



**DATE:** October 13, 2006

**TO:** Montgomery County Planning Board

**VIA:** Rose Krasnow, Chief *RK*  
Development Review Division  
  
Catherine Conlon, Supervisor *CC*  
Development Review Division

**FROM:** Richard A. Weaver, Coordinator (301) 495-4544 *RAW*  
Development Review Division

**SUBJECT:** Request for an extension to the validity period – Preliminary Plan No. 1-00065 – Panagos Property

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**Recommendation:** Extend validity period to September 30, 2007

**Background:**

The preliminary plan for the Panagos Property, Preliminary Plan No. 200100065 (1-00065) was approved by the Planning Board at a regularly scheduled public hearing on July 27, 2000. The date of mailing of the Planning Board Opinion for the plan was December 21, 2000. As a condition of that approval the validity period of the preliminary plan was set at 37 months from the date of mailing of the Planning Board Opinion, or January 21, 2004. On January 19, 2001 an administrative appeal seeking judicial review of the action of the Planning Board was filed in the Circuit Court for Montgomery County, Maryland by neighboring property owners. This restricted the ability to plat the property. The expiration date of the appeal period for this Court decision was July 31, 2004. On September 23, 2004 a Petition for a *Writ of Certiorari* was filed to the Maryland Court of Special Appeals by Normandy Homes, which again restricted the ability of the property owners to proceed with record plats for the property.

A request for extension was submitted on September 23, 2004 citing the Court action as an impediment to recording of plats on the property. On September 30, 2004, the Planning Board, pursuant to Section 50-35(h)(1), approved a one-year extension of the validity period to September 30, 2005. At the time, this extension period seemed to

coincide with the pending date for a decision by the Court and allow the platting process to proceed. However, it was not until December 10, 2004 that the court case was resolved, in favor of the property owners, and control was returned to the Panagos family. It should be noted that during the appeal period Mr. John Panagos passed away, and on December 21, 2004, Mrs. Panagos sold the property to Bells Mill, L.L.C. On September 15, 2005, the Planning Board approved a second one-year extension to September 30, 2006. This extension was based on unanticipated delays by governmental agencies or other parties.

### **Discussion**

Attached, please find the applicant's timely request dated August 21, 2006, to extend the validity period for the Preliminary Plan (12000650) for twelve additional months to September 30, 2007. The extension is requested to afford the applicant adequate time to resolve remaining issues which will allow the pending plat to be recorded and to pursue a preliminary plan amendment for a portion of the site. Pursuant to Section 50-35 (h)(3)(d) of the Subdivision Regulations, "the Planning Board may only grant a request to extend the validity period of a preliminary plan if the Board is persuaded that:

- i. delays, subsequent to the plan approval by the government or some other party, essential to the applicant's ability to perform terms of conditions of the plan approval, have materially prevented applicant from validating the plan, provided such delays are not created by the applicant; or
- ii. the occurrence of significant, unusual, and unanticipated events, beyond applicant's control and not facilitated or created by applicant, have substantially impaired applicant's ability to validate its plan and that exceptional or undue hardship (c as evidenced, in part, by the efforts undertaken by applicant to implement the terms and conditions of the plan approval in order to validate its plan) would result to applicant if the plan were not extended."

The applicant's letter seeks the extension based on certain unanticipated delays by government and other parties that continue to impact the project as discussed below.

### **Applicant's position**

The applicant's letter cites a number of delays that are related to the inability to record a final record plat in a timely manner. The previous extension was granted, in part, based upon delays caused by a change to the stormwater management regulations. The final approval of the stormwater management concept is at hand, but has been further delayed by a late change to the stormwater management access location requested by MCDPS. The access issue was resolved in July 2006 after recordation of an access easement.



The applicant continues to work with MNCPPC, MCDPS and MCDPWT to resolve a continuing issue regarding the need for, and location of, a sidewalk along Bells Mill Road. While staff and MCDPS do not support a sidewalk along Bells Mill Road, MCDPWT has remained steadfast in requiring the sidewalk to be built. A field meeting between the review agencies and the applicant is scheduled for October 20, 2006, to bring final closure to this issue.

The applicant maintains that they continue to diligently pursue all the necessary approvals to allow recordation of the pending plats. A preliminary plan amendment has been submitted that revises the layout of the western portions of the property to make use of the former Willowbrook Road alignment and the existing Panagos homesite.

### **Staff Position**

This request for extension is based on unanticipated delays by a government agency or other party that have hindered the ability of the applicant to plat the property. The request for extension was received in a timely manner. In their letter, the applicant cites many of the same delays that were mentioned in the previous extension request. However, staff notes that the applicant's team has been in constant contact with MNCPPC staff as the issues were being addressed over the past year. The apparent conflict between MCDPS and MCDPWT regarding the need for a sidewalk on Bells Mill Road seems to be coming to a conclusion and will need to be resolved before the preliminary plan amendment is brought before the Planning Board. The stormwater management concept approval has been secured. The applicant has continued to work towards resolution of the issues associated with this plan.

For this extension request, staff has also taken into consideration the extensive amount of time that this application was held up in the Court system. For a number of years there was little to no activity on the plan due to the uncertainty of the Court's pending actions. The applicant has submitted sufficient grounds to justify the extension of the validity period for the subject preliminary plan. The Court actions on this property have created significant impediments to the plat process. The unanticipated delay outlined in the applicant's letter and summarized above are reasonable justification upon which the Planning Board can base the approval of the current extension pursuant to Section 50-35(h)(3)(d) of the Subdivision Regulations. Therefore, staff recommends that the preliminary plan be extended to September 30, 2007, to allow adequate time for all issues to be addressed, including a decision of the preliminary plan amendment, and eventual platting of the entirety of the property.

Attachments:

Extension letter

Catherine Conlon, Supervisor  
Development Review Division  
Maryland-National Capital Park and Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910

Re: Request for Extension of Validity of Preliminary Plan No. 1-00065

Dear Ms Conlon:

We represent Bells Mill, LLC, successor applicant to John and Mary Ann Panagos in Preliminary Plan No.1-00065. The Planning Board previously extended the validity period for Preliminary Plan No. 1-00065 and it is now scheduled to expire on September 26, 2006. This letter and the enclosed Application request a further extension of the validity period of the above-referenced Preliminary Plan. In support of our request, we offer the following justification and information:

*I. History of Preliminary Plan 1-00065*

The Planning Board, following a public hearing on July 27, 2000, approved Preliminary Plan No. 1-00065, subject to conditions. The Opinion approving the Preliminary Plan became effective on December 21, 2000. On January 19, 2001, an administrative appeal seeking judicial review of the action of the Planning Board was filed in the Circuit Court for Montgomery County, Maryland by neighboring property owners. That court upheld the action of the Planning Board following a hearing on July 31, 2001. The date on which the Court's decision became final and unappealable was August 31, 2001.

While the administrative appeal case was pending, the then applicants, John and Mary Ann Panagos were precluded from initiating the process to record final plats by a second law suit filed as a counter-claim by defaulting contract purchasers, Normandy Homes and Robert Keeler ("Normandy Homes"). Normandy Homes was contractually responsible for securing approval of final record plats and their failure to do so was an essential element of the then pending litigation. Mr. and Mrs. Panagos were essentially again held hostage by a frivolous claim in a lawsuit. Ultimately, the Circuit Court ruled in favor of the Panagos family and dismissed Normandy Homes' claims. Mr. Keeler and Normandy Homes then appealed that decision to the Maryland Court of Special Appeals. Unfortunately, during the course of this litigation, Mr. Panagos passed away.

The Court of Special Appeals issued its Opinion affirming the decision of the Circuit Court in favor of Mrs. Panagos on August 11, 2004. While awaiting the Mandate of that Court, which released the *lis pendens* that had precluded the applicants from proceeding, a Request for Extension of the Preliminary Plan Validity Period on September 2, 2004 seeking a two-year



extension to provide an adequate period of time for the Court of Special Appeals' Mandate to issue and a then anticipated Petition for a *Writ of Certiorari* to the Court of Appeals to be decided thereby restoring property control to Mrs. Panagos who would then be legally entitled to submit a record plat application.

On September 23, 2004, after the first Preliminary Plan extension was requested, Normandy Homes filed a Petition for *Writ of Certiorari* to the Maryland Court of Appeals, again depriving the Panagos family of property control. Finally, on December 10, 2004, the Court of Appeals issued its final order and denied the *Writ of Certiorari*. On that date the *lis pendens* was lifted and property control returned to the Panagos family.

On September 30, 2004, prior to the denial of the *Writ of Certiorari* by the Court of Appeals, the Planning Board approved a one-year Extension of the Preliminary Plan Validity Period to September 30, 2005.

## ***II. Bells Mill, LLC- The Current Owner***

On December 21, 2004, Mrs. Panagos sold the property Bells Mill, LLC, the successor applicant for this Extension Request. Since its purchase of the property, Bells Mill, LLC has worked diligently to overcome obstacles to the recordation of final plats of subdivision for this property. On September 15, 2005, the Planning Board granted another one-year extension of the validity period of the subject Preliminary Plan because of the following efforts that Bells Mill, LLC had exerted and undue delays caused by governmental agencies:

The Subject Property is located within the Potomac Planning Area, for which the District Council approved a revised Area Master Plan on March 2, 2002, after the Planning Board had approved the subject Preliminary Plan. That revised Master Plan included significant new recommendations that directly affected the Subject Property. Because they did not have property control, the Applicant was precluded from seeking to implement the Master Plan recommendations until after the litigation was terminated by the Court of Appeals in December 2004. The most significant and, at the time, controversial, Master Plan revision was the elimination of the requirement that Willowbrook Road extend through the Subject Property to intersect with Bells Mill Road. The approved Preliminary Plan extended Willowbrook Road as required by the prior Master Plan even though a more appropriate site design with a cul-de-sac was preferred.

In order to accomplish the objective of the revised Master Plan, a revised site design had to be prepared to eliminate the cut-through and redesign the layout along Bells Mill Road. The timing of that redesign was complicated by the need to respond to a requirement imposed by the Department of Public Works and Transportation ("DPWT") for a sidewalk along the Subject Property's Bells Mill Road frontage. Constructing that sidewalk would require the removal of a

mature stand of trees, which, while not technically a forest, provides both canopy, buffering and screening from Bells Mill Road and the confronting neighborhood.

Also during the same time period the Washington Gas Light Company ("WGL") informed the Panagos family and Bells Mill, LLC that it required an easement to construct additional natural gas facilities along Willowbrook Drive. The proposed location of that WGL facility impacted the Category I Forest Conservation Easement that the applicant had agreed to preserve, and considerable time and effort was expended in working out the details with WGL in a way that minimized environmental impacts to the property and preserved the approved forest conservation easement area.

Because DPWT's proposed sidewalk posed environmental challenges as well as the logistical challenge of responding to a significant grade differential at the sidewalk's terminus that would also result in additional right-of-way, contrary to the Master Plan, a waiver of that sidewalk requirement was requested from the Department of Permitting Services.

The sidewalk waiver request was discussed with Environmental Planning Division Staff and the Department of Permitting Services ("DPS") in April 2005 and ADTEK Engineers submitted the formal Waiver Request to DPS on April 28, 2005 offering to pay a fee in lieu so that a more appropriate contiguous sidewalk could be constructed elsewhere along Bells Mill Road. The Waiver Request remains pending as of the date of this letter, deferred upon request of DPWT. However, on several occasions, subsequent to the waiver hearing before DPS, we were informed verbally by DPS Staff that the waiver would be approved.

On August 3, 2005, we received formal notification of the deferral based on DPWT's recommendation against the waiver because it does not have in place a process for accepting a fee in lieu of sidewalk construction. We further understand that it is the position of DPS that the sidewalk should not be constructed at this location. Your Environmental Planning Division does not favor this sidewalk. A final decision on the sidewalk waiver has a direct effect on the submission of the final plat for those lots that will not be altered by the revision of the Preliminary Plan required by the redesign of Willowbrook Road, and those that must be realigned.

In addition to the sidewalk issue, both DPS and DPWT have just completed reviewing the reconfiguration of Willowbrook Drive into a cul-de-sac as recommended by the current Potomac Subregion Master Plan.



### *III. The Extension Request*

Subsequent to the Planning Board's previous approval of an extension of the validity period for the subject Preliminary Plan on September 15, 2006, the Applicant has made continuous efforts to complete both the final record plat for the approved preliminary plan and the amendment applications and through no fault of its own, the applicant has been delayed in its efforts to complete this process.

The location of the WGL easement to construct additional natural gas facilities along Willowbrook Drive was finally decided during the summer of 2004. The negotiation of the location of the WGL easement required revisions to record plat. The revisions to the Category I Forest Conservation Easement to accommodate the easement location could not be contemplated until the WGL easement location was decided.

The stormwater management facility had to be redesigned because of the implementation of new regulations that took effect after the initial approval of the Preliminary Plan and completion of the litigation with Normandy Homes. The Department of Permitting Services recently required that the stormwater management access be moved from access off of a private drive to off of Willowbrook Drive. The Applicant prepared and recorded on July 12, 2006, a second stormwater management easement, after seeking approval from DPS, granting the County 5-foot easements along lots 44 and 45 for access to the stormwater management facility.

The Applicant was also required to comply with the Department of Permitting Services' request for an additional public improvement easements and agreement that the Applicant prepared and had approved by DPS. The Applicant recorded the PIE on July 24, 2006 and executed a revised PIA, as per DPS' comments on July 31, 2006. Although the sidewalk waiver has yet to be decided and is not supported by your Staff, DPS of the Applicant because of its environmental impact, the Applicant complied with DPS' request for a PIE for the construction of a sidewalk along Bells Mill Road.

We met with M-NCPPC Staff on June 20, 2006 to discuss again the proposed amendment to the Preliminary Plan that will reflect the recommended Willowbrook Drive right-of-way in the Potomac Master Plan before the validity period expires in September. We met with Christina Contreras of the Department of Permitting on July 7, 2006 for the third and final review of the record plat. The Final Record Plat will be submitted to M-NCPPC in August 2006. We anticipate that the Final Record Plat for the remainder of the approved subdivision will be before the Planning Board for approval following the Board's recess.

But for the loss of property control that occurred during the extended litigation, all of the engineering work and departmental reviews would have been completed during the typical validity period for a single-phase subdivision. The practical affect of the litigation was to narrow

that two-year period of time to seven months. While much has been accomplished in the months following the Board's prior extension approval, the time required by both DPS and DPWT to review and work through issues with the Applicant has substantially impaired the Applicant's ability to complete the required government approval processes that are conditions precedent to recordation of a final plat. The delay caused initially by the *lis pendens* preventing property control in order to move forward with securing these approvals was beyond the control of the Applicant.

The Applicant is continuing to diligently pursue all of the necessary approvals and to make the required revisions to the Preliminary Plan and to record the plat for the remainder of the subdivision. These efforts will have been for naught if the underlying Preliminary Plan expires on September 30, 2005.

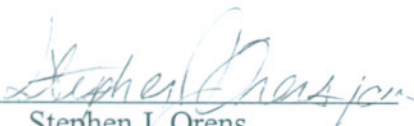
We are hopeful to have specific written guidance regarding the sidewalk waiver as a result of our July 12, 2006 meeting with DPWT Director Holmes so we can complete both the final plat application and the revised preliminary plan so that both can be submitted and processed within the requested extension period.

Accordingly, we respectfully request that the Planning Board grant an Extension of the Validity Period of Preliminary Plan No. 1-00065 to September 30, 2007.

Should you require any further information to process this request, please let me know. I appreciate your consideration of and attention to this matter.

Very truly yours,

DUFOUR & ORENS, CHTD.

By:   
Stephen J. Orens

cc: Angela Brown, DRD  
Richard Weaver, DRD  
Debra Daniel, Associate General Counsel  
Norman Haines, Haines Land Design  
Kenneth Ellis, ADTEK  
Daniel Demeria, Bells Mill LLC