plan of Subdivision, a Project Plan, and one or more Site Plans. However, these laws do not precisely define the characteristics of the Planning Board's hearing and decision process; the specific decisions the Planning Board must make at each step; and the degree to which the Planning Board may approve later changes that modify earlier Board actions.

Chapter 59 delegates the authority to the Planning Board to approve development plans, but does not specify the procedure that the Board must follow for its hearing and decision-making proceedings, such as rules for public notice, holding hearings, and taking action. In contrast, the law requires the Board of Appeals to follow the procedure outlined in the Administrative Procedures Act (County Code Chapter 2A).

Chapters 50 and 59 mandate that the Planning Board make findings along the way that certain decisions are "consistent" with earlier decisions. In addition to not defining what "consistent" means, they do not specify, in the case of a discrepancy among governing documents, clear rules for interpreting those documents and sorting out conflicts.

**Finding #11: The law creating the Residential Mixed Use zone (RMX) does not specify how and when the Planning Board must establish certain and enforceable height standards.**

Chapter 59 (the County Zoning Ordinance) does not establish building height guidelines for optional method development projects in the RMX zone. Instead, it indicates various points in the development approval process where height standards could be established. As a result, there is no explicit step in the process when the Planning Board must develop clear and enforceable height standards for development approvals in RMX zones.

Chapter 59 refers to the Master Plan, Project Plan, and Site Plan all as potential sources of building height standards in an RMX zone. First, Section 59-C-10.2.2 refers to the applicable Master Plan as the source of development standards in an RMX zone. Next, Sections 59-D-2.12 and 59-D-3.23 provide for a height determination as part of the Project Plan as well as the Site Plan. However, neither section stipulates when the Planning Board must establish a final height standard for the project.

The only "guidelines" on height in the Clarksburg Master Plan were that: "All apartment building in the future Town Center will be four stories or less except within walking distance of the transit stop, where a building height of six to eight stories may be allowed if Master Plan recommendations concerning compatibility with the historic district can be achieved." (Clarksburg Master Plan, page 46)

**Finding #12. The provisions in the law for amending approved Project Plans and Site Plans do not adequately define the distinction between “major” and “minor” amendments.**

The law (Section 59-D-2.6) authorizes the Planning Board and staff to amend approved Project Plans and Site Plans. The Board itself must act for “major” changes, but the staff may approve “minor” changes on its own. However, the law does not provide sufficient guidance on which changes are “major” or “minor”, and does not specify who is authorized to make that decision. Finding #3 addresses how the rules governing plan amendments were further complicated for the CTC Project by the Planning Board’s decision to include a condition of approval, Condition #38, that broadly delegated authority to staff to make changes to the approved CTC Project Phase I Site Plan. In addition to providing insufficient guidance on the parameters of implementing Condition #38, the Board did not articulate how Condition #38 related to the existing provisions in the law concerning amendments.

**Finding #13. The law does not clearly assign agency responsibility to assure that building permits comply with the approved Site Plan.**

County Code Chapter 8, Buildings, delegates authority and establishes requirements for the Department of Permitting Services (DPS) to issue building permits in zones that require a Site Plan approved by the Planning Board. County Code Chapter 59, Zoning Ordinance, similarly delegates authority and establishes requirements for the Department of Park and Planning to assure that building permits comply with approved Site Plans.

As a result of the Development Authorization Process review in the early 1990s, the Department of Park and Planning was assigned the lead responsibility for reviewing building permits for “compliance with approved site plans.” However, the record of the CTC Project shows that the Department of Park and Planning and DPS had no mutual understanding about who would review building permits for compliance with all development standards, including building height.

DPS believed that ensuring compliance with the height standard in the Site Plan was the responsibility of the Planning Board staff. At the same time, Park and Planning staff believed that DPS had this responsibility. The result was that neither had a system in place to check whether each building permit application met the height standards in the approved Site Plan.

The ambiguity in the law on the assignment of agency responsibilities is further evidenced by the different interpretations held today by the Department of Park and Planning and the Office of the County Attorney. (See Chapter II, page 38)

**Finding #14. The Zoning Ordinance contains incomplete guidance on whether Planning Board approvals should address all relevant County Code requirements and on the Planning Board's authority to waive different provisions of County law.**

As the complexity of land use regulations evolves, it is not unusual for one County law to conflict with or contradict another. These discrepancies often emerge during the review of a development request because a proposal for a specific site must comply with multiple legal requirements simultaneously.

In the case of the CTC Project, the development needed to comply with seven other chapters of the County Code in addition to the Subdivision Regulations (Chapter 50) and the Zoning Ordinance (Chapter 59).<sup>3</sup>

OLO's review of the Planning Board Opinions for the CTC Project found references to some of these additional provisions, but not all. Chapter 59 only requires the Planning Board to make an explicit finding of compliance with the water quality (Chapter 19) and forest conservation (Chapter 22A) laws. However, Chapter 59 does not require the Planning Board to make findings of compliance with other applicable County laws, such as Chapters 22 (Fire Safety Code) and 49 (Streets and Roads).

In addition, Chapter 59 contains incomplete guidance on the Planning Board's authority to waive different provisions of County law. OLO's review of the CTC Project found that the Planning Board approved three waivers to the County Code. The waivers authorized the use of closed section streets, the use of on-street parking to count toward the parking requirement, and the reduction of setbacks along streets and boundary lines.

The Planning Board's CTC Project Plan Opinion did not address a waiver to Fire Safety Code regulations in Chapter 22, although this issue had been raised during project reviews at the staff level.

### **C. OVERSIGHT**

The County Council's previous approach to overseeing the work of the Planning Board did not identify the serious shortcomings in the development approval and implementation process that are now evidenced by the CTC Project. Since July 2005, the Council has taken a notably different approach to oversight of the Planning Board.

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<sup>3</sup> The relevant provisions include Chapter 8, Buildings; Chapter 14, Development Districts; Chapter 19, Erosion, Sediment Control and Stormwater Management; Chapter 22, Fire Safety Code; Chapter 22A, Forest Conservation; Chapter 25A, Housing, Moderately Priced ; and Chapter 49, Streets and Roads.

**Finding #15: The County Council's annual budget worksessions and semi-annual meetings with the Planning Board did not identify the underlying problems with the management of the regulatory process established by the Planning Board.**

For years, the County Council has relied largely on its annual budget review and semi-annual meetings with the Planning Board as mechanisms to oversee the activities of the Planning Board and its staff. Historically, the Council has focused on the overall level of resources allocated to the agency, its annual work program (with special attention to the master plan schedule), and major policy or fiscal issues identified by Council staff or Planning Board members for more detailed discussion.

The Council's approach to overseeing the Planning Board's activities did not identify the underlying structural problems with the law and management systems that the CTC Project chronology now makes apparent. In fact, Councilmembers' initial reaction to alleged problems with the CTC Project was influenced by their baseline operating assumption that the regulatory process established by the Planning Board and its staff was functioning without major management deficiencies.

Planning Board sessions with the Council have not systematically reviewed major responsibilities of the Board and the Department of Park and Planning. In recent years, the semi-annual meetings have focused on topics of interest to the Planning Board and Council, but only selectively addressed specific functions and responsibilities of the Board.<sup>4</sup>

The Planning Board submits an annual budget request to the County Executive and the Council that describes and recommends funding levels for major programs. The program descriptions change very little from year-to-year, and the budget document only highlights changes from the base budget. Given the time constraints of the budget process, the Council generally is not able to thoroughly review the direction, performance, and relative priority level of specific planning and regulatory functions.

**Finding #16: Since July, the Council has shifted its approach to overseeing the Planning Board and its staff.**

Councilmembers learned of the public's concerns with the CTC Project over a 12-month period from different sources in different contexts. For a majority of Councilmembers, the news about potential problems with CTC was received as one of many concerns with the overall development of the infrastructure and County government service delivery for the new communities being built in and around Clarksburg.

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<sup>4</sup> The Planning Board and its staff typically submit written materials before each semi-annual report that discuss work program issues for all Divisions in the Department of Park and Planning. However, the Board presentation and the resulting Council discussion rarely addressed the development approval and implementation process.

The Council has no direct role in approving and implementing individual development projects, and Councilmembers' initial response to learning about potential problems with CTC was consistent with the Council's longstanding tradition of deferring questions and concerns about individual projects to the Planning Board and its staff.

This past summer, as the nature of the problems with the CTC Project became clearer, the Council as an institution became actively involved and shifted its approach to overseeing the work of the Planning Board and its staff. Specific actions taken by the Council included assigning OLO to conduct this fact-finding review and adopting a Council Resolution that requires biweekly status reports from the Planning Board Chairman and DPS Director on steps being taken to assure compliance with approved site plans.

Starting in September, the Council's PHED Committee has held biweekly oversight sessions on development approval issues. In addition, three other Council Committees have held follow-up sessions on specific issues related to Clarksburg: the Transportation and Environment Committee reviewed the status of master-planned roads; the Public Safety Committee reviewed the status of fire and rescue services in Clarksburg; and the MFP Committee reviewed the status of implementing development districts in the Clarksburg area.

## **Chapter VII. Recommendations for Next Steps**

The complexity of Montgomery County's development approval and implementation process reflects the high expectations of County residents. The County's laws and associated regulatory process to review, approve, permit, inspect, and enforce land use plans are designed to promote many important public policies, including public safety, environmental protection, and affordable housing.

The Office of Legislative Oversight's fact-finding review of the Clarksburg Town Center Project identified many problems with the regulatory process established by the Planning Board and its staff for the approval and implementation of Preliminary Plans of Subdivision, Project Plans, and Site Plans. The Clarksburg Town Center Project was subject to a regulatory process that lacked predictability and reliability, clear decision documents, the establishment of fixed development standards, complete records, and transparency. Contributing factors were underlying ambiguities in the County's laws that govern the regulatory process, gaps in interagency coordination, and the CTC Project Developer's own actions.

The authority and responsibility to address these issues rests with the County Council. As reviewed in the report, the Council, Planning Board, and County Executive have already taken a number of actions to deal with some of the known problems. The recommendations that OLO outlines in this chapter would supplement reforms already underway to address more systematically the legal, management, and oversight issues identified in OLO's report.

OLO proposes a program for reform that consists of three sequential recommendations for Council action.

- First, the Council should articulate clear and certain expectations for the characteristics of the regulatory process and translate those expectations into law and regulations.
- Second, the Council should direct the Planning Board Chairman to submit, no later than January 15, 2006, a comprehensive management improvement plan that will address the flaws that OLO observed in the regulatory process.
- Third, the Council should revise how it approaches its annual budget review and semi-annual meetings with the Planning Board in order to sharpen the Council's oversight of the Montgomery County portion of M-NCPPC.

The balance of this chapter discusses these recommendations in more detail.



**Recommendation #1: Articulate clear and certain expectations for the characteristics of the regulatory process and translate those expectations into law and regulations.**

The Council should articulate the characteristics of the regulatory process that the Council expects the Planning Board to employ in approving and implementing Preliminary Plans of Subdivision, Project Plans, and Site Plans. The necessary attributes for this regulatory process should include:

- Well-defined responsibilities for review, approval, permitting, inspection, and enforcement;
- Reliable and predictable steps that are clearly differentiated;
- Use of clear and certain decision documents;
- Maintenance of an accessible and complete record; and
- Transparency to all key participants, including developers and the public.

The Council's list of desired attributes should specify whether the Council expects the Planning Board's procedures for deciding regulatory matters to be primarily quasi-legislative or quasi-judicial in nature. This would include guidance on, for example, whether the Board's hearings should follow the procedures mandated in the County Administrative Procedures Act, and whether the Board should use the same rules of procedure for plan approvals as it does for appeals or show cause hearings.

OLO recommends that the Council decide whether clarity and transparency are best served by including detailed procedural rules in laws or regulations. OLO advises the Council to consider using a combination of law and regulation, with basic policies delineated by legislation and implementing details contained in regulations. The Council should also decide whether those regulations should be subject to Council review or approval.

In terms of other legislative changes, the Council should consider whether to maintain or change the current assignment of agency responsibilities for various elements of the development process, such as review, approval, permitting, inspection, and enforcement. The Council should also direct its own staff to draft a package of amendments to the County Code, including the zoning law, that address the ambiguities in the current legal framework that OLO identified in its fact-finding review. This would include legislative changes to:

- Provide clear and certain direction to the Planning Board on the distinctions among the different types of plans that the Board prepares and approves;
- Provide clear and certain direction on the types of plan amendments (such as major vs. minor) and the procedures for reviewing and approving each type of amendment;

- More precisely define the rules for interpreting regulatory documents and sorting out conflicts;
- Clarify the Board's authority and process for waiving provisions of the County Code or other regulations when approving site plans; and
- Formalize the membership, roles and responsibilities of the inter-agency Development Review Committee.

OLO notes that the Council recently introduced the following legislative proposals that already place some of these issues squarely in front of the Council:

- ZTA 15-18, Authorizing Planning Board to Assign Certain Matters to a Hearing Examiner;
- Bill 35-05, Permitting Services and Site Plan Enforcement; and
- ZTA 05-19, Use and Occupancy Permits and Site Plan Enforcement.

**Recommendation #2: Direct the Planning Board Chairman, to submit, no later than January 15, 2006, a comprehensive management improvement plan to address the flaws that OLO observed in the regulatory process.**

OLO recommends that the Council direct the Planning Board Chairman to submit, no later than January 15, 2006, a comprehensive management improvement plan to address the flaws that OLO observed in the regulatory process, as evidenced by the CTC Project. The Chairman's management improvement plan should outline the Chairman's recommendations for a comprehensive restructuring of the regulatory duties of the Department of Park and Planning.

The Chairman's improvement plan should include:

- Tasks and milestones to design and implement improvements;
- Specific details of staff assignments and staff training;
- Resources needs listed in priority order; and
- The sequencing of each improvement.

To address issues that require interagency coordination between the Department of Park and Planning and County Government, the Planning Board Chairman should coordinate the proposed plans for improvement with the Chief Administrative Officer.

OLO recommends that the Council use the Planning, Housing, and Economic Development (PHED) Committee to review and regularly report to the Council on the Chairman's management improvement plan. At least for the coming year, the PHED Committee should hold regular sessions to monitor the Planning Board and its staff's progress in implementing the promised improvements.

Whether the Planning Board in the short run hires one or more management consultants is a legitimate topic of discussion between the Board and the Council. However, OLO recommends that the Council should place a high priority on assuring that the agency has a management team with the vision and qualifications to lead the agency over time.

With this in mind, OLO recommends that the Council's oversight of management improvements should include an early review of the Planning Board's plan to fill the vacant position of Director of Park and Planning. OLO recommends the Council provide written guidance to the Planning Board that outlines what the Council expects in terms of the respective roles and responsibilities of the Planning Board Chairman and the Director of Park and Planning. OLO also recommends the Council review the job description and recruitment/selection strategy to fill the Director position to assure it is consistent with the Council's expectations.

**Recommendation #3: Revise how the Council approaches its annual budget review and semi-annual meetings with the Planning Board.**

For years, the Council's primary mechanism for oversight of the Montgomery County portion of M-NCPPC has been annual budget reviews and semi-annual meetings with the County Planning Board. These mechanisms did not serve to identify the flaws in the development approval and implementation process that were made apparent by the events surrounding the CTC Project.

OLO recommends the Council revise its ongoing approach to exercising oversight of the Planning Board and its staff. OLO suggests that the Council use upcoming semi-annual meetings, over time, as a forum to more systematically review agency activities. Taking one or two programs at a time, the Council and Planning Board should review the laws, regulations, policies, and other factors that influence program operations. For each, they should consider whether adequate standards, guidelines, and resources are in place to achieve expected levels of performance.

Based on the Council's input at these oversight reviews, the Planning Board should develop a work program that identifies, prioritizes, and sets performance objectives for on-going responsibilities and special projects performed by its staff. During the annual budget process, the Council will then be in a much stronger position to examine the Department's work program and adjust resources as needed to respond to changing conditions and emerging priorities.

**Fact-Finding Review of the  
Clarksburg Town Center Project**

**APPENDIX**

Office of Legislative Oversight  
Report Number 2006-3

## APPENDIX

### List of Exhibits

This Appendix lists documents examined by the Office of Legislative Oversight (OLO) during its fact-finding review of the Clarksburg Town Center Project. The exhibits in this Appendix include all documents referenced in the source tables contained in the report as well as other supporting materials.

The exhibits are organized into eight folders (listed alphabetically) that correspond to the different sources that provided documents to OLO. A list of all exhibits begins on page A-3.

Paper copies of the exhibits are available for review by contacting OLO at 240-770-7987. Electronic copies of the exhibits are available at a link from the County Council's website: <http://www.montgomerycountymd.gov/cshtml.asp?url=/content/council/index.asp>

As noted in the table of contents below, Folder H includes many documents that OLO received from the Park and Planning Commission but which were produced by other parties.

**Folder A – Builders** contains documents received by OLO from the CTC Project home builders. Folder H also includes several documents produced by the CTC Project builders and its partners that OLO received as attachments to documents provided by the Department of Park and Planning.

**Folder B – Community** contains documents received by OLO from the Clarksburg Town Center Advisory Committee and their legal counsel. Folder H also contains documents produced by the Clarksburg Town Center Advisory Committee, the Clarksburg Civic Association, and other community groups that OLO received as attachments to documents provided by the Department of Park and Planning.

**Folder C - County Council** contains documents received by OLO from the Office of the County Council.

**Folder D - Developer** contains documents received by OLO from Newland Communities, Inc. and members of the CTC Project developer's team, including their legal counsel, engineering, design, and landscaping partners. This folder also includes documents produced by previous project developers that OLO received from Newland Communities, Inc. Folder H contains many documents produced by the current and previous CTC Project developer and its partners that OLO received as attachments to documents provided by the Department of Park and Planning.

**Folder E – Department of Permitting Services** contains documents received by OLO from the Department of Permitting Services.

**Folder F – Law** contains excerpts from the Annotated Code of Maryland, the Montgomery County Charter, and the Montgomery County Code.

**Folder G - Other** contains documents received by OLO from the Department of Fire and Rescue Services, the Office of the County Executive, the Office of the County Attorney, the Department of Housing and Community Affairs.

**Folder H – Park and Planning** contains documents received by OLO from the Planning Board and the Department of Park and Planning.

The table below defines the acronyms that appear in exhibit names.

CPJ	Charles P. Johnson and Associates
CTC	Clarksburg Town Center
CTCAC	Clarksburg Town Center Advisory Committee
DAP	Development Authorization Process
DEP	Department of Environmental Protection
DFRS	Department of Fire and Rescue Services
DHCA	Department of Housing and Community Affairs
DOT	Department of Transportation (now DPWT)
DPS	Department of Permitting Services
DPWT	Department of Public Works and Transportation
DRC	Development Review Committee
DRD	Development Review Division
MCPS	Montgomery County Public Schools
M/K	Montgomery/Kontgias Enterprises
MFP	Council's Management and Fiscal Policy Committee
M-NCPPC	Maryland -National Parking and Planning Commission
MPDU	Moderately Priced Dwelling Unit
OLO	Office of Legislative Oversight
PB	Montgomery County Planning Board
PHED	Council's Planning, Housing and Economic Development Committee
PS	Council's Public Safety Committee
T&E	Council's Transportation and Environment Committee

### FOLDER A - BUILDERS

Exhibit Name	Doc.#
CTC Design Guidelines, January 17, 2001	A 001
Miller & Smith real estate sales contract Phase 1-B Single-Family Lots, September 4, 2001	A 002
Miller & Smith real estate sales contract Phase 1-B Townhouse Lots, September 4, 2001	A 003
Correspondence from Newland Construction Subcommittee to Miller & Smith re: CTC design guideline requirements	A 004

### FOLDER B - COMMUNITY

Exhibit Name	Doc.#
CTC Issues and Discrepancies prepared by CTCAC, June 25, 2005	B 001
CTCAC presentation packet for July 7, 2005 PB Violation Hearing	B 002
Letter from Knopf & Brown to PB Chair, September 19, 2005	B 003
Letter from Knopf & Brown to PB Chair responding to September 7, 2005 letter sent by Newland Communities, Inc. to the PB, September 26, 2005	B 004
E-mail from CTCAC to Councilmembers re: upcoming PB hearings, September 27, 2005	B 005
Presentation from the CTCAC to the PB, October 25, 2005	B 006

### FOLDER C - COUNTY COUNCIL

Exhibit Name	Doc.#
Resolution No. 13-89, Amendments to the Comprehensive Water Supply and Sewerage Systems Plan, adopted April 4, 1995	C 001
Resolution No. 12-1844, Clarksburg Sectional Map Amendment	C 002
Resolution No. 15-87, Clarksburg Town Center Development District, adopted March 4, 2003	C 003
Montgomery County Council Press Release: Council Seeks Applicants for Position on Montgomery County Planning Board, January 7, 2005	C 004
Memo from Councilmember Praisner to Steve Silverman, Chair, PHED Committee re: request for meeting, June 28, 2005	C 005

**FOLDER C - COUNTY COUNCIL (cont.)**

<b>Exhibit Name</b>	<b>Doc.#</b>
Memo from the Council President to OLO assigning the independent fact-finding review of the CTC Project, July 12, 2005	C 006
Memo from Council Staff Analyst and Attorney to the County Council re: Briefing on the Status of Building Permits and Site Plan Review, July 22, 2005	C 007
Memo from Council Staff Attorney re: Public Hearing/Action: Expedited Bill 22-05, Building Permits – Moratorium – Certain Areas, July 26, 2005	C 008
Supplementary Packet: Public Hearing/Action: Expedited Bill 22-05, Building Permits – Moratorium – Certain Areas, July 26, 2005	C 009
Resolution 15-1125: Short-term Measures to Assure Compliance with Site Plans, July 26, 2005	C 010
Memo from Chief Administrative Officer to Council re: DPS and M-NCPPC Staffing Plan as Required by Resolution 15-1125, August 2, 2005	C 011
Memo from Chief Administrative Officer to Council re: DPS and M-NCPPC Biweekly Report as Required by Resolution 15-1125, August 12, 2005	C 012
Memo from Chief Administrative Officer to Council re: DPS and M-NCPPC Biweekly Report as Required by Resolution 15-1125, August 26, 2005	C 013
Memo from Council Deputy Director to T&E Committee re: Briefing – status of roads in Clarksburg, September 6, 2005	C 014
Statement by Councilmember Silverman announcing bi-weekly committee oversight sessions on development approval issues, September 6, 2005	C 015
Memo from Chief Administrative Officer to Council re: DPS and M-NCPPC Biweekly Report as Required by Resolution 15-1125, September 9, 2005	C 016
Memo from Council Staff Analyst to Public Safety Committee re: Update – Fire and Rescue Service in Clarksburg, September 13, 2005	C 017
Memo from Council Staff Analyst to PHED Committee re: Oversight Session on Developmental Approval Issues, September 15, 2005	C 018



**FOLDER C - COUNTY COUNCIL (cont.)**

<b>Exhibit Name</b>	<b>Doc.#</b>
Memo from Chief Administrative Officer to Council re: DPS and M-NCPPC Biweekly Report as Required by Resolution 15-1125, September 27, 2005	C 019
Memo from Council Staff Analysts to PHED Committee re: Oversight Session on Developmental Approval Issues – MPDU and Other Issues, September 28, 2005	C 020
Memo from Council Staff Attorney to MFP Committee re: Update – Development Districts in Clarksburg, October 10, 2005	C 021
Memo from Council Staff Analysts to PHED Committee re: Oversight Session on Developmental Approval Issues, October 14, 2005	C 022
Memo from Chief Administrative Officer to Council re: DPS and M-NCPPC Biweekly Report as Required by Resolution 15-1125, October 17, 2005	C 023
Semi-Annual Report from the PB to the County Council for the meeting with Council on Oct. 18, 2005	C 024

**FOLDER D -DEVELOPER**

<b>Exhibit Name</b>	<b>Doc.#</b>
Original Terrabrook sales brochure	D 001
2004 Newland sales brochure	D 002
Color coded map of Clarksburg Town Center, January 2005	D 003
CPJ composite map of site plan amendments and revisions	D 004
Documentation for Revision #1 on CPJ composite map	D 005
Documentation for Revision #2 on CPJ composite map	D 006
Documentation for Revision #3 on CPJ composite map	D 007
Documentation for Revision #4 on CPJ composite map	D 008
Phase IB2 Site Plan Sign Set 9-98001B	D 009
Phase IB3 Site Plan Sign Set signed December 17, 2001 from CPJ	D 010
Phase IA Site Plan Sign Set 8-98001	D 011
Phase IA Dumpster with unit change revision SP 8-98001C	D 012
Recorded Subdivision Plat for Clarksridge Road (Plat No. 22367)	D 013
Subdivision Record Plat No. 21971	D 014
Approved storm drain and paving plan Lots/Block: 33-72/C,1-46/D, 1-29/E (sheet 2 of 5)	D 015

**FOLDER D -DEVELOPER (cont.)**

<b>Exhibit Name</b>	<b>Doc.#</b>
Letter from Allegheny Power to Park and Planning staff re: CTC proposed utility service, January 7, 1998	D 016
Memo from Linowes and Blocher to file re: April 13, 2000 meeting Park and Planning staff	D 017
M-NCPPC memorandum re: outlining process for staff level approvals of changes to the original Terrabrook Site Plan, April 13, 2000	D 018
Correspondence from Linowes and Blocher to Park and Planning staff re: Site Plan Enforcement Agreement for Phase II (8-02014), May 20, 2003	D 019
Letter to Park and Planning staff re: confirming Planning staff's position on heights, November 10, 2004	D 020
Letter from CPJ to Park and Planning staff re: record plats for Phase II, June 30, 2005	D 021
Letter from CPJ to Park and Planning staff re: record plats for Phase II, June 30, 2005	D 022
Letter from CPJ to Park and Planning staff re: clarification of process and intent behind the final layout of the units at CTC, July 18, 2005	D 023
Letter from CPJ to Park and Planning staff re: setbacks for CTC units, July 18, 2005	D 024
Letter from CPJ Associates Park and Planning staff re: process and intent behind the final layout of the units at CTC, July 18, 2005	D 025
Development Review Committee minutes re: Phase IA Part One, July 31, 2001	D 026
Excerpt of minutes from DRC meeting re: discussion of CTC Phase IA - 8-98001C, July 31, 2005	D 027
Letter from Counsel to Newland to OLO re: description of the allocation of the duties and responsibilities, August 9, 2005	D 028
Letter from Linowes and Blocher to Council re: response filed on behalf of Newland Communities, Inc. to allegations of site plan violations, September 15, 2005	D 029
Letter from Linowes and Blocher to PB Chair in response to September 19, 2005 letter from CTCAC's counsel, September 28, 2005	D 030

**FOLDER E -DPS**

<b>Exhibit Name</b>	<b>Doc.#</b>
DPS Guide to Permitting Services	E 001
DPS website information on permitting	E 002
DPS Fact Sheet – About DPS	E 003
DPS Fact Sheet – Permitting Process	E 004
DPS Fact Sheet – Building codes and Standards	E 005
DPS Fact Sheet: Code Modification Procedure	E 006
DPS Fact Sheet: Off-Street Parking Waiver	E 007
List of zones for which DPS has enforcement authority	E 008
Montgomery County Executive Regulation 7-02AM: Stormwater Management, Effective July 23, 2002	E 009
Special Protection Area Program Annual Report 2004, October 2005	E 010
Montgomery County Executive Regulation 29-95: Regulations for Water Quality Review-Special Protection Areas, Effective October 24, 1995	E 011
Montgomery County Executive Regulation 27-10AM: Requests under the Maryland Public Information Act, Effective November 20, 2001	E 012
DPS diagrams of lot requirements	E 013
Administrative Checklist for Sediment Control Plan Review	E 014
Sediment Control/Stormwater Management Detail Plan & Permit Process	E 015
DPS Overview of site plans transition to grading, storm drain and sediment control permits	E 016
Stormwater Management Concept Requirements	E 017
Water Resources Technical Policies: Access Requirements for Underground Stormwater Management Facilities in Montgomery County, July 1, 2005	E 018
DPS Complaint Form and Standard Operating Procedure for complaint handling	E 019
DPS Administrative/Operating Procedure for Public Information Policy, 2003	E 020
Storm Drain Design Criteria, Department of Transportation, August 1988	E 021
DPWT Book of Design Standards, February 2001	E 022
DPS Standard Operating Procedure: Zoning Code Enforcement, signed December 31, 2001	E 023

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Office of the County Attorney: Code Enforcement in Montgomery County: Process and Procedure from Citation to Trial and Beyond, January 2002	E 024
DHCA and DPS Publication: A Guide to Code Enforcement, January 2002	E 025
DPS conditions for right-of-way and sediment control permits	E 026
DPS notices regarding sediment control permit requirements	E 027
Summary of DEP comments on CTC Water Quality Plan, February 28, 1997	E 028
Developer's Water Quality Monitoring Quarterly Report: October – December 1997	E 029
Developer's Water Quality Monitoring Quarterly Report: April 1997 – June 1997	E 030
Stormwater Management Facilities Report CTC prepared by Schnabel Engineering, July 1997	E 031
Report on hydrogeological investigations for stormwater management structures prepared by Schnabel Engineering, October 1997	E 032
DPS file containing CTC stormwater management and subdivision documents	E 033
CTC Ecological Covenant for Declaration for Clarksburg Homeowners Association from Linowes and Blocher	E 034
Subdivision lists from Department of Park and Planning, received by DPS approximately March 2003	E 035
Code Interpretation/Policy Section 59-A-5.33: Established Building Line	E 036
Code Interpretation/Policy Section 59-C-1.32: Development Standards – Lots with no Street Frontage	E 037
Code Interpretation/Policy Section 59-B-5.1 and 59-B-5.3: Exemptions from Controls	E 038
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Public Improvements Agreement No. 990027, October 20, 2005	E 050
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Erosion and Sediment Control Plan Review Checklist for Permit # 206900	E 052
Summary Table of DPS Permits and Inspections for CTC Project	E 053
CTC Final Water Quality Plan Phases IA and IB, July 1997, Revised November 1997 and December 1997	E 054
Clarksburg Town Center Water Quality for Phase IIC/IID prepared by CPJ Associates, August 2003	E 055
Groundwater Recharge Facilities Section 1B-Part 3 August 2001	E 056
Clarksburg Town Center Phase IA Part I Water Quality Control Comps prepared by CPJ Associates, November 2002, revised January 2003	E 057
Report of subsurface exploration prepared by Geo-Technology Associates, April 9, 2001	E 058
Attachment to the Final Water Quality Plan for Clarksburg Town Center Phase II, May 2002	E 059
Clarksburg Town Center Water Quality for Phase IIB, November 2002	E 060
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DPS Right-of-Way Construction Permit Approval with Bond Estimates issued October 24, 2003	E 064
DPS Study: Clarksburg Town Center, Phase IB – Part 3, August 2001	E 065
Sediment Control Permit # 205466 – Shop Drawing Review Checklist	E 066
Citations: State of Maryland vs. Craftstar Home, Inc.	E 067
DPS Policy: Right-of-way plan review and permit processing, August 2002	E 068
Sample CTC building permit applications	E 069
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Stormwater Management Concept Application 1-95042 by Loiderman Associates, November 18, 1994	E 072
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Building permit application package and permits for Bozzuto Building #3	E 074
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Subdivision development standard list created by DPS – updated August 2, 2005	E 076
DPS Correspondence Related to Transportation	E 077
Letters from DPS to MK Enterprises re: Stormwater Management Concept Request, February 14, 1995	E 078
Memo from DEP staff to DOT staff re: Waivers of Open Section Roadways in CTC Preliminary Plan #1-95042, September 8, 1995	E 079
Correspondence from DPS to MK Enterprises dated December 11, 1997, January 15, 1997, and April 6, 1998	E 080
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Fax from Biohabitats to DPS staff re: Final Water Quality Plan Certification, February 6, 1998	E 084
Letter from MK Enterprises to DPS staff re: CTC Site Plan #8-98001, March 2, 1998	E 085
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Letter from EQR Resources to Terrabrook re: Stream Stabilization work completed at the Clarksburg Site, October 25, 2001	E 089
Letter from DPS staff to CPJ re: Stormwater Management Concept Request for CTC Phase II, May 9, 2002	E 090
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Correspondence from MCPS to DPS re: sediment control permit #206930, May 16, 2003	E 092
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Memo from County Executive to Council President re: Proposal to Assume Site Plan Enforcement, September 6, 2005	G 004
Memo from County Attorney to OLO re: legal questions 1, 2, 3, 6, and 7, September 26, 2005	G 005
Memo from Associate County Attorney to OLO responding to legal questions 4, 8, and 9, October 7, 2005	G 006
DHCA correspondence to Newland regarding MPDU violations	G 007



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Site Plan Amendment Phase I 8-98001F Project Application	H 034
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Site Plan Amendment Phase I 8-98001G Planning Board Opinion	H 037
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Site Plan Amendment Phase I 8-98001H (B) Approved Signature Set	H 039
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Site Plan Phase II 8-02014 Approved Signature Set – includes MPDU location map	H 042
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Chart listing regulatory approvals for CTC project and Project Approvals in Chronological Order	H 047
Park and Planning staff response to OLO information request re: statutory authority of Park and Planning staff to make minor amendments to a plan	H 048
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CPJ Associates unit type list per section, Site Plan Phase III Application #8-04034, June 17, 2005	H 051
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PB Public Hearing notice: February 10, 2005 Manor House (Site Plan #8-98001G and #8-02014B)	H 056
PB Public Hearing notice: April 14, 2005 Failure to Comply/Violation Hearing (Bldg Height) and Failure to Comply (Building Setback)	H 057
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Memo from Park and Planning staff to PB re: Reconsideration of Alleged Height Violations and Consideration of Alleged Setback Violations Case #8-98001 and amendments and #8-02014 and amendments, July 7, 2005	H 063
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Development Review Committee description of responsibilities and members	H 078
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PB Public Hearing notice: July 28, 2005 Preliminary Plan extension (#1-95042)	H 083
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Policy Level Report, Streamlining Montgomery County's Development Authorization Process, April 15, 1992	H 089
Pages from Park and Planning staff logbook of CTC site plan amendment applications and fees	H 090
List of CTC inspections and field comments from August 3, 2000 to July 20, 2005	H 091
Memo from M-NCPPC General Counsel to PB re: Zoning Text Amendment 04-06 to Eliminate Requirement for Site Plan Enforcement Agreements, April 23, 2004	H 092
Zoning Text Amendment 04-06 to Zoning Ordinance 15-26 for the purpose of eliminating the site plan agreement requirement, Adopted July 20, 2004	H 093
Park and Planning Press Release: Stop Work Order Issued for Parts of Clarksburg Town Center, September 19, 2005	H 094
Department of Park and Planning Stop Work Order issued September 20, 2005	H 095
Subdivision Regulation, Section 50-41, Enforcement	H 096
Montgomery County Planning Board of the M-NCPPC Forest Conservation Regulations, No. 1-01 AM, July 30, 2002	H 097
Site Plan Guidelines for Projects containing MPDUs, June 1, 1995	H 098
MPDU Location Plan for CTC, April 2002	H 099
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Building Permit Release Routing sheet: Phase I Site Plan (8-98001)	H 101
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Memo from Park and Planning staff to OLO re: response to legal question 2, August 15, 2005	H 108
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Memo from Park and Planning staff to CTC Review Team, re: review of Site Plan 8-98001 August 6, 1997	H 113
Memo from Park and Planning staff to other County Staff and Agencies requesting comments on proposed CTC site plan, October 25, 1997	H 114
Revised memo from Park and Planning staff to PB re: Approval of Final Water Quality Plan, January 16, 1998	H 115
Memo from Park and Planning staff to members of the Clarksburg Town Center Concept Plan Review Team re: Concept Plan Review, July 17, 2000	H 116
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Memo from Park and Planning staff to PB re: Approval of Final Water Quality Plan including Stormwater Management Concept, May 2, 2002	H 118
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Letter from CPJ to Park and Planning staff re: field verification of building heights, July 21, 2005	H 126
Letter from CPJ to Park and Planning staff re: CTC setbacks table, July 21, 2005	H 127
Letter from M-NCPPC Counsel to OLO re: Rules of Procedure for PB, August 9, 2005	H 128
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Letter from PB Chair to Council President re: brief chronology and a detailed action plan, September 2, 2005	H 130
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Memo from Park and Planning staff to OLO re: implementation status for conditions specified in CTC Project Plan, Preliminary Plan, and Site Plans, September 21, 2005	H 132
Memo from Park and Planning staff to OLO re: legal response to OLO questions 4 and 8, September 22, 2005	H 133
Memo from Knopf & Brown to PB Chair, October 18, 2005	H 134
Needs Assessment for Clarksburg Library, September 22, 2001	H 135
Clarksburg Retail Study, September 1991	H 136
Design sketches for Clarksburg Town Center	H 137
Pamphlet: Department of Park and Planning Packager Protocol	H 138
PB Traffic Mitigation Guidelines	H 139
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Approved and Adopted Guidelines and Interim Policies for the Administration of Preliminary, Project, and Site Plan Extensions, Effective September 18, 1992	H 143
Guidelines for Interpreting the definition of "subdivision" as it applies to mortgage and lease lines, June 18, 1992	H 144
I-3 Trip Reduction Guidelines, September 11, 1992	H 145
Staff Guidelines for the Consideration of Transportation Noise Impacts in Land Use Planning and Development, June 1983	H 146
Department of Park and Planning - Trees Approval Technical Manual	H 147
Design Guidelines Handbook for Historic Preservation, 1979	H 148
Department of Park and Planning Recreation Guidelines, September 1992	H 149
Department of Park and Planning Environmental Guidelines, January 2000	H 150
Park and Planning staff response to OLO information request re: drafting and executing site plan enforcement agreements	H 151
Park and Planning staff response to OLO information request re: procedures for drafting Planning Board opinions	H 152
Department of Park and Planning procedures for review of plans and a written protocol for communication between DRD staff and other divisions	H 153
Department of Park and Planning Records Management Manual, December 1992	H 154
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Department of Park and Planning description of record plat approval procedures	H 157
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# THE CLARKSBURG TOWN CENTER PROJECT

## A FACT-FINDING REVIEW

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### THE PROJECT

The Clarksburg Town Center (CTC) Project sits on approximately 268 acres located in the northern part of Montgomery County. Clarksburg Joint Venture purchased the property with the intent of developing a Neo-Traditional community, based on a town planning principle that features narrow streets, alleys, closely spaced street lamps, and no minimum building setbacks.

The CTC Project site changed ownership twice in the past six years. In 1999, Terrabrook Clarksburg LLC purchased the site from Clarksburg Joint Venture. In October 2003, NNPII-Clarksburg, LLC (Newland Communities) became the owner of the CTC Project. Newland Communities remains today as the developer of the CTC Project.

### THE ASSIGNMENT

In July 2005, the County Council assigned the Office of Legislative Oversight the task of conducting an independent fact-finding review of the Clarksburg Town Center Project. The Council asked OLO to:

- Develop a chronology of events for the approvals and implementation of the CTC Project;
- Identify flawed processes, lack of coordination, or other problems that occurred during the approvals and implementation of the CTC Project; and
- Provide the Council with recommendations for next steps.

OLO's methodology combined interviews with an extensive document review. The names of the 125 individuals who provided information to OLO are on Page 4. The 342 source documents used by OLO in its fact-finding are available for viewing in an on-line Appendix.

### EXECUTIVE SUMMARY

The Clarksburg Town Center Project is the product of a series of development reviews, approvals, and actions over the past 11 years. The Office of Legislative Oversight's fact-finding review found that much of "what went wrong" with the CTC Project can be attributed to flaws in the regulatory process established by the Planning Board and its staff for the approval and implementation of Preliminary Plans of Subdivision, Project Plans, and Site Plans.

In sum, OLO found that the CTC Project was subject to a regulatory process that lacked predictability and reliability, clear decision documents, the establishment of fixed development standards, complete records, and transparency. Contributing factors to these problems were the CTC Project Developer's own actions, gaps in inter-agency coordination, and underlying ambiguities in the County's laws that govern the regulatory process.

OLO also found that, when faced with community questions and complaints about the CTC Project, the Planning Board and its staff did not respond in a fair or effective way. The agency did not adequately comply with requests for documents and information, sent confusing and mixed messages to the community, and failed to carry out a timely, thorough fact-based investigation.

Finally, OLO found that the County Council's previous approach to overseeing the work of the Planning Board and its staff did not serve to identify the serious shortcomings in management, law, and oversight evidenced by the CTC Project. Since July 2005, the Council has taken a more active approach to overseeing the Planning Board's activities.

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## A CHRONOLOGY OF KEY EVENTS

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- Spring 1994:** Council approves Clarksburg Master Plan.
- Summer 1995-Spring 1999:** Planning Board approves the CTC Project Plan, Preliminary Plan, and Phase I Site Plan, which delegates broad amendment authority to staff. The development standards in the decision documents are not identical; the data table dimensions do not match the drawing.
- Winter 1999-Spring 2000:** Terrabrook buys the CTC Project and hires an architect to prepare a revised “more neo-traditional” concept plan; the revised plan contains fewer units, more housing types, and numerous layout changes. P&P staff begin an internal review.
- Winter 2001:** Terrabrook publishes a Design Guideline Booklet, based on the revised concept plan, that establishes lot by lot project design controls; it displays heights of 4 stories and variable setbacks.
- August 2001:** DPS issues the first CTC Project building permit. P&P staff sign off that it “complies with the approved site plan” because the setbacks on the permit application match the Signature Set drawing. Neither P&P staff nor DPS staff check for compliance with a height standard.
- P&P staff approve the first of ten amendments that are reviewed and approved at the staff level (2001-2005). Some amendments reflect Terrabrook’s revised concept plan; others address more specific issues. Not all amendments are well documented.
- June 2002:** The Board approves the Phase II Site Plan. In 2003, P&P staff authorize the recordation of 25 plats before the Phase II Signature Set is signed (October 2004).
- October 2003:** Newland Communities purchases the CTC Project.
- Summer 2004:** CTCAC raises questions about Newland Communities’ retail proposal and the height of an existing building.
- Fall 2004:** P&P staff give CTCAC different answers to their questions about building height. CTCAC has trouble obtaining documents. In December, P&P staff write to CTCAC that no height violations exist because the structures built match the 4 story height standard in the Board Opinion.
- January 2005:** CTCAC meets with Board Chairman who sees two possible interpretations of the height standard. He advises CTCAC to send a letter requesting a Board hearing.
- April 2005:** Board holds its first violation hearing. In preparing her staff report, the P&P Site Plan Reviewer edits a data table to make it consistent with the Board Opinion. The Board finds (4-1) that no height violations exist. Soon after the hearing, CTCAC locates an unmarked version of the data table and informs P&P.
- May 2005:** The Site Plan Reviewer resigns and the Board votes to reconsider its finding of no violation. The Board directs P&P staff to work out a settlement among the parties. Staff’s efforts are unsuccessful.
- July-November 2005:** The Board holds a series of violation hearings to consider allegations of different site plan violations. To date, the Board has found setback, height, phasing, and amenity violations.

*CTC = Clarksburg Town Center  
P&P = Department of Park and Planning  
DPS = Department of Permitting Services  
CTCAC = Clarksburg Town Center Advisory Committee  
Board = Montgomery County Planning Board*

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## FINDINGS AND RECOMMENDATIONS

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### HIGHLIGHTS OF FINDINGS

**1. The regulatory process established by the Planning Board and its staff lacked predictability and reliability, failed to adopt clear decision documents, lacked a complete record, and was not sufficiently transparent.**

The decision documents that the Planning Board and its staff approved for the CTC Project contain ambiguous language and internal inconsistencies. As a result, the regulatory process failed to produce one clear and certain set of approval conditions, including development standards such as height and setback.

The Planning Board and its staff did not effectively prepare or maintain the official record of documents for the CTC Project. Examples of this are: undated documents, documents with missing pages, and documents that appear to be composite versions of others. As a result, the agency is not able to produce a reliable and complete set of all CTC Project approvals, which in turn compromises the government's ability to determine developer compliance.

The Planning Board's approval of the Phase I Site Plan included a condition that gave staff enhanced authority to approve amendments. The amendment documentation is both confusing and incomplete. The use of this amendment authority raises questions about the transparency of the regulatory process.

**2. The CTC Project Developer contributed to the confusion in the record of approvals.**

The CTC Project Developer prepared, submitted, and signed documents that contained errors and internal inconsistencies. Further, when members of the CTC Project Developer's team noticed discrepancies in the decision documents, they did not insist on returning to the Planning Board for clarification.

**3. Gaps in inter-agency coordination contributed to problems with the CTC project.**

Neither the Department of Park and Planning nor the Department of Permitting Services had a system in place to check whether building permit applications met the height standards in the approved CTC Project Site Plans.

DPS issued more than 75 building permits for the CTC Project before the Department of Housing and Community Affairs and the developer executed an MPDU Agreement. This sequencing did not comply with the MPDU law.

**4. The laws governing the regulatory approval process for the CTC Project contain ambiguities in the process to be followed and the assignment of agency responsibilities.**

The law does not specify the procedural rules for the Planning Board to follow when deciding regulatory matters.

The law creating the Residential Mixed Use zone (RMX) does not specify how and when the Planning Board must establish certain and enforceable height standards.

The law does not provide clear and certain direction on how Project Plans differ from Site Plans, how to amend approved plans, or when to establish development standards. The law also does not contain precise rules on how to interpret documents.

The law does not clearly assign agency responsibility for ensuring that building permits are issued only when the permit is in compliance with the approved Site Plan.

**5. Significant problems were found in how the Planning Board and its staff handled questions and complaints from members of the Clarksburg community about CTC Project Plans, both approved and pending.**

When faced with community inquiries and complaints about the CTC Project, the Planning Board and its staff did not adequately answer questions or adequately comply with requests for documents. In addition, staff from different parts of the agency provided different answers about how to interpret documents and how to pursue concerns about compliance with approved plans.

Further, when confronted with specific complaints about alleged Site Plan violations and with knowledge that the decision documents were open to interpretation, the Planning Board and its staff failed to carry out a timely and thorough fact-based investigation of its own.

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### RECOMMENDATIONS FOR NEXT STEPS

The authority and responsibility to systematically address the management, legal, and oversight issues identified by OLO's fact-finding review of the CTC Project rests with the County Council. OLO proposes a program for reform that consists of three sequential recommendations for Council action:

**First, the Council should articulate clear and certain expectations for the characteristics of the regulatory process and translate those expectations into law and regulations.**

**Second, the Council should direct the Planning Board Chairman to submit, no later than January 15, 2006, a comprehensive management improvement plan to address the flaws that OLO observed in the regulatory process.**

**Third, the Council should revise how it approaches its annual budget review and semi-annual meetings with the Planning Board in order to sharpen the Council's oversight of the Montgomery County portion of M-NCPPC.**

## SOURCES OF INFORMATION

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