



**MONTGOMERY COUNTY PLANNING DEPARTMENT**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

**Staff Report: Limited Site Plan Amendment 82003025B, Lofts 24 – Silver Spring Park**

**ITEM #:**

**MCPB HEARING**

**DATE:** November 20, 2008

**REPORT DATE:** November 6, 2008

**TO:** Montgomery County Planning Board

**VIA:** Rose Krasnow, Chief  
Robert Kronenberg, Supervisor  
Development Review Division

**FROM:** Sandra Pereira, Senior Planner  
Development Review Division  
301.495.2186  
sandra.pereira@mncppc.org



**APPLICATION DESCRIPTION:** CBD-1/Fenton Village Overlay Zone; 0.38 acres; Limited Amendment to reflect as-built conditions on the site and lighting plans, and minor revisions to the landscape plan; located in the SW quadrant of the intersection of Fenton Street and Bonifant Street, Silver Spring CBD Sector Plan.

**APPLICANT:** MAB, LLC

**FILING DATE:** May 22, 2008

**RECOMMENDATION:** Approval with conditions.

**EXECUTIVE SUMMARY:**

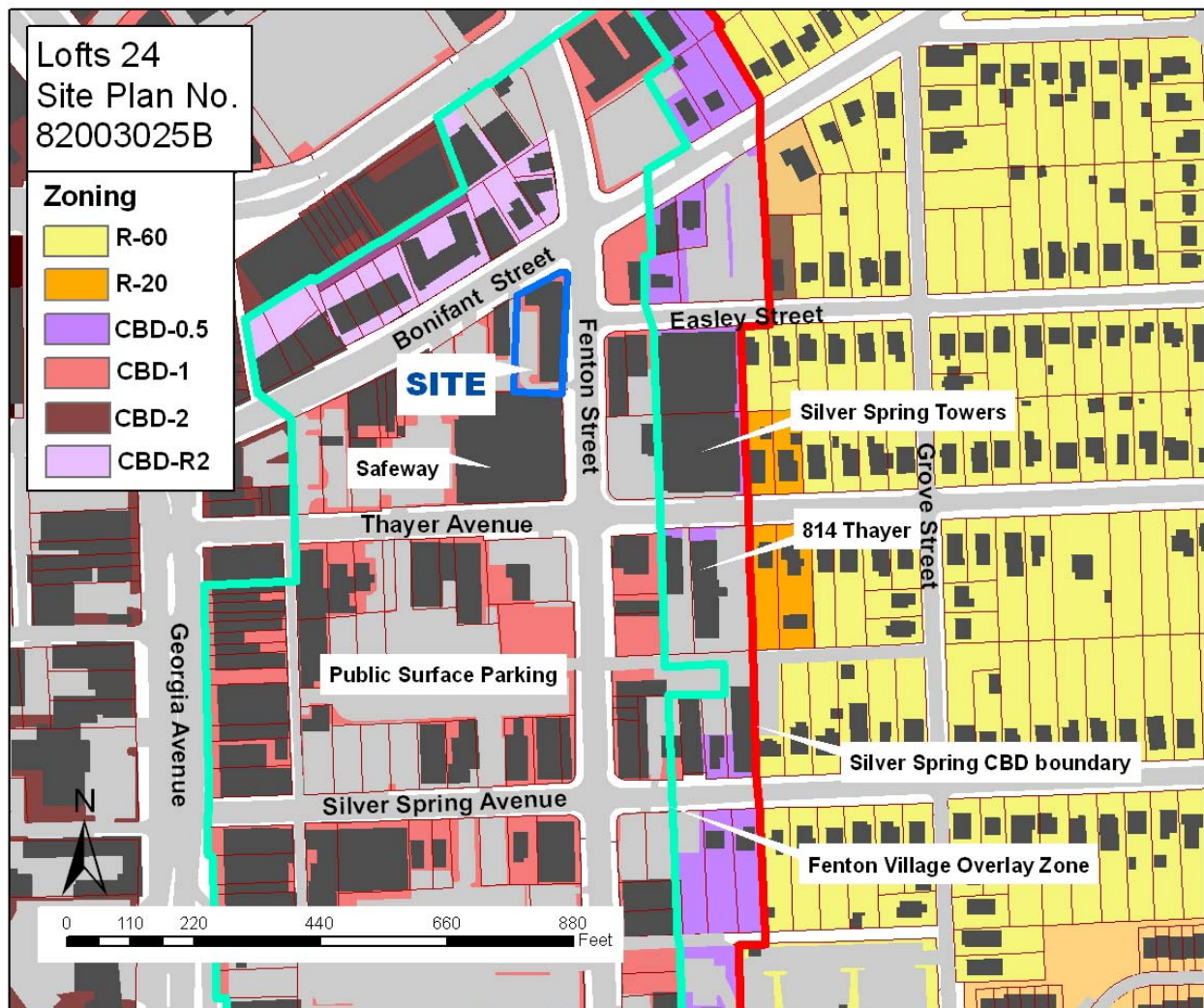
The Applicant seeks approval of several modifications to conform with as-built conditions, some of which have resulted from requirements of other agencies. The modifications proposed by this Amendment are for the most part reasonable and are acceptable to the Condominium Association at Lofts 24. They include revisions to light fixtures, plant material, hardscape, and site features.

## SITE DESCRIPTION

### Vicinity

The subject site is located in the southwest corner of the intersection of Bonifant Street and Fenton Street, approximately 600 feet east of Georgia Avenue in Downtown Silver Spring. An existing two-story building and surface parking lot is located directly west of the site. Across Fenton Street, to the west, is the Citgo Gas Station, which also borders Easley Street. Directly south and adjacent to the property is the existing Safeway Store. The Silver Spring Metro Station is located approximately ½ mile to the west of the site, along Bonifant Street.

The surrounding property within the Fenton Village Overlay Zone is zoned CBD-1 and CBD-R2, and consists of a mix of building types and structures. On the outskirts of the overlay zone, the zoning pattern changes to CBD-2. Past the CBD zones to the east are one-family residential neighborhoods in the R-60 Zone.



*Vicinity Map*



## Site Analysis

The subject site currently has 24 residential loft apartments in an L-shaped building that fronts on Fenton and Bonifant Streets. Parking is accommodated in the rear and is accessed via a one-way circulation pattern from Fenton Street to Bonifant Street. The main area of public use space is located at the NE corner of the building.



*Aerial Photo with approximate site boundary outlined in blue.*

## AMENDMENT DESCRIPTION

### Previous Approvals

This plan is subject to the conditions of Preliminary Plan No. 120030600, which was approved for 24 new garden apartments on one lot and a waiver of full width dedication, on May 22, 2003.

This plan is subject to the conditions of Site Plan No. 820030250, which was approved for 33,665 GSF, including 24 garden apartments, on May 22, 2003.

This plan is subject to the conditions of Site Plan No. 82003025A, which was approved administratively on January 27, 2005. The Amendment called for the removal of 41.4 square feet of public open space in front of the building and the addition of 169.5 square feet of public open space on the NW corner of the building and at the driveway. This plan was further approved administratively on April 5, 2005 to allow the removal of the skylights from the building, due to conflicts with County Building Codes.

### **Conformance to Conditions of Approval**

The proposed development must comply with the conditions of approval for Site Plan 820030250 as enumerated in the Planning Board Opinion dated June 20, 2003, and as modified by the administrative Site Plan Amendment No. 82003025A, except as modified below:

### **Description of Amendment**

The Applicant requests the following modifications to the Site Plan. While Staff supports proposed changes 1-12, Staff does not support changes 13 and 14.

1. Replace previously approved fiberglass benches with (4) small round concrete benches in the locations shown on the approved site plan. The concrete benches will be mounted to the ground.
2. Modify the bollard light fixture to a similar model by a different manufacturer. The proposed bollard is also black and is similar in shape and dimensions to the one previously approved.
3. Change the pole mounted and wall mounted light fixtures to a similar model by a different manufacturer. The design and photometric output is equivalent.
4. Eliminate one wall mounted face plate light fixture on the wall at the rear of the property, and increase the wattage of the remaining light fixtures to 200 watts on the type A (S-twin) lights and to 175 watts on the type B-2 lights. Update photometric plan.
5. Adjust location of honey locust to account for the larger PEPCO transformer pad.
6. Eliminate (1) yew shrub from the planting area adjacent to the dumpster area due to the reduced size of the planting area.
7. Remove (1) magnolia tree on the west side of the building to avoid obstructing the electrical meters.
8. Remove skylights from plans as consistent with M-NCPPC administrative approval dated of April 5, 2005. Skylights were not installed due to DPS measuring standards for building height, an issue raised during the building permit approval process.
9. Show dual railing on the sidewalk off Bonifant Street as required by DPS (Appendix A).
10. Revise location of PEPCO blast wall to be a 3-foot distance from the transformer pad as indicated in the PEPCO standards (Appendix B).
11. Revise the concrete pad of the PEPCO transformer to reflect the larger PEPCO transformer that was installed per PEPCO requirements.
12. Add 6-inch step and depressed curb at the northwest end of the parking lot.
13. Install the brick area of approximately 60 square feet as shown on the approved landscape plan and proffered in exchange for the loss of public use space that resulted from the shifting of the building.
14. Revise thickness of granite pavers to two centimeters rather than two-inch thickness as previously approved.<sup>1</sup>

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<sup>1</sup> It is Staff's understanding that the Applicant's position has recently changed concerning installation of the granite pavers, however, at the time that this Staff Report was completed, Staff responded to the most recent plans dated August 15, 2008.

## PUBLIC NOTICE

A notice regarding the subject amendment was sent to all parties of record by the Applicant on May 19, 2008. The notice gave interested parties a non-limited period of time to review and comment on the amended site plan per Montgomery County Zoning Ordinance Section 59-D-3.7. Staff did receive inquiries from the Lofts 24 Condominium Association regarding this amendment. The main concern of the Association was that the proposed modifications should be equal, better or equivalent to the certified site plan. Staff worked closely with representatives of the Condominium Association to ensure that the changes approved were consistent with the original site plan or, if they differed, that the Condominium Association agreed with the change. Most of the changes proposed have been accepted by the Condominium Association.

## ISSUES

### 1. Granite pavers

The Certified Site Plan No. 820030250, and subsequent administrative approvals, approved mortared in place 2" x 24" x 24" flamed black granite pavers with a matching border of 2" x 12" x 12" pavers, at the three entrances to the building and at the public use space at the corner of Bonifant and Fenton Streets. The granite pavers were never installed. Instead, the entryways were installed with brick and concrete, and the public use space with textured aggregate concrete.



Building entryway was partly installed with poured in place concrete and partly with brick (left image); the public use space was installed with textured aggregate concrete (right image).

### Applicant's position (Appendix C)

The Applicant argues demolishing of the existing entrance infrastructure and public use space would be a wasteful expenditure to achieve aesthetic preferences rather than functional enhancements, and would cause potential structural damage to the building and disruption to the building access. The Applicant has also raised concerns about the granite pavers being potentially slippery under certain weather conditions. Therefore, the Applicant requests that any liability associated with the replacement of the existing concrete with the granite pavers be transferred from MAB, LLC to M-NCPPC and/or Lofts 24 Condominium Association.



### Lofts 24 Condominium Association

The Lofts 24 Condominium Association wants to have the granite pavers installed as approved in the certified site plan. The pavers will improve the visual appeal of their entryways and public use space, and ultimately increase property values.

### Staff's position

The granite pavers were approved by the Planning Board in the original site plan, and subsequent administrative approvals, and specified in the latest Certified Site Plan for the locations mentioned above. A Notice of Violation was issued on September 12, 2007 (Appendix D), indicating that the granite pavers had not been installed and that the Applicant was legally bound to execute all the features and requirements of the Certified Site Plan. Installation of the granite pavers in conformance with the approved site plan is necessary to avoid a violation action.

The Amendment as originally submitted on May 22, 2008, sought to substitute the granite pavers with 12" x 12" ceramic tiles. However, because the proposed modification of the existing condition was not better or equivalent to the original approval, Staff did not concur with the substitution. The granite pavers were a part of the original design, including the amenity package, approved by the Planning Board, and subsequently approved administrative amendments, and were intended to highlight entryways and give emphasis to the public use space as an amenity for the building and community.

There are three issues concerning the granite pavers that need to be addressed. First, the latest plans submitted on August 15, 2008, reflect the previously approved requirement for the granite pavers, except for their thickness. While the originally approved certified site plan and subsequently approved administrative amendments specified two-inch thick granite pavers, the Amendment proposes two-centimeter, or less than one-inch, thick granite pavers. The Applicant has argued that the two-inch thickness reflected on the original site plan was a mistake – that the thickness was intended to be two centimeters – but has not provided any evidence to support this contention. Staff disagrees that it was a mistake. The paver dimensions are all listed in inches, and in Staff's experience it is highly unusual for two different units of measure to be used together in dimensioning a single feature of a plan. Further, using two-inch thick granite pavers makes better practical sense, because they will be far more durable than two-centimeter pavers would be.

The second issue relates to liability for replacing the existing concrete with the required granite pavers at the building entrances and public use space and the use of brick pavers in the driveway. The Applicant's request for the M-NCPPC or the Lofts 24 Condominium Association to assume liability is highly unusual and inappropriate. The need to remove the concrete and replace it with the required granite pavers is based entirely on the originally approved site plan. The fact that the concrete must be removed is due to the Applicant's failure to comply with the approved site plan, and is not something for which either the Commission or the Condominium Association should take the unusual step of assuming liability.

The third issue relates to concerns of using granite pavers as a non-standard material for entryways and the public use space and potentially being slippery under certain weather conditions. Staff argues that granite can have many different finishes ranging from more to less

polished and it is the responsibility of the Applicant to provide a finish that is appropriate. As street pavers, granite is usually very porous, which makes it non-slippery. On streetscape applications, granite is widely used for accent and to highlight specific features. As an example, the streetscape on Georgia Avenue and Colesville Avenue in front of the Lee Building in downtown Silver Spring incorporates granite pavers.



The streetscape on Georgia Avenue and Colesville Avenue in front of the Lee Building incorporates granite pavers.

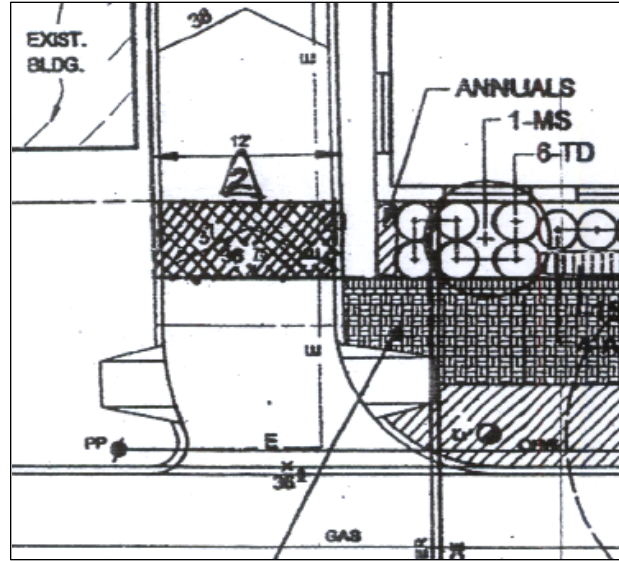
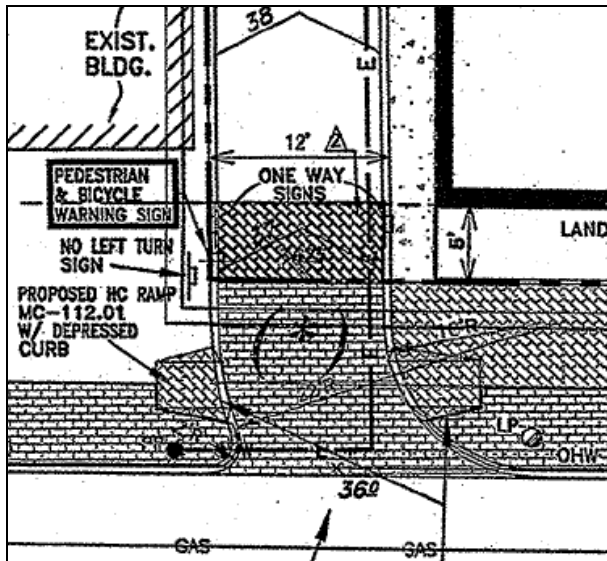
More generally, in reviewing the proposed amendment, Staff views the existing approved plans as creating a comprehensive package of requirements that it is important to comply with in detail. Staff believes that it is very difficult to change individual elements of the approved plan without substantially changing the whole equation of what was originally approved.

## **2. Driveway off Fenton Street**

Although the Certified Site Plans No. 820030250 and 82003025A approved a brick crosswalk for the driveway off Fenton Street, it was never installed. Instead, this area was built in concrete.

### Applicant's position (Appendix C)

The Applicant agrees to install the brick area as shown on the approved amended landscape plan rather than as shown on the approved amended site plan. The site plan shows brick pavement crossing the drive lane as an extension of the adjacent sidewalks, and in addition, a brick area above the crossing, whereas the amended landscape plan shows brick pavement above the crossing area only (see images below). The discrepancy was shown on the original site plan and the administrative Amendment A.



Driveway off Fenton Street as shown on site plan sheet on 82003025A (left image) and as shown on landscape sheet L-1 on 82003025A (right image).

Pedestrian safety has been raised as a concern if the brick pavers are installed because of the lack of a visual cue for pedestrians indicating a vehicular access point that a change in material would create. The Applicant requests that any liability associated with the replacement of the concrete apron with brick pavers be transferred from MAB, LLC to M-NCPPC and/or Lofts 24 Condominium Association.

#### Staff's position

Within the original certified site plan set, landscape sheet L-1 did not show the brick crossing, whereas elsewhere in the set, including site plan, lighting plan, storm water management plan, and erosion and sediment control plan, the brick crossing is shown on the driveway off Fenton Street. Amendment A added an additional brick area of approximately 5 by 12 feet (identified with Triangle 2 in the plans) adjacent to the brick crossing, which was proffered in exchange for the loss of public use space that resulted from the shifting of the building.

Even though the amended landscape sheet still did not show the brick crossing, it is clear that the intent of the proposal was to have a brick crossing, to which Amendment A proffered an additional brick band. A standalone brick band that does not align with the sidewalk or handicap ramps on Fenton Street is not appropriate.

Furthermore, the recommendation to have a brick crossing is consistent with the Silver Spring streetscape standards. Throughout downtown Silver Spring, driveways crossing sidewalks have been required to be installed using brick to give priority to the pedestrian realm. The M-NCPPC will not assume any liability from the installation of the brick crossing on the driveway off Fenton Street.



## **STAFF RECOMMENDATION AND CONDITIONS**

As amended by the conditions of approval, the proposed modifications to the site plan will not alter the overall character or impact the development with respect to the original findings of approval. Further, these modifications will not affect the compatibility of the development with respect to the surrounding neighborhood. This amendment has been submitted to formalize modifications to the site plan that have already been built and are the subject of the Notice of Violation dated September 12, 2007 (Appendix D). Staff recommends approval of Site Plan Amendment 82003025B as shown on the site plan and landscape plans stamped by the M-NCPPC on August 15, 2008, except as modified by the following conditions:

1. The final Certified Site Plan must be consistent with all as-built conditions or as modified by this Amendment.
2. Redirect bollard lighting once seating is installed.
3. Prior to approval of the revised Certified Site Plan, the plans must be revised to reflect the original conditions of approval as follows, subject to Staff review and approval:
  - a. Provide black granite pavers with a 2-inch thickness, mortared in place at the three entryways to the building and public use space at the corner of Bonifant and Fenton Streets. The individual pavers must be 2" x 24" x 24" with a 2" x 12" x 12" matching border as originally approved.
  - b. Add note on plans stating "Remove existing tile pavers at entryways and public use space, and excavate the concrete slab to the necessary depth to accommodate the 2-inch thick granite pavers mortared in place." The granite pavers must be installed so that the surface is flush with the surface of the existing surrounding pavement.
  - c. Document and add a note on plans relative to the 1-year warranty on landscaping from date of planting and based on proper maintenance.

## **APPENDICES**

- A. DPS standards on railings
- B. PEPCO standards on transformer blast walls
- C. Applicant's correspondence
- D. Notice of Violation dated September 12, 2007

# Appendix A



**Alejandro Diaz**

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**From:** "Jiang, Ye" <Ye.Jiang@montgomerycountymd.gov>  
**To:** "Alejandro Diaz" <a.diaz50@verizon.net>  
**Cc:** "Mansouri, Hadi" <Hadi.Mansouri@montgomerycountymd.gov>  
**Sent:** Tuesday, January 24, 2006 11:14 AM  
**Attach:** Preliminary Walk-through1-19.doc

Mr. Diaz,

Attached please find our inspection comments for a preliminary walk-through conducted at Lot 24 last Friday, Jan 19th, 2006. I would like to have a meeting here in the county with your office to discuss the concerns listed in the comments. Please call me if you have any questions.

Thanks,

Ye Jiang, P.E.  
Senior Permitting Services Specialist  
Division of Building Construction  
Montgomery County Government  
255 Rockville Pike, 2nd FL  
P (240)777-6234  
F (240)777-6241

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## Comments to the Preliminary Walk-through for Loft 24 Condo Project

AP # 328076 - 328085

Jan 19th, 2006

### Exterior General:

Stair riser heights shall be 7 inches maximum and 4 inches minimum. Stair tread depths shall be 11 inches minimum. The tolerance between largest and smallest riser or between the largest and smallest treads shall not exceed 3/8 inches in any flight of stair. Per IBC 200, Section 1003.3.3.3 and 1003.3.3.31

Walking surfaces in the means of egress shall comply with IBC 2000, Section 1003.2.7.

Ramp used as part of a means of egress shall have a running slope not steeper than 1:12. Per IBC 2000, Section 1003.3.4.1. Ramps with a rise greater than 6 inches shall have handrails on both sides. Per IBC 2000, Section 1003.3.4.7 and Section 1003.3.11. Ramp shall have landing at the top and bottom of each ramp. Landing shall have a slope not steeper than 2% in any direction, Per IBC 2000, Section 1003.3.4.5

Slope of flared side shall be 1:12, or provide 5-foot wide flat landing with a 1:12 slope ramp on each side. Per ADDAG 4.7.5

### Inside Units General:

The minimum clear width of each door opening shall not be less than 31.75 inches. Per IBC 2000, Section 1003.3.1.1

### Stairs General: (For all three stairs)

Exits shall discharge directly to the exterior of the building. Per IBC 2000, 1006.1

Handrail height, measured above stair tread shall be 34 inches minimum and 38 inches maximum. Per IBC 2000, Section 1003.3.11.1

Provide fire stop system to all penetrations (including ducts, structural members) through fire-resistance-rated walls. Per IBC2000, Section 711.3.1.2

Door opening into the path of egress travel shall not reduce the required width to less than 50% during the course of the swing. Per IBC2000, Section 1003.2.3.1

Penetrations other than those necessary for the purpose of the shaft shall not be permitted in shaft enclosures. Per IBC 2000, Section 707.8.1, 1005.3.4.1, NFPA 2000, Section 7.1.3.2.3.

Penetrations into an exit enclosure assembly are prohibited except for required exit doors, equipment and ductwork necessary for independent pressurization, sprinkler piping, standpipes, and electrical conduit serving the exit enclosure. Per IBC 2000, Section 1005.3.4.1

Missing bolt at steel channel

## Appendix B





**Distribution Engineering, Maryland Division**  
201 West Gude Drive  
Rockville, Maryland 20850  
Telephone: 301-670-8700  
Fax: 301-670-8718

July 24, 2008

Dan Kolakoski  
Eichberg Construction

Subject:  
Padmount Transformer Location Requirements.

Dear Mr. Kolakoski:

According to our phone conversation I am including a copy of Pepco's standard for locating Padmount Transformers adjacent to buildings.

It is imperative that the customer comply with these standards to ensure safety and to reduce any damages as a result of potential Transformer failure events. The ideal design would be to locate the Transformer away from the building. But if this is not an option, the customer may choose to install the Transformer a minimum of 3' away from a non-combustible wall, where there are no doors, windows or air-intake openings. If this is not an option either, a non-combustible wall of at least 1 ft higher than the Padmount Transformer may be built, a minimum of 3' from the Transformer pad.

The attached Pepco standard will provide more details concerning this issue.

Should you have any questions regarding to this matter, please contact me at (301) 548-4311.

Sincerely,

Samson Thomas  
Senior Engineer  
Distribution Engineering - MD





**Distribution Engineering, Maryland Division**  
201 West Gude Drive  
Rockville, Maryland 20850  
Telephone: 301-670-8700  
Fax: 301-670-8718

September 16, 2008

Ms. Judith Meany  
MAP LLC  
38897 John Wolford Rd  
Waterford, VA 20197

Subject:  
Padmount Transformer Location Requirements at Lofts 24

Dear Ms. Meany:

This letter is to provide further clarification on my letter dated July 24, 2008 to Dan Kolakoski regarding Pepco's requirements for Padmount Transformer placement adjacent to a building. I want to further clarify that the minimum distance requirement is to be implemented from the Transformer pad. This is to allow for future service upgrades which may require the need for a larger size Transformer. The non-combustible wall was required at the Lofts 24 project site since the Transformer Pad and thereby the Transformer placement was directly in front and within 10' of a window.

Please refer to Pepco CD Drawing CD.006.01 for further details on this standard.

Should you have any questions regarding to this matter, please contact me at (301) 548-4311.

Sincerely,

Samson Thomas  
Senior Engineer  
Distribution Engineering - MD



## Appendix C



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AUG 15 2008

DEVELOPMENT REVIEW

15850 Crabbs Branch Way  
Suite 200  
Rockville, MD 20855  
Telephone 301-417-0200  
Facsimile 301-975-0169

August 15, 2008

Ms. Sandra Pereira  
M-NCPPC  
Development Review Division  
8787 Georgia Avenue  
Silver Spring, MD 20910

**Re: Lofts 24**  
**Apex Job No.: 150201**

Dear Sandra,

In response to your June 19, 2008 email and subsequent July 9 meeting we have revised the Lofts 24 plans and are resubmitting for your review and approval. To aid in your review we have listed your comments and our response as to how we have addressed them.

- 1) Granite pavers need to be shown on the plans and installed per the approved site plan. Please show the entryways with granite extending the full width of the adjacent planter areas.  
**Response: We have revised the plan to show black granite pavers. As discussed we have changed the detail to show 2-centimeter paver thickness instead of 2 inches, which was incorrect. This information can be found on the landscape plan.**
- 2) Plans need to show elliptical benches per the approved Site Plan, rather than square shaped benches.  
**Response: Per our discussion at the meeting we have revised the plans to show round concrete benches. The photos /samples of the benches will be submitted under separate cover. The bench detail is located on the Landscape Plan.**
- 3) Bollard lighting is acceptable.  
**Response: No action required**
- 4) Upgrade wattage of all lights in the rear of the building to a minimum of 100 Watts, ideally 250 Watts.  
**Response: We have revised the plan to specify 200 watts on the type A (S-twin) and 175 watts on the type B-2 lights.**
- 5) Floodlight style is acceptable.  
**Response: No action required**
- 6) Candytuft groundcover needs to be installed per the approved Landscape Plan since this has not yet been approved.  
**Response: Candytuft ground cover will be installed per the approved Landscape Plans.**
- 7) The yew shrub needs to be installed per the approved Landscape Plan.

**Response: The yew shrubs were planted around the transformer. The shrubs were arranged to fit due to the transformer location.**

- 8) The Honey Locust tree needs to be shown per the approved Landscape Plan provided that its location is adjusted in response to the larger PEPCO transformer. Some shrubs might need to be relocated.

**Response: The Honey Locust has been added to the plans in the island with the PEPCO transformer.**

- 9) Three Nandina shrubs need to be installed per the approved Landscape Plan.

**Response: The shrubs will be installed per the approved plan.**

- 10) Dumpster area needs to be adjusted in the plans to fit 4 cubic yard dumpster. Consider relocating metal side poles to provide a wider opening.

**Response: Per the client's email a 4 cubic yard dumpster can fit in the existing dumpster enclosure. The metal side poles have been adjusted as requested.**

- 11) Landscape Plan shows two Magnolia trees which is consistent with the approved Landscape Plan. This is acceptable.

**Response: Magnolia will be installed per the approved plan.**

- 12) Provide documentation justifying not installing the skylights (see email below). **Response: See the attached approved plan revision that removed the skylights.**

- 13) Remove railing from sidewalk off Bonifant Street into rear parking lot. Install wall next to the PEPCO transformer into the planting area (as shown on the site plan amendment drawings) rather than on the sidewalk (as currently built).

**Response: The railing was required by the Montgomery County Department of Permitting Services (MCDPS) during construction. We have included copies of correspondence from MCDPS. The wall adjacent to the PEPCO transformer was required by PEPCO. See enclosed copies of correspondence from PEPCO.**

- 14) Correct amended landscape plan drawings to show brick paving extending to Fenton Street.

**Response: Per our community outreach meeting the members of the community did not want brick in the driveway. As discussed at our meeting we feel that the concrete serves to alert the people in vehicles and the pedestrians that there is a pedestrian crossing in this driveway, which has limited sight distance.**

In addition we have revised the plan to show current site conditions in the areas described below.

- Added 6-inch step and depressed curb at the northwest end of the parking lots.
- Changed the concrete pad and wall at the transformer to reflect existing site conditions.

Also in response to your August 11 email we offer the following.

- Confirmation that lights in the rear can support higher wattage. **Response: MAB has spoken to the manufacture and confirmed that the lights can support the higher wattage.**
- Revised photometric plan with new wattages and/or lights location. **Response: See the enclosed photometric study.**



- Submit photos showing surface treatment of proposed benches. **Response: Will be submitted by the client under separate cover.**
- Confirm 1-year warranty on newly installed plant material. **Response: A one year ( from the date of plant installation, based on proper maintenance) warranty as granted to MAB LLC by the Landscape installer will be transferred to the Lofts 24 Condominium Association. We have been informed by our contractor that the landscaping should be installed no later than the end of September 2008. Unless otherwise directed we request a final landscaping inspection at the time of planting. We will contact your inspector.**

We hope that this letter helps in your review. Please contact us or representatives of MAB LLC if you require additional information.

Sincerely,  
**Apex Engineering**



Karen V. Carpenter RLA

cc: Judith Meany – MAB LLC  
Gus Bauman - Beveridge & Diamond, P.C.  
Terry Downs – MAB LLC

MAB LLC  
JUDITH A. MEANY, MANAGING MEMBER  
38897 JOHN WOLFORD ROAD  
WATERFORD, VIRGINIA 20197  
703-926-8643/540-882-3258 FAX

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OCT 20 2008

DEVELOPMENT REVIEW

October 15, 2008

Ms. Sandra Pereira  
Montgomery County Planning Department  
Development Review Division  
Maryland-National Capital Park and  
Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910-3760

RE: Site Plan 8-20030250- Lofts 24- Silver Spring Park  
Follow-up to August 27, 2008 Letter

Dear Sandra,

Thank you for your letter of August 27, 2008 regarding staff recommendations for the outstanding site plan issues remaining for Site Plan 8-20030250- Lofts 24-Silver Spring Park. MAB, LLC has reviewed each item and obtained additional documentation where appropriate. MAB, LLC is happy to report, as you see in the following responses, that we are down to 1-2 issues as explained below. For your convenience, I will track my responses in the order of issues from your August 27, 2008 letter as follows.

- 1) MAB, LLC has investigated the suggested ripping out and reconstruction of the public open space, the two private entryways including stairs and landings off Fenton Street, and the private entryway, stairs and landing to the sprinkler pump room off Bonifant Street (also referred to as the fire pump room). These suggested actions are solely for aesthetic reasons and would achieve little if any functional benefit. They would cost MAB, LLC, a small business, at least \$120,500. This would cause potential damage to the structural building components as well as great disruption to the residents of the building. In fact, the project's general contractor, Eichberg Construction of Gaithersburg, Maryland, will not agree to perform this work because of the risks involved, even if paid in full. These actions would add no value to the



property. Thus, this would be “economic waste” under Maryland law. I will address each of these four items separately.

The cost estimate is at least \$29,000 to rip out and reconstruct the existing brick and textured concrete aggregate material installed in the public open space sidewalk area (see attached letter and cost estimate report from Eichberg Construction dated September 25, 2008). The installation of the non-standard exotic flamed granite product in a high pedestrian traffic area coupled with wet weather conditions at a sloped location continues to raise liability concerns. The traditional brick and textured aggregate concrete, which are currently installed and performing as intended, do not present this risk. Because MAB, LLC opposes installation of the substituted material at these locations it should not bear the burden of potential liability and respectfully requests indemnification from MNCPPC and/or Lofts 24 Condominium Association in the event the installation is compelled.

With respect to the private entrances to the building, the issues are similar. I contacted the Fire Code and Life Safety reviewer at Montgomery County Department of Permitting Services, Division of Building Construction, who referenced two code sections that must be met regarding installation of the granite product in the stairs and landings. According to the IBC code Section 10.03.4, all walking surfaces of the means of egress shall have a slip resistant surface and be securely attached. The National Fire Protection Association Life Safety Code Section 7.1.6.4 requires that a surface be non-slip under all weather conditions.

With the contemplation of additional construction of the property (landscape area) and the building structure, MAB, LLC would be required to receive final approval by the Department of Permitting Services for any changes to the original construction. As DPS did not review these granite materials in the original or amended Site Plan for compliance with Fire and Life Safety codes, it is not yet known whether the granite pavers will meet these code requirements.

It should be noted that the private entryway off Bonifant Street serves no residential units, only the building’s sprinkler pump room. At the time of the original site plan approval, this private entryway was planned to serve two private units. Two field conditions changed this entryway design. Low water pressure in the Silver Spring quadrant mandated the installation of an enclosed fire pump and a building foundation shift occurred requiring an amendment to the Site Plan. The architectural redesign of the building entrance off Bonifant Street thus changed the entryway to the sprinkler pump room for the exclusive use of fire personnel. In the entry redesign of the building along Bonifant Street for the Site Plan amendment, only the location of the building envelope was addressed; corresponding construction issues and material changes were overlooked.

Returning to the specific private entryways, the cost estimate to rip out and reconstruct each of the two entrances off Fenton Street is at least \$28,000 for Entrance One (8310 entrance) and at least \$30,000 for Entrance Two (8320 entrance) (see September 25, 2008 Eichberg Construction cost estimate report). Each entrance accesses only 2 units. Brick



pavers that are consistent with Silver Spring redevelopment urban design guidelines are being suggested for removal by staff along with concrete stairs and landings. Reconstruction at these locations is problematic. The cable enclosed wiring emanating from the fire pump connection is under the landing slab and could be adversely affected by excavation activity. No functional improvement or enhanced value to the owners of Lofts 24 condominiums would be gained by replacing brick and concrete with granite pavers. MAB, LLC requests that any and all liability related to this recommendation be transferred from MAB, LLC to MNCPPC and/or Lofts 24 Condominium Association. Such indemnification is necessary since construction disturbances to retrofit these stairs and landings may result in structural problems not currently existing.

The cost estimate to rip out and reconstruct the entryway, stairs and landing at the fire pump room entrance off Bonifant Street is at least \$33,500 (see September 25, 2008 Eichberg Construction cost estimate report). This cost is the highest because of additional stairs. Disruption of this entryway is the most problematic because all fire pump connections, all electrical wiring servicing the sprinkler pump room and connected throughout the building as well as the water line to the building are directly under these stairs and landing. It is highly likely that these structural elements of the building would be compromised and damaged during demolition and reconstruction. MAB, LLC will not take any responsibility for reconstruction of this area. MAB, LLC requests that any and all liability related to this recommendation be transferred from MAB, LLC to MNCPPC and/or Lofts 24 Condominium Association. Such indemnification is necessary since construction disturbances to retrofit these stairs and landings may result in structural problems not currently existing.

In past discussions with Eichberg Construction, they have indicated that they are not prepared to take any liability for such work and, indeed, would not perform the reconstruction of any building entrances. This will compound liability and warranty relationships between, MAB, LLC as developer, Eichberg Construction, as general contractor, Lofts 24 Condo Association, and individual unit owners of the building.

In summary, demolition of the existing entrance infrastructure is a wasteful expenditure to achieve arguably aesthetic preferences rather than functional enhancement, and presents extreme construction issues and unit disruption with major liability if anything goes wrong.

2) Agreed per Montgomery County Planning Department recommendation. MAB, LLC will install 4 small concrete round benches in locations shown on the approved site plan. A bench detail showing mounting to the ground is enclosed.

3) Agreed per Montgomery County Planning Department recommendation. No action required.

4) Agreed per Montgomery County Planning Department recommendation. Installation shall be scheduled to occur prior to the Montgomery Planning Board meeting on November 20, 2008.

5) Agreed per Montgomery County Planning Department recommendation. No action required.

6) Agreed per Montgomery County Planning Department recommendation. Annuals, primarily peonies in these areas, will be removed and installation of the candytuft ground cover will be planted per the Landscape Plan. Landscape installation is scheduled for October 14-16, 2008 and re-inspection will be requested at that time.

7) Agreed per Montgomery County Planning Department recommendation. An additional yew scrub will be planted along Fenton Street as per the Landscape Plan. Landscape installation is scheduled for October 14-16, 2008 and re-inspection will be requested at that time.

8) Agreed per Montgomery County Planning Department recommendation. A Honey Locust tree will be planted in the island adjacent to the Transformer Pad. Landscape installation is scheduled for October 14-16, 2008 and re-inspection will be requested at that time.

9) Agreed per Montgomery County Planning Department recommendation. The two healthy yew scrubs will be removed and replaced with two Nandinas. Landscape installation is scheduled for October 14-16, 2008 and re-inspection will be requested at that time.

10) Agreed per Montgomery County Planning Department recommendation. No action required.

11) Agreed per Montgomery County Planning Department recommendation. The site plan will be changed to reflect one magnolia tree at this location.

12) Agreed per Montgomery County Planning Department recommendation. No action required.

13) With respect to part 1 of this item, the installed railing on sidewalk off Bonifant, agreed per Montgomery County Planning Department recommendation. No action required.

With respect to part 2, the PEPCO blast wall, PEPCO required the blast wall at the current location (see attached letters from PEPCO dated July 24, 2008 and September 16, 2008). MAB, LLC has measured the distance from the blast wall to the edge of the transformer pad as required by PEPCO. Measuring several points from the blast wall to the perimeter of the transformer pad, the measurement ranges from is 3' to 3'1 ½". To maintain compliance with the PEPCO standards, the blast wall cannot be moved.

14) The Lofts 24 Site Plan sheet and the Landscape Plan sheet L-1 originally approved by the Montgomery County Planning Board as part of an Opinion Letter dated June 20, 2003



issued for Site Plan # 03025 are in conflict. The Site Plan sheet shows brick pavement crossing the drive lane at the Fenton Street entrance while the Landscape Plan sheet L-1 does not show brick pavement at this location. This conflict was continued on the two amended sheets approved by the Montgomery County Planning staff as Site Plan 02035A on January 27, 2005. The cost estimate to rip out and reconstruct the drive lane with brick pavement is at least \$31,100. The discrepancy with these two pages causes MAB, LLC significant economic harm. In addition, no functional improvement or enhanced value to the owners of Lofts 24 condominiums would be gained by replacing the concrete drive apron with brick pavers. Further, at this location, the lack of a visual cue for pedestrians through material changes from bricked sidewalk to a drive lane should be seriously considered. East Silver Spring community members made this point at our community meeting in arguing for maintaining the visual cue with the concrete apron instead of replacing the area with brick pavers. MAB, LLC requests that any and all liability related to this recommendation be transferred from MAB, LLC to MNCPPC and/or Lofts 24 Condominium Association. Such indemnification is necessary since reconstruction eliminates a completely safe and attractive existing condition.

After investigating this situation, it may be safer for pedestrians not to continue the brick pavement. With the continuation of the brick pavement as on the sidewalk, pedestrians walking along Fenton Street from both directions will have no change of materials warning that a car entrance is located at that location. The drive lane concrete material is a visual warning to pedestrians that cars may turn into this location, especially since parallel parking along Fenton Street blocks sight distance for both vehicular and pedestrian traffic.

MAB, LLC agrees with the staff recommendation to install the brick area of approximately 60 sq. ft. (9.5' X 6.5') as shown on the approved amended landscape plan and proffered in exchange for the loss of public open space that resulted from the shifting of the building. As contained in Note 14 Triangle 2, the brick pavement off the Bonifant side of the building of 109.5 sq. ft., (4' X 28.5') combined with the brick pavement on the drive lane totals 169.5 sq. ft of brick pavement in the public open space to compensate for the loss of 41.4 sq. ft due to the shifting of the building footprint.

Additional items revised to reflect current conditions:

- a. Agreed per Montgomery County Planning Department recommendation. No action required.
- b. Agreed per Montgomery County Planning Department recommendation. No action required.
- c. A repair to the building basement wall along Bonifant Street in June 2008 required that the flowering hydrangeas be temporarily removed. They have been restored and cut back to promote healthy re-growth. The hydrangeas are showing strong re-growth, are now

seasonally dormant and will bloom again in the Spring. After further inspection, one hydrangea may have been inadvertently removed and will be replanted. A picture of the current condition dated September 17, 2008 is attached.

We look forward to discussing this with you. Thank you very much.

Sincerely,

  
Judith A. Meany, Ph.D., FAICP  
Managing Member

cc. w/o attachments

Robert Kronenberg, Development Review Division  
Joshua Kaye, Development Review Division  
Gus Bauman, Beveridge and Diamond  
Dan Kolakoski, Eichberg Construction  
Alex Diaz, Project Architect  
Terry Downs, MAB, LLC  
Karen Carpenter, APEX Engineering  
Thomas Schild, Esq., Lofts 24 Condominium Assoc.



November 3, 2008

Ms. Debra Daniel  
Associate General Counsel  
Maryland-National Capital Park and Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910-3760

RECEIVED  
NOV 04 2008  
DEVELOPMENT REVIEW

Re: Site Plan 8-20030250- Lofts 24 Condominium ("Site Plan")  
Application of Economic Waste Doctrine to Concrete Tear-Out

Dear Ms. Daniel:

I represent MAB LLC ("MAB") in connection with its application to amend the above-referenced Site Plan, set for hearing before the Planning Board on November 20. It is my understanding that all but a few of the issues have been successfully resolved. The purpose of this letter is to raise to your attention Maryland's "economic waste" doctrine as it would apply to two remaining issues, namely the proposed replacement of concrete improvements at the locations described at items 1 and 14 of my client's October 15, 2008 letter to Sandra Pereira (attached) (the "Tear-out Work"). For the reasons set forth below, the equitable considerations behind this doctrine militate strongly against the thought of possibly requiring MAB to perform such disruptive, wasteful work.

**A. Brief Factual Summary**

MAB has completed construction on Lofts 24, a handsome 24-unit loft condominium located at the corner of Fenton and Bonifant Streets in downtown Silver Spring. The building was constructed according to the Site Plan that, among other things, showed the use of exotic flamed granite for the walkways and stairs in three entry areas as well as in a public use space located on the corner of Fenton and Bonifant Streets. In addition, the Site Plan sheet showed brick paving crossing the drive lane at the Fenton Street entrance. Notably, a Landscape Plan sheet, also approved by MNCPPC, showed concrete pavement at this drive lane location.

During construction, the contractor used traditional brick and textured aggregate concrete, which are currently installed and performing as intended, in lieu of flamed granite. And concrete was applied at the drive lane at the Fenton Street entrance instead of brick pavers.

Ms. Debra Daniel  
November 3, 2008  
Page 2

These modifications were noted on March 30, 2006 by one of MNCPPC's inspectors, leading to my client's current efforts to amend the Site Plan.

Conforming strictly to the Site Plan would require MAB to rip out and reconstruct in a residentially occupied building the public space, the two private entryways including stairs and landings off Fenton Street, and the private entryway, stairs and landing to the sprinkler pump room off Bonifant Street; MAB would also have to remove and reconstruct the drive lane with brick (collectively, the "Tear-out Work"). In both instances, the suggested actions add no value to the property, pose significant disruption and potential risks to current residents and the structure itself, and would achieve no functional benefit. And it would cost MAB, a very small company, over \$150,000.

#### **B. Maryland's Economic Waste Doctrine**

The economic waste doctrine is a well-established principle of law developed in the context of construction disputes involving alleged non-conformities in constructed improvements, to guard against the specter of burdening a contractor or builder with a "cost to cure" award that far exceeds the actual injury caused by the underlying non-conformity. *Andrulis v. Levin Construction Corp.*, 331 Md. 354, 366-75, 628 A.2d 197 (1993).

Maryland's Court of Appeals explained the circumstances under which it is applicable:

First, economic waste is a limitation on the ordinary rule of [cost to cure] damages . . . .

Second, the concept of waste represents a substantial degree of disproportionality, and that disproportionality must be determined in relation to something else . . . . [W]here we deal with improvements to real estate, in order to demonstrate that the cost of cure mounts up to economic waste, considerable weight must be given to any difference between the value of the property after the corrective work is done with the value of the property absent the corrective work. That difference is then compared to the cost of cure.

*Id.* at 374-75.

Although *Andrulis* involved a dispute between a homeowner and a builder, there is directly analogous case law where courts have applied the economic waste doctrine to similar disputes involving allegedly non-conforming construction improvements between governmental entities and construction contractors. Prior to *Andrulis*, the Court of Special Appeals recognized and discussed a variation of the rule in a dispute between a governmental entity and private party. See *Board of Education of Charles County v. Plymouth Rubber Company*, 82 Md. App. 9,



Ms. Debra Daniel  
November 3, 2008  
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27, 569 A.2d 1288 (1990), quoting *Hooten v. Kenneth B. Muman Plumbing and Heating Company, Inc.*, 271 Md. 565, 574, 318 A.2d 514 (1974) (The non-breaching party is entitled to that which fulfills the warranty, not to a system designed to exceed that standard or one that “results in unreasonable economic waste.”).

The economic waste doctrine has also been applied in other jurisdictions on numerous occasions in disputes involving allegedly non-conforming construction improvements between governmental entities and construction contractors. See, e.g., *Granite Construction Co. v. United States*, 962 F.2d 998, 1007 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 965 (1993) (The U.S. Government cannot require strict compliance to specifications when “the cost of correction is economically wasteful and the work is otherwise adequate for its intended purpose.”); *Toombs & Co., Inc.*, ASBCA Nos. 34590 et al., 91-1 B.C.A. (CCH) 1 23,403 (Sept. 18, 1990) (The economic waste doctrine should be applied when the Government requires the replacement of non-conforming work that has no adverse aesthetic impact or proven operational or sanitary disadvantage.); *County of Maricopa v. Walsh and Oberg Architects, Inc.*, 494 P.2d 44 (Ariz. Ct. App. 1974) (The court applied the economic waste doctrine to limit damages for non-conforming part of new county complex.).

Finally, the principles of fairness undergirding the economic waste doctrine were explained well by Professor Corbin in the following passage quoted by the *Andrulis* court:

In many . . . cases, the structure as it exists, even though it is not exactly in accordance with the contract requirements, is such that it will render substantially all the service that the structure contracted for would have rendered; and reconstruction and completion in accordance with the contract may be possible only at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method involving such economic waste.

*Andrulis*, 331 Md. at 371, 638 A.2d at 205 (quoting A. Corbin, *Corbin on Contracts* § 1089, 485-87 (1964)).

### **C. Application of the Doctrine**

The Tear-out Work being contemplated fits squarely within the doctrine of economic waste. A comparison between the value of Lofts 24 condominium units after the Tear-out Work with the value of the property absent the Tear-out Work would be a difference of zero. Whether MAB were to perform the entire Tear-out Work or none of it, property values would remain unaffected (assuming the Tear-out Work caused no structural damage to the building). Neither the Lofts 24 Condominium Association nor the unit owners, nor anyone else, has suffered or will suffer any injury as a result of the subject pavement installations.

Ms. Debra Daniel  
November 3, 2008  
Page 4

The “disproportionality” between this zero value differential on the one hand and the “cost of cure” involved in performing the Tear-out Work on the other is striking. As noted above, estimates MAB has received for such work from Eichberg Construction, the project’s original contractor, exceed \$150,000.00. (The September 25, 2008 ECI letter to MAB, with accompanying pricing documentation, has been provided to Planning Staff.) These estimates come with numerous exclusions and qualifications, meaning that the final cost numbers would most likely be considerably higher.

Moreover, there are additional, compelling reasons for not undertaking the considered Tear-out Work. Tellingly, Eichberg Construction has informed MAB it would not perform the tear-out and reconstruction of any building entrances given the serious potential risks to the structural integrity of the building that such work would entail. And at a meeting with East Silver Spring community members, we learned that residents in the area prefer concrete drive lanes because they provide a visual cue amongst the brick sidewalks to look for turning cars along busy Fenton Street. At the same time, the thought of possibly undertaking the Tear-out Work raises significant concerns regarding potential liability and unit disruption for building residents.

We submit that, in light of the negligible benefit that may be achieved, burdening a small company such as MAB with the overwhelming cost of the Tear-out Work would be both “imprudent and unreasonable.” And given the real risk involved with such work, it has the potential to cause far more harm than any potential good.

Thank you very much for your consideration of this matter, and we look forward to discussing it with you.

Sincerely,



Gus Bauman

cc: ✓ Sandra Pereira, Development Review Division  
Robert Kronenberg, Development Review Division  
Joshua Kaye, Development Review Division  
Judith Meany, MAB, LLC  
Alex Diaz, Project Architect  
Terry Downs, MAB, LLC  
Karen Carpenter, Apex Engineering

## Appendix D





**NOTICE OF VIOLATION**

September 12, 2007

Ms. Judith Meany  
38897 John Wolford Road  
Waterford Virginia 20179

Re: Inspection results  
Lofts-24  
Site Plan #: 8-20030250

Dear Ms. Meany:

During June of 2007 re-inspections for compliance with the approved site plan was performed at the Lofts-24 site. The property is governed by the approved site plan 8-20030250. Your signature appears on the site plan and associated developer's certificate, which has legally bound you to execute all the features and requirements of the site plan. Pursuant to the site inspection the following elements of the approved site plan were missing or require correction:

1. Granite pavers have not been installed for entryways and the NE corner of building.
2. Elliptical benches have not been installed for seating area at NE corner of building.
3. Bollard lighting style installed at NE corner of building does not match plan details (as depicted on sheets A-0.5 & Sheet L-1); the bollards are not oriented to illuminate the seating area per approved lighting plan.
4. Only 3 of the 4 lights required wall mounted lights have been installed on the retaining wall (west side of property).
5. The floodlights installed throughout the site do not match detail for lighting depicted on Sheet A-0.4.
6. The Candytuft (groundcover) plantings were absent from the site.
7. A yew shrub is missing from landscape bed along Fenton Street.

8. The Honey Locust (shade tree) is missing from the landscape bed at the SW corner of the building. The shrub species and locations installed at this location also differ from approved landscape plan.
9. 2 yew shrubs were planted adjacent to the dumpster enclosure instead of the required 3 Nandina shrubs.
10. The 4 cubic yard dumpster is not present (per detail 1 sheet 10 of 10). The metal sleeve (to receive steel cane) per detail 2-note 14 was not installed. Furthermore, doors of dumpster enclosure do not open wide enough to accommodate required dumpster.
11. A Magnolia tree on the West side of the building (near the handicapped parking space) was not installed.
12. Skylights depicted on sheets 3&4 of site plan have not been installed.
13. Internal walks installed are narrower than the minimum 4' width required (per Planning Board condition of approval item 1.b.)
14. Brick paving has not been installed at Fenton street driveway entrance. Pedestrian and Bicycle warning sign also absent from this location.

As a result of the above-mentioned items, the site is not in compliance with the approved site plan and associated Planning Board conditions of approval. The deficient landscape items must be corrected as soon as possible, but no later than October 31, 2007. All other site plan discrepancies must be corrected by November 30, 2007. Failure to comply with these corrective measures by the dates specified will result in the issuance of civil citations for non-compliance with the approved site plan.

If you have any questions concerning this notice or any corrective requirements please contact me at 301-495-4521, or Robert Kronenberg at 302-495-2187.

Sincerely,



Marco Fuster  
Development Review Division

Attachment: Site photos



Granite paving has not been installed. Benches not present. Lighting not directed toward seating area.



Granite paving has not been installed throughout site (required at entrances).





Only 1 of 2 required shrubs is present at left side of image. Candytuft groundcover missing from front of plantings bed and from entire site.



Brick paving not installed at crosswalk, sign missing.



Yew shrubs have been substituted for the required Nandina shrubs.



Dumpster not present, doors of enclosure do not open wide enough to accommodate required dumpster. Metal sleeve not installed.





3 of the 4 required lights were installed within retaining wall.



Large transformer box present; required tree absent from bed. Species and locations of landscape shrubs differ from approved plans.



Installed lighting fixtures do not match style per plan details.



Magnolia tree missing from right side of landscape bed.



Internal walkways installed are narrower than the minimum 4' width required.





Internal walkways installed are narrower than the minimum 4' width required.

