

Mr. Derick Berlage, Chair  
and Members of the Montgomery  
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| Development Standard          | Permitted/Required | Proposed         |
|-------------------------------|--------------------|------------------|
| Min. Building Setbacks (ft.): |                    |                  |
| From any street               |                    |                  |
| Commercial bldgs.             | n/a                | n/a – w/Phase II |
| Residential bldgs.            | n/a **             | 10 ft. min. **   |

\*\* *The Planning Board reviewed this setback during the Project Plan Review and found that no setback is necessary per the approved master plan. Phase I Staff Report at 32. (Emphasis supplied.)*

As stated above, in its Opinion approving the Phase I Site Plan, the Planning Board expressly made as a part of its Opinion the Staff Report and its discussion of building setback requirements. The Planning Board's action in this regard demonstrates that from a regulatory perspective the Board had determined conclusively that **no** setback was required from the street. In light of its prior findings, we respectfully suggest that the Board cannot retroactively change or find buildings constructed pursuant to and in accordance with its prior determination to now somehow violate a setback standard the Board concluded did not exist.

Similarly, the Planning Board expressly made the Phase II Staff Report dated May 2, 2002 a part of its Phase II Site Plan Opinion. The Phase II Staff Report contained the following data table, again in pertinent part:

| Development Standard          | Permitted/Required | Proposed        |
|-------------------------------|--------------------|-----------------|
| Min. Building Setbacks (ft.): |                    |                 |
| From any street               |                    |                 |
| Commercial bldgs.             | n/a                | n/a – Phase III |
| Residential bldg.             | n/a                | 10 ft. min. *   |

\* *The Planning Board reviewed this setback during the Project Plan review and found that no setback is necessary per the approved Master Plan. Phase II Staff Report at 17-18. (Emphasis supplied.)*

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Again, based on the Planning Board's Phase II Site Plan Opinion, through its express incorporation of the Phase II Staff Report, the Board determined conclusively that **no** setback from the street was to be required within this project.

We have also reviewed the various site plans and site plan amendments approved in this case. Based on these plans, a number of different setback and yard standards were shown in the data tables on these plans, and it is apparent that inconsistencies appear within each data table with respect to front and side yard standards relative to street setbacks.

For example, with respect to the March 24, 1999 Phase I Site Plan and the October 23, 2001 Phase IB-1 Site Plan, the signed signature sets approved by staff included a data table which appears to require a 10' setback from any street. The same signature site plans also appear to require a 10' minimum front yard for all unit types (sfd, TH, courtyard TH, MF). However, the Site Plan data table indicates a 0' side yard setback is required for single-family detached, townhouses and courtyard townhouses (Phase I) and a 0' side yard for townhouses and courtyard townhouses (Phase IB-1). Attachment 1. Under these Phase I Site Plan documents, there seems to be an irreconcilable conflict between a 10' street setback and a 0' side yard requirement for a unit built on a corner lot where the side yard also happens to abut a street.

Staff approved an amendment to the Phase I Site Plan (Phase IA) on May 30, 2003 and the Phase II Site Plan signature set on October 14, 2004. The data table appearing on these plans continued to indicate a 10' building setback from any street, but the front yard standard for townhouses and courtyard townhouses was amended to "NA" (not applicable) from the previously approved 10' standard. In addition, the side yard standard for townhouses and courtyard townhouses remained 0'. Attachment 2.

Based on the May 30 Phase IA and the October 14, 2004 signature Phase II Site Plans, it again appears inconceivable to require, on the one hand, a 10' street setback, but also to indicate on the other hand that there is no applicable front yard requirement for townhouses and courtyard townhouses and a 0' side yard requirement for such units. Clearly, if buildings were required to be set back 10 feet from any public right-of-way (typically considered a "street"), there would necessarily be a corresponding required 10' front and side yard (for a corner lot). However, the approved data table indicates no such yard was required.

In our view, the only way the different standards set forth within the same data table can be reconciled is to interpret the term "street" as the paved travelway and not the edge of the right-of-way. To our knowledge, **all** units approved and constructed meet a 10' setback requirement from the travelway. Also, to our knowledge, **all** units have been built in accordance with the Site

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Plan drawing itself. Again, the Planning Commission staff recommended approval of each building permit and the Department of Permitting Services approved each permit and issued occupancy permits following inspection of the various properties. Under the circumstances, it would be unjust to find a violation where all units have been built in accordance with the Site Plan Opinions, the Site Plan drawing itself and all reviewing agencies have endorsed and/or approved building and use and occupancy permits. This is clearly and surely the case when the Planning Board itself has, through adoption of the Phase I and Phase II Site Plan Staff Reports, determined conclusively in its Opinions that *no* setback is required from the street.

Lack of CTCAC Standing.

The Clarksburg Town Center Advisory Committee (“CTCAC”) was formed after a meeting held July 27, 2004, at the request of Newland Communities to discuss plans for the development’s retail center. At the close of the meeting, Newland Communities suggested that a smaller group of residents work with Newland Communities and its consultants to improve the retail center design. This smaller group subsequently identified itself as the CTCAC.

To our knowledge, the CTCAC is not governed by adopted bylaws and its members have not been elected by a representative community-wide vote. To our knowledge, the positions taken by the CTCAC in this matter and in letters sent to the Board have not been presented to or debated by residents at a properly noticed, community-wide meeting and have not been endorsed by community-wide vote. Rather, it appears the individuals claiming to speak for the residents of the Clarksburg Town Center were authorized by a small percentage of residents to solely and specifically work with Newland Communities on the retail center design, and have subsequently through mere acquiescence and scattered support assumed a broader role in which they claim to speak for an entire community on the building height issue.

Residents who *oppose* the request for reconsideration cite in letters to the Board the failure of the CTCAC to seek or to express input received from all members of the community. Reference to a strong bias against multifamily unit owners is also reported in these letters. Those *opposing* the request for reconsideration further characterize the attack on building heights as a means of gaining leverage over Newland Communities and its proposal for the retail center. In this regard, a recent letter addressed to “Residents and Neighbors” and signed only “Your neighbors on the CTCAC” was sent, we believe, in response to staff’s request for this group to identify possible mitigation for building heights in excess of 35’ and 45’. However, the letter clearly focused primarily on specific aspects of the retail center development that have been controversial with the CTCAC. The letter also did not advise prospective respondents that the inquiry was to gather information for use in connection with the unrelated building height controversy. Attachment 3.

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Newland Communities also renews its objection to individual complainants purporting to speak for an entire community when no such mandate or authority has been given. The "CTCAC" as an entity does not own property in the Town Center, is not a duly formed representative body of the community and lacks standing before the Board. Individual complainants should not be permitted to continue to advance individual objectives under the false mantle of a duly organized and representative community association.

Newland Communities and its Builders Have Relied in Good Faith on Permits Issued by Montgomery County and Recommended for Issuance by MNCPPC.

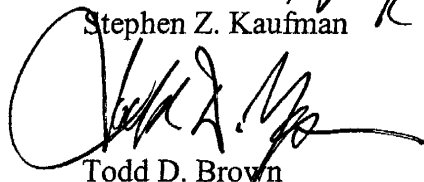
Lastly, regarding the June 1, 2005 letter to Michele Rosenfeld from counsel to the CTCAC, we strongly object to the suggestions of wrongdoing in the letter and state unequivocally that Newland Communities has done nothing improper in this matter and has acted in good faith reliance on the Site Plan Opinions issued by the Board. Newland Communities similarly believes its individual builders have also acted in good faith reliance on the building and use and occupancy permits issued by MCDPS, following positive recommendations for issuance of such permits by the Planning Board staff. In this regard, to our knowledge each and every building permit issued by MCDPS in this case was also recommended for issuance by the Planning Board staff.

For the foregoing reasons, we request the Board find no violation of building height limits or applicable setback standards in the Clarksburg Town Center.

Very truly yours,

**LINOWES AND BLOCHER LLP**

  
Stephen Z. Kaufman

  
Todd D. Brown

Attachments

Mr. Derick Berlage, Chair  
and Members of the Montgomery  
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June 10, 2005  
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cc: Ms. Kim Ambrose  
Mr. Charles Loehr  
Ms. Rose Krasnow  
Mr. Michael Ma  
Michele Rosenfeld, Esq.  
Sharon Koplan, Esq.  
Barbara Sears, Esq.  
Timothy Dugan, Esq.  
Kevin Kennedy, Esq.  
David Brown, Esq.

**LINOWES**  
**AND BLOCHER LLP**  
ATTORNEYS AT LAW

June 17, 2005

**Stephen Z. Kaufman**  
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**Todd D. Brown**  
301.961.5218  
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Mr. Charles R. Loehr  
Director  
Maryland-National Capital Park and  
Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910

Re: Clarksburg Town Center

Dear Mr. Loehr:

On behalf of NNPII-Clarksburg LLC and Newland Communities, LLC (collectively, "Newland Communities"), the purpose of this letter is to request additional time before the Planning Board at its July 7, 2005 meeting to address the building height and setback compliance issues at Clarksburg Town Center. Newland requests a total of one hour to present evidence and legal argument on both the building height and setback compliance issues. Considering the potential impact to several hundred owners of permitted, built, purchased and occupied homes and contract purchasers who await delivery of their homes, Newland requests this additional time to assure a complete and balanced presentation of the issues.

Thank you for your consideration.

Very truly yours,

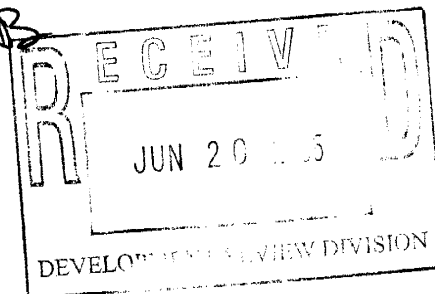
**LINOWES AND BLOCHER LLP**



Stephen Z. Kaufman



Todd D. Brown



Mr. Charles R. Loehr

June 17, 2005

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cc: Planning Board Members  
Ms. Rose Krasnow  
Mr. Michael Ma  
Michele Rosenfeld, Esq,  
Ms. Kim Ambrose  
Mr. Rick Croteau  
Robert Brewer, Esq.  
Tim Dugan, Esq.  
Kevin Kennedy, Esq.  
David Brown, Esq.

**LINOWES**  
**AND BLOCHER LLP**  
ATTORNEYS AT LAW

June 24, 2005

**Todd D. Brown**  
301.961.5218  
tbrown@linowes-law.com

Ms. Rose Krasnow  
Development Review Division  
Maryland-National Capital Park  
and Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910

Re: Clarksburg Town Center

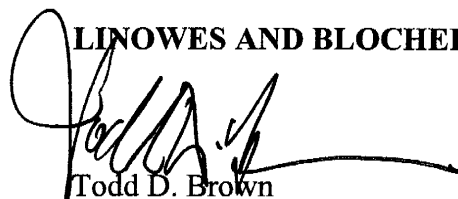
Dear Ms. Krasnow:

On behalf of NNPII-Clarksburg LLC and Newland Communities, LLC (collectively, "Newland Communities"), enclosed in response to the questions raised about the status of the completion of the recreation facilities and amenities at Clarksburg Town Center, is a table identifying the amenity areas and recreation facilities required within Phase 1 of the development and the status of each. As noted on the table, Phase I consists of 768 units, of which 401 are occupied. This results in a 52.2% occupancy rate. With respect to Phase II, 497 total units were approved by the Planning Board, only 198 of which are occupied. This results in a 39.8% occupancy rate.

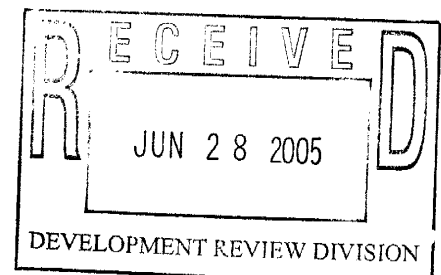
As you will note from the enclosed table, in several instances Newland Communities is providing additional recreation facilities for its residents that are not required by the approved Site Plan.

If you have any questions concerning the above, please do not hesitate to contact me.

Very truly yours,

  
**LINOWES AND BLOCHER LLP**  
Todd D. Brown

TDB:cp  
Enclosure





Ms. Rose Krasnow  
June 24, 2005  
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cc: Mr. Michael Ma  
Michele Rosenfeld, Esq.  
Mr. Rick Croteau  
Robert Brewer, Esq.  
Timothy Dugan, Esq.  
Kevin Kennedy, Esq.  
David Brown, Esq.  
Stephen Kaufman, Esq.  
Barbara Sears, Esq.

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## CLARKSBURG TOWN CENTER – PHASE I

### Occupancy Rate

768 total approved units, 401 occupied = 52.2% occupancy

### Per 1998 Staff Report:

| <u>I. Specified Amenity Areas (p.21)</u>   | <u>Location(s) &amp; Status</u>  |
|--|--|
| A. Town Square   | 1A-4 (site plan pending)   |
| B. Land dedicated for future civic building (with Phase II)  | III (site plan pending)  |
| C. Streetscape system  | Being completed with adjacent house completion   |
| D. Neighborhood squares and green area   | All completed except 1A-4, HH & II   |
| E. Greenway dedicated to public use  | Pending flood plain study approval   |
| F. Greenway roadway  | Under construction (to be completed '05)   |
| G. Specialty planting areas along Greenway Road  | Pending completion of roadway  |
| H. Park/School Site/Large Private Recreation Areas for Major Fields (with Phase II)                              | Land conveyed to MCPS and MNCPPC; 2 of 3 fields sodded   |
| I. Land for expansion of areas next to Historic District   | Provided   |
| J. Green areas and buffer next to Historic District  | Provided   |
| K. Green areas and setback areas located along MidCounty Highway, Stringtown Road & Clarksburg Road improvements | Piedmont – landscaping 75% (100% 7/05); Stringtown 65% (remainder pending road construction); Clarksburg Road 75% (remainder pending road construction; est. 2006-2007 completion) |

L. Pond Area (SWM Facility)

Pending SWM conversion (est. 2006 completion)

II. Recreation Calculations (p.34)

Facility

Location(s) & Status

A. Tot Lot (1 required)

**5 provided:** 1A-1, Block EE (installed); 1B-3, Block F (installed); 1A-3, GG (Spring '06); 1A-4, II (site plan pending); 1B-2, Block D (completed) (except sidewalk to be done this week)

B. Multi-Age Playlot (2 required)

**2 provided:** 1A-2, FF (contracted-waiting for installation of underground SWM; est. Fall '05 completion); IB-3, F (completed)

C. Picnic/Sitting (12 required)

**19 provided:** 1B-1, A(1) (completed); 1B-2, D(2) (completed); 1B-2, E(1) (completed); 1B-3, F(3) (completed); 1A-1, AA(1) (completed); 1A-1, EE(1) (completed); 1B-2, B(2) (pending SWM conversion–Fall '06); 1A-2, EE(1) (out to bid – summer '05); 1A-4, HH(1) (site plan pending); 1A-4, II(2) (site plan pending); Town Square (2) (site plan pending); Overlook seating areas - Clarksburg Square Road (2) (pending completion of road construction)

D. Open Play Area II (1 required)

**3 provided:** 1B-2, E(2); 1B-3, F(1) – completed

E. Bike System (1 required)

**1 provided:** Class III (pending home construction, final topping); Master Plan (Piedmont Road)(completed, pending road opening 7/05); Master Plan (Stringtown Road) (Fall '06)

F. Pedestrian System (1 required)  
Pathway - Murphy's Grove

**1 provided:** Being completed with adjacent house completion. 1B-2, B (pending conversion of SWM)

- |    |                                      |   |
|----|--------------------------------------|---|
| G. | Nature Trails ( <b>1 required</b> )  | <b>1 provided:</b> Pending – to be field located w/Staff (begin Fall '05) |
| H. | Nature Areas                         | Existing  |
| I. | Swimming Pools ( <b>1 required</b> ) | <b>1 provided:</b> 1A-4 (pending site plan approval)                      |
| J. | Wading Pools ( <b>1 required</b> )   | <b>1 provided</b> 1A-4 (pending site plan approval)                       |

**LINOWES**  
**AND BLOCHER LLP**  
ATTORNEYS AT LAW

March 8, 2005

**Barbara A. Sears**  
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The Honorable Derick Berlage, Chairman  
and Members of the  
Montgomery County Planning Board  
8787 Georgia Avenue  
Silver Spring, Maryland 20910

Re: Response to Letter dated January 25, 2005 from Clarksburg Town Center Advisory Committee ("CTCAC") Regarding Building Height in Clarksburg Town Center

Dear Chairman Berlage and Members of the Planning Board:

Our firm represents Bozzuto Homes, Inc. ("Bozzuto"), owner and developer of certain portions of the Clarksburg Town Center. The purpose of this letter is to respond to the January 25, 2005 letter complaint of the CTCAC alleging height violations of existing and proposed buildings in the Clarksburg Town Center.

**Complaint**

The specific contention of the CTCAC is that height violations exist in the Clarksburg Town Center because certain unspecified buildings, although 4 stories, exceed 45 feet in height, which is the maximum height in feet that the CTCAC contends was established by the approved Project Plan. As a result, the CTCAC is requesting, pursuant to Section 59-D-3.6 of the Zoning Ordinance, that the Planning Board "... issue a stop work order regarding Site Plans previously approved for buildings not yet built, but also having the potential to exceed the height guidelines as defined in the Board-approved Project Plan." See January 25, 2005 CTCAC letter. The complaint does not specify the existing building(s) alleged to be in violation or those not yet built but allegedly having the "potential" to exceed the purported height limitation of 45 feet. However, based on information Bozzuto has obtained from discussions with Staff and others, Bozzuto understands that the allegations as they pertain to Bozzuto are limited to the following two multi-family buildings: (i) Building #3, a 30-unit condominium building which has been constructed and sold to others, and (ii) Building #6, a

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30-unit multi-family building, which has received site plan approval, but is not yet under construction.

### **Factual and Legal Background**

The Clarksburg Town Center is zoned RMX-2 (Residential Mixed-Use Development, Specialty Center) and is an optional method project. The optional method of the RMX-2 Zone does not specify a maximum building height for the development. Under the optional method, general commercial uses and higher density residential uses are allowed if they comply with the optional method of development regulations of the RMX-2 Zone (Sec. 59-C-10-3.1) and the density, numerical limitations, and other guidelines contained in the applicable Master Plan (Sec. 59-C-10.2.2). In addition, a project plan and site plan(s) must be approved by the Planning Board under the optional method.

Project Plan No. 9-94004 for the Clarksburg Town Center (the "Project Plan") was approved by the Planning Board by Opinion mailed on May 11, 1995 (the "Project Plan Opinion"). In the Project Plan Opinion, the Planning Board specifically finds that the Project Plan conforms with the requirements and intent of the RMX-2 Zone and the approved and adopted Clarksburg Master Plan & Hyattstown Special Study Area (1994) ("Master Plan"). As noted above, the RMX-2 Zone does not specify a maximum height as a development standard. In this regard, Section 59-D-2.12(d) regarding project plans requires only that a project plan include a land use plan showing, *inter alia*, the "... general bulk and height of the principal buildings ...". Section 59-D-2.42 provides that, to approve a project plan, the Planning Board must find, *inter alia*, that it complies with the intents and requirements of the zone, including the applicable Master Plan. The CTCAC argues that although it is uncontested that Buildings #3 and #6 are 4 stories, both the Master Plan and the Project Plan required a maximum height limitation for residential buildings in the Clarksburg Town Center of 45 feet. This argument is without merit. Initially, the Master Plan, as more fully discussed below, does not specifically state or in any way imply that a 4-story structure in excess of 45 feet is incompatible with the Master Plan recommendations for the Historic District, as advanced by the CTCAC. Second, the Project Plan establishes the required height of the residential building to be 4 stories consistent with the Master Plan, but does not restrict the general height as to be 45 feet or less.

On this latter point, the CTCAC argues that because the Project Plan Opinion contains a data table indicating that the *required* height of residential buildings is "4 stories" and that the

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*proposed* height is “4 stories (45 ft.),” the Project Plan is somehow reflecting a strict compatibility requirement of the Master Plan that the buildings must not only be 4 stories, but also not exceed 45 feet in height rather than a general anticipated height in feet for a 4-story building as required by Section 59-D-2.12(d). As noted, Buildings #3 and #6 are 4 stories. The final measurement of the height of Building #3 in feet is approximately 53 feet 7-3/4 inches and that of Building #6 approximately 50 feet. This height in feet in no way violates the 4-story requirement of the Project Plan, nor the applicable provisions of the Master Plan as more fully discussed below.

### **Master Plan**

A careful review of the Master Plan indicates that there is no basis for the contention of the CTCAC that any residential building in the Clarksburg Town Center in excess of 45 feet somehow violates the Master Plan. In this regard, the Master Plan does not set a specific height limitation for buildings in the Town Center in terms of feet. Specifically, the Master Plan states at p. 46 as follows:

“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.”

Additionally, Figure 21 of the Master Plan, entitled “Clarksburg Historic District Buffers,” graphically illustrates the specified Master Plan guideline found at p. 48 of the Master Plan to create certain buffer areas adjacent to the Historic District. The Master Plan recommends that the areas on the east side of the Historic District, specifically within 400 feet east of existing MD 355 and/or on land which is within the Historic District, development be limited to single-family detached structures that are no higher than 2 stories. The Master Plan further recommends that certain areas between existing MD 355 and relocated MD 355 to the west (an area of approximately 550 feet) also be limited to detached housing with a maximum of 2 stories. Finally, the Master Plan calls for the area between relocated MD 355 and the transitway (approximately 500 feet) have residential housing with a maximum of 3 stories.

According to the Master Plan, these specific buffer recommendations were intended to “... help assure a sympathetic relationship between the ‘old’ and ‘new’ areas of Clarksburg,” thereby

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effecting compatibility with the Historic District. These Master Plan recommendations on height limitations are very specific and deal with stories only, not specific limitations in feet. Moreover, the "buffer" recommendations regarding the Historic District deal with areas that do not encompass and are indeed far removed from Buildings #3 and #6 of the Clarksburg Town Center. These areas are in the Town Center and the Master Plan specifically permits 4 stories to as many as 8 stories if within walking distance of the transit stop. Therefore, there is no basis for the CTCAC's contention that the scale and character of the Clarksburg Historic District requires the Master Plan to be read as prohibiting residential structures in the Town Center in excess of 45 feet or that the Project Plan restricts the height to 45 feet. All that is required is that these structures be 4 stories, a requirement that has been fully complied with.

### Site Plan

The RMX-2 Zone further requires an approved site plan prior to building permit. The CTCAC contends that since the Project Plan purportedly capped the height of the multi-family residential buildings at 45 feet, the Site Plan could not permit a 4-story structure with height in feet excess of 45 feet. Once again, this conclusion is unsupported by the facts and the law. The Planning Board approved the Phase I Site Plan in an Opinion mailed on March 3, 1998 (the "Phase I Site Plan Opinion"). The Phase I Site Plan Opinion specifically found that the Phase I Site Plan was consistent with the approved Project Plan for the optional method of development and met all of the requirements of the RMX-2 Zone. Moreover, this Opinion provides Condition 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 the building type and location, open space, recreation and pedestrian and vehicular circulation, adequacy of parking, etc. for staff review and approval."

The final determination of "height of building" expressed in feet is dependent upon several factors such as final architecture, setbacks, grading, etc., and will vary within a residential building of any number of stories. *See* 59-A-2.1. Moreover, due to the size and scale of the project, as illustrated by Condition 38, flexibility in matters not associated with fundamental findings of the Planning Board were anticipated after Site Plan approval. Based on a review of the Master Plan, the RMX-2 Zone and Project Plan and Site Plan findings, the notion that 45 feet



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was a fundamental finding of the Planning Board is erroneous. A 4-story structure consistent with the Master Plan recommendations and the definition of height from the Zoning Ordinance is the proper standard on which to assess compliance. It is the standard which the Staff used to respond to the CTCAC in properly rejecting its contention of height violations. Far from the unfortunate and misguided allegations by the CTCAC of "gross negligence" or undue influence by the Developer, the Staff applied the proper standards of review to the Project Plan and Site Plans and has properly rejected the CTCAC's claim of height violations.

Similarly, Building #6 was approved as part of the Phase II Site Plan for which the Planning Board issued an Opinion mailed June 17, 2002 (the "Phase II Site Plan Opinion"). Once again, the Planning Board found that the Site Plan was consistent with the Project Plan and requirements of the RMX-2 Zone. In the Phase II Site Plan Opinion, the Planning Board again identified the height of the buildings to be 4 stories and did not specify a height in terms of feet.

For the reasons stated above, there are no height violations by Bozzuto as it pertains to the buildings in question, of the Project Plan or Site Plan and, therefore, no grounds exist pursuant to Section 59-D-3.6 of the Zoning Ordinance for a finding by the Planning Board of a violation of the Site Plans.

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

Very truly yours,

**LINOWES AND BLOCHER LLP**

*Barbara Sears /kw*

Barbara A. Sears

cc: Mr. Clark Wagner  
Ms. Jackie Mowrey  
✓Ms. Rose Krasnow  
Mr. Michael Ma  
Ms. Wynn Witthans

**LINOWES**  
**AND | BLOCHER LLP**  
ATTORNEYS AT LAW

June 22, 2005

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The Honorable Derick Berlage  
Chairman, and Members of the  
Montgomery County Planning Board  
8787 Georgia Avenue  
Silver Spring, MD 20910

Re: Clarksburg Town Center Building Heights – Bozzuto Homes, Inc.

Dear Chairman Berlage and Members of the Planning Board:

Our firm represents Bozzuto Homes, Inc. (“Bozzuto”), owner and developer of certain portions of the Clarksburg Town Center. The purpose of this letter is to request that the Board reconfirm its prior decision that no site plan violation has occurred for reasons stated in this letter and to be presented by Bozzuto at the public hearing on this matter. The specific complaint as it pertains to Bozzuto is confined to the question of height compliance of two multi-family buildings, identified as Building No. 3, a 30-unit condominium building which has been constructed and sold to others, and Building No. 6, a 30-unit multi-family building, which has received site plan approval, but is not yet under construction. Please incorporate this letter and all exhibits referenced herein in the record of the proceeding.

Initially, we have been provided with a copy of the letter from Stephen Z. Kaufman and Todd D. Brown of Linowes and Blocher on behalf of NNPII—Clarksburg LLC and Newland Communities, LLC, the project development manager (collectively, “Newland Communities”) dated June 10, 2005, to the Board also requesting that the Board reconfirm its prior decision that no site plan violation has occurred (the “June 10, 2005 Newlands Letter”). With reference to the allegations of height non-compliance of Buildings No. 3 and No. 6 which are the subject of this hearing, Bozzuto incorporates by reference those sections of the June 10, 2005 Newlands Letter dealing with building height compliance as well as those sections dealing with lack of standing of the CTCAC and reliance in good faith on permits issued by Montgomery County and recommended for issuance by M-NCPPC as if fully set forth in this letter.

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On April 14, 2005, the Planning Board adopted the Staff Recommendation and found no height violation had occurred. By letter dated April 22, 2005, the CTCAC requested reconsideration alluding to evidence that the CTCAC had recently discovered but did not attach. By letter dated April 27, 2005, the CTCAC submitted an alleged copy of Site Plan 8-980016 covering Phase 1B – Part 3 for Building Permit #301788, further identified as “Bozzuto ‘Bldg. #3’.” The CTCAC further alleged that this site plan had been retrieved from DPS. Finally, the CTCAC submitted a one-page document which it entitled “MC Department of Permit Services Building Review Detail – Page 1.” The basis for the CTCAC’s reconsideration request was that the site plan found at DPS had contained a data table stating a height requirement of 45 feet for multi-family buildings and that this site plan was signed by Wynn Witthans on behalf of the M-NCPPC on October 31, 2002 and by Clark Wagner on behalf of Bozzuto Homes on June 27, 2002. As stated, this site plan, denoted No. 8-980016, dealt exclusively with Phase 1B-Part 3 and contained minor revisions approved by Staff to the footprint and configuration of certain multi-family buildings in Phase 1B – Part 3, including Building No. 3 (the “Phase 1B – Part 3 Site Plan”).

What the April 27, 2005 letter from the CTCAC improperly fails to disclose is that the Phase 1B – Part 3 Site Plan was submitted as a part of a complete building permit application package filed with DPS. Apparently, the CTCAC merely excerpted the Phase 1B – Part 3 Site Plan from this entire package and the full set of plans was *not* submitted to the M-NCPPC as part of the reconsideration request. This “selective” submission fails to disclose that the Building Permit Application for Building No. 3 was an application for a four-story, multi-family building with a height in feet, as measured in accordance with the Zoning Ordinance, of approximately 53 feet (hereinafter “53 feet” or “53-foot”). The entire filing with the architectural plans showing the 53-foot height for Building No. 3 as part of the submission demonstrating the context in which the site plan submitted should have been brought to the attention of the Board, not just the chart depicted on the site plan.

Attached as Exhibit “A” is a copy of the Building Permit Application for Building No. 3 (“Application”). This Application, together with the full set of plans attached as Exhibit “B”, forms the basis of the approved building permit, a copy of which is attached as Exhibit “C”.<sup>1</sup> The date of issuance of the building permit is July 31, 2003. The plans, showing the 53-foot building, are stamped “Approved” by Montgomery County Division of Building Construction

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<sup>1</sup> Since Exhibit “B” contains multiple pages of building plans, only one set is being provided with the record copy of this letter, which will be provided to Rose Krasnow.

The Honorable Derick Berlage  
And Members of the  
Montgomery County Planning Board  
June 22, 2005  
Page 3

for Permit 301788. These plans clearly contain the elevations which demonstrate the 53-foot height of Building No. 3. Further, as evidenced by the letter dated June 21, 2005 from Les Powell of CPJ to Clark Wagner of Bozzuto (attached as Exhibit "D"), in June of 2002, as part of the submission of the minor modifications to the layout of the multi-family buildings in Phase 1B – Part 3, CPJ provided the architectural elevations to the Planning Board Staff, which illustrated the height of Building No. 3 at 53 feet. These architectural elevations formed the basis of the building plans that similarly demonstrate the 53-foot building.

Therefore, as indicated by the course of dealing and the full set of plans, it had been the consistent position of Planning Board Staff that the height of the multi-family buildings was controlled by the four-story requirement and was not further limited by a 45-foot restriction in height. Accordingly, Bozzuto's actions taken as a whole, as evidenced by the Building Permit Application submission to DPS and the subsequent sign-off by the M-NCPPC on the building permit for Building No. 3, issuance by DPS of the Building Permit, and issuance of the Use and Occupancy Permit for Building No. 3 were all perfectly consistent with this understanding. The fact that a data table that erroneously indicated 45 feet was reproduced in the Phase 1B – Part 3 Site Plan, does not negate the extensive course of dealings and consistent good-faith actions of Staff and Bozzuto with regard to the treatment of the height requirements as four stories or constitute a site plan violation.

The consistent administrative actions of multiple builders and agencies in filing for and issuing permits with regard to height for the Clarksburg Town Center, which height was controlled by compliance with the story limitations is the controlling factor in interpreting the Project Plan and Site Plan Opinion requirements, not an erroneous data table and unfortunate, but irrelevant, purported staff modification to the data table allegedly occurring in November of 2004. This long-standing course of administrative actions, issuance of permits and construction of buildings pursuant to those permits and receipt of occupancy permits must override the inadvertent and mistaken placement of a data table on a site plan document. There was clearly no effort or intent to misstate, hide, or otherwise obscure the heights of these buildings, as underscored by the very document submitted by the CTCAC as the basis of its reconsideration request when that document is taken as a whole as opposed to one sheet taken out of context. Finally, as noted in the June 10, 2005 Newlands Letter, we again emphasize that the modification by Planning Board Staff of the chart last fall was irrelevant. Not only was this written modification in no way relied on by Bozzuto in any aspect of the permitting of the buildings or in defense of the complaint in the April hearing, but was not even known by Bozzuto until presented at the April hearing.

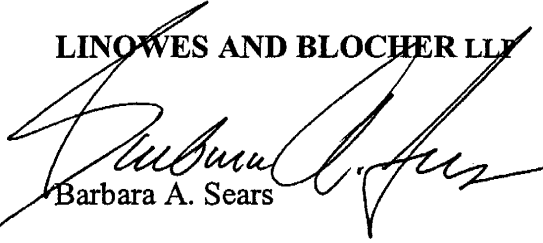
The Honorable Derick Berlage  
And Members of the  
Montgomery County Planning Board  
June 22, 2005  
Page 4

Therefore, the materials submitted by the CTCAC do not establish a violation of the site plan. Instead, they merely show the use of an erroneous chart. The use of this erroneous chart to establish the height requirement is completely outweighed by the approvals history, and multiple and long study actions of the parties, M-NCPPC and DPS confirming and approving the proper interpretation of the height requirement.

In summary, whether the erroneous data table appears on the Phase 1B – Part 3 Site Plan or not, the property as it pertained to Building No. 3 was not impressed with a 45-foot height limitation and no violation has occurred. As to Building No. 6, this building falls within the Phase 2 Site Plan, which contains no such data table. For the above reasons, and those to be presented at the hearing on this matter, Bozzuto respectfully requests that the Board find no violation of building height limits in the Clarksburg Town Center.

Very truly yours,

**LINOWES AND BLOCHER LLP**

  
Barbara A. Sears

Enclosures

cc: Mr. Tom Bozzuto  
Mr. Clark Wagner  
Ms. Jackie Mowrey  
Mr. Charlie Loehr  
Ms. Rose Krasnow  
Mr. Michael Ma  
Michele Rosenfeld, Esq.  
Stephen Kaufman, Esq.  
Todd Brown, Esq.  
Timothy Dugan, Esq.  
Kevin Kennedy, Esq.  
David Brown, Esq.



FOR OFFICE USE ONLY ZONING

Classification: Sheet Number: Board of Appeals: Checked By:

BUILDING PERMIT APPLICATION

DPS - #1

SEDIMENT CONTROL NUMBER: 206452

PART ONE 1A. WORK TYPE (ACTION):

- Construct Extend/Add Alter/Renovate Demolish/Move Repair

1B. PRINCIPLE USE: (Check one)

- Assembly Boarding House Business\* Educational Industrial Commercial Swim. Pool Hotel Institutional Mercantile Motel Multi-Family Restaurant Place of Worship Public Utility Fence Single Family Storage Townhouse Misc. Structure Multi-Family Senior Building

1C. 4 No. of Stories (units if multi-family)

1D. 28,750 Sq. Footage of Land Disturbance

1E. 28,750 Sq. Footage of Area Created or Effected by this Action

\*If Business, please specify use:

1F. Construction Cost Estimate \$ 2,435,000

1G Model Name: BUILDING 3

1H. Plans for this model have been reviewed and approved as a "Model House Type" under Permit #: N/A

1I. This is a Site OR Structural Revision to Permit #: N/A

1J. This is a refer-back to Permit # N/A Subdivision: N/A

Contact Person: JOHN RENNER Telephone No.: (301) 446-2215 FAX No.: 301 / 486-1315

Name of Applicant: BA CLARKSBURG LLC Daytime Phone No.: 301 / 220-0100

Address: 6401 GOLDEN TRIANGLE DR. City: GREENBELT State: MD Zip: 20770

Contractor: BOZZUTO HOMES, INC. Contractor Reg. No.: 16599715 / LICENSE NO. BC 3694

Contractor Address: 6401 GOLDEN TRIANGLE DR., GREENBELT, MD 20770 Contractor Phone No.: 301 / 220-0100

Plans Prepared By: THE LESSARD ARCHITECTURAL GROUP Registration No.: 12530 Telephone No.: 703 / 760-9344

Location of Building/Premise

BUILDING 3

Street Number 12824 Street Name: CLARKSBURG SQUARE ROAD

Town/City CLARKSBURG Zip 20871 Election District 2ND

Nearst Cross Street CLARKSMEADE DRIVE

Lot 3 Block F OR Liber N/A Folio N/A Parcel N/A

Subdivision CLARKSBURG TOWN CENTER, PHASE 1B - PART 3

PART TWO 2A. TYPE OF SEWAGE DISPOSAL:

- WSSC Septic Other:

2B. TYPE OF WATER SUPPLY:

- WSSC Well Other:

PART THREE IS THIS AN IMPACT TAX AREA? Yes No

Do you choose to use impact tax credits for this application? Yes No If Yes, attach a copy of approved credit and state the amount of credit you wish to apply to this application: \$ N/A

PART FOUR IS THIS AN EDAET OR DAP AGREEMENT FOR THIS LOT? Yes No If yes, submit copy of agreement.

TO BE READ BY APPLICANT

Any information that the applicant has set forth in this application that is false or misleading may result in the rejection of the application. A condition for the issuance of this permit is that the proposed construction comply at all times with the plans as approved by all applicable government agencies. I hereby declare and affirm, under the penalty of perjury, that all matters and facts set forth in this building permit application are true and correct to the best of my knowledge, information and belief.

Date

Signature of Applicant



# APPLICATION FOR A PERMIT FOR CONSTRUCTION ON PROPERTY DEDICATED TO PUBLIC USE

DPS Permit No. \_\_\_\_\_  
(DPS use only)

Building Permit Reference \_\_\_\_\_

Name of Applicant: JOHN RENNER, BA CLARKSBURG LLC Phone No.: (301) 446-2215  
(Owner, Person, Firm or Corporation Proposing to Execute or to have work executed)  
Address: 6461 GOLDEN TRIANGLE DRIVE, SUITE 200 Fax No.: (301) 486-1315  
GREENBELT, MD 20770

## LOCATION OF WORK

Address 12824 CLARKSBURG SQUARE ROAD, CLARKSBURG 20871

SUBDIVISION NAME (legal description): CLARKSBURG TOWN CENTER, PHASE 1B - PART 3 Lot: 3 Block: F

The Application is for: (Check all categories that apply)

- This application is for: (Check appropriate categories)
  - Residential
  - Commercial
  - Industrial
  - Institutional

### PERMIT CONDITIONS:

- If there is an existing permit for the driveway apron, provide the following information.  
Driveway Permit No. \_\_\_\_\_  
GP Permit No. \_\_\_\_\_  
Letter of Permission (If the applicant is not the permittee of the existing driveway or GP permit provide written authorization from the permittee)

- New entrance to serve this site.
- Existing entrance will be used to access the site during construction.
- A temporary construction entrance will be constructed to access the site during construction.
- Additional work in the public right of way is required for this site. (Sidewalk, storm drain connections, street trees, street lights, streetscaping features, etc.)
- A dumpster will be placed in the public right of way during construction.
- The public sidewalk, and/or a travel/parking lane will have to be closed during construction.
- A crane will occupy the public right of way sometime during this construction.
- A construction fence will be placed in the public right of way during construction.
- Provide a copy of the approved Record Plat (If an access easement is involved.)
- Provide a copy of the approved preliminary/site plan and DPWT's written requirements (For development approved by MNCP&PC)
- Other, please describe \_\_\_\_\_

**OFFICE USE ONLY**

**FIELD REPORT - Driveway Aprons**

No. of Dwys: \_\_\_\_\_ Dwy. Std. No. \_\_\_\_\_  
 Pipe Size: \_\_\_\_\_  
 Sight Dist. Check Req: \_\_\_\_\_  
 Modification (Explain): \_\_\_\_\_  
 \_\_\_\_\_  
 Add. Work Req.(Explain): \_\_\_\_\_  
 \_\_\_\_\_  
 Rural Rustic Road: \_\_\_\_\_  
 Date: \_\_\_\_\_ Insp: \_\_\_\_\_  
 Field Supervisor: \_\_\_\_\_

**Permit Acceptance Status**

Approved  Disapproved  
 Not Required  Pending Approval

Field Investigation Required:  Yes  No  
 Reviewed By: \_\_\_\_\_

The proposed work shall be performed in accordance with the conditions of this permit, subject to the provisions of the Montgomery County Head Construction Code, Standards, Specifications and Inspection and control of the Director of the Department of



DEPARTMENT OF PERMITTING SERVICES

Douglas M. Duncan  
County Executive

Robert C. Hubbard  
Director

**BUILDING  
PERMIT**

Issue Date: 7/31/2003

Permit No: 301788  
Expires: 7/31/2004  
X Ref.  
Rev. No:  
ID: AC901624

THIS IS TO CERTIFY THAT: B.A. CLARKSBURG, LLC  
6401 GOLDEN TRIANGLE DRIVE  
GREENBELT MD 20770

HAS PERMISSION TO: CONSTRUCT MULTI-FAMILY DWELLING

PERMIT CONDITIONS:


PREMISE ADDRESS: 12824 CLARKSBURG SQUARE RD  
CLARKSBURG MD 20871-

|                          |                   |       |             |
|--------------------------|-------------------|-------|-------------|
| LOT NA                   | BLOCK NA          | ZONE  | GRID        |
| LIBER                    | ELECTION DISTRICT | PLATE | PARCEL      |
| FOLIO                    | TAX ACCOUNT NO.:  |       | PS NUMBER 0 |
| PERMIT FEE: \$104,470.81 | SUBDIVISION       |       |             |

**MUST BE POSTED ON JOB SITE  
AN APPROVED FINAL INSPECTION IS REQUIRED  
PRIOR TO USE OR OCCUPANCY**

NOTICE  
THIS APPROVAL DOES NOT INCLUDE  
PLUMBING, GAS PIPING OR ELECTRICAL  
OR CONSTRUCTION IN ANY  
DEDICATED RIGHT-OF-WAY.

NOTE  
THIS PERMIT DOES NOT INCLUDE  
APPROVAL FOR ANY ELECTRICAL  
WORK. YOU MUST HAVE A  
SEPARATE ELECTRICAL PERMIT  
TO DO ANY ELECTRICAL WORK.

  
Director, Department of Permitting Services



# Charles P. Johnson & Associates, Inc.

Planners Engineers Landscape Architects Surveyors

Silver Spring, MD

Frederick, MD

Fairfax, VA

# CPJ Associates

June 21, 2005

Mr. Clark Wagner  
Bozzuto & Associates, Inc.  
7850 Walker Drive  
Suite 400  
Greenbelt, MD 20770

Re: Clarksburg Town Center Site Plan No. 8-980016 for Phase 1B – Part 3

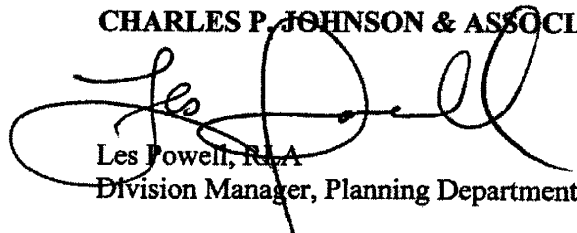
Dear Mr. Wagner:

This letter will confirm that, on behalf of Bozzuto Homes, Inc., Charles P. Johnson & Associates, Inc. ("CPJ") submitted certain minor modifications to the above-referenced Site Plan in June of 2002. This submission was for the purpose of obtaining some minor modifications to the footprint and the layout of certain multi-family buildings, including Building No. 3. As part of this submission, CPJ provided architectural elevations to staff, which illustrated the height of Building No. 3 at approximately 53 feet.

Prior to this time, CPJ had discussed the height restrictions applicable to multi-family buildings such as Building No. 3 with the staff reviewer. It was our understanding that Park and Planning interpreted the height restriction applicable to such multi-family buildings to be four stories and not further limited by a height restriction of 45 feet. CPJ did place a data table on the aforementioned site plan that indicated a height of 45 feet for multi-family buildings. However, CPJ did so since the data table had been identified as the one to place on the site plan by staff and not as a statement that the height in feet superseded the four-story limitation CPJ understood to apply to the multi-family building.

I hope the above is responsive to your inquiry. Should you have any questions, please feel free to call me.

CHARLES P. JOHNSON & ASSOCIATES, INC.



Les Powell, RLA  
Division Manager, Planning Department

N:\29100\bozzuto\wp\050621-Letter to TBozzuto.DOC

1751 Elton Road • Silver Spring, MD 20903 • 301-434-7000 • Fax 301-434-9394

Exhibit "D"

**LINOWES**  
**AND BLOCHER LLP**  
ATTORNEYS AT LAW

June 24, 2005

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

Ms. Rose G. Krasnow  
Chief, Development Review Division  
M-NCPPC  
8787 Georgia Avenue  
Silver Spring, MD 20910

Re: Clarksburg Town Center Building Heights - Bozzuto Homes, Inc.

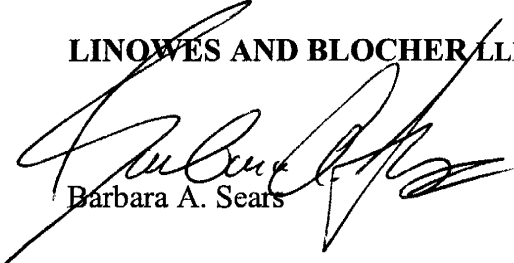
Dear Ms. Krasnow:

On behalf of Bozzuto Homes, Inc., enclosed please find a copy of the Use-and-Occupancy Certificate for Bozzuto Multi-Family Building #3 at Clarksburg Town Center, which was issued on August 11, 2004. Please incorporate this letter and enclosure in the hearing record in the above-referenced matter.

Thank you. Should you have any questions, please feel free to contact me.

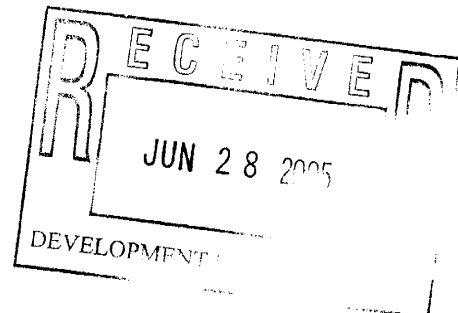
Very truly yours,

**LINOWES AND BLOCHER LLP**

  
Barbara A. Sears

Enclosure

cc: Michele Rosenfeld, Esq.  
Mr. Clark Wagner  
Ms. Jackie Mowrey  
David Brown, Esq.



L&B 449135v1/01056.0026



DEPARTMENT OF PERMITTING SERVICES

Douglas M. Duncan  
County Executive

Robert C. Hubbard  
Director

USE-AND-OCCUPANCY  
CERTIFICATE

Issue Date: 8/11/2004

Expires: NONE

Certificate No.: 220831

ID: AC901624

Residence or building location: 12824 CLARKSBURG SQUARE RD  
CLARKSBURG MD 20871-

Proposed Use: DWELLINGS, MULTI-FAMILY

The applicant has applied for a certificate of Use and Occupancy under the provisions of the Montgomery County Code. The use for each floor, or part thereof; the live load (p.s.f.); the fire grading; the construction type; the code/edition; and any special conditions must be as follows:

| Floor | Use Group Class | Maximum Live Load | Fire Grading | Occupancy Load | Construction Type | Code/Edition | Conditions |
|-------|-----------------|-------------------|--------------|----------------|-------------------|--------------|------------|
| 1-4   | R-2             | 40                | N/A          |                | VA                | 2000IBC      |            |

This certificate applies only to the above-described residence or building and is valid until the permitted use changes. Changes in use require recertification or new registration, pursuant to the Building Code.

Director, Department of Permitting Services

RECEIVED  
JUN 28 2005  
NATIONAL ARCHIVES  
DIVISION