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MARY R. SCHRIDER-FOX  
REBECCA L. TRIFILLIS  
SUSAN HUESMAN MITCHELL\*\*  
JANE R. PATCHELL

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Emeritus Member:

TEMPE BROWNELL STEEN  
*limited to representing charitable and non-profit organizations without compensation, except where compensation is Court ordered*

August 9, 2018

**Via OpenGovernment@state.de.us**

Department of Justice  
Attn: Kim Siegel, MPA, FOIA Coordinator  
820 North French Street  
Wilmington, DE 19801

**RE: FOIA Correspondence Regarding the Town of Fenwick Island**

Dear Ms. Siegel:

This letter is sent in response to yours dated August 6, 2018, regarding the letter that your office received from Ms. Carmean alleging that the Town of Fenwick Island (hereinafter "Town") violated the Delaware Freedom of Information Act, 29 *Del.C.* §§10001-10007 (hereinafter "FOIA").

As stated in your letter, your Office is statutorily limited to considering allegations of FOIA violations. The foregoing bears repeating because, while it is clear from Ms. Carmean's letter that she takes issue with the Town's response to a building plan recently submitted by a commercial property owner, how FOIA has allegedly been violated is not easily identified. It appears that Ms. Carmean believes that, as part of the building plan review and building permit approval process, the Town Council as a whole should have been consulted and, because it was not, a FOIA violation was the end result. Any other complaints set forth in Ms. Carmean's letter do not appear to implicate FOIA and, rather, concern the interpretation of the Town's Zoning Code and Delaware law concerning zoning or other municipal matters, all of which are outside the FOIA purview of your Office.

Accordingly, the primary focus of this response letter shall be on the building plan review process in effect for the Town and how said process was followed in this particular instance. Chapter 61 of the Town's Code describes the building plan review and building permit approval process for the Town. According to Section 61-2 of the Town Code, all property owners must submit information about a proposed construction project to the Town's Building Official. Section 61-3 of the Town Code then goes on to describe how the Building Official shall review the building plans submitted, which may include, but not necessarily be limited to, discussing the same with the owner or his agent as necessary and identifying possible reasons for denial of a

permit. The plans are then submitted by the Building Official to the Building Committee members for approval, with the signature of two (2) Building Committee members required for approval and issuance of a building permit. A copy of Sections 61-2 and 61-3 of the Town's Code is enclosed herewith as Exhibit "A".

In this particular instance, the commercial property owner in question did, in fact, submit building plans and a request for a building permit to the Town's Building Official, Patricia J. Schuchman, for review and approval. As part of Ms. Schuchman's review of the building plans, she engaged in some discussion with the property owner about certain aspects of the plan. Ms. Schuchman also conferred with her supervisor, the Town Manager, as well as the Mayor (who is charged by Section 16 of the Town's Charter with the "general supervision of the affairs of the Town", copy enclosed as Exhibit "B"), Chairman of the Building Committee, and the Town Solicitor concerning certain Zoning Code interpretation issues. Specifically, the Zoning Code interpretation issues that arose concerned how to interpret and apply the building height requirement and whether roof-mounted mechanical equipment and/or elevator shafts are included in the building height calculation that is currently described in the Town's Zoning Code. As part of that review process, the property owner's attorney also contacted the Town Solicitor to share his interpretation of the Town's Zoning Code.

After engaging in the above-described review process, Ms. Schuchman further conferred with and shared her opinion about the building plans and building permit application with Building Committee Chairman, William ("Bill") Weistling, who accepted Ms. Schuchman's opinion and signed off on the building permit application. Ms. Schuchman also conferred with and shared her opinion about the building plans and building permit application with Building Committee member, Jesse Sheppard, who also accepted Ms. Schuchman's opinion and signed off on the building permit application. More specifically, the building plans and building permit application were approved, with the exception of the elevator shaft, which was determined to be subject to and in violation of the building height requirement. The mechanical equipment at issue was determined not to be included in the building height requirement based on an interpretation of the existing language of the Town's Zoning Code and with the case of *Norino Properties, LLC, v. Mayor and Town Council of the Town of Ocean View*, 2010 WL 3610206 (Del. Ch.) in mind. The foregoing was then communicated by Ms. Schuchman to the property owner and a courtesy copy of Ms. Schuchman's communication was forwarded by the Town Solicitor to the property owner's attorney. Copies of said communications are collectively enclosed herewith as Exhibit "C".

The above-described process of Building Official review, which sometimes occurs with the assistance of legal counsel and/or Town supervisors and/or the Building Committee Chairman as necessary, followed by individual consultations with the Building Committee members, has been the building plan review and building permit approval process followed by the Town for at least the last twenty-five (25) years. It has not been the practice of the Town to involve the Town Council in the review of building plans and/or the issuance of building permits for either residential or commercial projects in the Town. Nor is such a review by the Town

Council required by the Town Code or any other legal authority applicable to the Town. Accordingly, because the Town Council was not required to be part of the decision-making process concerning the building plans and building permit application underlying Ms. Carmean's letter of complaint, a meeting of the Town Council was not required and no FOIA violation has occurred.

Similarly, no FOIA violation resulted from the standard review process used by the Town. The Building Official is not a "public body" as such is defined in §10002(h) of FOIA. Even assuming *arguendo* that the Building Official could be identified as a "public body", according to §10004(h)(6) of FOIA, the open meeting requirements in FOIA do not apply to a public body having only one member. Nor has a FOIA violation resulted from the Building Official consulting with Town supervisors (i.e., the Town Manager and Mayor), the Town Solicitor, and/or the Building Committee Chairman, when and as she deems necessary, as such persons do not constitute a council, committee, board or other public body subject to FOIA. Rather, said persons assist in the review process, when requested by the Building Official, by lending their experience and knowledge of the construction-related and/or legal issues that arise during the Building Official's review of building plans and building permit applications. It is also true that a FOIA violation did not result from the Building Committee members' consultation with the Building Official and signing of the approved building plans and building permit application. At no time did a meeting of a quorum of the Building Committee members occur and, just as importantly, such is not required according to the process set forth in the Town Code and the Town's standard practice for at least twenty-five (25) years, which only requires that the Building Committee be informed of the Building Official's opinion and that two (2) Building Committee members sign the plans for approval to be granted.

Finally, as previously mentioned, much of Ms. Carmean's letter of complaint appears to focus on issues that are unrelated to FOIA and the review authority of your Office. The Town certainly disagrees with the factual accuracy of many statements made in Ms. Carmean's letter, including, but not limited to the description of conversations she or other members of Town Council had with the Mayor; the description of communications with the Town Solicitor (which occurred via both email and telephone) concerning the legal issues, review process and whether anticipated, strong public interest in the subject hotel project constitutes a threat of litigation under FOIA; the Town Solicitor's interactions with the attorney for the commercial property owner as described in a June 5 email; and the Town Solicitor's emailed comments regarding sending a memo to the Town Council (copies of the two (2) emails, last referenced, which were sent to and from the Town Solicitor are enclosed herewith as Exhibit "D"). However, again, the Town's disagreement with the factual accuracy of Ms. Carmean's letter has no bearing on the FOIA review performed by your Office, as the issue of how or if a building plan review and building permit approval process was shared with individual Town Council members or the Town Council as a whole is not a FOIA issue. To the extent that Ms. Carmean's complaints focus on the end result of the building plan review and building permit approval process and/or whether that end result usurped the authority of the Board of Adjustment or any other person or body, that also is not a FOIA issue reviewable by your Office. A process to appeal any decision

Department of Justice  
Attn: Kim Siegel, MPA, FOIA Coordinator  
August 9, 2018  
Page Four (4)

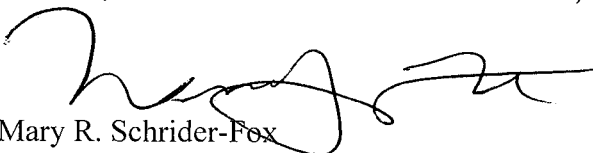
of the Building Official by an aggrieved person exists as a matter of State law (see 22 *Del.C.* §324) and pursuant to Section 160-13 of the Town's Zoning Code. Neither process involves either the Town Council and/or your Office.

In conclusion, it is important to note how imperative it is that the employees of the Town and the Town's individual representatives, supervisors or committee members and professional consultants be able to communicate ideas, concepts, positions and legal arguments or interpretations among and between themselves, as part of performing their job duties, without having to consult with the full Town Council. To require that every conversation, email, memo, letter or note between employees and/or individual representatives, supervisors or committee members and professional consultants be limited to presentation and discussion at a publicly noticed meeting of the Town Council would make municipal government, or any government at all, virtually impossible. If Town Council members do not like certain Town processes and/or the description of job duties assigned to Town employees, their remedy is to take such issues up with their fellow members of the Town Council and not with your Office under the pretense of a FOIA complaint.

The Town wishes to thank your Office in advance for your consideration of the above and the enclosed. We look forward to your decision in this matter.

Very truly yours,

**STEEN, WAEHLER & SCHRIDER-FOX, LLC**



Mary R. Schrider-Fox

MRSF

Enclosures - Exhibit "A" (Sections 61-2 and 61-3 of the Town's Code)  
Exhibit "B" (Section 16 of the Town's Charter)  
Exhibit "C" (Emails re: building plan/permit decision)  
Exhibit "D" (Emails to/from Town Solicitor)  
Exhibit "E" (Affidavits of Building Official and Building Committee Chairman)

cc: Client (via email; w/encl.)  
Vicki L. Carmean (via email; w/encl.)

# EXHIBIT “A”

Town of Fenwick Island, DE  
Monday, August 6, 2018

## Chapter 61. Building and Utility Construction

### Article I. Building Permits

#### § 61-2. Application for permit or clearance.

[Amended 9-29-1995; 4-27-2007]

When a building permit or a preliminary clearance for Department of Natural Resources and Environmental Control is required hereunder, the owner of the property involved or his authorized agent shall submit to the Town Manager or directly to the Building Official an application, which shall include the following:

- A. The name and residence and business addresses of the owner and the agent, if any.
- B. An accurate description of the work proposed to be done, including but not limited to plans for buildings or structures, showing dimensions, elevations, setbacks, etc., and the property on which the work is to be done.
- C. The proposed use of the building or structure.
- D. The estimated cost of the work based upon a signed contract.  
[Amended 7-22-2011]
- E. Proof of ownership.

#### § 61-3. Issuance of permits.

- A. The Building Official shall review the plans for complete compliance with all Town ordinances or other applicable requirements. He may discuss the plans with the owner or agent for clarification of any part of the plans and point out necessary changes for compliance or possible reasons for disapproval. The Building Official shall submit his recommendation for approval or disapproval to the Building Committee, setting forth the reasons for his recommendation.
- B. Any new construction costing less than \$20,000 may be approved and the building permit issued by the Building Official without submitting the building permit application to the Building Committee for approval. Any additions, alterations or renovations of existing structures which do not change the horizontal dimensions, roof peak height or flood zone elevation requirements of the existing structure may be approved and a building permit issued by the Building Official without submitting the building permit application to the Building Committee for approval.  
[Amended 12-16-1989; 9-29-1995; 10-31-2003]

- C. The Building Committee will instruct the Building Official to issue the permit, if approved. Signatures of at least two members of the Building Committee are required for approval.

- D. If disapproved, the owner may appear before the Town Board of Adjustments for a variance or appeal (procedures in Chapter 160, Zoning, § 160-10).
- E. The Building Official shall see that the building conforms in all respects to the provisions of Chapter 160, Zoning, and/or other applicable ordinances.  
[Amended 1-31-1992; 11-21-1997]
- (1) Mercantile licenses. After a building permit has been issued, the Building Official shall see that the general contractor and all subcontractors and artisans involved in the work have the proper mercantile licenses.
  - (2) Stop-work orders. Stop-work orders are issued by the Building Official of the Town of Fenwick Island as follows:
    - (a) On any work that is contrary to the provisions of this chapter, Chapter 160, Zoning, other applicable ordinances and/or a building permit, or on any work being performed in an unsafe or dangerous manner. All such work shall be stopped immediately upon issuance of a written or oral stop-work order.
    - (b) Where no emergency exists, notice shall be in writing, presented to the owner or his agent or to the person performing the work.
    - (c) Where an emergency exists, no written statement shall be required to be given by the Building Official. A conforming written notice shall follow as soon as practicable.
    - (d) A stop-work order will remain in effect until the required remedies have been met to the Building Official's satisfaction or until an appeal to Town Council results in a dismissal of the stop-work order.
    - (e) The Building Official may issue a stop-work order to anyone found working without a proper building permit or mercantile license.
    - (f) If necessary, the Building Official may enlist the assistance of the Town Police Department in enforcing any stop-work order.
- F. Prior to occupancy and issuance of a certificate of compliance, it is the duty of the Building Official to inspect all buildings for which building permits have been issued, when the building has been completed, to certify that all provisions of this article and Chapter 88, Flood Damage Prevention, have been complied with. The Building Official shall issue a certificate of compliance upon satisfactory completion of this inspection.  
[Amended 9-29-1995]
- G. Any permit shall require a "Certificate of Compliance" with all ordinances and regulations of the Town from the Building Official before additional permits are approved.  
[Added 5-23-2008]

# EXHIBIT “B”



*Town of Fenwick Island, DE*

*Monday, August 6, 2018*

## Chapter C. Charter

### Section 16. Duties of President.

The President shall preside at the meetings of the Town Council. He shall have general supervision of the affairs of the Town, and shall perform such other duties as may be prescribed by ordinance or by-laws adopted by the Council.

# EXHIBIT “C”

**Received: Thursday, July 12, 2018 8:44 AM**  
**From: Pat Schuchman <pschuchman@fenwickisland.org>**  
**To: "SPIRO BUAS (spiro@ocrooms.com)" <spiro@ocrooms.com>**  
**CC: Teresa Tieman <townmgr@fenwickisland.org>, "Mary Schrider-Fox (mary@swsflaw.com)" <mary@swsflaw.com>, "Bill Weistling (billwinfi@gmail.com)" <billwinfi@gmail.com>**  
**Subject: Mechanical Equipment/Elevator for New Construction of Hotel**  
**Date: Thu, 12 Jul 2018 12:44:41 +0000**

Spiro

To follow up on our conversation regarding your request for a variance for your mechanical equipment and the elevator shaft for the new construction of your hotel, please be advised of the following:

After discussion with our Town Attorney, Town Manager, Building Committee chairperson and myself, we agreed that whether or not roof-mounted mechanical equipment is considered part of a building and whether or not such equipment is considered when determining maximum building height is, arguably, ambiguous and, thus, falls into somewhat of a gray area under the Town code as it is presently written. Therefore, the collective decision was that the prudent decision is to err on the side of the property owner, by allowing the roof-mounted mechanical equipment to exceed the maximum building height set forth in the Town code. We understand that the mechanical equipment in question will not exceed the maximum building height by more than six feet. Accordingly, this letter hereby confirms that such equipment may exceed the maximum building height by no more than six feet, as requested.

Additionally, please note that Chapter 160-5C(4) requires that any mechanical equipment in any setback must be screened from view. In keeping with the spirit of that requirement, the Town further requests that you screen the area of the HVAC units and any other roof-mounted mechanical equipment, with both equipment and screening to remain within and not to exceed the six feet requested for such equipment.

Please know that we did not, however, determine that the elevator shaft could be considered "mechanical equipment" since it is not included in the definition of mechanical equipment and also since the shaft that houses the elevator is part of the building envelope. You will still need to request a variance from the Board of Adjustment for the elevator. As we discussed, please have both letters from you and Mr. Fisher changed accordingly. Thanks...Pat

Patricia J. Schuchman  
Building Official/Code Enforcement  
Town of Fenwick Island  
800 Coastal Highway  
Fenwick Island DE 19944  
302-539-3011  
[pschuchman@fenwickisland.org](mailto:pschuchman@fenwickisland.org)

Received: Thursday, July 12, 2018 10:10 AM  
Date: Thu, 12 Jul 2018 10:10:09 -0400  
From: Mary Schrider-Fox <mary@swsflaw.com>  
To: Tim Willard <tim@fwsslaw.com>  
Subject: fw: Mechanical Equipment/Elevator for New Construction of Hotel  
Re-Sent-By: Mary Schrider-Fox <mary@swsflaw.com>

Tim:

To follow up our earlier email exchanges, please see the below email that Pat Schuchman sent to your client earlier today.

Thanks!

Very truly yours,  
Mary R. Schrider-Fox  
STEEN, WAEHLER & SCHRIDER-FOX, LLC  
P.O. Box 1398  
92 Atlantic Avenue, Unit B  
Ocean View, DE 19970  
(302) 539-5600  
(302) 539-7800 (fax)

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If you have received this transmission in error, please immediately notify me by forwarding this e-mail to or by telephone at (302) 539-5600 and then delete the message and its attachments from your computer. Thank you. Mary R. Schrider-Fox, Esquire, e-mail: [Mary@swsflaw.com](mailto:Mary@swsflaw.com).

-----Original Message-----

Date: Thursday, July 12, 2018 8:44 AM  
From: Pat Schuchman <pschuchman@fenwickisland.org>  
To: "SPIRO BUAS (spiro@ocrooms.com)" <spiro@ocrooms.com>  
cc: Teresa Tieman <townmgr@fenwickisland.org>, "Mary Schrider-Fox (mary@swsflaw.com)" <mary@swsflaw.com>, "Bill Weistling (billwinfi@gmail.com)" <billwinfi@gmail.com>  
Subject: Mechanical Equipment/Elevator for New Construction of Hotel

Spiro

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of the HVAC units and any other roof-mounted mechanical equipment, with both equipment and screening to remain within and not to exceed the six feet requested for such equipment.

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As we discussed, please have both letters from you and Mr. Fisher changed accordingly. Thanks...Pat

Patricia J. Schuchman  
Building Official/Code Enforcement  
Town of Fenwick Island  
800 Coastal Highway  
Fenwick Island DE 19944  
302-539-3011  
[pschuchman@fenwickisland.org](mailto:pschuchman@fenwickisland.org)

# EXHIBIT “D”

Received: Tuesday, June 05, 2018 2:48 PM  
From: Tim Willard <tim@fwsslaw.com>  
To: "mary@swsflaw.com" <mary@swsflaw.com>  
Subject: Fenwick - Hotel  
Date: Tue, 5 Jun 2018 18:47:54 +0000

Attachment: image001.jpg

Mary-

Hope this email finds you well.

You recall we worked on the ordinance for the new hotel in Fenwick. Looks like it is going to be a Tapestry by Hilton. Building plans are in the works. I am contacting you about those plans before they are submitted - specifically about the 32' height limit. In short, the hotel plans to have a roof line of 32' but their HVA ventilation stacks and units exceed that on the roof. I note Fenwick has a chimney exception:

*160-8 A. Height and area requirements shall be subject to the following regulations and exceptions:*

*(2) Chimneys may be erected to a height which is required to provide efficient draft.*

Looks like these modern day chimneys might apply to the extent they provide efficient draft. Your thoughts? I can show you some drawings. If they are not considered chimney's, a variance request to keep them on the roof would need to be filed. In fact, to put them on the ground would not only be a greater impact on neighbors but would also require setback variances.

Finally there is a 5' elevator shaft necessary for the operation of the elevator; would that qualify as a chimney type structure? If not, likewise, the design would be ripe for meeting on the elements for a variance.

The builder is ready to move on this project so I thought I would run these legal questions by you first.

Thanks. -Tim

Timothy G. Willard, [tim@fwsslaw.com](mailto:tim@fwsslaw.com), 302-856-7777



Paynter House, 26 The Circle, Georgetown, DE 19947

*This correspondence may contain attorney client privileged information.*

Received: Tuesday, July 10, 2018 11:41 AM  
 Date: Tue, 10 Jul 2018 11:41:14 -0400  
 From: Mary Schrider-Fox <mary@swsflaw.com>  
 To: Terry Tieman <townmgr@fenwickisland.org>  
 cc: Bill Weistling <billwinfi@gmail.com>,  
 Gene Langan <gene\_langan@yahoo.com>,  
 Pat Schuchman <pschuchman@fenwickisland.org>  
 Subject: re: Hilton Tapestry Memo to Council 071018

Attachment: 0c65dd55.JPG  
 Attachment: Hilton Tapestry Memo to Council 071018 (MRSF RV).docx

Terry, et al.:

Attached hereto is the Council memo with my suggested edits tracked therein.

Also, although I don't see any harm in giving Council members this memo, just a reminder that this is not a confidential memo and could be the subject of a FOIA request. Again, this memo just lays out the analysis that, to some extent at least, has already been shared publicly with Spiro, so there is no legal harm in my opinion. I just don't want anyone to be surprised later on if this memo is part of a public records request.

Thanks!

Very truly yours,  
 Mary R. Schrider-Fox  
 STEEN, WAEHLER & SCHRIDER-FOX, LLC  
 P.O. Box 1398  
 92 Atlantic Avenue, Unit B  
 Ocean View, DE 19970  
 (302) 539-5600  
 (302) 539-7800 (fax)

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If you have received this transmission in error, please immediately notify me by forwarding this e-mail to or by telephone at (302) 539-5600 and then delete the message and its attachments from your computer. Thank you. Mary R. Schrider-Fox, Esquire, e-mail: [Mary@swsflaw.com](mailto:Mary@swsflaw.com).

On Tuesday, July 10, 2018 10:31 AM, Teresa Tieman wrote:

**Date:** Tue, 10 Jul 2018 14:31:07 +0000  
**From:** Teresa Tieman  
**To:** 'Gene Langan' <gene\_langan@yahoo.com>, "Mary Schrider-Fox (mary@swsflaw.com)" <mary@swsflaw.com>  
**cc:** "'billwinfi@gmail.com'" <billwinfi@gmail.com>, Pat Schuchman <pschuchman@fenwickisland.org>  
**Subject:** Hilton Tapestry Memo to Council 071018

Good morning,

Please review the attached memo and let me know your thoughts. I will need to send this out to Council in the next few days. Thank you in advance for your efforts.



Best regards,

**TERRY TIEMAN** | Town Manager ICMA-CM  
Town of Fenwick Island  
800 Coastal Highway | Fenwick Island, DE 19944  
p: 302.539.3011 f: 302.539.1305  
e: [townmgr@fenwickisland.org](mailto:townmgr@fenwickisland.org)  
[fenwickisland.delaware.gov](http://fenwickisland.delaware.gov)

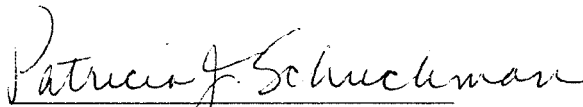


# EXHIBIT “E”

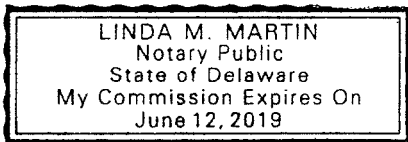


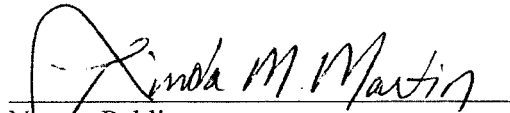
from two (2) Building Committee members is attached to the Town's letter response as part of Exhibit "C".

6. At no time during my eighteen (18) years as the Building Official for the Town have I been required to seek approval from the Town Council, either individual members thereof or the Town Council as a whole, as part of the building plan review and building permit application approval process.
7. The review process followed for the Request from this Applicant is the same process used for review of other residential and commercial building plans and building permit applications submitted to the Town.
8. I am an employee of the Town and am not a member of any Town councils, committees, boards or other bodies of the Town.

  
Patricia J. Schuchman

SWORN TO and SUBSCRIBED before me the day and year aforesaid.



  
Notary Public

Linda M. Martin  
Type or Print Name of Notary

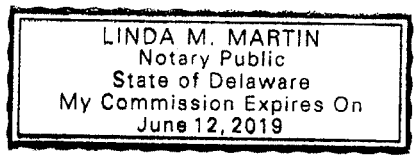
Commission Expires: June 12, 2019



7. In keeping with the standard review process that I have known and followed for approximately twenty-five (25) years, I and another member of the Building Committee (in this instance Jesse Sheppard) each individually met with the Building Official to review the Request and to sign off on the building permit application.
8. The Building Committee does not meet as a group and, rather, as our schedules permit, the members will meet and confer individually with the Building Official whenever a building permit application is pending. This has been the process followed for the approximately twenty-five (25) years that I have been a member of the Building Committee.
9. At no time during my approximately twenty-five (25) years as a member of the Building Committee or when serving as the Building Official have I been required to seek approval from the Town Council, either individual members thereof or the Town Council as a whole, as part of the building plan review and building permit application approval process.
10. The review process followed for the Request from this Applicant is the same process used for review of other residential and commercial building plans and building permit applications submitted to the Town.

William M. Weistling  
 William M. Weistling

SWORN TO and SUBSCRIBED before me the day and year aforesaid.



Linda M. Martin  
 Notary Public

Linda M. Martin  
 Type or Print Name of Notary

Commission Expires: June 12, 2019