



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

**MCPB**

**ITEM #6**

**7/10/08**



**MEMORANDUM**

**DATE:** June 27, 2008

**TO:** Montgomery County Planning Board

**VIA:** Rose Krasnow, Chief *RK*  
Development Review Division

**FROM:** Catherine Conlon, Subdivision Supervisor (301-495-4542)  
Development Review Division *CC*

**REVIEW TYPE:** Request for extensions of the validity periods for the Preliminary Plan and the Adequate Public Facilities (APF) Ordinance approval

**PROJECT NAME:** Wilgus East

**CASE NO.** 11999029A (formerly 1-99029A)

**REVIEW BASIS:** Pursuant to Chapter 50, the Subdivision Regulations

**ZONE:** O-M, C-O and R-200

**LOCATION:** In the southwest quadrant of the intersection of Montrose Road and "Old" Old Georgetown Road

**MASTER PLAN:** North Bethesda-Garrett Park

**APPLICANT:** Wilgus-Montrose Associates Limited Partnership

**ATTORNEY:** Abrams & West, P.C.

**FILING DATE:** March 20, 2008

**HEARING DATE:** July 10, 2008

**Staff Recommendation:** Grant an extension of the Preliminary Plan validity period until November 27, 2009. Do not grant extension of the validity period for the Adequate Public Facilities (APF) Ordinance approval.

### **Executive Summary**

Wilgus-Montrose Associates Limited Partnership (the “Applicant”) owns property for which it filed a preliminary plan of subdivision and received Planning Board approval (Wilgus East, Preliminary Plan Nos. 1-99029 and 1-99029A) to create one lot for 308,400 square feet of office use. The initial Planning Board approval (Preliminary Plan No. 1-99029) was granted in February, 2000, subject to a number of conditions. The Applicant subsequently filed a legal challenge to the Board’s conditions of approval in the Circuit Court for Montgomery County. However, after that filing and before the petition was heard, the Planning Board, the Applicant, and Montgomery County entered into a three-party settlement agreement dated July 28, 2004. Consistent with the terms of the agreement, the Applicant filed, and the Planning Board approved, an amendment to the Preliminary Plan (Plan No. 1-99029A) with revised conditions. Per those conditions, the Preliminary Plan remains valid for four years after the mailing date of the Opinion (until October 27, 2008), as does the Applicant’s ability to obtain building permits pursuant to its related Pay-and-Go approval. Adequate Public Facilities approval remains valid until November 27, 2009. Citing a dispute between the Applicant and Montgomery County regarding road construction responsibilities associated with the settlement agreement as a significant, unusual and unanticipated event that has substantially impaired the Applicant’s ability to validate its plan, the Applicant is requesting extension of the validity periods of the Preliminary Plan and the Adequate Public Facilities (APF) approval until November 27, 2016.

### **SITE DESCRIPTION and SURROUNDING AREA**

The Wilgus East property (“Property”) consists of 8.7 acres of land located in the southwest quadrant of the intersection of Montrose Road and “Old” Old Georgetown Road in the North Bethesda-Garrett Park Master Plan area (Attachment A). It is split-zoned O-M, C-O and R-200. The Property has frontage to the north and east along Montrose Road and “Old” Old Georgetown Road, respectively; and to the south along Montrose Parkway for which right-of-way was dedicated from the Property. Montrose Parkway is under construction by the County as a four-lane divided road from Montrose Road (600 feet east of Tildenwood Road) to “Old” Old Georgetown Road with a projected completion date of December, 2008. To the west is an undeveloped property owned by the Applicant and the Cherington townhouse community.

### **BACKGROUND**

The Preliminary Plan for Wilgus East (#1-99029) was approved by the Planning Board on February 17, 2000, with the conditions specified in the Planning Board Opinion dated August 30, 2002 (Attachment B). Based on the FY 00 Annual Growth Policy, there was no remaining capacity available at the time for additional jobs in the transportation staging ceiling for the North Bethesda Policy Area. To satisfy the Adequate Public Facilities (APF) Ordinance test for traffic, the Applicant participated in the Alternate Review Procedure for Expedited Non-Residential Development Approval, more commonly known as “Pay-N-Go”. Under Pay-N-Go,



a development could proceed without making specific road improvements under Local and Policy Area Transportation Reviews if the Expedited Development Approval Excise Tax (“EDAET”) was paid to the County.

The conditions of the original approval included, among other things, the requirements that the Applicant dedicate right-of-way for the future Montrose Parkway and eliminate access from the proposed development directly to “Old” Old Georgetown Road. Subsequent to the Board’s approval, the Applicant filed a legal challenge to these conditions in the Circuit Court of Montgomery County. However, before the case was heard the Applicant agreed to a remand of the matter back to the Board to enter into settlement negotiations with the Board and Montgomery County. A three-party settlement agreement was reached on July 28, 2004 (Attachment C). Per that agreement, the Applicant would dedicate the right-of-way for Montrose Parkway in exchange for Planning Board amendment of the previous conditions of the Preliminary Plan approval, and Montgomery County’s construction of Cherington Road to the west of the Property to provide a second access point for the development from Montrose Parkway.

Consistent with the terms of the agreement, and after staff recommendation and public hearing, the Planning Board approved an amendment to the Preliminary Plan (Plan No. 1-99029A) on July 29, 2004 with revised conditions as noted in the Board Opinion dated October 27, 2004<sup>1</sup> (Attachment D). The revised Preliminary Plan (Attachment E) also removed access to “Old” Old Georgetown Road and included a planned connection to future Cherington Road with a provision for a temporary access road within the right-of-way for the future Montrose Parkway in the event the County’s road projects were not completed prior to the development. The Applicant recorded a plat that dedicated the Montrose Parkway right-of-way to the County in December, 2004.

While the County is in the process of constructing Montrose Parkway along the frontage of the Property, it has not constructed Cherington Road. This is because the County have been in dispute with the Applicant since at least October 10, 2005, over acquisition of the land needed to provide either public right-of-way, or a construction easement for the road. Although not part of the subject Property, the Applicant also owns the adjacent land over which Cherington Road would cross. It is the Applicant’s position that the County is obligated under the settlement agreement to purchase the necessary right-of-way for Cherington Road and construct it as a public street. The County has taken the position that the road should be private and is seeking a temporary easement from the Applicant for construction of the road.

## **EXTESION REQUESTS**

### Amended Preliminary Plan

Because of the disagreement with the County regarding Cherington Road, the Applicant has not filed an application for the Site Plan approval, which is needed before the Property can be recorded and a building permit can be issued. Per condition 10 of the 2004 Opinion, a final

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<sup>1</sup> The approval conditions of the October 27, 2004 Planning Board Opinion for Preliminary Plan 1-99029A superseded all previous conditions of approval for the Preliminary Plan.

record plat for all property included in the amended Preliminary Plan must be recorded before October 27, 2008, or an extension must be filed. By letter dated March 17, 2008, as amended by letter dated April, 21, 2008 (Attachments F and G), the Applicant has made a timely request for extension of the amended Preliminary Plan. The request asks that the plan validity be extended out to the expiration date of the plan's APF approval. Because the Applicant is also requesting extension of the APF validity, that date varies between November 27, 2009 (the current APF expiration date) and the alternative APF extension dates discussed below.

#### Adequate Public Facilities Approval

Per condition 11 of the 2004 Opinion, the validity period of the non-transportation APF review for the amended Preliminary Plan remains valid until November 27, 2009. The Applicant is seeking an eight-year extension of the APF validity period pursuant to Section 50-20(c)(10) of the Subdivision Regulations which permits extension of up to twelve years for subdivision plans that required at least a \$2,500,000 commitment of funds to comply with specific infrastructure conditions. Alternatively, the Applicant seeks a waiver of Section 50-20(c)(5) pursuant to Section 50-38 to permit a two-year extension of APF to compensate for the time in which the project has been delayed because of the dispute with the County over Cherington Road.

#### Pay-N-Go Approval

Although the conditions of the amended Preliminary Plan establish a 61-month validity period for the APF review, this applies only to the non-transportation elements since the specific provisions of the FY 00 Annual Growth Policy Pay-N-Go Alternate Review Procedure for traffic impacts require that building permits for the proposed development be obtained within 48 months of the Preliminary Plan approval, or by October 27, 2008. The Applicant requests a waiver of the Subdivision Regulations pursuant to Section 50-38 to permit extension of the Pay-N-Go approval to correspond with the requested extension of the APF validity.

### **STAFF ANALYSIS AND DISCUSSION**

#### Amended Preliminary Plan Validity

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 or 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 (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 March 17, 2008 letter (Attachment F) seeks extension of the amended Preliminary Plan based on the delay in being able to file a site plan and record plat caused by the County's refusal to timely construct or acknowledge to construct Cherington Road without conditions. In the Applicant's opinion, this constitutes a failure by the County to abide by the settlement agreement, and a significant and unanticipated event that prevented the Applicant from validating the plan. Furthermore, the Applicant states that this has and will continue to create an exceptional or undue hardship until resolved by the parties or the Courts, and could cause the Applicant to forfeit the value of the land dedicated for the Montrose Parkway right-of-way, lose its EDEAT deposit and approval under Pay-N-Go, and be subject to the time and expense of filing a new preliminary plan.

Although a site plan for the subject property could have been submitted for review despite the dispute over how Cherington Road will eventually be constructed, the issue has to be resolved before such a site plan could be approved since Cherington Road is a necessary access point for the development. The disagreement regarding this road construction does qualify as a significant and unanticipated event that prevents validation of the plan. The loss of the EDEAT deposit and the time and expense associated with filing a new preliminary plan also qualify as an undue hardship to the Applicant if the amended Preliminary Plan is not extended. For these reasons, staff supports a limited extension of the amended Preliminary Plan validity, until November 27, 2009.

Staff does not support either of the longer plan extensions requested by the Applicant because, as discussed below, staff does not support extension of the APF validity period. Per Section 50-35 of the Subdivision Regulations, preliminary plan validity period may not exceed the validity of the APF.

#### APF Validity

The Applicant requests an eight-year extension of the APF validity period under Section 50-20(c)(10) of the Subdivision Regulations (by letter dated April 21, 2008, Attachment G), or a waiver of Section 50-20(c)(5) pursuant to Section 50-38 to permit a two-year APF extension. This amounts to either a nine-year or three-year extension of the transportation-related APF validity period under Pay-N-Go.

#### ***Extension under Section 50-20(c)(10)***

Section 50-20(c)(10) of the Subdivision Regulations states:

*"(10) The Planning Board may extend a determination of adequate public facilities once for up to 12 more years beyond the otherwise applicable validity period if the Board finds that :*

- (A) *The preliminary subdivision plan for the development required a significant commitment of funds by the applicant, amounting to at least \$2,500,000, to comply with specified infrastructure conditions;*
- (B) *The applicant has met or exceeded the required infrastructure conditions during the original validity period; and*
- (C) *The applicant's satisfaction of the required infrastructure conditions provides a significant and necessary public benefit to the County by implementing infrastructure goals of an applicable master or sector plan."*

In the Applicant's opinion, these requirements are met or exceeded by the Applicant's dedication of 2.34110 acres of land for the Montrose Parkway that was valued between \$2.75 and \$4.8 million by appraisals, and the \$79,612 EDEAT deposit that has been made to the County. The Applicant's letter states that this dedication and payment provides a significant necessary public benefit at no cost to the County in implementing construction of a sizable segment of the Montrose Parkway as called for in the North Bethesda-Garrett Park Master Plan.

In staff's opinion, the requirements of Section 50-20(c)(10) have not been met because the right-of-way dedication should not be counted toward the infrastructure costs associated with this development. Instead, the infrastructure costs for this development should be considered to be the total EDEAT payment to the County that was required under the Pay-N-Go approval in lieu of specific roadway improvements. To date, the Applicant has made only \$79,612 of this payment.

#### ***Extension under waiver of Section 50-20(c)(5)***

The Applicant is alternatively requesting a waiver of Section 50-20(c)(5) of the Subdivision Regulations pursuant to Section 50-38 to permit a two-year extension of the APF validity based on the delays experienced by the Applicant in trying to resolve the dispute with the County over Cherington Road. The grounds for an APF extension contained in Section 50-20(c)(5) are as follows:

*"(5) The Planning Board may extend a determination of adequate public facilities for a preliminary plan of subdivision for nonresidential development beyond the otherwise applicable validity period if:*

- (A) *At least 40% of the approved development has been built, is under construction, or building permits have been issued, such that the cumulative amount of development will meet or exceed 40%;*
- (B) *All of the infrastructure required by the conditions of the original preliminary plan has been constructed or payments for its construction have been made; and*
- (C) *The development is an "active" project, meaning that either occupancy permits have been issued or a final building permit inspection has been passed for at least 10 percent of the project within the 4 years before an extension request is filed, or occupancy permits have been issued for at least 5 percent of the project within the 4 years before an extension request is filed if 60 percent of the project has been built or is under construction. If occupancy permits are not typically issued for the type of development for which an extension is requested, a part of the development can be*



*treated as complete when its final inspection has been approved. The Board may treat a building as complete even if occupancy permits have been issued for only part of the building."*

Since the subject development has not begun, the application does not meet the grounds for extension as specified above. The provisions that could be applied to waive this section and permit an extension are contained in Section 50-38(a)(1) of the Subdivision Regulations which states:

*"The Board may grant a waiver from the requirements of this Chapter upon a determination that practical difficulties or unusual circumstances exist that prevent full compliance with the requirements from being achieved, and that the waiver is: 1) the minimum necessary to provide relief from the requirements; 2) not inconsistent with the purposes and objectives of the General Plan; and 3) not adverse to the public interest."*

In staff's opinion, the dispute over the construction of Cherington Road constitutes an unusual circumstance that has prevented the applicant from obtaining the site plan approval necessary for release of a building permit. Under different circumstances staff might support the requested waiver to restore the time lost during the unexpected delay<sup>2</sup>. However, in this particular circumstance a waiver to permit extension of the APF should not be granted. This finding is based on the fact that approval of the traffic test for APF was granted for this Preliminary Plan and subsequent amendment under the alternate review procedures of Pay-N-Go that require the Applicant to obtain building permits for the entirety of the subdivision by October 27, 2008. As discussed below, in staff's opinion this requirement cannot be waived by the Board so there would be no benefit or justification for extending the rest of the APF review.

#### Validity of the Pay-N-Go Approval

The Applicant has also requested a waiver of the Subdivision Regulations under Section 50-38 to permit the Pay-N-Go approval for the amended Preliminary Plan to be extended for either two, or eight years to correspond with the request for extension of the APF validity period discussed above. In the opinion of the Applicant's legal representative, the Planning Board is the delegated authority to set the period of validity for finding public facility adequacy under the Subdivision Regulations and therefore has the authority to extend the method by which such adequacy is to be accomplished, even if the applicable validity period has been established by a separate resolution of the County Council. The Applicant bases its waiver request on the practical difficulties and unusual circumstances related to the road dispute.

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<sup>2</sup> A similar waiver and APF extension were granted in the recent case of the Islamic Center of Maryland (Preliminary Plan No. 120020410) based on governmental delays experienced by the project. Staff based their recommendation for approval of that extension on, among other things, consideration of the original APF approval for the preliminary plan and an evaluation of the current and future capacity of roads and transportation facilities. A similar analysis was conducted by Transportation Planning staff for the subject request and is summarized in their memorandum which is included as Attachment H to this report.

Staff does not support the Applicant's argument regarding the Board's authority to waive the requirements contained in the FY 00 Annual Growth Policy Resolution for Pay-N-Go approvals under the provisions of the Subdivision Regulations. Pay-N-Go clearly requires that building permits for the entirety of the development be issued within 48 months of a preliminary plan approval with no provisions for extension. The Subdivision Regulations do not contain any provisions that otherwise give the Planning Board authority to modify this requirement and the Board's authority to grant waivers applies only to the provisions of the Subdivision Regulations. To staff's knowledge, there has never been an exception made to this Pay-N-Go requirement. Although Pay-N-Go no longer exists, granting this request could set an undesirable precedent for other projects that did not reach completion under their own Pay-N-Go approvals. For these reasons, staff does not support a waiver of the Subdivision Regulations to extend the validity of the Pay-N-Go approval for this Preliminary Plan.

## **CONCLUSION**

Based on the analysis above, staff recommends a one-year extension of the validity period for the amended Preliminary Plan. The disagreement regarding construction of Cherington Road does qualify as a significant and unanticipated event that is preventing validation of the plan. The loss of the EDEAT deposit and the time and expense associated with filing a new preliminary plan also qualify as an undue hardship to the Applicant if the amended Preliminary Plan is not extended. Although this recommended extension exceeds the validity of the Pay-N-Go approved traffic test for APF, it does not extend the plan validity beyond that of the APF approval specified by the plan conditions. The additional year may give the Applicant time to file a site plan that includes a request for approval of a new traffic test for APF. If that plan is approved, the Applicant may submit a request for further extension of the validity period for the amended Preliminary Plan.

Staff does not support the requested extensions to the validity periods of the APF and Pay-N-Go approvals. The application does not qualify for APF extension under Section 50-20(c) of the Subdivision Regulations and although there may be grounds for a waiver of the section under Section 50-38 of the regulations, the time limits of the Pay-N-Go approval would supercede any extension that might be granted. In staff's opinion, the Planning Board does not have the authority to waive the Pay-N-Go requirements under the provisions of either the FY 00 Annual Growth Policy Resolution, or the Subdivision Regulations.

If the Board is inclined based on the Applicant's argument to grant a Subdivision Regulations waiver to extend the Pay-N-Go approval, a Board finding is necessary that practical difficulties or unusual circumstances exist that prevent full compliance with the requirements from being achieved, and that the waiver is: 1) the minimum necessary to provide relief from the requirements; 2) not inconsistent with the purposes and objectives of the General Plan; and 3) not adverse to the public interest. As previously noted in this report, the Transportation Planning staff memorandum included in Attachment H includes staff's analysis of the potential traffic impacts related to granting an extension.



Attachments:

Attachment A – Vicinity Map

Attachment B – Opinion for the Original Preliminary Plan

Attachment C – Settlement Agreement

Attachment D – Opinion for the Amended Preliminary Plan

Attachment E – Amended Preliminary Plan Drawing

Attachment F – March 17, 2008 Applicant's Letter (without attachments)

Attachment G – April 21, 2008 Applicant's Letter (without attachments)

Attachment H – Transportation Planning Staff Memorandum

## 11999029A WILGUS EAST



Map compiled on June 30, 2008 at 1:54 PM | Site located on base sheet no - 215NW06

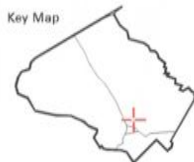
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Key Map



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0 600

1 inch = 600 feet

1 : 7200

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

8787 Georgia Avenue - Silver Spring, Maryland 20910-3760





THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Date of Mailing: August 30, 2002

Attachment B

## MONTGOMERY COUNTY PLANNING BOARD

### OPINION

Preliminary Plan Review No. 1-99029

Project: Wilgus East - North Bethesda Policy Area

Date of Hearing: February 17, 2000

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Action: **APPROVAL OF PRELIMINARY PLAN NO. 1-99029, SUBJECT TO CONDITIONS.** (Motion to approve was made by Commissioner Holmes; duly seconded by Commissioner Bryant; with a vote of 3-1, Commissioners Holmes, Bryant and Hussmann voting for the Motion; and Commissioner Wellington voting against the Motion. Commissioner Perdue necessarily absent.)

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#### I. INTRODUCTION

On October 15, 1998, Wilgus Associates, L.P., ("Applicant") submitted the subject Preliminary Plan in the O-M (office building, moderate intensity) ((C-O (Commercial office buildings) and R-200 (Residential, minimum lot size 20,000 square feet) Zones. The 8.7-acre site (Property) is located in the southwest quadrant of Montrose Road and "Old" Old Georgetown Road. The Applicant proposes two buildings, one with 308,400 square feet of general office space, and the other with 5,500 square feet of general office space. The Applicant seeks to subdivide the Property into one lot.

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After due notice, the Planning Board held a public hearing on February 17, 2000, to review the subject Preliminary Plan, in accordance with the requirements of the Md. Code Ann., Art. 28 ("Regional District Act"), Montgomery County Code, Chapter 50 ("Subdivision Regulations"), Montgomery County Code, Chapter 59 ("Zoning Ordinance"), and the Planning Board's Rules of Procedure.<sup>1</sup> At the public hearing, the Planning Board considered the Application, heard testimony from its expert technical staff ("Staff"), representatives of the Applicant, a representative of Montgomery County's Department of Public Works and Transportation (DPWT), and various individual property owners in the neighborhood, and received evidence into the record on the Application. In presenting the Application to the Planning Board, Staff prepared packets of information including a Staff Report and analysis of the application. Transportation Planning Staff also presented a memorandum dated January 26, 2000, which modified in part a previous memorandum dated January 21, 2000.

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<sup>1</sup> The Board previously held hearings on this application on December 2, 1999, January 7, 2000, and January 27, 2000. The testimony and materials from Staff, the Applicant and all speakers from those hearings are incorporated into this record.

The site is located on a portion of an overall previously recorded and registered loophole property. The Planning Board approved Preliminary Plan No. 1-81029 on September 17, 1981, for 165,000 square feet of general office use. A special exception was granted for the existing Texaco service station on center Parcel Q, N208. With the North Bethesda Sectional Map amendment, this overall property was rezoned from C-O and C-2 to R-20, C-4, and O-M. The western portion, Parcel P, N212, was approved as Preliminary Plan No. 1-96009, Wilgus Property, on December 7, 1995, for 88 single-family attached units and 12 multi-family units. As a condition of approval of Preliminary Plan No. 1-96009, the O-M portion of the property must undergo additional Adequate Public Facilities ("APF") review.

## II. ISSUES

### A. Uncontested Issues

Based on the FY 00 Annual Growth Policy staging ceiling capacity, there is no remaining capacity available for additional jobs in the transportation staging ceiling for the North Bethesda Policy Area ("Policy Area"). As of October 31, 1999, there were 991 negative jobs in the Policy Area, which results in a moratorium on most non-residential new development. Consequently, as a general rule, the Board could not find that there are adequate public transportation facilities to support this development. The proposed development of 313,900 square feet of general office development will create 1,395 jobs ("Proposed Development").

As a preliminary plan with more than 100,000 square feet of non-residential development filed before May 18, 1999, the subject preliminary plan may satisfy the APF test under the Alternative Review Procedure for Expedited Development Approval Excise Tax (EDAET), which the Applicant has done as detailed in the memoranda submitted into the record by Transportation Planning staff.<sup>2</sup> Therefore, the adequacy of public transportation facilities is uncontested. In addition, with the exception of the two issues discussed in Section B, below, all other factual matters were uncontested, including adequacy of all public facilities, e.g., (water, sewer, schools), the forest conservation plan, and lot size and conformance with Zoning Ordinance requirements.

### B. Contested Issues

#### 1. Dedication of Master Plan Right-of-Way for Montrose Parkway

The North Bethesda/Garrett Park Master Plan ("Master Plan") identifies a new, alternative east-west road that runs parallel to Montrose/Randolph Road, called the Montrose Parkway (A-270) ("Parkway"). The Master Plan recommends a 300-foot right-of-way for the Parkway, to accommodate a future transitway (a portion of right-of-way reserved exclusively for transit vehicle use), buffering for adjacent communities and enhanced landscaping along the roadway, and a 10-

<sup>2</sup> This site is within the boundary of the North Bethesda Transportation Management District ("TMD"), and the Applicant will be required to participate in the North Bethesda TMD in accordance with Executive Regulation 25-95 as a condition of approval (see Condition No. 1(d), below).



foot Class I hiker-biker trail on the south side.<sup>3</sup> Subsequent DPWT and Maryland State Highway Administration ("SHA") design efforts have relocated the Class I hiker-biker trail to the north side of the roadway between Old Farm Creek and Rockville Pike, and reduced the 300-foot right-of-way down to 130 feet along the site's western frontage.

The Applicant proposed a right-of-way width ranging from 130 feet at the western frontage limit to 215 feet at "Old" Old Georgetown Road. During the public hearing, the Planning Board expressed concern that reducing the Parkway right-of-way from 300 feet to 130 feet along the Applicant's site frontage would compromise the Master Plan intent to preserve a transitway option in the Parkway right-of-way.

Staff advised the Board that in its opinion the dedication of 130-foot right-of-way (in lieu of a 300-foot wide dedication) is sufficient because: (1) a transitway is no longer desirable in the Parkway corridor; (2) the 130-foot right-of-way could accommodate other transit priority treatments, should such a facility be desirable in the future; and (3) the adjacent properties are commercially zoned, limiting the need to provide a buffer. Staff based its opinion in part on the fact that the 1994 Master Plan (page 161, and page 166, figure 58) noted that the Montrose Parkway transitway was considered to be beyond the timeframe of the master plan and was not included in the year 2020 transportation analysis for the master plan. More importantly, a *Transitway and High-Occupancy Vehicle Network Master Plan Alternatives Report*, dated January 1995 (subsequent to the adoption of the Master Plan), recommended that the transitway not be retained for further study because of low travel demand, environmental concerns outside the Parkway right-of-way, and the difficulty of connecting this section to any other transitway serving other areas. While the *Alternatives Report* did not result in Master Plan changes, Staff noted that it has not included a transitway along the Parkway in subsequent Staff analysis of long-range transportation plans.

In summary, Staff advised the Board that the Master Plan transitway concept is not suited to the Parkway corridor. However, Staff recognized that the Master Plan has not been amended to remove the Master Plan transitway, so the Parkway right-of-way should not preclude transitway implementation. In particular, Staff noted that while an exclusive transit right-of-way is no longer considered desirable, some lesser form of transit or HOV priority system, such as a concurrent non travel lane, may still be warranted beyond the Master Plan timeframe. Staff advised the Planning Board that a 130-foot right-of-way for the Parkway provides the flexibility to accommodate such future expansion. A 130-foot cross-section is 50 feet greater than the design standard for an arterial roadway (the standard right-of-way width being 80-feet for a non-parkway design). DPWT also has a DPWT design standard for incorporating a transitway within a 41-foot wide section along the edge of a public roadway. Based on these standards, Staff advised the Board that both the arterial roadways and the transitway could therefore be accommodated within the 130-foot minimum cross-section for the Parkway. DPWT staff concurred with the Planning Board Staff's recommendations on the appropriate amount of right-of-way.

<sup>3</sup> The Planning Board reviewed the design alternatives for the Parkway on October 7, 1999, as part of the *Public Hearing Preliminary Draft of the Plan of Highways Amendment within Montgomery County* and on again on May 6, 1999, as part of the review of the project's facility planning, in anticipation of its future mandatory referral review.



B. Access to Site

The site is located in the southwest quadrant of Montrose Road and "Old" Old Georgetown Road. It is uncontested in the record that two access points are required to handle the volume of traffic generated by the Proposed Development. The first access point is a right-turn-in and a right-turn out onto Montrose Road ("Front Entrance"). Staff recommended approval of the Front Entrance access point.

In its previous submittal, the Applicant had proposed as its second site access a temporary full-movement access from "Old" Old Georgetown Road ("Side Entrance").<sup>4</sup> Staff had advised against this Side Entrance for several reasons. First, it is important to note that "Old" Old Georgetown Road is not designated in the Master Plan as a major business, arterial or primary road. Second, Staff concluded that direct access from the Side Entrance is not operationally feasible because the distance along "Old" Old Georgetown Road between the Side Entrance and Montrose Road is too short to store the queue of vehicles that the Proposed Development will generate. Finally, in addition to the inadequate distance required to store site-generated traffic, Staff testified that the site-generated traffic would create adverse conflicts with existing through traffic on "Old" Old Georgetown Road that is generated by other existing development, such as traffic generated by the Midpike Plaza "rear" access point.

Staff reached these conclusions for the following reasons. First according to Staff, the Applicant's traffic study reflects a significantly lower distribution of site-generated traffic than has been calculated both in other traffic studies prepared for nearby developments and other recent trip distribution information based on census data.<sup>5</sup> Second, conflicting movements would occur between the existing traffic and the site-generated traffic (traveling to and from the Applicant's proposed Side Entrance) on the southern leg of the "Old" Old Georgetown Road at the intersection

<sup>4</sup> The temporary access is required until the Applicant and Montgomery County enter into a Memorandum of Understanding to build a portion of the Parkway. At that time the Front Entrance will remain on Montrose Road, and the Side Access would have been relocated from "Old" Old Georgetown Road to the Parkway.

<sup>5</sup> Specifically, the Applicant's traffic study assumed that 8% of the total traffic volume to and from the site would come from the west on Montrose Road. This percentage is significantly lower than the typical 23% average in other traffic studies and the 35% based on census data. Using the 8% percent distribution, the Applicant projected that there would be 70 peak-hour inbound trips during the weekday morning peak period and 58 peak-hour outbound trips during the weekday evening peak period, to and from the west on Montrose Road. Assuming a 23% average percent distribution, however, as used in other traffic studies, the trips to and from the west on Montrose Road are projected to be 201 (or 131 more) peak-hour inbound trips during the weekday morning peak period, and 166 (or 108 more) peak-hour outbound trips during the weekday evening peak period. The Applicant's traffic study also projected that the site-generated traffic west into the Front Entrance would enter the site from the right-turn-in only access on Montrose Road during the weekday morning peak period.



with Montrose Road.<sup>6</sup> A representative from DPWT similarly testified before the Board that use of Applicant's proposed Side Entrance would cause operational problems both at the Front Entrance and Side Entrances. Third, along "Old" Old Georgetown Road (in addition to the conflicting movements between existing traffic and site-generated traffic) the distance between the Side Entrance and the intersection with Montrose Road is too short to store the site-generated traffic in the northbound left-turn lane during the weekday evening peak period (and traveling from the Side Entrance to the west).<sup>7</sup>

Consequently, the Applicant proposed that it relocate the access originally proposed onto "Old" Old Georgetown to access directly onto the Parkway right-of-way, full turning movements. Staff advised the Board that this location would be adequate to handle the site-generated traffic assuming the more consistent trip distribution from recent traffic studies prepared for nearby developments and in SHA's assessment of traffic distribution.

#### FINDINGS:

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With respect to the contested issues of record, the Board finds as follows:

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Pursuant to Montgomery County Code Section 50-35(l), the Planning Board is obligated to make a finding that a preliminary plan "substantially conform to the applicable master plan . . . including maps and text, unless the Planning Board finds that events have occurred to render the relevant master plan . . . recommendation no longer appropriate." In the instant case, the Master Plan requires a 300-foot right-of-way to be dedicated. After consideration of testimony of Staff and DPWT representatives, the Board concluded that the full right-of-way dedication no longer is required. The Board based this decision on, specifically, the study indicating that a transitway is no longer desirable in the Parkway corridor, and that even if it became desirable in the future it could be accommodated within the 130-foot to 215-foot right-of-way that the Board required.

In addition, under Section 50-30 of the Subdivision Regulations, "In its consideration of the approval of a . . . preliminary plan of subdivision . . . the board shall require the dedication to public

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<sup>6</sup> Based on the existing traffic counts collected at that time, 270 vehicles per peak-hour were traveling to the south through this intersection to other destinations during the weekday morning peak period. SHA's analysis resulted in a slightly higher number of 295 vehicles per peak-hour traveling past the site's Side Entrance during weekday morning peak hours. And again, Staff concluded that the Applicant's distribution assumption resulted in project traffic volumes inconsistent with existing peak-hour trips. With the redistribution of the site-generated traffic based on Staff's data, Staff concluded that the additional peak-hour volume that the proposed development would generate adds 131 morning peak-hour trips, and adds 108 evening peak hour trips.

<sup>7</sup> Without redistributing the site-generated traffic and using the Applicant's data, 58 peak-hour trips would be turning left during the weekday evening peak period. Using the redistribution based on the Staff's data, the number of left turns increased by 108 or a total of 166 peak-hour trips during the weekday evening peak period. Consequently, due to the inadequate storage capacity for 166 northbound left-turning vehicles, the Applicant proposed that it relocate the Side Entrance to an access point onto the Parkway right-of-way, with full turning movements.



use of adequate open spaces for traffic and the coordination of roads within the subdivision with other existing, planned or platted roads, or with other features of the district, or with the Commission's general plan . . . " In addition, with limited exemptions, the dedication "shall be to the full extent of the required right-of-way." In fact, those exemptions apply here, and the Board finds that it is appropriate to reduce *significantly* the required dedication to an amount less than the 300-foot minimum dedication recommended in the Master Plan. The Board specifically finds that events have occurred to render the relevant master plan recommendation with respect to a 300-foot right-of-way dedication to no longer be appropriate, and finds that a 130-foot to 215-foot right-of-way is more consistent with the transportation network plans to date.

With respect to selection of a second access point to the site, the Board notes that "Old" Old Georgetown Road is not master planned as a business (or any other designated) road, and therefore establishment of any access point at this location does not substantially comply with the Master Plan recommendations. In addition, the Planning Board concurs with Staff's analysis of the traffic numbers as detailed in the Staff reports (summarized above) and as confirmed by testimony from DPWT. In addition, the Board finds that the Applicant's traffic analysis was inconsistent with the analysis methods of other studies, thus inaccurately finding lower volumes to and from the west on Montrose Road, and northbound on "Old" Old Georgetown Road at Montrose Road. Therefore ~~the Board finds that peak rush-hour traffic accessing the site via an entrance on "Old" Old Georgetown Road results in inadequate ingress/egress to the site, and underscores the need for a temporary access within the Montrose Parkway right-of-way until the Parkway is constructed between East Jefferson Street and "Old" Old Georgetown Road. As a result, the Board finds that the Side Entrance access onto "Old" Old Georgetown Road would not provide adequate ingress/egress to the site and further finds that the Applicant must provide this temporary access within the Parkway right-of-way until the Parkway is so constructed.~~

**The Board Approves Preliminary Plan No. 1-99029; Pursuant to the FY2000 Annual Growth Policy Alternative Review Procedure for Expedited Development Approval ("Pay-and-Go"), Subject to the Following Conditions:**

1. Limit approval of the preliminary plan to a maximum of 308,400 square feet of office use<sup>8</sup> and pay to the Montgomery County Department of Finance the balance of the expedited development approval excise tax prior to receipt of building permit(s), and provide for the following:

a) Dedicate right of way for Montrose Parkway for a minimum of 130 feet through the property frontage expanding to approximately 215 feet approaching "Old" Old Georgetown Road to accommodate the MDSA's planned street grade design for the future MD355 and Montrose Road interchange. All rights of way, except for the area of reservation shown on the approved preliminary plan, shall be dedicated by the Applicant.

b) Provide a concept plan showing the transition of right of way for Montrose Parkway between "Old" Old Georgetown Road and East Jefferson Street to accommodate the proposed roadway improvements. The right of way should be approximately 215 feet in width at "Old" Georgetown

<sup>8</sup> The additional 5,500 square feet of space were not approved, as that portion of the site will be placed in reservation pursuant to Condition 3, below, and cannot be developed at this time.



Road tapering to 130 feet at the western edge of Wilgus East per Montrose Parkway design plans and expanding to 300 feet at East Jefferson Street. The concept plan should be submitted and reviewed by the technical Staffs of M-NCPPC and DPWT prior to the Planning Board approval of the site plan application.

c) Design and construct the two outside lanes of the segment of Montrose Parkway through the property frontage, the two lanes to establish a parkway road character.

d) Join and participate in the North Bethesda Transportation Management District (TMD) to satisfy traffic mitigation requirement, for the North Bethesda/Garrett Park Master Plan.

2. Construction of Montrose Parkway to be in accordance with the DPWT recommendations dated October 27, 1999 and November 24, 1999, as modified by the conditions of this Opinion.

3. Prior to MCPB release of building permits, Applicant to submit to M-NCPPC a reservation plat application depicting the land area located adjacent to "Old" Old Georgetown Road and Montrose Road, shown by the November 2001 SHA Environmental Assessment to be located within the alternative roadway alignment of the Montrose Road and MD 355 intersection improvements as may be updated before recordation of plat. The right of way area is to be placed in reservation for a period not to exceed, by this action, three (3) years.

4. All roads shown on the approved preliminary plan shall be constructed by the Applicant to the full width mandated by the applicable Master Plan, except as modified in Condition #1 above.

5. No clearing, grading or recording of plats prior to site plan approval.

6. Landscape, lighting, parking facilities plan and final forest conversation plan to be reviewed and approved with site plan.

7. No direct access to "Old" Old Georgetown Road through the property frontage, outside of the dedicated right-of-way for Montrose Parkway.

8. Final stormwater management approval, which may include an off-site facility to accommodate future roadway improvements, shall be approved by DPS prior to Planning Board approval of site plan.

9. Other necessary easements.

10. This Preliminary Plan will remain valid for thirty-seven (37) months from the date of mailing of the Planning Board opinion. Prior to the expiration of this validity period, a final record plat for all property delineated on the approved Preliminary Plan must be provided or a request for an extension must be filed.

11. The Adequate Public Facilities (APF) review for this Preliminary Plan will remain valid for sixty-one (61) months from the date of mailing of the Planning Board opinion.

SETTLEMENT AGREEMENT

THIS AGREEMENT entered into this 28th day of July, 2004 by and between Wilgus-Montrose Associates Limited Partnership, ("Applicant"), the Montgomery County Planning Board of the Maryland National Capital Park & Planning Commission ("The Board") and Montgomery County, Maryland ("The County").

WHEREAS on October 15, 1998, Wilgus-Montrose Associates Limited Partnership ("Applicant") submitted a preliminary plan application to The Maryland-National Capital Park and Planning Commission proposing certain development on an 8.7-acre site located in the southwest quadrant of Montrose Road and "Old" Old Georgetown Road in Montgomery County, Maryland ("Wilgus Site"); and

WHEREAS on August 30, 2002, the Montgomery County Planning Board ("Board") issued a written opinion for Preliminary Plan Number 1-99029 ("Opinion") (Exhibit One), approving two commercial buildings, one with 308,400 square feet of general office space and the other with 5,500 square feet of general office space ("Development"); and

WHEREAS the Board imposed certain conditions on the Applicant in its Opinion; and

WHEREAS on September 17, 2002, the Applicant filed a timely written objection ("Written Objection") to the Board's Opinion and related conditions in accordance with Chapter 50-30(c)(1) of the Montgomery County Code ("Subdivision Regulations"); and

WHEREAS on September 25, 2002, the Applicant timely filed a petition for judicial review of the Board's Opinion and related conditions captioned *Petition of Wilgus-Montrose Associates Limited Partnership f/k/a Wilgus Associates Limited Partnership for Judicial Review of the Decision of the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission*, Civil Action No. 236745-V ("Court Case"); and

WHEREAS on November 22, 2002, the Board entered a timely Response in the Court Case; and

WHEREAS the Board and Applicant (collectively "Parties") have jointly obtained a stay of the Court Case pending settlement discussions; and

WHEREAS the Parties jointly seek the concurrence of Montgomery County, Maryland, ("County"), to certain terms of this Agreement and that concurrence is provided below for the specific provisions indicated herein; and

NOW, THEREFORE, WITNESSETH, in consideration of the mutual agreements and promises contained herein, the Parties jointly agree to settle the Court Case based on the following terms:

I. Recitals. The above recitals are incorporated herein by reference.



## II. Planning Board Conditions of Approval.

A. The Board will seek a remand from the Circuit Court in order for the Board to undertake a new public hearing to consider the following proposed amended conditions of approval:

1. Condition No. 1.a) will be revised as follows:

Dedicate right of way for Montrose Parkway for a minimum of 130 feet through the property frontage expanding to approximately 215 feet approaching "Old" Old Georgetown Road to accommodate the MDSHA's planned street grade design for the future MD355 and Montrose Road interchange. All rights of way, except for the area of reservation shown on the approved preliminary plan, shall be dedicated by the Applicant. The Applicant shall dedicate this right-of-way within six months of the mailing of this opinion but not later than December 31, 2004.

2. Condition No. 1.c), which states "Design and construction two lanes of the segment of Montrose Parkway through the property frontage, the two lanes to establish a parkway road character," will be deleted in its entirety.

3. Condition No. 2, which states "Construction of Montrose Parkway to be in accordance with the DPWT recommendations dated October 27, 1999 and November 24, 1999, as modified by the conditions of this Opinion," will be deleted in its entirety.

4. New Condition No. 2 will be added that states "Applicant to participate in the construction of Montrose Parkway as provided for in the Settlement Agreement dated **July 28, 2004.**"

5. Condition No. 4, which states "All roads shown on the approved preliminary plan shall be constructed by the Applicant to the full width mandated by the applicable Master Plan, except as modified in Condition #1 above," shall be deleted in its entirety.

6. New Condition No. 4 will be added that states "All roads shown on the approved preliminary plan shall be constructed by the Applicant to the full width mandated by the applicable Master Plan, except for the road identified as the Montrose Parkway, which shall be constructed in accordance with the terms of the Settlement Agreement referenced above in New Condition No. 2.

7. Condition No. 10 shall be revised to reflect a forty-eight month validity period pursuant to a four-year phasing plan, giving the Applicant four years to record the preliminary plan approval and preserving its rights under Pay-and-Go.

8. Condition No. 11 shall be revised to extend Applicant's APFO approvals consistent with the four-year phasing plan.

- B. All other conditions of approval will remain unchanged and in effect.
- C. Within ninety (90) days of the Board's public hearing approving the terms of this settlement agreement the Board will mail a revised opinion ("Revised Opinion") reflecting these revised conditions.
- D. The Board will verify in its opinion that the Preliminary Plan approval and related DAP approvals will remain in effect for four (4) years after the mailing date of the Revised Opinion.

### III. Montrose Parkway

- A. Dedication of Right-of-Way for Montrose Parkway. Within six (6) months of the mailing date of the Board's Revised Opinion, but not later than December 31, 2004, the Applicant shall file, in proper form, a record plat for the dedication of Montrose Parkway, as required under Condition No. 1.a) of the Board's Revised Opinion. Applicant shall make this dedication regardless of whether it submits a record plat for the Development or proceeds to obtain building permits for the Development.

The parties hereby confirm that all existing building and parking area setbacks for the Washington Science Center property to the south of the Montrose Parkway conform to all applicable setback requirements and no additional or different setbacks will be required by virtue of the dedication and construction of the Montrose Parkway

### B. Construction of Montrose Parkway.

- 1. The Applicant and County each will pay for fifty percent (50%) of the cost of construction of two lanes of Montrose Parkway along the Wilgus Site frontage ("Road Construction") up to a combined cost of \$400,000 ("Road Costs"), as follows:
  - (i) If the County undertakes the Road Construction, then Applicant will pay fifty percent (50%) of the Road Costs, not to exceed \$200,000 ("Applicant's Share").
  - (ii) If Applicant constructs Montrose Parkway along the Wilgus Site frontage, then Applicant will pay fifty percent (50%) of the Road Costs up \$400,000 and all additional construction costs between \$400,000 and \$450,000 ("Applicant's Share").
  - (iii) If Applicant undertakes the Road Construction and total costs exceed \$450,000 (i.e., \$450,000.01) ("Additional Costs"), then the County and Applicant



agree to renegotiate in good faith additional County funds toward the total amount of (1) the Road Costs; (2) the Applicant's Share; and (3) the Additional Costs (all three together the "Aggregate Costs"). Notwithstanding anything in this Agreement, however, the County's contribution toward the Aggregate Costs shall not exceed fifty-percent (50%) of the Aggregate Costs.

2. Applicant will notify the County in writing by August 2, 2004, if it elects to undertake the Road Construction.

3. Applicant shall pay Applicant's share of the Road Costs, and the Applicant's Share of Additional Costs if incurred, regardless of whether it submits a record plat for the Development or proceeds to obtain building permits for the Development. Applicant shall make four (4) equal payments of Fifty Thousand Dollars (\$50,000) each month commencing upon Applicant's receipt of a copy of Notice to Proceed with Construction. Applicant shall make the first of such payments within thirty (30) days of receipt of said Notice and at the expiration of each thirty (30) day period thereafter until Applicant's share is paid in full.

IV. Court Case. Within thirty (30) days of the mailing date of the Board's Revised Opinion, Applicant shall withdraw, with prejudice, its Written Objection; and dismiss, with prejudice, its Court Case.

V. Miscellaneous.

A. Site Access.

1. Internal Access. Applicant will construct, at its cost, driveway access from Cherington Road into its site, as indicated on Exhibit One. The County has no obligation to provide access internal to the Wilgus site.
2. Cherington Road. Applicant has no obligation to fund the design or construction of Cherington Road or the removal of any portion of Jefferson Street if closed. When funding is appropriated and construction scheduling allows, the County will construct Cherington Road (as indicated on Exhibit Two) at its cost. This County funding may include private participation contributions resulting from other development approvals, e.g., Cherington Subdivision and shall not include or be the responsibility of the Applicant.
3. East Jefferson Street. The County will close all temporary access to East Jefferson Street at its cost.
4. Other Improvements
  - a. The County agrees to allow access between the Washington Science Center Parcel E and the Montrose Parkway at the approximate location reflected upon Exhibit 3 attached hereto and made apart hereof and subject to any required

adjustments for engineering and safety reasons by DPWT and/or DPS, to allow for construction of the driveway. Applicant shall have sole discretion as to whether or not to build such access. Applicant shall assume the cost of installing such access.

b. The County approves the Applicant's proposal to construct a pedestrian bridge crossing over the Montrose Parkway linking the Applicants site to the Washington Science Center property in a location substantially similar to the location reflected within attached Exhibit 4. The Applicant shall submit all plans and permit applications to DPWT and/or DPS required for such construction and shall bear the cost of the engineering and construction of the pedestrian bridge. DPWT and/or DPS shall review the Applicants plans for engineering and safety and require revisions with respect to engineering and safety as may be necessary to construct the bridge. Applicant shall have sole discretion as to whether to construct the approved pedestrian bridge. Should Applicant construct such pedestrian bridge, (the "bridge"), the Applicant shall be responsible for all maintenance of the bridge, and further, Applicant shall inspect the bridge every other year in accord with all Federal Regulations. The County shall also have the right (and any right of access) to inspect the bridge should applicant fail to inspect as provided for herein and be reimbursed from the Applicant for the cost of such inspection.

c. The Board if necessary shall incorporate its approval of the improvements described in this paragraph V-A.4 above into its revised Opinion on the subject Preliminary Plan No. 1-99029.

- B. Storm Drainage Conveyance. The County is aware of two potential storm drain systems that potentially could serve the Wilgus site. One may be constructed by Maryland's State Highway Administration, parallel to "Old" Old Georgetown Road. The second is an existing system under the adjacent Mid-Pike Plaza shopping center, owned by the Federal Realty Investment Trust. The Applicant may seek to tie into either of these systems and the County will not oppose those applications provided they do not compromise capacity needed by the County for the pending construction of Montrose Parkway. The Applicant is responsible for providing its own on-site stormwater management and retention system.
- C. Front Foot Benefit Assessment. The County will not assess a front foot benefit charge against the Wilgus site.
- D. To the extent permitted by law or The Annual Growth Policy (AGP) of the County, the Expedited Development Approval Excise Tax (EDAET) payment of the Applicant may be applied toward any applicable impact tax on development of this property.
- E. Warranty of Signatures. Each signatory to this Agreement warrants that they have full and complete authority to enter into this Agreement on behalf of the parties hereto and to be bound by the terms and conditions set forth herein.
- F. Parties entered this agreement after consultation with counsel. The parties hereto acknowledge that they have individually consulted with their respective legal counsel



regarding the terms and conditions of this Agreement prior to executing this Agreement.

G. Notice Provisions

Any notification required by the Terms of this Agreement or otherwise shall be made to the following persons in writing and shall be deemed delivered either by certified mail, prepaid or by hand delivery:

If to: The Montgomery County Planning Board of the  
Maryland National Capital Park & Planning Commission  
ATTN: Chairman  
8787 Georgia Avenue  
Silver Spring, MD 20910

With copy to: Office of the General Counsel  
Montgomery County Planning Board  
ATTN: Michelle Rosenfeld, Esq., Asst. General Counsel  
8787 Georgia Avenue  
Silver Spring, MD 20910

If to: Wilgus Associates, L.P. and/or  
Wilgus-Montrose Associates Limited Partnership  
Richard Cohen, General Partner  
7811 Montrose Road  
Potomac, Maryland 20852

With copy to: Stanley D. Abrams, Esq.  
4550 Montgomery Avenue, #760N  
Bethesda, MD 20814

If to: Montgomery County, MD  
ATTN: Office of The County Executive  
Executive Office Building  
101 Monroe Street  
Rockville, MD 20850

With copy to: County Attorney for Montgomery County, Maryland  
Office of the County Attorney  
Executive Office Building, 3<sup>rd</sup> Floor  
101 Monroe Street  
Rockville, MD 20850

H. Entire Agreement/Binding Effect

This Agreement contains the entire agreement between the parties and shall be binding upon and inure to the benefit of the parties, their respective successors and assigns.

I. Maryland Law

This Agreement and the rights and obligations of the parties under this Agreement shall be governed by the laws of the state of Maryland.

J. Counterpart Copies

This Agreement may be executed in counterpart copies.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK.]  
[SIGNATURE PAGES TO FOLLOW.]



This Agreement made on the date first written above.

ATTEST:

The Maryland-National Capital  
Park and Planning Commission

\_\_\_\_\_  
Patricia Colihan Barney  
Secretary-Treasurer

\_\_\_\_\_  
Trudye M. Johnson  
Executive Director

\_\_\_\_\_  
Date

Wilgus Associates Ltd. Partnership (a/k/a  
Wilgus-Montrose Associates Ltd. Partnership)

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Richard Cohen, General Partner

\_\_\_\_\_  
Date

\_\_\_\_\_  
Roswil, Inc., General Partner

\_\_\_\_\_  
Date

Rebecca S. Domaruk  
Witness

Montgomery County, Maryland

Joseph F. Beach  
Joseph F. Beach, Asst. Chief  
Administrative Officer

7/9/04  
Date

APPROVED AS TO FORM AND LEGALITY  
OFFICE OF COUNTY ATTORNEY

BY Sileen J. Brennan

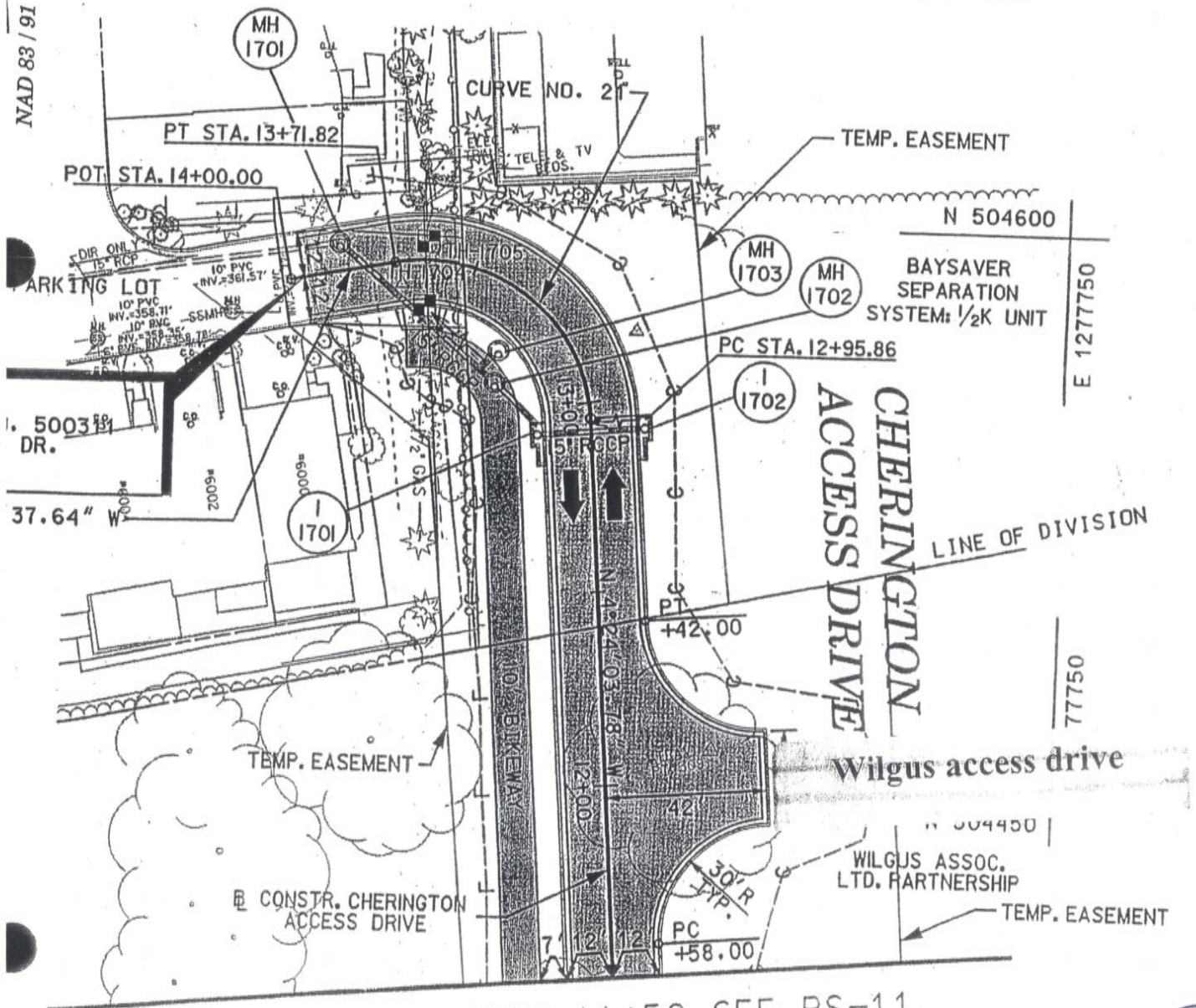
DATE 7/7/2004

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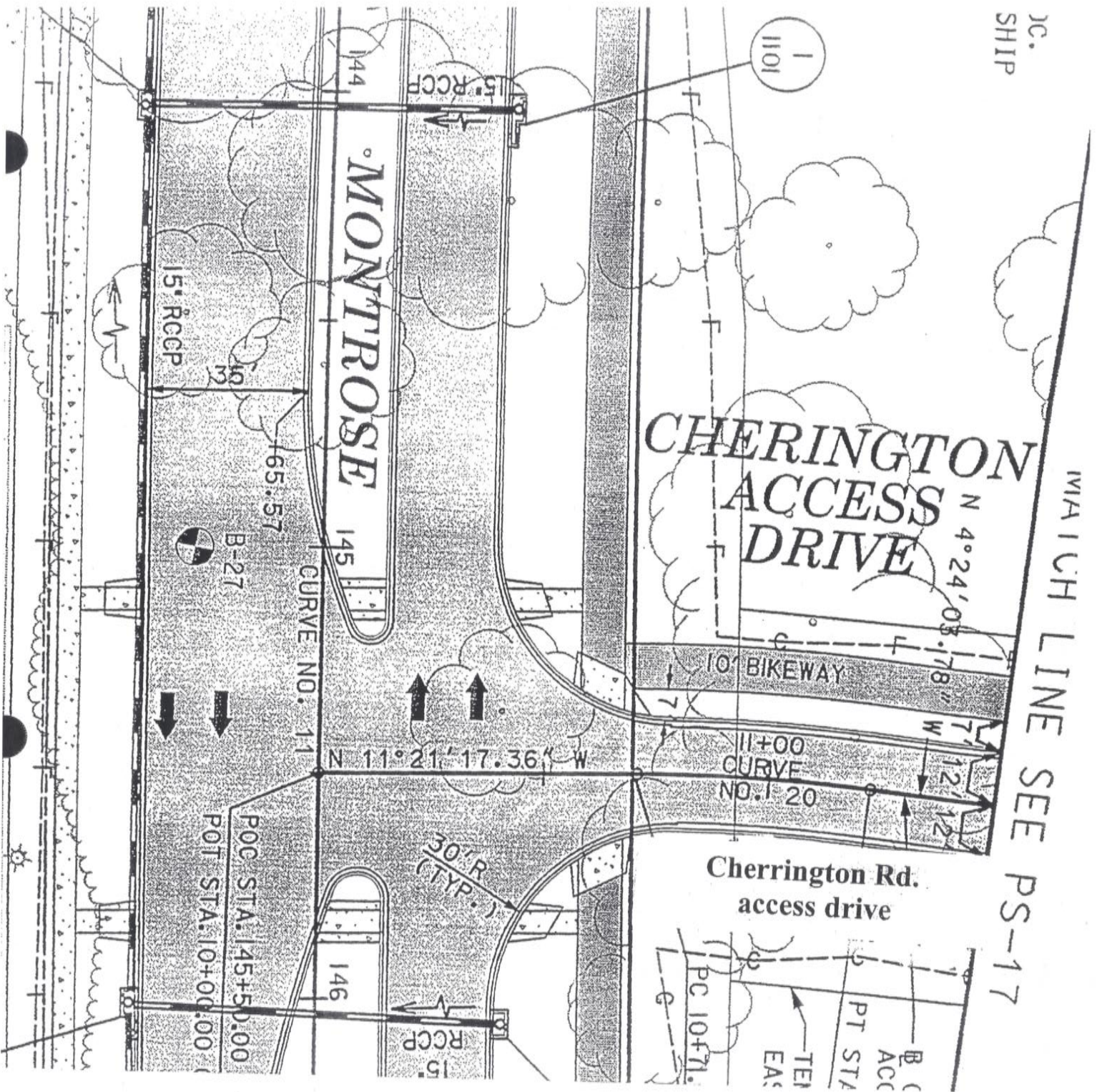


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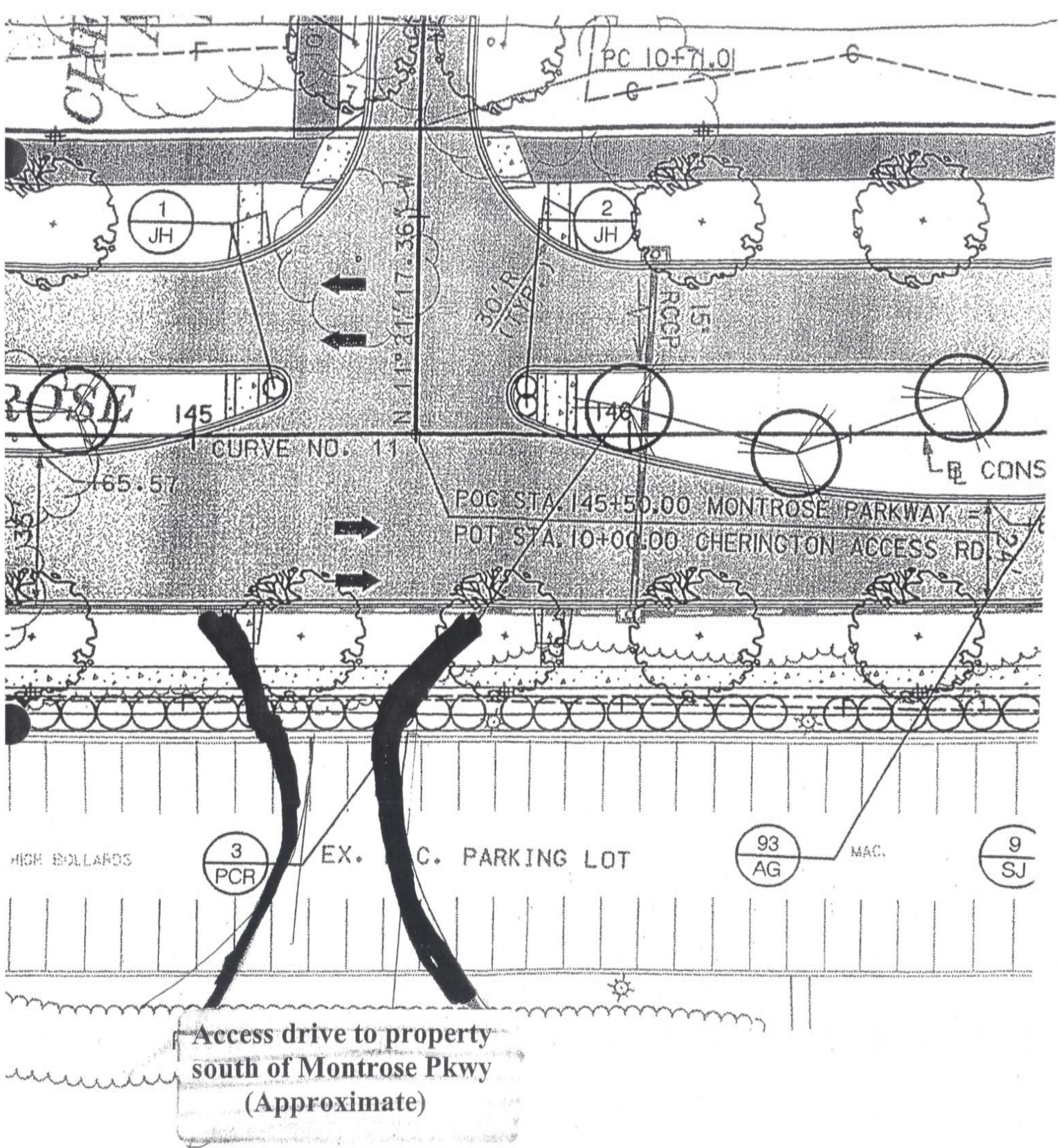
Exhibit 1

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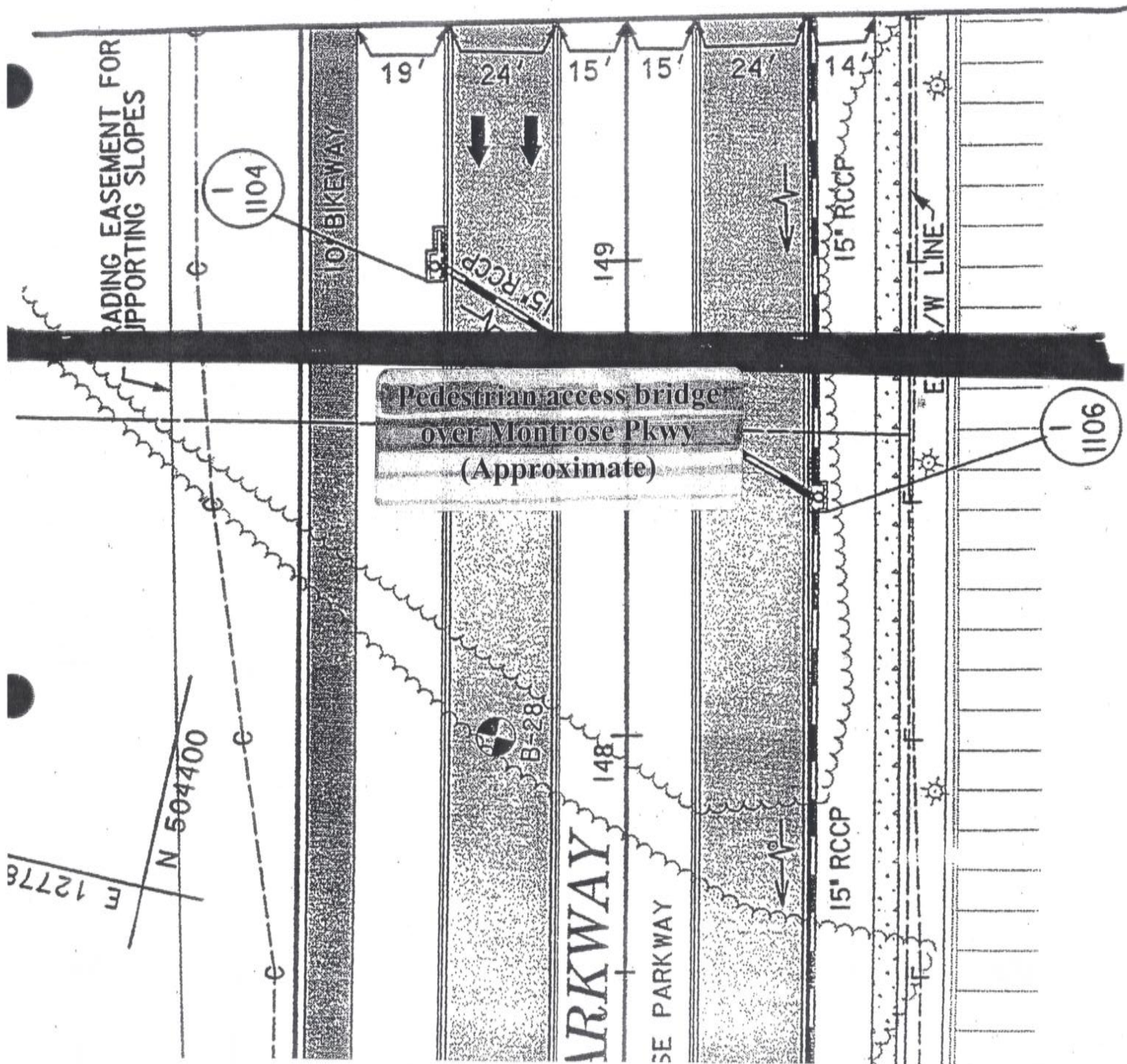




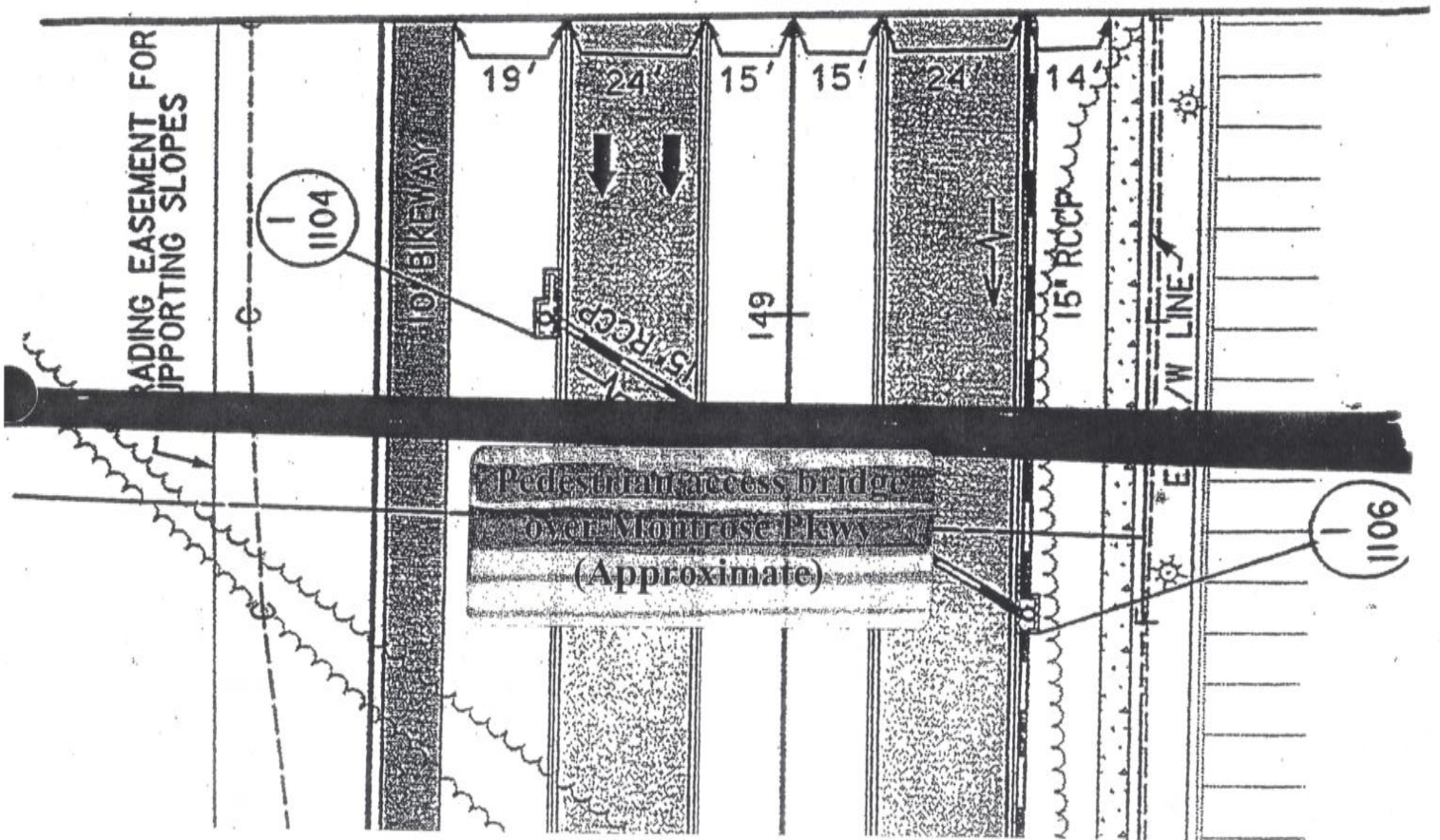




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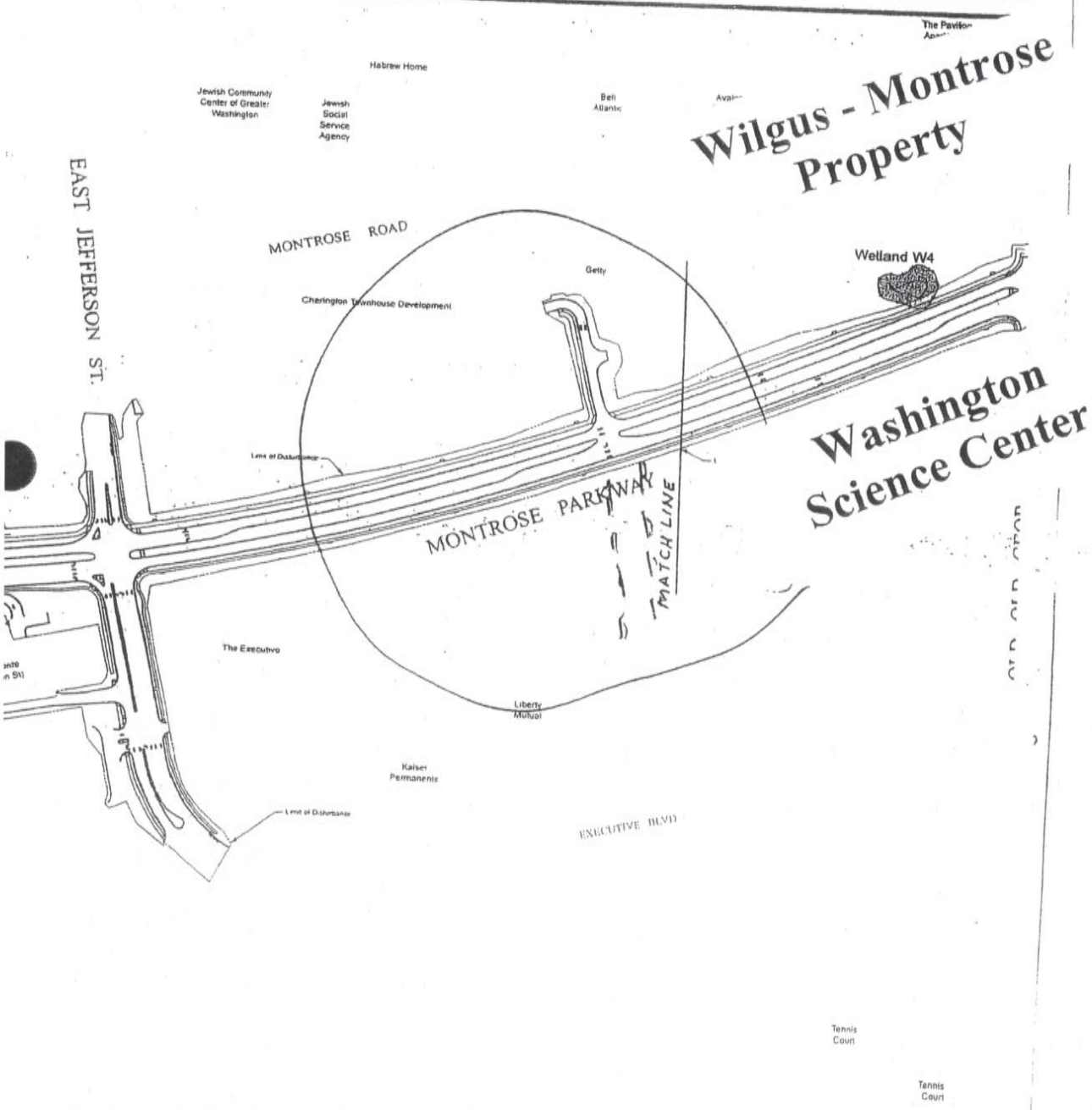
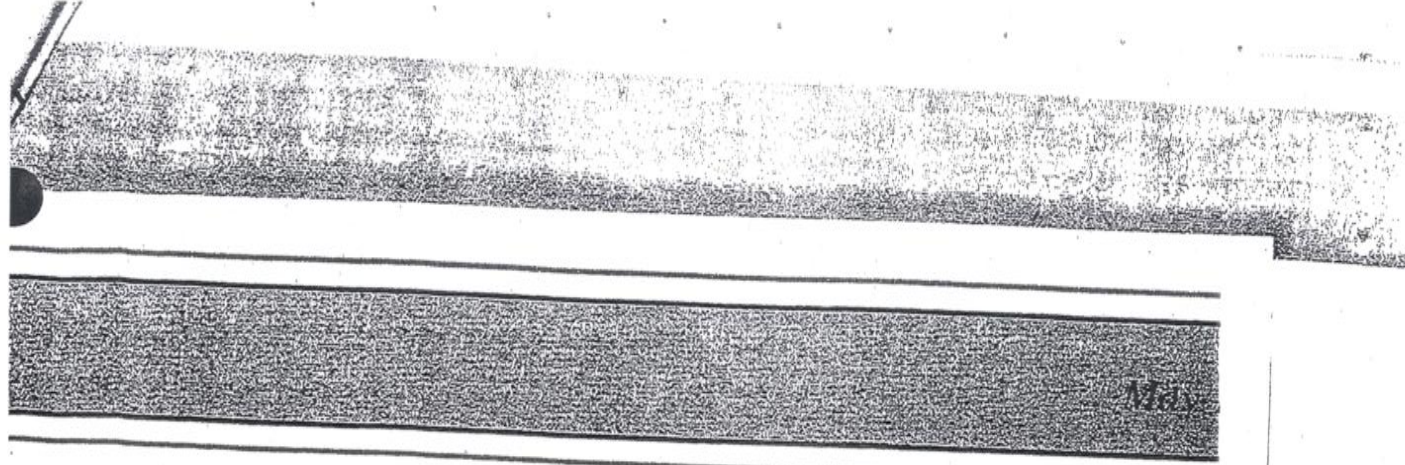


PLATE 4 OF 14



Date Mailed: October 27, 2004

## MONTGOMERY COUNTY PLANNING BOARD

## OPINION

Preliminary Plan: 1-99029A  
Name of Plan: Wilgus East  
Date of Hearing: July 29, 2004

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Action: Approval, subject to conditions. Motion to approve was made by Commissioner Bryant, duly seconded by Commissioner Perdue, with a vote of 5-0. Commissioners Berlage, Perdue, Bryant, Wellington and Robinson voting to support the motion.

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On August 30, 2002, the Planning Board issued a written opinion confirming the oral preliminary plan approval that it issued after a duly noticed public hearing held on February 17, 2000, approving the above-referenced preliminary plan subject to a number of conditions. The applicant, Wilgus Limited Partnership, filed a legal challenge to the Board's conditions of approval in the Circuit Court for Montgomery County.<sup>1</sup> Subsequent to the filing of the appeal, the Planning Board, Wilgus Limited Partnership and Montgomery County entered into a three-party settlement agreement dated July 28, 2004, in the above-referenced case. Consistent with the terms of that agreement, this Preliminary Plan will remain valid for four (4) years after the mailing date of the Revised Opinion, as will the Applicant's ability to obtain building permits pursuant to its related Pay-And-Go approvals.

The only testimony at the public hearing came from the applicant and its representatives, who supported staff's recommendation of approval and asked the Board to approve the preliminary plan amendments. There was no opposition in the record, in the form of either written or verbal testimony, to the

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<sup>1</sup> *Petition of Wilgus-Montrose Associates Limited Partnership f/k/a Wilgus Associates Limited Partnership for Judicial Review of the Decision of the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, Montgomery County Circuit Court Civil Action No. 236745-V.*



amended plans or to the settlement agreement, thus the recommendation to amend the conditions was utterly uncontested in the record.

Consistent with the terms of that settlement agreement, the Planning Board approves Preliminary Plan No 1-99029A, pursuant to the FY2000 Annual Growth Policy Alternative Review Procedure for Expedited Development Approval ("Pay-and-Go"), subject to the following conditions:

1. Limit approval of the preliminary plan to a maximum of 308,400 square feet of office use<sup>2</sup> and pay to the Montgomery County Department of Finance the balance of the expedited development approval excise tax prior to receipt of building permit(s), and provide for the following:
  - a) Dedicate right of way for Montrose Parkway for a minimum of 130 feet through the property frontage expanding to approximately 215 feet approaching "Old" Old Georgetown Road to accommodate the MDSHA's planned street grade design for the future MD355 and Montrose Road interchange. All rights of way, except for the area of reservation shown on the approved preliminary plan, shall be dedicated by the Applicant. The Applicant shall dedicate this right-of-way within six months of the mailing of this opinion but not later than December 31, 2004.
  - b) Provide a concept plan showing the transition of right of way for Montrose Parkway between "Old" Old Georgetown Road and East Jefferson Street to accommodate the proposed roadway improvements. The right of way should be approximately 215 feet in width at "Old" Georgetown Road tapering to 130 feet at the western edge of Wilgus East per Montrose Parkway design plans and expanding to 300 feet at East Jefferson Street. The concept plan should be submitted and reviewed by the technical Staffs of M-NCPPC and DPWT prior to the Planning Board approval of the site plan application.
  - c) Join and participate in the North Bethesda Transportation Management District (TMD) to satisfy traffic mitigation requirement, for the North Bethesda/Garrett Park Master Plan.
2. Applicant to participate in the construction of Montrose Parkway as provided for in the Settlement Agreement dated July 28, 2004.
3. Prior to MCPB release of building permits, Applicant to submit to M-NCPPC a reservation plat application depicting the land area located adjacent to "Old" Old Georgetown Road and Montrose Road, shown by the November 2001 SHA Environmental Assessment to be located within the alternative roadway

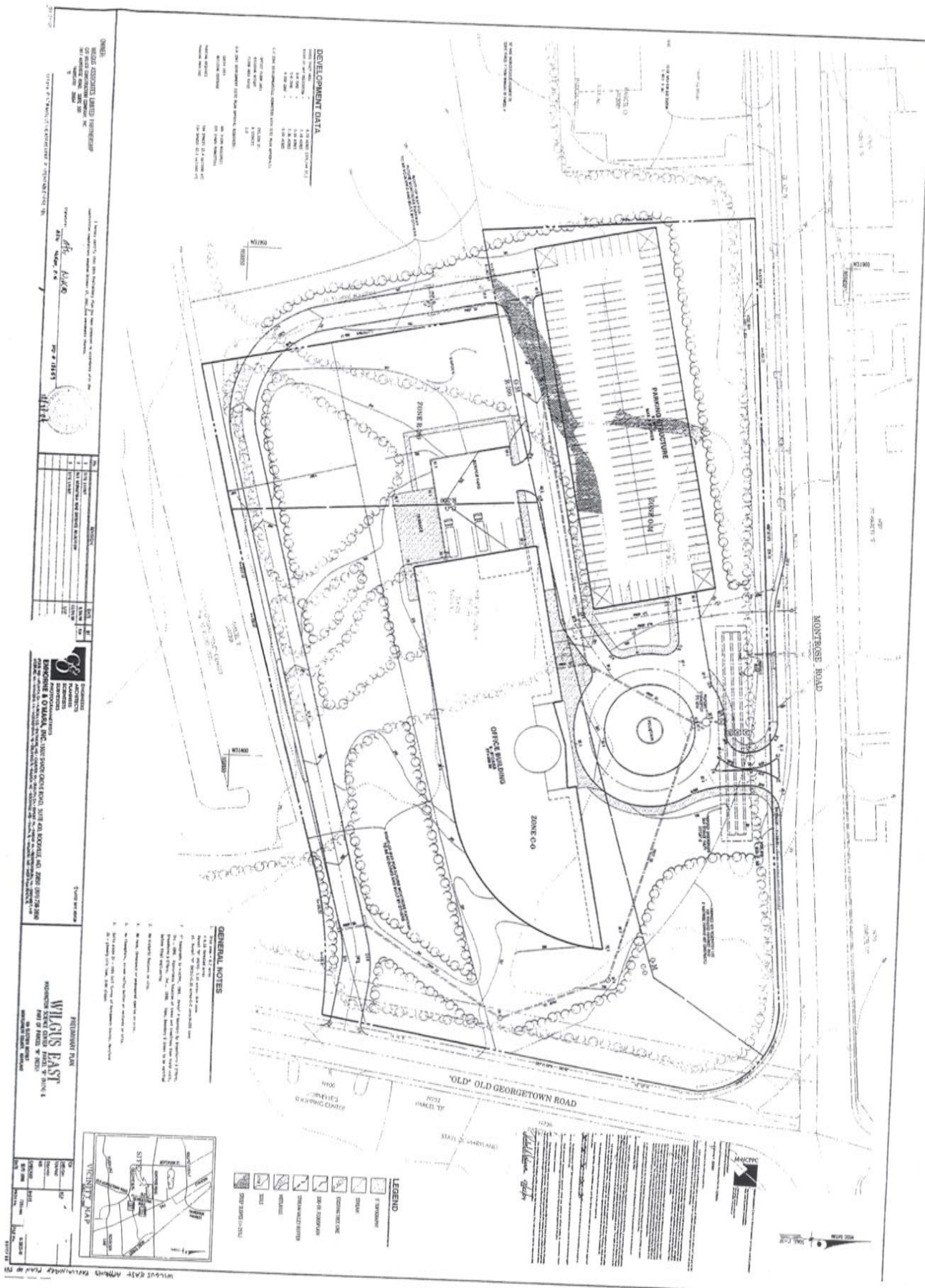
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<sup>2</sup> 5,500 square feet of space were not approved, as that portion of the site will be placed in reservation pursuant to Condition 3, below, and cannot be developed at this time.

alignment of the Montrose Road and MD 355 intersection improvements as may be updated before recordation of plat. The right of way area is to be placed in reservation for a period not to exceed, by this action, three (3) years.

4. All roads shown on the approved preliminary plan shall be constructed by the Applicant to the full width mandated by the applicable Master Plan, except for the road identified as the Montrose Parkway, which shall be constructed in accordance with the terms of the Settlement Agreement referenced above in New Condition #2.
5. No clearing, grading or recording of plats prior to site plan approval.
6. Landscape, lighting, parking facilities plan and final forest conversation plan to be reviewed and approved with site plan.
7. No direct access to "Old" Old Georgetown Road through the property frontage, outside of the dedicated right-of-way for Montrose Parkway.
8. Final stormwater management approval, which may include an off-site facility to accommodate future roadway improvements, shall be approved by DPS prior to Planning Board approval of site plan.
9. Other necessary easements.
10. This Preliminary Plan will remain valid for forty-eight (48) months from the date of mailing of the Planning Board opinion, as do all Pay-and-Go approvals. Prior to the expiration of this validity period, a final record plat for all property delineated on the approved Preliminary Plan must be provided or a request for an extension must be filed.
11. The Adequate Public Facilities (APF) review for this Preliminary Plan will remain valid for sixty-one (61) months from the date of mailing of the Planning Board opinion.





**ABRAMS & WEST, P.C.**

STANLEY D. ABRAMS  
ANNETH R. WEST  
JITH J. ROSA

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March 17, 2008

Dr. Royce Hanson, Chairman  
Montgomery County Planning Board  
8787 Georgia Avenue  
Silver Spring, MD 20910

**RE: Request for Extension of Validity Periods  
And/or Request for Variation or Amendments  
Related to Preliminary Plan 1-99029A –  
Wilgus East**

Dear Chairman Hanson:

On behalf of the property owner/Petitioner (hereinafter "the Petitioner") Wilgus-Montrose Associates Limited Partnership we hereby request the Planning Board to grant the following:

- (1) Extend the validity period for Preliminary Plan 1-99029A which currently expires October 27, 2008 to at least November 27, 2009, concurrent with the expiration of the APF Review in order to file and receive site plan approval for this property; or
- (2) Extend the validity period for Preliminary Plan 1-99029A and the validity period of the APF Review until Oct. 10, 2011 which is co-terminus with the amount of the governmentally caused delay as explained below; and
- (3) Extend the Pay-N-Go Approval by grant of a variation or amendment to at least coincide with any extension period granted under (1) or (2) above.

**Factual Background**

The subject property split zoned OM/CO/R-200 contains 8.7 acres of land located in the southwest quadrant of Montrose Road and "Old" Old Georgetown Road in North



Bethesda (originally designated as Preliminary Plan No. 1-99029) was granted preliminary plan approval August 30, 2002 for two office buildings, one containing 308,400 square feet and the second building containing 5,500 square feet (See Attachment "A"). To satisfy the APF test the Petitioner participated in the Alternate Review Procedure for Expedited Development Approval Tax (EDAET) or more commonly known as "Pay-N-Go" and deposited with the County the deposit amount of \$79,612.50 (See Attachment "B") with the remainder to be due at subdivision recordation. Among the conditions of approval the Planning Board required of the Petitioner:

- Dedication of right-of-way for the Montrose Parkway along the property frontage (Condition No. 1.a)
- Design and construct two lanes of the Montrose Parkway along the property frontage (Condition No. 1.c)

It is important to note that the approved preliminary plan (See Attachment "C") reflected two (2) access points, one to Montrose Road and a second temporary access within the planned right-of-way area for Montrose Parkway to "Old" Old Georgetown Road to the east. This temporary access would be extinguished with the construction of the Montrose Parkway and a permanent second access would connect with a proposed road to the west of the Petitioner's property known as Cherington Road. Cherington Road would also provide access to the Cherington townhouse community located to the west in order to abandon the townhouse communities existing access on E. Jefferson Street to improve traffic flow (See Attachment "D").

The Petitioner filed timely objection with the Board pursuant to §50-30(c)(2) of the Subdivision Regulations to the condition for dedication and construction of the right-of-way for Montrose Parkway. Before the Board could entertain the objections, the Petitioner had to file a Petition for Judicial Review with the Circuit Court to the preliminary plan decision or any appeal to court would have been waived. While awaiting the record to be filed with the Circuit Court, the Petitioner agreed to a Remand with Board's counsel to enter into settlement negotiations with the Board and the Montgomery County Department of Public Works and Transportation (DPWT) which was in final design of the roadway and would thereafter start property acquisition for the Montrose Parkway. The matter was remanded to the Board by Court Order entered August 13, 2003 (See Attachment "E").

For approximately the next twelve (12) months negotiations continued between the Petitioner, Montgomery County (through DPWT) and the Planning Board (through its then Assistant General Council, Michele Rosenfeld, Esq.) and finally culminated with a three party settlement agreement dated July 28, 2004 (See Attachment "F"). In exchange

for the Petitioner agreement to dedicate the land before December 31, 2004 valued at over Two Million Dollars (\$2,000,000+) for the Montrose Parkway, the Planning Board agreed to amend its conditions of approval (§ II-A of Attachment "F") and most importantly Montgomery County agreed to construct Cherington Road as follows:

2. *Cherington Road. Applicant has no obligation to fund the design or construction of Cherington Road or the removal of any portion of Jefferson Street if closed. When funding is appropriated and construction scheduling allows, the County will construct Cherington Road (as indicated on Exhibit Two) at its cost. This County funding may include private participation contributions resulting from other development approvals, e.g. Cherington Subdivision and shall not include or be the responsibility of the Applicant.*

In December, 2004, the Petitioner submitted the record plat to the Planning Board for the dedicated area of Montrose Parkway fronting the property as agreed and the dedication plat was recorded. The Planning Board as it agreed under the terms of the Settlement Agreement and after public hearing and recommendations from staff approved Preliminary Plan No. 1-99029A for a single 308,400 sq. ft. office building with revised conditions on October 27, 2004 (See Attachments "G-1" and "G-2") including conditions No. 10 & 11 which states:

10. *This Preliminary Plan will remain valid for forty-eight (48) months from the date of mailing of the Planning Board opinion, as do all Pay-and-Go approvals. Prior to the expiration of this validity period, a final record plat for all property delineated on the approved Preliminary Plan must be provided or a request for an extension must be filed.*

11. *The Adequate Public Facilities (APF) review for this Preliminary Plan will remain valid for sixty-one (61) months from the date of mailing of the Planning Board opinion.*

The County filed "quick take" condemnation proceedings for other property to the west of the subject property owned by my client and has constructed a portion of the Montrose Parkway up to E. Jefferson Street. A subsequent condemnation Petition was filed August 17, 2005 for that portion of Montrose Parkway east of E. Jefferson Street up to the area dedicated by the Petitioner under the Settlement Agreement.

#### **The Necessity for the Requests**



In order to record a plat and apply for and receive site plan approval there is insufficient time before the current validity period of October 27, 2008 expires. If it expires the APF review validity period will also expire. Therefore an extension of the Preliminary Plan validity period and APF review are necessary. In addition, the EDAET approval (Pay-N-Go) may also expire because we cannot receive a building permit leaving Petitioner with dedication of several million dollars of land and possible forfeiture of its EDAET deposit, a delay of several years with carrying costs all because of the actions of Montgomery County as explained below.

### **The Basis for the Requests**

Procedurally, to validate the preliminary plan, the Petitioner had to receive site plan approval before it could record its record plat. Further, to validate the Pay-N-Go, Petitioner had to receive a valid building permit under the provisions of the then applicable AGP. As previously noted the approved preliminary plan in 2000 provided for a temporary access to "Old" Old Georgetown Road through the planned right-of-way for the Montrose Parkway (See Attachment "C"). This would cease with the construction of this segment of the Montrose Parkway and permanent access would be via Cherington Road to Montrose Parkway. Also, in the approval of the 2000 Preliminary Plan, the Planning Board determined that the recommended 300 foot right-of-way recommended in the North Bethesda Master Plan would be reduced to 130 feet in width, increasing to 215 width at "Old" Old Georgetown Road (See pp. 2, 3 of Attachment "A"). Approximately 170 foot depth of right-of-way would be required to link Cherington Road from Montrose Parkway back into the access drives for the Cherington townhouse community and the Petitioners property (See Attachment "H"). Cherington Road although outside of the area covered by both the 2000 and 2004 preliminary plans was included in the July, 2004 settlement agreement whereby the County agreed to design and construct Cherington Road and agreed that the Petitioner would not be responsible for funding of this improvement (See Attachment F, ¶ IV A.2).

Notwithstanding, these obligations under the Settlement Agreement, the County has refused to construct Cherington Road since at least October 10, 2005 when it notified the Petitioner that it expected the Petitioner to give the property "gratis or dedicated" and it will be a private street or driveway (See Attachment "I"). This obviously came as a shock to the Petitioner:

- At no time during the twelve (12) months of negotiating the Settlement Agreement did the County as part of the negotiations or anyone else mention that the land was to be dedicated or given "gratis" to the County for this road right-of-way by the Petitioner.

- No mention of such dedication or gift of the land is contained in the Settlement Agreement.
- The representative of the Planning Board at all settlement negotiation meetings, being its former legal counsel, Michele Rosenfeld, Esq., who drafted the agreement has indicated to this writer that it was her understanding that Cherington Road was totally the responsibility of the County and that my client, the Petitioner, had no obligation at all for this road.
- If the Petitioner had already dedicated extensive land for the Parkway in December, 2004 and the construction of Cherington Road was part of the County's plan to provide access to the townhouse community so it could close the existing townhouse access on E. Jefferson Street to improve circulation at the E. Jefferson Street/Montrose Road intersection, why did it suddenly become the Petitioner's responsibility to provide free land to the County?
- If the County agreed to design and construct a road how do they construct the road without acquiring the land for the road?
- Finally, if the County believed that the Petitioner was responsible for donating or dedication of the land for Cherington Road why didn't they request such dedication be made a part of the Planning Board approval of Preliminary Plan 1-99029A?

Despite meetings and communications between representative of the Petitioner and the County in which Petitioner sought the commitment of the County to construct that road, the County has consistently refused to do so claiming that it will not acquire property for what they consider a "private driveway" (See Attachment "J"). The obvious question is why does the County have a problem with acquiring land for a "private driveway" but has no problem agreeing to construct a private driveway? Further, why shouldn't such a right-of-way be a public street?

The County is proceeding with the condemnation of property owned by my client east of E. Jefferson Street for the parkway including only a "temporary" easement over the disputed land for Cherington Road. My client is or will contest the "temporary" status of the easement sought to be acquired in those proceedings. Nonetheless we have no assurance that the County will build this road and therefore until this is resolved we could not file our site plan and proceed to validate our approvals since we are not assured of this method of access. The case has been in mediation and failing that will be tried in the Circuit Court.



### **Statutory and Case Law Basis for Granting Requests**

§50-35(h)(3) of the Subdivision Regulations authorize the Planning Board to extend the validity period of a preliminary plan for the following reasons:

- (D) i. delays, subsequent to the plan approval by the government or some other party, essential to the applicant's ability to perform terms or conditions of the plan approval, have materially prevented applicant from validating the plan, provided such delays are not created or facilitated 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 (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.

### **Petitioner's Position**

The delay in being able to file a site plan and record plat was caused by the County's refusal to timely construct or acknowledge agreement to construct without conditions Cherington Road as explained above and the significant and unanticipated event is that the County would not abide by the Settlement Agreement to construct this road which is the permanent access for the Petitioner's project. This has and will continue to create an exceptional or undue hardship until resolved by the parties or the Courts and could cause the Applicant to forfeit over Two Million Dollars (\$2,000,000) in land dedicated for the Montrose Parkway, lose its EDEAT deposit and ability to proceed under this Pay-N-Go approval, require the filing of a new preliminary plan with its attendant costs and time and be subject to new regulatory requirements. Furthermore, if this requested extension is not granted, the Petitioner must seriously consider seeking relief for all of their damages caused by the County's breach of the 2004 Settlement Agreement.

### **§§50-35(h)(2) and 50-35(h)(D)(ii) of the Subdivision Regulations**

These regulations state that the preliminary plan validity period may not exceed the APF Validity Period. The APF Validity Period as noted in preliminary plan Condition No. 11 (infra. p. 3) is 61 months from the date of mailing of the Board's opinion but the preliminary plan under Condition No. 10 is only 48 months.

### **Petitioner's Position**

The Planning Board approval of Preliminary Plan 1-99029A on October 27, 2004 states in Condition No. 11 that the APF Validity period for this plan is "sixty-one (61) months from the date of mailing of the Planning Board Opinion." This expires November 27, 2009 and consequently the Petitioner requests that the validity period of the Preliminary Plan be extended at least until this date. The Petitioner certifies that the requested extension is the minimum additional time required for validation. Petitioner further certifies that the subject project is capable of being financed, constructed and marketed within a reasonable time frame for the following reasons:

- The property has been owned by Petitioner for over 30 years and is not subject to any underlying debt.
- The principals of Petitioner have extensive experience as developers and owners of commercial office buildings including the Washington Science Center to the south of the Montrose Parkway along Executive Boulevard.
- Petitioners have been in communications with potential users of office space including Federal Government Agencies who are seeking office facilities in the subject area.
- The subject property is in a prime market location near Rockville Pike and I-270 and in reasonable vicinity of the White Flint Metro Station.

### **§50-38 of the Subdivision Regulations**

The Board may grant variations to the requirements of Chapter 50.

### **Petitioner's Request/Position**

The Petitioner requests extension of the existing Pay-N-Go approval (EDAET) to at least November 27, 2009 (or to October 10, 2011 to fully compensate for governmentally caused delay) due to the practical difficulties and unusual circumstances related above and such extension is the minimum necessary to receive all approvals and permits required under EDAET and is not inconsistent with the purpose and objectives of



the General Plan which recommends the subject use and would not be adverse to the public interest in providing safe and coordinated access with the adjacent townhouse community to the Montrose Parkway. The variation will coordinate time limits with the extension of validity request set forth above and the validity period of the APF review (i.e. 61 months).

Petitioner submits that it has a vested interest and contract with Montgomery County under the Expedited Non-Residential Development Approval provision of the FY 2000 Annual Growth Policy - Policy Element, Paragraph A.3.6 thereof adopted by Resolution 14-328 on October 28, 1999. The Planning Board is the delegated authority to set the period of validity for finding public facility adequacy (§50-20(c)) and therefore has the authority to extend the method by which such adequacy is to be accomplished. This authority is established by local law which cannot be restricted by resolution of the County Council in subsequent AGP's in attempting to limit the Planning Boards authority to extend validity periods, including that of determination as to extension of Pay-N-Go.

#### **Applicable Case Law**

*Lanzaron v. Anne Arundel County*, 402 Md. 140, 935 A.2d 689 (2007). The Maryland Court of Appeals held that the granting of a "time variance" for a one-year extension to obtain a building permit and an additional 1 ½ years to implement a use authorized by special exception was authorized and proper under the zoning ordinance. The impediments to meeting the statutory time requirements for obtaining permits was due to "multi-tiered County and State requirements" and an appeal by neighbors. The Court stated:

"Additionally, we have long held that when a zoning decision has been made authorizing a particular action which by statute must be taken by a certain time, that time generally does not begin (or continue) to run during a period in which opponents or other governmental agencies (or even in some cases circumstances) have created conditions, such as permitting processes, appeals or other litigations, that block the taking of a particular action."

Montgomery County in continually refusing to construct Cherington Road pursuant to the 2004 Settlement Agreement by requiring dedication or gift of the right-of-way which was not part of the Settlement Agreement and refusing to otherwise condemn the land while in the process of condemning other right-of-way for Montrose Parkway has frustrated the ability of Petitioners to file a site plan which eliminates the temporary access point and establishes the permanent access where everyone agrees it should be.

The issue may well have to be settled by continued mediation or the condemnation proceedings related to adjacent properties.

Additionally, the Court in Lanzaron, quoting Nutter v. City of Baltimore, 230 Md. 6, 13-14, 185 A.2d 360, 363-64 (1962), stated,

“Common knowledge and experience discloses it is frequently impossible to complete all steps necessary in the development of a large building project within the restricted period of time. I cannot believe it was the intention of the framers of the ordinance to impose impossible conditions on builders or fetter the Board with an arbitrary and unchangeable time limitation which the Board would be without power to extend in any case. Great difficulty could only result from a hard and fast rule denying the Board power to act as it has and which power the Board has been exercising for many years.”

Even though the time restriction that has been imposed on Petitioner is not contained in the Montgomery County Zoning Ordinance, the time period was established as a condition of approval in accordance Chapter 50 of the Subdivision Regulations. As a result, it follows from the reasoning in Lanzaron and Nutter that a time restriction imposed as a condition of approval such as ours should not be an “arbitrary and unchangeable time limitation which the Board would be without power to extend.” Id.

Just as in the variance ordinance in Lanzaron, there is nothing in §50-38 that limits the ability of the Board to grant a time variation requested in the subject case. The waiver provision found in §50-38(d) states that the section does not apply to “provisions” of Chapter 59 of this Code, the road construction code, health laws or other ordinances or regulations of the County.” The AGP is not an “ordinance or regulation” nor has it been adopted as such. Section 50-38(d) specifically lists the sections of the County Code for which the Board is not authorized to issue a waiver or variation.

As stated in Lanzaron,

“The local legislative body clearly knew that it could except certain parts of the Code from the application of the variance provisions. [This] section . . . was not one of the sections that was excepted.”

Id. at 150.



The Lanzaron decision and its rationale clearly apply here and support justification for the extension of the validity period requested and the Board's extension of EDEAT as it applies to this preliminary plan.

We regret the length of this explanation of the Petitioner's request, but the facts are so unique and have been developed over such a long and tortured path that any shorter explanation would not suffice.

Respectfully Submitted,



Stanley D. Abrams

SDA:dw  
Enclosures

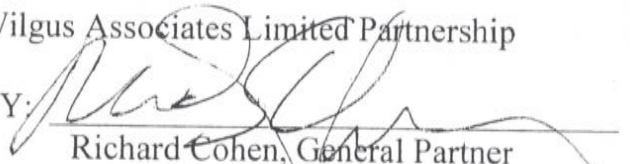
Cc: Richard Cohen  
Cathy Conlon  
Al Blumberg

**CERTIFICATION**

I, RICHARD COHEN, as representative of Petitioner certify that to the best of my knowledge information and belief that facts stated herein are true and correct.

Wilgus Associates Limited Partnership

BY:

  
Richard Cohen, General Partner

## ABRAMS &amp; WEST, P.C.

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April 21, 2008

Ms. Cathy Conlon  
Subdivision Review Section  
Development Review Division  
Montgomery County Planning Board  
8787 Georgia Avenue  
Silver Spring, MD 20910

**RE: Amendment to Request for Extension of  
Validity Periods  
Preliminary Plan No. 1-99029A  
Wilgus - East**

Dear Cathy:

We have previously filed a request with your office to extend the validity period for the above referenced preliminary plan which currently expires October 27, 2008 and to extend the validity period of the APF determination which expires November 27, 2009. The outside date requested for extension of three validity periods was October 10, 2011 which was co-terminus with the amount of governmentally caused delay as explained in our original filing. We amend our request to an alternate outside validity period to October 10, 2016 pursuant to Section 50-20(c)(5)(C)(10) of the Subdivision Regulations which states:

- (10) *The Planning Board may extend a determination of adequate public facilities once for up to 12 more years beyond the otherwise applicable validity period if the Board finds that:*
- (A) *The preliminary subdivision plan for the development required a significant commitment of funds by the applicant, amounting to at least \$2,500,000, to comply with specified infrastructure conditions;*
  - (B) *The applicant has met or exceeded the required infrastructure conditions during the original validity period; and*



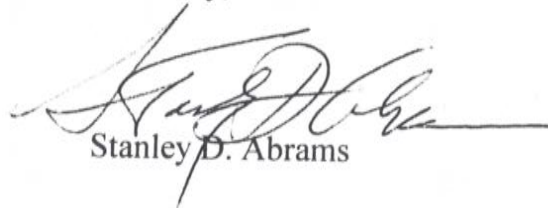
- (C) *The applicant's satisfaction of the required infrastructure conditions provides a significant and necessary public benefit to the County by implementing infrastructure goals of an applicable master or sector plan.*

The Petitioner meets or exceeds all of the above cited criteria. The Preliminary Plan Approval (October 27, 2004) was conditioned (Condition 1(a)) upon dedication of right-of-way for the Montrose Parkway along the property frontage. This dedication of 2.34110 acres occurred during the initial validity period and is recorded at Plat No. 2318 in the Land Records. The land was zoned almost entirely C-O (2.3155 ac) with small sections zoned O-M and R-200 (.025 ac.). The attached letter and appraisal report received from James Thompson, Esq. involved in Montrose Parkway condemnation proceedings on the abutting Parcel 279 reflects that the property dedicated for the Montrose Parkway as C-O zoned land is valued between \$2,753,379 (\$27/FAR sq. ft.) by Montgomery County's appraiser and \$4,800,000 (\$32/FAR Sq. Ft.) by Petitioner's appraiser. Under either scenario Petitioner has committed over \$2,500,000 to comply with specified infrastructure conditions (i.e.: dedication of land for Montrose Parkway). This does not include the EDEAT deposit with the County of \$79,612 which represents, I believe, ten percent (10%) of the total EDEAT payment.

The dedication of this land and the EDEAT payment provides a significant necessary public benefit at no cost to the County in implementing construction of a sizable segment of the Montrose Parkway as called for in the North Bethesda Master Plan. This site due to its location, proximity to Metro and approved square footage of development (308,400 sq. ft.) is under active review by the National Institutes of Health for location of additional office and lab facilities which would provide increased public benefits to the local economy.

I look forward to our meeting on May 6, 2008 with Rose Krasnow to further elaborate on our request and answer any questions.

Sincerely,



Stanley D. Abrams

SDA:dw

cc: Rose Krasnow  
Al Blumberg  
Richard Cohen



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

June 30, 2008

**MEMORANDUM**

TO: Cathy Conlon, Supervisor  
Development Review Division

VIA: Shahriar Etemadi, Supervisor  
Transportation Planning

FROM: Ed Axler, Planner/Coordinator  
Transportation Planning

SUBJECT: Adequate Public Facilities Validity Period Extension  
Preliminary Plan No. 1-99029A  
Wilgus East  
North Bethesda Policy Area

This memorandum is Transportation Planning staff's Adequate Public Facilities (APF) review for the validity period extension of the subject preliminary plan. The original preliminary plan was approved on January 27, 2000, for general office space of 308,400 square feet under the *FY 2000 Annual Growth Policy's* Alternative Review Procedure for Expedited Non-Residential Development Approval (or "Pay & Go"). Subsequently, there was a legal challenge whose settlement resulted in the Planning Board approval of a preliminary plan amendment on July 26, 2004 with the opinion dated October 27, 2004. The amended preliminary plan included an APF valid period through November 27, 2009 (i.e. remaining validity of 61 months after the date of the Planning Board's opinion mailing). Since the approval of the amended preliminary plan, the applicant was delayed by a legal dispute with the Montgomery County Department of Public Works and Transportation (DPWT) over the ownership of the right-of-way for Cherington Road.

**RECOMMENDATION**

We do not recommend that the APF extension because the original preliminary plan was approved under the unique requirements of the *FY 2000 Annual Growth Policy's* Alternative Review Procedure for Expedited Non-Residential Development Approval which did not permit extensions.

The subject preliminary plan for non-residential development was eligible under Section A.3.b. of the *FY 2000 Annual Growth Policy*, Alternative Review Procedure (ARP) for Expedited Non-Residential Development Approval (commonly known as "Pay & Go"), because the preliminary plan was filed between November 1, 1997 and October 31, 1999. Under "Pay & Go", the applicant need not take any action under Local Area Transportation Review and Policy



Area Transportation Review, if the Expedited Development Approval Excise Tax (EDAET) is paid to the County. The use of this ARP was subject to the following:

1. "Compliance with the appropriate master/sector plan developmental staging recommendations related to transportation improvements that require *Annual Growth Policy* approval of increased ceiling capacity to proceed to an additional stage of development."
2. "The applicant must receive each building permit no later than 4 years after the Planning Board approves the preliminary plan of subdivision. If the deadline is not met, the approval for the subdivision or portion of the subdivision for which the deadline is not met expires."

The "approval" date would be October 27, 2004, the date of the Planning Board's opinion for the preliminary plan amendment. The expiration date would be four years from that approval date, October 27, 2008. This expiration date should apply to the APF transportation-related validity since the Planning Board's opinion for the preliminary plan amendment permits APF non-transportation validity until November 27, 2009.

Staff does not believe a "Pay & Go" approval can be extended under the transportation-related requirements of the *Annual Growth Policy*, but staff did analyze an APF review to determine the traffic impacts if a waiver is granted by the Planning Board:

1. From the Local Area Transportation Review perspective, the extension of the "Pay & Go" APF approval would not result in the capacity of the nearby signalized intersections exceeding their CLV congestion standards since relevant County and State roadway improvement projects are now funded for construction within four years. These projects would result in providing alternative transportation network infrastructure (i.e., Montrose Parkway parallel to existing Montrose Road and an interchange replaces an existing at-grade intersection) to significantly reduce the traffic volumes through the nearby signalized intersections.
2. From the "Policy Area" perspective, trip mitigation would not be provided to satisfy the current Policy Area Mobility Review under the *FY 2007-2009 Growth Policy* as would be required for a new APF review.

## DISCUSSION

### Site Location and Vehicular Access Points

The site, Parcels "R"/N174 and "N"/N231, is located on the west side of "Old" Old Georgetown Road between Montrose Road and Montrose Parkway. Montrose Parkway is currently under construction. The originally approved preliminary plan in 2000 showed vehicular access points from Montrose Road as a right-turn-in/right-turn-out only and an interim driveway from "Old" Old Georgetown Road until an access from Montrose Parkway via Cherington Road is constructed.

### Master Plan Roadways and Bikeway

According to the *North Bethesda/Garrett Park Master Plan*, the master-planned roadways and bikeway are as follows:

1. Montrose Road from Old Bridge Road to Rockville Pike (MD 355) is designated as an arterial, A-90, with a recommended 80-foot right-of-way.
2. Montrose Parkway from Montrose Road to Parklwan Drive is designated as an arterial, A-270, with a recommended 300-foot right-of-way and a Class I bikeway. According to the *Countywide Functional Bikeways Master Plan*, the shared use path, SP-50, is designated along Montrose Parkway.

Although "Old" Old Georgetown Road is not listed in the *Master Plan*, the road functions as a business district street with an 80-foot right-of-way.

### Relevant Transportation Improvement Projects

The following are relevant transportation improvement projects:

1. DPWT's Capital Improvements Program (CIP) Project 5000311, "Montrose Parkway", is funded for construction of a four-lane divided road from Montrose Road (600 feet east of Tildenwood Road) to "Old" Old Georgetown Road. Construction is projected to be complete in December 2008.
2. Phase I of the Maryland State Highway Administration's (SHA) Capital Transportation Program (CTP) project MO830A11, "Maryland 355, Montrose Road, Randolph Road, CSX Railroad", is funded for construction of an interchange at the Rockville Pike/Montrose Road/Randolph Road intersection. This CTP project's western project limit starts at "Old" Old Georgetown Road. Construction starts for Phase I in June 2008.

### Available Transit Service

The segment of Montrose Road between Rockville Pike and East Jefferson Street is not served by public transit. Ride-On route 46 operates along nearby Rockville Pike to the east and Ride-On routes 5 and 26 operate along nearby Old Georgetown Road to the south.

### Pedestrian Facilities

Along property frontage, sidewalks exist on both sides of Montrose Road.

### Local Area Transportation Review (LATR)

When the original preliminary plan was approved in 2000, the approved land use generated 516 peak-hour trips during the weekday morning peak period (6:30 a.m. to 9:30 a.m.) and 464 peak-hour trips during the evening peak period (4:00 p.m. to 7:00 p.m.). Because the



site-generated trips were 50 or more peak-hour trips, a traffic study was required to identified intersections that had Critical Lane Volumes (CLV) exceeding 1,600 the applicable congestion standard at that time. Based on the results of the traffic study, the Transportation Planning staff recommended that the EDAET to be collected by the County be used in providing the following improvements:

1. Montrose Parkway

Contribute to DPWT project to construct Montrose Parkway.

2. Montrose Road/East Jefferson Street Intersection:

Contribute to DPWT's CIP Project No. 507017, PDF 7-29, to provide the following improvements:

- a) Add a second right-turn lane from southbound East Jefferson Street to westbound Montrose Road.
- b) Reconstruct curb line on the intersection's west quadrant to provide an extra eastbound approach lane on eastbound Montrose Road. The extra lane would be used as a second exclusive left-turn lane in lieu of the existing combination (second) left-turn and (second) through lane. Currently, there are an exclusive right-turn lane, exclusive through lane, a combination (second) left-turn and (second) through lane, and an exclusive left-turn lane.

The design plans were reviewed by the Planning Board as a Mandatory Referral No. 98810-DPWT-1 on March 4, 1999.

3. Montrose Road-Randolph Road/Rockville Pike Intersection:

Contribute to the construction of a right-turn lane on eastbound Montrose Road which was funded by the County to satisfy the conditions of approval for Zoning Case No. G-745, Montgomery County Conference Center. Funds were appropriated on August 4, 1998, for this and others off-site intersection improvements required in Zoning Case No. G-745 as CIP Project No. 509995, Conference Center Intersection Improvements.

Subsequently SHA CTP project # MO830A11 was funded for construction of a grade-separated interchange at the Rockville Pike/Montrose Road/Randolph Road intersection.

If a traffic study was submitted to satisfy LATR today, the two intersections above should not exceed the current CLV standard of 1,550 because publicly funded construction projects would result in the following:

1. Much of the through traffic now traveling on Montrose Road through the intersection with East Jefferson Street should shift to Montrose Parkway.

2. The current conflicting vehicular movements through the at-grade intersection of Montrose Road-Randolph Road and Rockville Pike would no longer occur after the grade-separated interchange is constructed by SHA.

#### Policy Area Mobility Review

As a revision to the original preliminary plan approved before January 1, 2007, the applicant is not required to mitigate the new site-generated peak-hour trips by this development located within the North Bethesda Policy Area. If a new preliminary plan is required and it is filed before July 1, 2008 under the *FY 2007-2009 Growth Policy*, the applicant is required to mitigate 25% of the new site-generated peak-hour trips or 129 peak-hour trips. If a new preliminary is filed on or after July 1, 2008 under the *FY 2009-2011 Growth Policy*, the applicant is required to mitigate 40% of the new site-generated peak-hour trips or 206 peak-hour trips. With the number of PAMR trips to be mitigated is over 30 peak-hour trips, a Traffic Mitigation Agreement is required with the Planning Board and DPWT that would be executed as part of the APF test at the time of preliminary plan review.

#### Policy Area Transportation Review

Under the *FY 2000 Annual Growth Policy*, the Wilgus East development was subject to Policy Area Transportation Review (PATR). For developments located in the North Bethesda Policy Area, the remaining staging ceiling capacity for non-residential development was in a deficit or "moratorium". To satisfy PATR, the applicant filled the preliminary plan for approval under the *FY 2000 Annual Growth Policy's* Alternative Review Procedure- Expedited Non-Residential Development Approval.

The County Council Bill No. 22-99, "Taxes – Development Tax – Expedited Development Approval Excise Tax – Amendments" established that under Section 52-61(c)(4), the applicant must pay the County \$3.50 per square foot of gross floor area for non-residential buildings located in a moratorium policy area (i.e., North Bethesda Policy Area). Under Section 52-62(b)(1), the first 1,200 square feet of gross square area of new non-residential building is exempt from the Excise Tax. In County Council Bill No. 34-97, "Development Impact Tax - Expedited Development Approval Payment Excise Tax", 10% of the applicable excise tax (i.e., \$107,520 or 10% of \$3.50 times [308,400 minus 1,200 or] 307,200 square feet) must be paid before preliminary plan of subdivision is approved to the County Director of Finance. The remaining 90% of the applicable excise tax (i.e., \$967,680) must be paid before a building permit is released for any building in the area covered by the subdivision plan.

EA: tc

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