

MEMORANDUM

TO: Montgomery County Planning Board of the
Maryland-National Capital Park and Planning Commission

FROM: Linowes and Blocher LLP
Barbara A. Sears
Scott C. Wallace

DATE: November 18, 2005

RE: Bozzuto Homes, Inc. - Clarksburg Town Center - Multi-Family
Buildings 1-7 and 9-12 (the "Bozzuto Buildings") - Site Plan Nos. 8-
98001 and 8-02014, as amended

I. INTRODUCTION – PROCEDURAL BACKGROUND

Bozzuto Homes, Inc., BA Clarksburg, LLC and BA Clarksburg Two, LLC (collectively "Bozzuto") are the owners, builders, or contract purchasers of certain multi-family buildings in Clarksburg Town Center ("CTC") identified as Buildings 1, 2, 3, 4 and 9 in Phase I of the CTC and Buildings 5, 6, 7, 10, 11 and 12 in Phase II of the CTC (collectively, the "Bozzuto Buildings").¹ Between 2002 and 2003 Bozzuto entered into contracts to purchase site-planned, record platted and "finished" pad sites, with the right to build an approved number of units in multi-family buildings thereon, from Terrabrook Clarksburg, LLC, which at the time of purchase by Bozzuto was the developer of the CTC ("Terrabrook"). In this regard, Bozzuto has taken title to, constructed and sold units to third parties in Buildings 1, 2, 3 and 4. Bozzuto has taken title to Buildings 7, 9, 10, and 11, and partially constructed and sold units to third parties in Buildings

¹ Buildings 7, 9, 10, 11 and 12 are also known as the Manor Homes.

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7 and 9; construction has not started on Buildings 10 and 11. Finally, Bozzuto has contracted to purchase but not taken title yet to Buildings 5, 6 and 12.

The Bozzuto Buildings were approved for construction pursuant to three Site Plans duly reviewed and approved by either the Montgomery County Planning Board (the "Planning Board") following a public hearing, or by Planning Board Staff as amendments to Board-approved Site Plans: (1) Site Plan No. 8-98001G for (Buildings 1-4), approved as a Site Plan Amendment to Site Plan No. 8-98001 (the "Original Phase I Site Plan") by Planning Board Staff on October 31, 2002 (the "October 31, 2002 Site Plan"); Site Plan No. 8-02014 for Buildings 5 and 6 approved by the Planning Board by Opinion dated June 17, 2002, with Signature Set approval on October 14, 2004 (the "Original Phase II Site Plan"); and Site Plan Nos. 8-98001G and 8-92014B for Buildings 7 and 9-12 approved by the Planning Board by Opinion dated March 21, 2005, with Signature Set approval pending (the "Manor Homes Amendment") (collectively the "Bozzuto Buildings Site Plans") (Exhibits "1", "2", and "3").

Further, Bozzuto Buildings 1, 2, 3 and 4 were constructed by Bozzuto pursuant to Building Permit Nos. 287893, 288610, 301788, and 301791, respectively, which were duly reviewed and approved by the Planning Board and reviewed, approved, and issued by the Montgomery County Department of Permitting Services ("DPS") (Exhibits "4", "5", "6" and "7"). All of the units in Buildings 1 through 4 with the exception of one model unit in Building 1 have been sold to third-party purchasers. Bozzuto Buildings 7 and 9 are partially

under construction pursuant to Building Permit Nos. 353463 and 353465, respectively, duly reviewed and approved by the Planning Board and reviewed, approved and issued by DPS (Exhibits "8" and "9"). Finally, construction has not yet begun on Bozzuto Buildings 5, 6, 10, 11 and 12.

Beginning in mid-2004, culminating in a letter to Planning Board Chairman Derick Berlage dated January 25, 2005, a group of residents in CTC, identified as the Clarksburg Town Center Advisory Committee ("CTCAC") made allegations of height violations by residential buildings, including Bozzuto Buildings 3 (constructed and sold to third parties) and 6 (not yet constructed). The CTCAC claimed, in part, that Building 3, although constructed at four stories, and proposed Building 6, although not constructed, exceeded 45' in height, which CTCAC claims is the maximum height in feet allowed for multi-family buildings in the CTC. In response, Bozzuto argued, *inter alia*, that the applicable height standard is four stories for residential buildings in the CTC, without a height limitation in feet (See Exhibit "10", March 8, 2005 Letter from Linowes and Blocher to the Planning Board). This position was shared by Planning Board Staff as reflected in the December 30, 2004 letter from Rose Krasnow to Amy Presley on behalf of CTCAC (Exhibit "11") and the April 8, 2005 Staff Report prepared for the

April 14, 2005 Planning Board hearing to review CTCAC's claims, discussed below (Exhibit "12").²

On April 14, 2005, the Planning Board held a public hearing to determine whether there were height violations in the CTC. At the April 14, 2005 hearing, the Planning Board, by a vote of 4 to 1, determined that the permitted height in the CTC for multi-family buildings was four stories and, therefore, no height violations had occurred at the CTC with regard to Bozzuto Buildings 3 and 6.³

Thereafter, by letter dated April 22, 2005, CTCAC requested reconsideration of the Planning Board's decision. On May 5, 2005, the Planning Board granted the CTCAC's request for reconsideration. The Planning Board held a public hearing on the matter on July 7, 2005, and voted to reverse its previous determination that a maximum height of four stories for multi-family buildings was permitted in the CTC, although no relevant evidence was offered to support such a reversal.⁴ Bozzuto appeared at the public hearing and presented relevant testimony and evidence supporting its position that it had obtained confirmation from Ms. Witthans of the applicable height criteria as being four stories, with no limitation by feet, contemporaneous with its executing the October 31, 2002 Site Plan. Bozzuto also testified that as part of the

² As Bozzuto testified at the November 3, 2005 on the CTCAC's alleged violations, neither Bozzuto's position nor Staff's position regarding permitted height were based in any way on the Site Plan data table with hand-written notations presented by Wynn Witthans of the Planning Board Staff at the April 14, 2005 hearing.

³ The record of the April 14, 2005 hearing is incorporated herein by reference.

⁴ The record of the July 7, 2005 hearing is incorporated herein by reference.

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October 31, 2002 application materials, it submitted architectural drawings to Ms. Witthans showing Building 3 as being 53' in height. Further, Bozzuto subsequently obtained Building Permits approved by the Planning Board, constructed Building 3 pursuant thereto to obtain a Use and Occupancy Permit for Building 3, and sold Building 3 to third-party purchasers, all in accordance with applicable law. (See June 22, 2005 letter from Linowes and Blocher to the Planning Board, Exhibit "13".) To date, the Planning Board has not issued a written opinion setting forth its finding of violations made at the July 7, 2005 hearing.

Subsequently, CTCAC, by and through its counsel in multiple letters to the Planning Board and in oral testimony at public hearings, has made numerous additional allegations of violations, with varying specificity and clarity, of various County zoning and subdivision laws with regard to the development of the CTC, including, but not limited to, alleged violations of (1) development standards, such as rear, side and building setbacks and height; (2) provision of amenities; (3) MPDU requirements; (4) parking; and (5) grading (collectively the "Additional Allegations"). With regard to the Bozzuto Buildings, CTCAC alleges violations of (1) rear yard, side yard, and minimum space between buildings for Buildings 7 and 9; (2) minimum space between buildings for Building 10, which has not been constructed; and (3) height for Building 2. CTCAC also alleges violations regarding the grading in the vicinity of Buildings 1 and 2. CTCAC also generally alleges that various Site Plan approvals for development in the CTC, including Site Plans approved by the Planning Board following public hearings and

approved by Staff as minor amendments to Board-approved Site Plans, are invalid due to various, and sometimes confusing, theories: The Planning Board held hearings on the Additional Allegations on October 6 (not involving Bozzuto Buildings), October 25, and November 3, 2005, and held the record open until November 18, 2005 for parties to submit additional testimony.⁵

With regard to CTCAC's Additional Allegations pertaining to violations of development standards for Buildings 2, 7, 9 and 10, Bozzuto provided expert testimony at the November 3, 2005 hearing from David Little, a registered professional engineer and a principal in the civil engineering firm of Gutschick, Little & Weber, that demonstrated: (1) Buildings 2, 7 and 9, to the extent constructed, have been constructed in full compliance with all applicable development standards including height, setbacks and separation between adjacent buildings; (2) Building 10, which is not yet constructed, as approved by the Planning Board complies with all applicable development standards, including separation between adjacent buildings; and (3) all grading associated with Buildings 1 and 2 has been completed in accordance with all applicable development approvals. A summary of Mr. Little's testimony presented at the November 3, 2005 hearing, and the scaled plans reviewed at the public hearing in support of his testimony,

⁵ Linowes and Blocher, on behalf of Bozzuto, made written and verbal objections for the record to the prosecution of the Additional Allegations at the public hearings on the grounds that Bozzuto was not given due notice of the Additional Allegations as required by law. The grounds for Bozzuto's objections are set forth in letters to the Planning Board dated September 27, 2005 and October 25, 2005, attached hereto as Exhibits "14" and "15", which are incorporated and reasserted herein by reference. In this regard, the Planning Board has failed to follow the requirements of Section 59-D-3.6 of the Zoning Ordinance, failed to meet the required burdens of proof and failed to offer Bozzuto due process of law and continues to do so. In the present posture of this case, all allegations of violations as to Bozzuto, Newland and the other builders in CTC should be dismissed.

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have been submitted into the record of this matter, and Bozzuto reasserts and incorporates by reference the findings of Mr. Little set forth therein.

With regard to CTCAC's general allegation that the Site Plan approvals pertaining to the development of the CTC, including the Bozzuto Buildings Site Plans, are invalid, as discussed in detail below, CTCAC's claims necessarily ignore both applicable County law as set forth in Sections 59-D-2.6 and 59-D-3.7 of the Zoning Ordinance, allowing for minor site plan amendments to be approved administratively by Staff, but also the clear language of Condition 38 of the Opinion dated March 3, 1998 approving the Original Phase I Site Plan, which provides:

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

To adopt the CTCAC's position would arbitrarily dismantle the Planning Board's decisions set forth in both Planning Board Opinions duly issued following public hearings held pursuant to Section 59-D-3.4 and Staff approvals of Site Plan amendments made under the authority of both the provisions of Sections 59-D-3.4 and 59-D-2.6 of the Zoning Ordinance and by established Board practice and procedure.

As detailed below, Bozzuto relied, in good faith, on the Bozzuto Buildings Site Plans approved by the Planning Board and by Staff, as well as on the interpretation of Ms. Withans with regard to permitted height for certain buildings, and the approval by the Planning Board and DPS on all permits issued to date for the Bozzuto Buildings, as the basis for Bozzuto's purchasing, constructing, selling and expending significant sums on the development of the Bozzuto Buildings. In this regard, in reliance on these Planning Board actions, Bozzuto has expended in excess of \$20,000,000.00 for the land purchase, land development and construction, where applicable, of the Bozzuto Buildings. (See letter from Bozzuto to Derick Berlage, Exhibit "16".) For these reasons, the Planning Board is equitably estopped from rescinding its approval of the Bozzuto Buildings Site Plans or from finding any violations with regard to construction that has occurred pursuant thereto.

Further, Bozzuto obtained vested rights to develop the Bozzuto Buildings in accord with the Bozzuto Buildings Site Plans by virtue of both the Planning Board's approval of the Site Plans and building permits for construction and established a course of dealing with the developers and builders in the CTC, including Bozzuto, that cannot now be disavowed by arbitrary reversals of Planning Board practices and procedures that form the basis of over 7 years of development approvals in CTC.

Finally, as also discussed in detail below, with regard to the specific finding of height violations for Bozzuto Building 3 (and, to the extent a violation was found by the Board,

Building 6) made at the July 7, 2005 Planning Board hearing, we respectfully request the Planning Board reconsider its findings on the ground that the Board's determination is contrary to applicable law and grossly inequitable to Bozzuto.

II. STATEMENT OF FACTS

The CTC site consists of 198 acres located approximately one-half mile from I-270 at the intersection of Maryland 355 (Frederick Road) and Clarksburg Road and Maryland 355 and Stringtown Road. The CTC is zoned RMX-2 (Residential Mixed-Use Development) and is subject to Project Plan No. 9-94004, approved by Planning Board Opinion dated May 11, 1995 (previously defined herein as the "Project Plan") and Preliminary Plan No. 1-95042 approved by Planning Board Opinion dated September 28, 1995 (the "Preliminary Plan"). The first Site Plan approved in the CTC was designated Site Plan No. 8-98001, approved by Planning Board Opinion dated March 3, 1998 and covered the area of CTC known as "Phase I" (previously defined herein as the "Original Phase I Site Plan").

Bozzuto entered into negotiations in the spring of 2002 with Terrabrook to purchase pad sites with the right to construct multi-family buildings on site-planned, record-platted and "finished" parcels.⁶ Bozzuto and Terrabrook entered into a contract dated April 26, 2002 to purchase the pad sites for Buildings 1-7 (the "Original Purchase Contract"). (First Page and

⁶ It is our understanding that Terrabrook was acquired by Newland Communities, LLC ("Newland") in 2004.

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Signature Page attached as Exhibit "17".) As testified to by Clark Wagner, Vice-President and Director of Development for Bozzuto, at the November 3, 2005 hearing, the Original Purchase Contract contained a "take-down schedule" that required Terrabrook to complete the record platting and development work to certain specifications for the pad sites to be acquired by Bozzuto.

In this regard, Terrabrook was required to record lots for the pad sites prior to Bozzuto taking title to the pad sites and, in furtherance thereof, on May 31, 2002 Terrabrook recorded Plat No. 22230 in the Land Records of Montgomery County for Parcels "B" and "F", Block "F", on which the pad sites for Buildings 1-4 are located (Exhibit "18"). Bozzuto took title to the pad sites for Buildings 1-4 by Special Warranty Deeds dated September 27, 2002 and December 23, 2002 (Exhibit "19"), which is after plat recordation for the pad sites. The pad sites for Buildings 5, 6 and 7, are located on Parcel A, Block H, as shown on Plat No. 22535 recorded by Terrabrook on April 13, 2003 (Exhibit "20"). Bozzuto took title to the pad site for Building 7 by Special Warranty Deed dated December 18, 2003 (Exhibit "21"). To date, Bozzuto has not taken title to the pad sites for Buildings 5, and 6.

At the time of contracting to purchase Buildings 1-7 by Bozzuto, the pad sites for Buildings 1-4 were subject to Site Plan No. 8-98001C, approved by Planning Board Staff on December 17, 2001, which was an amendment to the Original Phase I Site Plan (the "December 17, 2001 Site Plan") (Exhibit "22"). The pad sites for Buildings 1-4 are identified on

the December 17, 2001 Site Plan as being located in "Phase IB-Part 3" of the CTC. The December 17, 2001 Site Plan shows four multi-family buildings located at the intersection of Clarksburg Square Road and Clarksburg Crossing Drive. The December 17, 2001 Site Plan also includes a signature block executed by Ms. Witthans of Planning Board Staff that describes the amendment as being for an "amended layout."

When Bozzuto entered into the Original Purchase Contract, it reviewed the December 17, 2001 Site Plan for Buildings 1-4 and used that Site Plan as the basis for designing their buildings to fit within the framework of the Site Plan. Bozzuto determined that some minor refinements to Buildings 1-4 to improve the design, functionality and appearance of the buildings would be beneficial. In this regard, Bozzuto was permitted, pursuant to the Original Purchase Contract, to make amendments to the December 17, 2001 Site Plan (and also to the applicable Site Plans for the other Bozzuto Buildings) as contract purchaser with the approval of Terrabrook, which approval was obtained for each Site Plan amendment that Bozzuto obtained for the Bozzuto Buildings. Accordingly, following purchase of the pad sites for Buildings 1-4, Bozzuto engaged an architect and CPJ, as the civil engineer, to develop working drawings based on its preferred building types and designs for Buildings 1-4 that could be accommodated within the basic layout approved in the December 17, 2001 Site Plan.

In order to process and review the proposed modifications, Ms. Witthans requested CPJ file an application for a Minor Site Plan Amendment for Bozzuto's revised design for Buildings

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1-4, along with site plan drawings showing the proposed modifications to the buildings. The application for a Minor Site Plan Amendment for Buildings 1-4 was signed by Bozzuto on June 22, 2002 and was filed by CPJ on July 3, 2002 (Exhibit "23"). Subsequently, following review by Ms. Witthans, a Site Plan Signature Set showing Bozzuto's proposed revisions to Buildings 1-4, identified as Site Plan No. 8-98001G, was signed by Clark Wagner of Bozzuto on June 27, 2002 and by Ms. Witthans on October 31, 2002 (previously defined herein as the "October 31, 2002 Site Plan"). The signature block of the October 31, 2002 Site Plan stated "Copy of Approved Site Plan Containing Minor Revisions Approved by Staff as Shown Amendment" (See Exhibit "1").

The development table on the Cover Sheet of the October 31, 2002 Site Plan indicates a permitted height for multi-family buildings of 45', with no indication of a height requirement in stories. As was explained in the prior Planning Board hearings, summarized in Section I above, before signing the October 31, 2002 Site Plan for the Buildings 1-4 revisions, Bozzuto raised questions with the Planning Board through CPJ regarding this notation on the data table on the Cover Sheet because Bozzuto's architecture for Building 3 submitted with the Site Plan amendment application showed a height of 53'. (See Exhibit "13".) Bozzuto obtained confirmation from Ms. Witthans of the applicable height criteria as being four stories, with no limitation by feet, contemporaneous with its executing the October 31, 2002 Site Plan. In this regard, as noted above, Bozzuto, through CPJ, submitted to Ms. Witthans architectural drawings

showing Building 3 at 53' in height; these architectural drawings were subsequently made part of the Building Permit package for Building 3, which building permit was issued by DPS after receiving approval by Planning Board Staff (See Exhibit "13"). (Bozzuto Buildings 1, 2 and 4 also shown on the October 31, 2002 Site Plan do not exceed 45' in height.)

Concurrent with the review and approval of the October 31, 2002 Site Plan for Buildings 1-4, Bozzuto filed Building Permit Applications with DPS for Buildings 1-4. The Building Permit Applications for Buildings 1-4 were duly reviewed by appropriate County agencies, including DPS and other County agencies. In particular, the Planning Board approved the Building Permit Applications for Buildings 1 and 2 on October 3, 2002, and for Buildings 3 and 4 on April 17, 2003 (Exhibit "24"). The Building Permit for Building 1 was issued on April 1, 2003, for Building 2 on January 13, 2003, and for Buildings 3 and 4 on July 31, 2003. Pursuant to these duly reviewed, approved and issued Building Permits, Bozzuto commenced construction of Buildings 1-4 beginning in March of 2003. Following completion of construction, Use and Occupancy Certificates were issued by DPS for Building 1 on March 23, 2004, for Building 2 on December 16, 2003, for Building 3 on August 18, 2004, and for Building 4 on November 18, 2004 (Exhibit "25"). Finally, Bozzuto sold the units in Buildings 1-4 to third-party purchasers.

Buildings 5, 6 and 7, which are part of Phase II of CTC, were at the time Bozzuto and Terrabrook entered into the Original Purchase Contract subject to Site Plan No. 8-02014, which was approved by Planning Board Opinion dated June 17, 2002 (previously defined herein as the

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“Original Phase II Site Plan”). The Original Phase II Site Plan shows Buildings 5, 6 and 7 located across Clarksburg Square Road from Buildings 1-4. Buildings 5 and 6 have not been constructed and have not been the subject of any amendments to the Original Phase II Site Plan. Building 7 was later included with the Manor Home Site Plan Amendment, discussed below, approved by the Planning Board on February 10, 2005, with an Opinion issued March 21, 2005.

By amendment to the Original Purchase Contract dated August 19, 2003, identified as the Fourth Amendment to Real Estate Sales Contract, Bozzuto contracted to purchase pad sites for Buildings 9, 10, 11 and 12 from Terrabrook (the “Fourth Amendment”) (First Page and Signature Page attached as Exhibit “26”). Bozzuto took title to Building 9 by Special Warranty Deed dated December 18, 2003, to Building 10 by Special Warranty Deed dated November 8, 2003, and to Building 11 by Special Warranty Deed dated December 13, 2004. (See Exhibits “27, 28 and 29”.) Bozzuto has not yet taken title to Building 12.

As with the pad sites for Buildings 1-7, Bozzuto did not take title to the pad sites for Buildings 9-12 until after Terrabrook recorded plats for the pad sites. In this regard, the pad site for Building 9 is shown on Record Plat No. 22365 as “Parcel C, Block AA”, recorded by Terrabrook on November 19, 2002 (Exhibit “30”); the pad site for Building 10 is shown on Plat No. 22631 as “Parcel C, Block S”, recorded by Terrabrook on July 23, 2003; the pad site for Building 11 is shown on Plat No. 22783 as “Parcel A, Block M” recorded by Terrabrook on

January 16, 2004 (Exhibit "31"); and the pad site for Building 12 is shown on Plat No. 23047 as "Parcel B, Block N", recorded by Terrabrook on November 12, 2004 (Exhibit "32").

At the time of purchase by Bozzuto, the pad sites for Buildings 10, 11 and 12 were subject to the Original Phase II Site Plan, which show "T-shaped," multi-family buildings on the pad sites. At the time of purchase by Bozzuto, the pad site for Building 9 was subject to Site Plan No. 8-98001C approved by Ms. Witthans on May 30, 2003, which amended the Original Phase I Site Plan (the "May 30, 2003 Site Plan Amendment") (Exhibit "33"). The May 30, 2003 Site Plan Amendment includes an approval stamp with a notation indicating the amendment is for "unit layout."

As with the purchase and development of Buildings 1-4, although the underlying Site Plan for Buildings 7 and 9-12 in effect at the time Bozzuto purchased the pad sites allowed for development of multi-family buildings, Bozzuto contemplated minor revisions to building design to allow for the Manor Home concept to be implemented. In this regard, Bozzuto met with Planning Board Staff including Ms. Witthans on December 18, 2003 to discuss the minor revisions to the underlying Site Plan for the Manor Homes and was initially advised by Ms. Witthans that the minor revisions Bozzuto proposed would be reviewed and approved as a Staff level amendment to the applicable underlying Site Plans in accordance with past practice and procedure for Site Plan amendments in the CTC. In furtherance of Staff's instructions, Bozzuto signed an application for a Minor Site Plan Amendment on August 12, 2004 and CPJ filed the

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amendment application with accompanying site plan drawings that showed the proposed Manor Homes with the Planning Board on September 8, 2004 (the "Manor Homes Amendment") (Exhibit "34").

The Manor Homes Amendment was then reviewed at a regularly scheduled Development Review Committee ("DRC") meeting held on October 18, 2004. At the DRC meeting, all participating County agencies, utilities, and Planning Board divisions reviewed and commented on the proposed Manor Homes Amendment. As indicated by DRC minutes taken by Ms. Witthans, Ms. Witthans advised Bozzuto that the Manor Homes Amendment may have to go to the Planning Board for hearing rather than be handled as a minor amendment (Exhibit "35"). By e-mail to Jackie Mowrey of Bozzuto from Ms. Witthans dated November 4, 2004, Ms. Witthans confirmed the Manor Homes Amendment would go to Planning Board for review at a public hearing and Staff subsequently scheduled the amendment for a Planning Board hearing on February 10, 2005 (Exhibit "36").

Prior to the Planning Board hearing, representatives of Bozzuto and its consultant team met with representatives of CTCAC on February 1, 2005 to review the Manor Homes Amendment and to address CTCAC's concerns regarding parking and building architecture. At the February 10, 2005 Planning Board hearing, several issues including height, parking, architecture and MPDUs were raised by Staff and the Planning Board and fully discussed both in written and oral testimony offered by Bozzuto and representatives of CTCAC. (See Hearing

Transcript, Exhibit "37".)⁷ In this regard, CTCAC testified at the February 10, 2005 hearing in support of the Manor Homes Amendment. (See CTCAC Letter dated February 10, 2005, Exhibit "38".) Further, Staff provided the Planning Board with an extensive Staff Report dated February 2, 2005 that provided a detailed discussion and analysis of the proposed Manor Home Buildings in terms of compliance with the applicable zoning requirements and development standards for the CTC (the "February 2, 2005 Staff Report") (Exhibit "39"). The February 2, 2005 Staff Report also included the scaled Site Plan drawings of each Manor Home Building (Buildings 7 and 9-12), which show that the Manor Home Buildings complied with all applicable development standards for parking, height, setbacks, and minimum distance between buildings. Following the testimony of Bozzuto and CTCAC, and after a thorough questioning of all parties and Staff on the issues raised, the Planning Board unanimously approved the Manor Homes Amendment and issued an Opinion setting forth their findings dated March 15, 2005, including a finding that the Manor Homes Amendment "meets all of the requirements of the RMX-2 Zone as demonstrated in the project Data Table contained in the staff report" (Exhibit "40").

On July 29, 2004 and August 3, 2004, Bozzuto submitted Building Permit Applications for Buildings 7 and 9, respectively, prior to the Planning Board's approval of the Manor Homes Amendment on February 10, 2005, which is customary in the building industry because the DPS review takes several months. DPS allows applications to be filed before Site Plan approval,

⁷ The record of the February 10, 2005 Hearing is incorporated herein by reference.

although it is understood by both DPS and the builder that the cost and time associated with their review is the builder's risk because a final site plan has yet to be approved and any changes required by the site plan approval will require revisions to the permit drawings. As noted above, the Building Permits for Buildings 7 and 9 were duly reviewed and approved by the Planning Board on October 18, 2004 and issued by DPS on October 29, 2004 and February 18, 2005, respectively.

III. ARGUMENT⁸

A. The Planning Board is equitably estopped from revoking the Bozzuto Buildings Site Plans because the Planning Board duly reviewed and approved the Site Plans in accordance with the applicable provisions of the Zoning Ordinance and established Planning Board practice and procedure and, in good faith reliance on the Planning Boards approvals of the Site Plans, Bozzuto expended significant sums for the purchase, development and construction of the Bozzuto Buildings.

As evidenced by the detailed chronology set forth above in Section II, Bozzuto secured the underlying development approvals for the Bozzuto Buildings pursuant to the well established Planning Board procedures for Site Plan and Site Plan Amendment approvals set forth in Section 59-D-3, *et seq.*, of the Zoning Ordinance and, for the Staff-approved Site Plan amendments,

⁸ The Planning Board is further precluded from invalidating the Bozzuto Buildings Site Plans, or otherwise finding violations of the Bozzuto Buildings Site Plans by the Bozzuto Buildings, by the doctrine of administrative finality, State and Federal constitutional guarantees of substantive due process and the prohibition on the retroactive application of administrative rules without proper notice. Bozzuto reserves the right to raise these, and other factual and legal arguments in this proceeding, and all associated procedures regarding alleged zoning violations of the Bozzuto Buildings.

additionally the specific terms of Condition 38 of the Original Site Plan Approval. The Planning Board, either following a public hearing or through its delegated authority to Staff, duly reviewed and approved the three Bozzuto Buildings Site Plans over the course of several years. The positive acts of the Planning Board in approving not only these Bozzuto Buildings Site Plans, but also in approving the December 17, 2001 Site Plan and the May 30, 2003 Site Plan that showed multi-family buildings on the Bozzuto Buildings pad sites prior to Bozzuto's entering into purchase contracts for the pad sites, induced Bozzuto to consummate the purchase of the pad sites from Terrabrook for the Bozzuto Buildings; subsequent actions of the Planning Board and DPS in approving Building Permits and/or Use and Occupancy Permits for Bozzuto Buildings 1-4, 7 and 9 induced Bozzuto to construct Buildings 1-4, 7 and 9 and ultimately sell units to third parties. Overall, in reliance on the Planning Board's actions, Bozzuto has expended over \$20,000,000.00 for the acquisition, development and construction of the Bozzuto Buildings. Therefore, the Planning Board is equitably estopped from revoking or disavowing its approvals of the Bozzuto Buildings Site Plans.

The doctrine of equitable estoppel applies to public agencies; in 1914, the Maryland Court of Appeals held that a "public agency" may, in obedience to the demands of justice, be estopped by its own conduct, or the conduct of its officers, from denying the existence or validity of [a grant or a contract]." *Mayor and Council of City of Hagerstown v. Hagerstown Ry Co. of Washington County*, 91 A. 170, 174 (1914). See also *Permanent Financial Corp. v. Montgomery*

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County, 308 Md. 239, 247, 518 A.2d 123, 127 (1986); *Gregg Neck Yacht Club, Inc. v. County Comm'rs of Kent County*, 137 Md. App. 732, 773, 769 A.2d 982, 1006 (2001).

According to the Maryland Court of Appeals, equitable estoppel is:

the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed...as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy. *Permanent Financial Corp. v Montgomery County*, 308 Md. 239, 247, 518 A.2d 123, 127 (1986), citing *Pomeroy*, EQUITY JURISPRUDENCE, § 804 (5th Ed. 1941).

The Permanent Financial decision sets out three elements necessary to establish equitable estoppel: "(1) voluntary conduct or representation; (2) reliance; and (3) detriment." *Gregg Neck Yacht Club, Inc. v. County Comm'rs of Kent County*, 137 Md. App. 732, 773, 769 A.2d 982, 1006 (2001). Equitable estoppel may be applied not only when the conduct of the party to be estopped has been wrongful or unconscientious and relied upon by the other party to his detriment, but also when the conduct, apart from its morality, has the effect of rendering it inequitable and unconscionable to allow the rights or claims to be asserted or enforced." *Id.*, citing *Zimmerman v. Summers*, 24 Md. App. 100, 123, 330 A.2d 722 (1975). More recently, the Court of Special Appeals has clarified, "with respect to equitable estoppel in regard to a municipality, 'there must have been some positive acts by such officers that have induced the action of the adverse party' and 'it must appear ... that the party asserting the doctrine incurred a

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substantial change of position or made extensive expenditures in reliance on the act.'" *Heartwood 88, Inc. v. Montgomery County*, 156 Md. App. 333, 372, 846 A.2d 1096, 1118 (2004), quoting *Anne Arundel County v. Muir*, 149 Md. App. 617,636, 817 A.2d 938 (2003). As noted by the Court of Special Appeals, "the question of estoppel is a question of fact because it involves 'the assessment of conduct by one party and reliance by another.'" *Heartwood 88, Inc. v. Montgomery County*, 156 Md. App at 370, quoting *Allstate Ins. Co. v. Reliance Ins. Co.*, 141 Md. App. 506, 515, 786 A.2d 27 (2001). See also *Grimberg v. Marth*, 338 Md. 546, 556, 659 A.2d 1287 (1995); *Travelers Indem. Co. v. Nationwide Construction Co.*, 244 Md. 401, 414, 224 A.2d 285 (1966).

The facts of this case clearly support all three elements of equitable estoppel against the Planning Board to prevent the Planning Board from revoking their approval of the Bozzuto Buildings Site Plans or otherwise finding violations of the Bozzuto Buildings Site Plans by the Bozzuto Buildings. First, in reviewing and approving the Bozzuto Buildings Site Plans, the Planning Board acted in accordance with not only applicable County law, in particular Sections 59-D-3.4, 59-D-2.6 and 59-D-3.7 of the Zoning Ordinance, but also with established Planning Board practices and procedures. The Original Phase II Site Plan Amendment for Buildings 5 and 6, and the Manor Homes Amendment for Buildings 7 and 9-12, were duly reviewed and approved by the Planning Board following public hearings, and evidence by written Opinions

and the approvals granted therein are, without question, legitimate exercises of the Board's authority under law.⁹

Further, even in the instance wherein a Site Plan amendment was approved by Staff, such approval was specifically authorized under color of Planning Board authority by both the Planning Board pursuant to Condition 38 of the Original Phase I Site Plan Approval Opinion and under color of County law as set forth in Sections 59-D-3.7 and 59-D-2.6 of the Zoning Ordinance. The inclusion of this condition demonstrates that the Planning Board anticipated that amendments to the Board – approved Original Phase I Site Plan – would be necessary in light of the scale of development within the Clarksburg Town Center. By the inclusion of Condition 38, the Board clearly delegated to Staff the ability to make amendments to provisions of the Site Plan of the type granted by Staff.

Condition 38 includes guidelines that the Staff must follow when approving changes to the Site Plans and is a lawful delegation of authority.¹⁰ A governmental agency that delegates interpretation and/or minor amendment authority (whether expressly or holding them out as having such authority) to its staff – like any principal – is bound by the action of its agents and

⁹ The Original Phase II Opinion was approved by Board Opinion dated June 17, 2002 and the Manor Homes Amendment was approved by Board Opinion dated March 21, 2005. The appeal periods for both Opinions have passed and no appeals from said Opinions have been filed. Any attempt to appeal these Opinions at this time would be untimely.

¹⁰ See also arguments of Newland's November 18, 2005 Record Submission on Planning Board delegation of authority to Staff and estoppel, incorporated herein by reference.

cannot claim "*ultra vires*," after the fact, in order to escape the vicarious results of those actions by its authorized staff members. *Heartwood 88, infra*.

In this regard, the following actions of Bozzuto and its authorized agents' actions in prosecuting the approval of the Bozzuto Buildings Site Plans clearly demonstrate reliance on the Planning Board's practice and procedure: filing formal, complete Site Plan applications with applicable fees; meeting with Staff numerous times to review the Site Plan applications; attending a regularly scheduled DRC meeting on the Manor Homes Amendment; revising design plans in accord with Staff instructions and community comments; appearing and presenting testimony before the Planning Board at the February 10, 2005 Manor Homes Amendment hearing; filing required Signature Set drawings; and filing required permit applications. In summary, Bozzuto followed a clearly defined, routine and well established development approval process mandated by County law, agency practices and Staff instructions to secure approval of the Bozzuto Buildings Site Plans. Ultimately, after being led down this path by the Planning Board, Bozzuto relied on the Planning Board's approvals of the Bozzuto Buildings Site Plans, and approval of Building Permits for Buildings 1-4, 7 and 9, to construct and offer units in these buildings for sale to third parties. This is clear evidence that the second element of equitable estoppel is met in the instant case.

The final factor of detriment is clear. To date, Bozzuto has expended in excess of \$20,000,000.00 in acquisition, entitlement and construction costs for the Bozzuto Buildings

including, but not limited to, costs for the purchase of underlying pad sites, site preparation (e.g., fine grading, utility installation), building construction, professional consultants fees (e.g., legal, civil engineering and architectural fees), permit/bond costs and insurance. (See Exhibit "16".)

Accordingly, the Planning Board is equitably estopped from disavowing the actions of its agency, finding violations based on such a disavowal, or revoking all, or part of the approvals of the Bozzuto Buildings Site Plans because of the legal and equitable rights Bozzuto has secured through its change of position (i.e., expenditures in excess of \$20,000,000.00) in reliance on the said approvals by the Planning Board and the approval of Building Permits for the constructed or partially constructed Bozzuto Buildings.

B. Bozzuto has acquired vested rights to construct all uncompleted Bozzuto Buildings in accordance with the Bozzuto Buildings Site Plans, as approved, that cannot be abrogated by Planning Board action, including revocation of the Site Plans.

By virtue of the approval of the Manor Homes Amendment by the Planning Board that includes Bozzuto Buildings 7 and 9-12, coupled with Bozzuto's expenditures and construction activity in reliance on said approvals as detailed above, Bozzuto has achieved a vested contractual interest in completing the buildout of the Bozzuto Buildings as approved in the Manor Homes Amendment. It is well established law in Maryland that the actions of government entities in approving land development plans and entering into associated development agreements create enforceable contractual obligations. *Mayor and City Council of*

Baltimore v. Crane, 277 Md. 198, 352 A.2d 786 (1976). See also *Mayor and Council of Rockville v. Brookville Turnpike Constr. Co.*, 246 Md. 117, 228 A.2d 263 (1967); *Beshore v. Town of Bel Air*, 237 Md. 398, 206 A.2d 678 (1965).¹¹ Significantly, a vested contractual interest need not be based upon a formal written agreement, but may arise through the actions of the parties and a well established course of dealing. See *Leaf Co. v. Montgomery County*, 520 A.2d 732 (Md. App. 1987). Further, a government agency cannot "arbitrarily impair" a previously incurred contractual obligation arising from the entitlement process. *Farmer v. Jamieson*, 354 A.2d 225, 231 (Md. App. 1976).

In the instant case, the Planning Board's approval of the Manor Homes Amendment, and overall course of dealing with Bozzuto in the processing, review and approval of the Manor Homes Amendment discussed in detail above, gave rise to vested contractual rights that obligate the Planning Board to permit Bozzuto to complete the development and construction of the remaining Manor Home. Further, Maryland courts recognize that, in the context of a planned unit development such as the CTC, vested rights can arise based on the actions and development activity that occurs on a project-wide basis, and not just based on the status of an individual lot

¹¹ In *Crane*, a landowner had conveyed approximately 5 acres of an 11-acre tract to the city for a future road extension, pursuant to an ordinance which allowed property owners making such conveyances to develop the remainder of their properties at the same density that would have applied to their original holdings (in this case, the original 11-acre site upon which the owner could have built 180 units prior to conveyance). The court held that the owner acquired a "vested contractual interest," even though it was not until seven years later than the owner sought to develop the remaining 6 acres with 178 units. Accordingly, the city's denial of a site plan, based upon an intervening change in the zoning ordinance, was improper.

or building. In *Rockshire Civic Assn., Inc. v. Mayor and Council of Rockville*, 358 A.2d 570, 579 (Md. 1976), the Court of Appeals stated:

[T]he question of vested or contract rights in planned residential unit development is an interesting and difficult question, which will no doubt return to the courts of this State . . . While it is entirely clear that in conventional zoning applications, the property owner acquires no vested interest in the continuation of existing zoning, in the absence of improvement of the property pursuant to such zoning, it is equally true that we are not dealing with the conventional zoning. The landowner invariably dedicates to the public use substantial amounts of valuable property, and improves other areas in a manner perhaps not most desirable to him, in return for the privilege of more intensive development, or commercial development, in other areas of the tract. Reduction of the initially approved commercial areas would clearly result in financial detriment to the owner of the property, but unless it would deprive the owner of all reasonable use of his property, such action may not be constitutionally impermissible."

The builders and developers in the CTC have undertaken significant land development and construction activity, including providing roads, amenities, and open space, in advance of full buildout of the CPD. The development of infrastructure and amenities in the CTC was done in contemplation of the developer and builders completing the full buildout of the CTC and any abrogation by the Planning Board of underlying development approvals that would prevent the full buildout of the CTC, including the remaining unbuilt Bozzuto Buildings, would, accordingly, violate vested rights obtained by the developer and builders.

Further, Bozzuto has constructed the footings, foundation, framing for all floors, roof and installed windows for Building 7, and constructed the footings, foundation and frost walls/stem walls for Building 9 pursuant, respectively, to Building Permit Nos. 353463 (Building 7) and 353465 (Building 9) approved by the Planning Board and issued by DPS. It is well established in Maryland that vested rights arise when a property owner obtains a building permit and, pursuant thereto, commences construction readily visible and recognizable on inspection of the property by a reasonable member of the general public. *Prince George's County v. Sunrise Development Ltd. P'ship*, 330 Md. 297, 623 A.2d 1296 (1993). Once established, vested rights "cannot be taken away by government regulation." *Town of Sykesville v. WestShore Communications, Inc.*, 110 Md. App. 300, 677 A.2d 102 (1996). Bozzuto's vested rights to complete the construction of Buildings 7 and 9 in accord with the Board's approval of the Manor Homes Amendment cannot be abrogated by subsequent Planning Board action, such as revocation of its approval of the underlying Manor Homes Amendments based on a mere change in policy regarding its practices and procedures.

C. The Planning Board's determination at the July 7, 2005 public hearing that Bozzuto Building 3 violated height restrictions for the CTC did not conform to relevant law and, therefore, the Planning Board must reconsider and reverse its finding of a height violation for Bozzuto Building 3.

Section 11 of the Board's Rules of Procedure authorizes the Board to review a request to reconsider based on grounds that include, *inter alia*, (i) a clear showing that the action of the

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Board did not conform to relevant law; or (ii) such other compelling basis as determined by the Board.

On both grounds set forth in Rule 11, we respectfully request the Board reconsider its July 7, 2005 finding of height violation for Building 3 (and, to the extent a violation was found for proposed Building 6) and, upon reconsideration, reverse its finding. In light of the clearly established grounds for estoppel argued above, the Planning Board's determination of a height violation on the basis of a post-construction disavowal of both the approved October 31, 2002 Site Plan and established Board practice and procedures, including the interpretation of Ms. Witthans made prior to the approval of the October 31, 2002 Site Plan that included Building 3, is clearly erroneous as a matter of law.

Further, the Board's finding of a violation regarding the height of Building 3, after Bozzuto in justifiable reliance on the Board's approvals, including approval of a building permit for Building 3, constructed Building 3, obtained a Use and Occupancy Permit for Building 3 and sold units in Building 3 to third-party purchasers, all in accordance with applicable law, amounts to a gross inequity and provides compelling grounds for the Board to reconsider its July 7, 2005 decision.

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IV. CONCLUSION

For all of the reasons stated above and presented at the hearings on this matter, Bozzuto respectfully requests that all charges of violations as to Bozzuto and the Bozzuto Buildings be dismissed.

LINOWES AND BLOCHER LLP

By: Barbara A. Sears (scw)
Barbara A. Sears

By: Scott C. Wallace
Scott C. Wallace

Attorneys for Bozzuto Homes, Inc.,
BA Clarksburg, LLC, and
BA Clarksburg Two, LLC

7200 Wisconsin Avenue, Suite 800
Bethesda, MD 20814-4842
(301) 961-5157