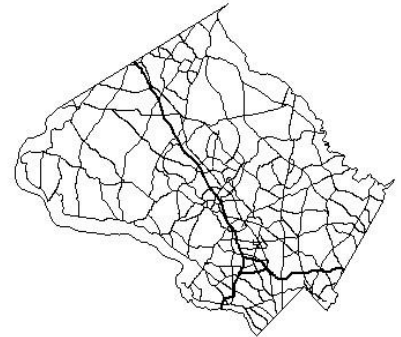




**MONTGOMERY COUNTY PLANNING DEPARTMENT**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

**MCPB**  
**Item #6**  
**1/27/11**



**MEMORANDUM**

**DATE:** January 14, 2011

**TO:** Montgomery County Planning Board

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

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

**REVIEW TYPE:** Preliminary Plan of Subdivision – Extension Request

**APPLYING FOR:** Reinstatement and extension of the expired adequate public facilities approval to permit construction of the remaining 105,000 square feet of office use

**PROJECT NAME:** Discoverly Hall

**CASE #:** 119852450

**REVIEW BASIS:** Chapter 50, Montgomery County Subdivision Regulations

**ZONE:** O-M

**LOCATION:** Located in the northeast quadrant of the intersection of Key West Avenue and Diamondback Drive

**MASTER PLAN:** Great Seneca Science Corridor

**APPLICANT:** CR Discoverly 9501, LLLP

**ATTORNEY:** Linowes and Blocher, LLP

**FILING DATE:** November 16, 2010

Approval signatures

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## **BACKGROUND**

The Decoverly Hall Preliminary Plan (119852450) was originally approved by the Planning Board at a public hearing on October 2, 1986 for 832,100 square feet of office space on approximately 44.2 acres of land in the O-M zone. The Opinion for that approval was mailed December 10, 1986. (Attachment A) The finding of adequate public facilities (APF) was set to expire July 25, 2001.

A previous owner of the property did allow the plan to expire on July 25, 2001, but subsequent that, an extension request pursuant to Section 50-20(c) and a waiver request pursuant to Section 50-38 of the Subdivision Regulations were filed by a new owner on March 8, 2002. The request sought to reinstate the plan and extend the APF review for 6 years to permit the final 105,000 square feet of office use to be constructed. The Planning Board approved the request on March 21, 2002, and a letter memorializing that action was sent on April 25, 2002. The extension established a new APF expiration date of July 25, 2007.

On February 20, 2007, another request for extension was requested for an additional nine months. That request was based on the fact that, while the letter memorializing the Board's action to reinstate and extend the APF approval was mailed on April 25, 2002, the new 6-year APF validity period ran from the previous expiration date of July 25, 2001. The Board denied the request for this additional extension based on the fact that Section 50-20(c)(8) of the Subdivision Regulations does not provide for an extension of APF beyond 6 years and is silent on any allowances for plans that have been allowed to expire. They also agreed with staff's opinion that the first APF extension period was correctly applied to the plan and that there were no provisions to extend the plan beyond an 18-year lifespan.

Although the 2007 extension request was not granted, a building permit was issued by the Department of Permitting Services (DPS) for construction of the remaining 105,000 square feet of office prior to the July 25, 2007 expiration date. The applicant, however, was unable to move forward with the proposed construction while the building permits were in effect, and the building permits expired on September 9, 2009. Since the original APF review was only valid until July 25, 2007, issuance of any new building permit for the remaining square footage is now required to have a new APF approval.

## **DISCUSSION OF THE CURRENT EXTENSION REQUEST**

On November 5, 2010, a representative of the applicant filed a letter ("Applicant's Letter" or "Letter")(Attachment B) requesting a waiver of Section 50-20(c)(7)(D) of the Subdivision Regulations pursuant to Section 50-38 to permit the reinstatement and extension of the now expired APF approval. Section 50-20(c)(7)(D) states that the applicant must file an application for an extension with the Board before the applicable validity period has expired. However, the Board may waive any provision of the Subdivision Regulations.

If the requested waiver is granted, the applicant seeks to extend the APF validity period for another six years pursuant to Section 50-20(c)(5)(A-C) of the Subdivision Regulations. This section states that:

“The Planning Board may extend a determination of adequate public facilities for a preliminary plan of subdivision for nonresidential development beyond the otherwise application 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 approval has been constructed, or payments for its construction have been made, and
- (C) the development is an “active” project, meaning that occupancy permits have been issued or a final building permit inspection has been passed for at least 10 percent of the project within 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 a building.”

The Applicant’s Letter contends that the project meets the three criteria outlined in this section and, therefore, qualifies for the extension. It also points out that in addition to meeting the technical requirements for an extension, the request, if granted, would further the planning and economic goals of the County and the recently adopted Great Seneca Corridor Master Plan that call for the concentration of large employment centers in areas well served by transportation infrastructure and the promotion of the development of high-end office space to retain existing employers by meeting their expansion needs in place. The applicant points out that the purpose of constructing the remaining office building is to house an expansion of the Financial Industry Regulatory Authority, Inc. (“FINRA”), which currently owns two office buildings in Decoverly Hall on lots adjacent to the property.

#### **APPLICANT’S WAIVER JUSTIFICATION**

Pursuant to Section 50-38 of the Subdivision Regulations, the Planning Board may grant a waiver after determining that:

“...practical difficulties or unusual circumstances exist that prevent full compliance with the requirements from being achieved, and 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 support of the request to waive the requirement that an application for an extension must be filed before the applicable validity period has expired, the Letter states that both practical difficulties and unusual circumstances prevented the applicant from filing the extension. Specifically, the Letter cites as unusual circumstances that the second previously requested extension for 9 months was denied in 2007, and that even though the applicant received a building permit before the scheduled expiration date, it was unable to secure a tenant/purchaser for the building and begin construction before the building permit expired in September of 2009 because of the severe economic downturn that took place at that time. The practical difficulty cited is that, without the waiver, FINRA cannot purchase the property or expand there, and absent that, no development on the property will proceed for the foreseeable future.

The Letter also argues that the Board can make the three findings necessary to support the waiver request. It states that the 6-year extension is the minimum necessary because, after purchase of the site, FINRA will need this time to complete its lease obligations, hire new employees and expand its services as prerequisites to constructing the building. It argues that the waiver is consistent with the Master Plan because it will meet the Master Plan's recommendation to retain office use within walking distance of planned public transit and the recognized need to allow opportunities for near-term projects to move forward without long-term staging requirements. The letter argues further that the waiver is justified because the traffic that will be generated by the proposed building is already reflected in the development pipeline and was counted in the forecasted projections for other projects that have been approved after this plan. Finally, the Letter argues that the waiver is in the public interest because the prior developers of Discoverly Hall paid for and built the required off-site infrastructure to support the full build-out of the office park, and in addition to that, FINRA will have to pay a Transportation Impact Tax under today's regulations. It also notes that FINRA is a key County employer that will bring new employees to the County and expand the County's tax base as well as enable the County, State and FINRA to build on the significant investment already made at Discoverly Hall and reap greater returns than originally planned without the need for any further public funds.

## **STAFF ANALYSIS**

The applicant believes the APF approval for this application should be extended pursuant to section 50-20(c)(5) because a waiver of the requirement to request an extension prior to plan expiration is justified, but paragraph (8) of 50-20(c) also applies in this case. This paragraph states that:

“The length of any extension of the validity period, or all extensions taken together if more than one extension is allowed, under paragraph (5) must be based on the approved new development schedule under paragraph 7(A)<sup>1</sup>, but must not exceed 2 ½ years for any development less than 150,000 square feet, or 6 years for any development with 150,000 square feet or greater. The extension expires if the development is not proceeding in

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<sup>1</sup> This paragraph requires the applicant to submit a new development schedule or phasing plan for completion of the project to the Board for approval. The applicant did not submit any specific development schedule or phasing plan to support the six years desired in this request, but does state that the requested 105,000 square feet would be constructed in one building.

accordance with the phasing plan unless the Board has approved a revision to the schedule or phasing plan.”

The Board has already acted in 2002 to grant the maximum 6-year extension permitted under paragraph (8), and a 50-38 waiver would also be needed to approve any extension beyond that<sup>2</sup>. In staff’s opinion, the two requested waivers should not be granted and this application should not be reinstated and extended because it does not meet the requirements of the Subdivision Regulations. In total, this project has had 18 years of plan validity, not counting the more than 2 years that the last building permit remained valid, to construct the approved 832,100 square feet of office use. The provisions of the Subdivision Regulations do not permit any further extension to be granted unless the applicant commits to reduce the amount of unbuilt development by at least 10 percent. This provision is included in paragraph (9) of section 50-20(c) which applies to a development project where no more than 30% of the entire approved development remains to be built and the amount of extension time granted does not exceed the limits established in paragraph (8). However, application of this provision would also require the Board to grant the waiver to reinstate the plan.

To permit the requested extension, the Board must grant two waivers. The first is a waiver of the requirement that a request for extension be made prior to the expiration of the plan. Historically, the Board has not supported reinstatement of plans that have been expired for extended periods of time. This is because such an action could serve to take away capacity from newer active projects; which is detrimental in areas, such as this one, where overall capacity is limited or restricted. The second waiver that must be granted is to permit the maximum extension time limit to be exceeded. Historically, the Board has not supported such requests in other cases, but rather, left it to the County Council to decide if modifications to County laws or policies were necessary. In staff’s opinion, that should be the avenue explored to permit the subject request.

Finally, in staff’s opinion, the applicant’s justification for the requested waivers is inadequate. The downturn in the economy that began at the end of this projects’ 18-year validity period should not constitute grounds for granting a waiver to extend the time now, after more than 4 more years have elapsed since the plan’s expiration date. Likewise, the decision to grant the waiver and extension should not be based on the desirability of a particular project or applicant.

## **CONCLUSION**

In these difficult economic times, the prospect of facilitating the expansion of an existing corporate entity is certainly appealing. However, staff was unable to recommend the requested waivers given the specific requirements of the subdivision regulations, which seemed to take into account that situations such as this might arise, the amount of time that has passed since the initial APF was approved, the limited available capacity in this area, and the fact that the Board had earlier denied a nine month extension because it exceeded the 18 year period set forth in the

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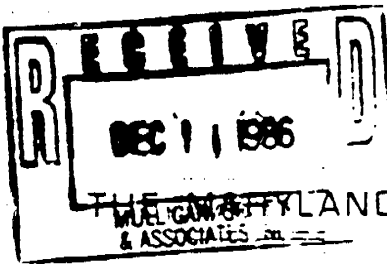
<sup>2</sup> In footnote 4 on page 7 of the Letter, the applicant’s representative requests that, to the extent this time limit applies, the Board grant a waiver of such limits for the reasons already given in support of waiving paragraph (7) of section 50-20(c).

regulations. However, Staff recognizes that the request is predicated on the need to accommodate the expansion of an existing tenant on the site and that the Board may find this reason to be compelling.

#### ATTACHMENTS

Attachment A – Opinion from the 12/10/86 Approval

Attachment B – Applicant’s 11/5/10 Justification Letter



Attachment A

Date of Mailing: Dec. 10, 1986

THE MONTGOMERY COUNTY PLANNING BOARD AND PLANNING COMMISSION  
8787 Georgia Avenue • Silver Spring, Maryland 20907

MONTGOMERY COUNTY PLANNING BOARD  
OPINION

Preliminary Plan No. 1-85245  
Project: Decoverly Hall, Parcel "S"

Action: Approval with Conditions (Motion of Comm. Krahnke, Seconded by Chm. Christeller, with a vote of 2-1. Comm. Keeney in favor; Comm. Floreen and Comm. Heiman absent.)

On November 19, 1985, Decoverly Corporation submitted an application for the approval of a preliminary plan of subdivision of property in the O-M Zone. The application was designated Preliminary Plan No. 1-85245. The application proposes to create 7 lots and 1 outlet on 44.27 acres of land.

The property which is the subject of this application is an existing single recorded lot. Development of the property is limited by a previously approved site plan (Site Plan Review No. 8-85034) to 832,069 sq. ft. of development.

The purpose of this application is to resubdivide the property into 7 fee simple lots and one outlet which will be used for stormwater management. The plan also proposes the abandonment of Diamondback Drive to the north of the property.

On October 2, 1986, Preliminary Plan No. 1-85245 was brought before the Montgomery County Planning Board for a public hearing. At the public hearing, the Montgomery County Planning Board heard testimony and received evidence submitted in the record on the application. Based upon the testimony and evidence presented, the Planning Board finds Preliminary Plan No. 1-85245 to be in accord with the purposes and requirements of the Subdivision Regulations and approves Preliminary Plan No. 1-85245 subject to the following conditions:

- 1) Agreement with Planning Board limiting development to 832,100 sq. ft. of office space with reference on the plat. Such Agreement shall be incorporated into the Site Plan Enforcement Agreement.
- 2) Pro-Rata participation in intersection improvements at Shady Grove Road and Research Boulevard as described in a

Transportation Division Memo, dated September 29, 1986. No participation in this road improvement shall be required for the recordation of those lots containing buildings completed or under construction as of October 2, 1986.

- 3) Pro-Rata participation in widening of Key West Avenue to 4 lanes between Shady Grove Road and Great Seneca Highway as described in the September 29, 1986 Transportation Division Memo, as corrected. No participation in this road improvement shall be required for the recordation of lots containing existing buildings or buildings under construction as of October 2, 1986, or for those lots which are recorded after the execution by the County of a contract for the construction of this road improvement. Pro-rata participation shall be calculated on a per lot basis, based on the ratio of the square footage of the lot to the total square footage of all lots approved herein except those containing existing buildings or buildings under construction as of October 2, 1986.
- 4) Revision of approved site plan prior to recording, if necessary.
- 5) Planning Board approval of Abandonment Resolution.
- 6) Necessary Easements.
- 7) Dedication of Right-of-Way for A-284 as shown on the preliminary plan.

The only issue raised at the public hearing on the application was whether the Plan meets the requirements of the Adequate Public Facilities Ordinance that the proposed subdivision is adequately served by roads and public facilities. Based upon the testimony and evidence submitted, the Planning Board finds that with the conditions imposed as a part of this Opinion, Preliminary Plan No.1-85245 meets the requirements of the Adequate Public Facilities Ordinance.



MCPB Opinion  
Preliminary Plan No. 1-85245  
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At the time of the public hearing, the applicant urged the Planning Board to find that no review of the adequacy of public facilities was required for the application since it does not propose any increase in development over the existing approved site plan, but only involves "the drawing of individual lot lines for seven (7) lots on the record plat." The Planning Board rejects that contention. Preliminary Plan No. 1-85245 proposes to resubdivide the subject property and therefore the Planning Board is required, pursuant to Section 50-35(k) of the Subdivision Regulations, to make a determination that the public facilities are adequate to service the proposed subdivision.

The 832,069 sq. ft. of development previously approved has been considered "in the pipeline" and has been counted in the threshold calculations. The current plan proposes no increase in development. Therefore, the traffic impact analysis of the proposed resubdivision is focused on the Local Area Transportation Review.

Based upon the Transportation Division memo dated September 29, 1986, and Staff testimony, the Montgomery County Planning Board finds that if the road improvements set out in Conditions 2 and 3 of this Opinion are implemented, the public road facilities would be adequate to service the proposed development.

The Board accepts the Staff's conclusion that the staging element of the master plan was not an issue in this case since the project had already been counted in the threshold calculations.

**LINOWES**  
**AND | BLOCHER LLP**  
ATTORNEYS AT LAW

November 5, 2010

**Scott C. Wallace**  
301.961.5124  
swallace@linowes-law.com

***By Hand Delivery***

Ms. Rose Krasnow  
Development Review  
Maryland-National Capital Park  
and Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910-3760

Re: Discoverly Hall Office Park - Record Parcel "KK", 9501 Key West Avenue, Gaithersburg, Maryland (the "Property") - Preliminary Plan No. 1-85245 (the "Preliminary Plan") – Application to Extend Adequate Public Facilities ("APF") Validity Period and to Waive the Requirements of Section 50-20(c)(7)(D) of the Subdivision Regulations (the "Application")

Dear Ms. Krasnow:

This office represents CR Discoverly 9501, LLLP ("DRA"), the owner of the referenced Property in the Discoverly Hall office park located in the northeast quadrant of the intersection of Key West Avenue and Diamondback Drive in Gaithersburg. The Property consists of a record lot containing approximately 3.22 acres and is zoned O-M (office, moderate intensity). The Property is part of a larger mixed-use housing and employment center ("Discoverly Hall") consisting of multiple buildings, interrelated parking areas, walkways, open space and other infrastructure. The Preliminary Plan approval allows 832,000 square feet ("SF") of office and residential uses on Discoverly Hall, including approximately 105,000 SF approved for the Property (the "Approved Density"). Except for the Property, which remains unimproved, all of the other buildings and the related infrastructure have been constructed pursuant to Site Plan No. 8-88015, approved by Planning Board Opinion dated June 8, 1988 (the "Site Plan").

The APF Validity Period for the Approved Density of 105,000 SF was scheduled to expire on July 25, 2007. Prior to the expiration of the APF Validity Period, however, building permits were issued by the Department of Permitting Services ("DPS") for construction of an office building containing approximately 105,000 SF on the Property ("Proposed Building 7"). However, because of the significant economic downturn, DRA was unable to move forward with Proposed Building 7 while the permits were in effect, and the building permits expired on September 9, 2009. Therefore, as referenced above, the Property remains vacant.

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In April of this year, DRA and Financial Industry Regulatory Authority, Inc. ("FINRA"), which currently owns two office buildings in Decoverly Hall on lots adjacent to the Property, entered into negotiations to purchase the Property in order to allow FINRA the opportunity to consolidate its employees and operations from other parts of the region onto Decoverly Hall and to provide space for future growth. On October 22, 2010, DRA and FINRA executed a contract of sale for the Property.

The extension of the APF Validity Period for the Approved Density is a prerequisite to DRA's completion of the sale to FINRA and FINRA's ability to expand in place in furtherance of important Montgomery County economic development objectives. Accordingly, the purpose of the Application is to seek the extension of the APF Validity Period for the Approved Density for six years pursuant to Section 50-20(c)(5)(A-C) of the Subdivision Regulations (the "APF Extension"). In addition, pursuant to Section 50-38 of the Subdivision Regulations, DRA seeks a waiver of the requirement of Section 50-20(c)(7)(D) that the Application be filed before the APF validity period for the Approved Density expired (the "Waiver").

## **Background**

As noted above, the Preliminary Plan allowed development of 832,000 SF of office uses on seven lots with shared parking and common amenities to create a well-integrated office park for high-end corporate users. Subsequently, Parcel "MM" in Decoverly Hall, which was approved in the Preliminary Plan and the Site Plan for development of approximately 107,000 SF of office uses, was instead developed with approximately 170 multi-family units in five buildings pursuant to amendments to the Preliminary Plan (designated Preliminary Plan No. 1-85245A) and Site Plan (designated Site Plan No. 8-05002).

Record plats for all seven lots, including the Property, have been recorded. As noted above, to date, approximately 727,000 SF of office and residential uses have been developed at Decoverly Hall pursuant to the Site Plan and a series of subsequent amendments to the Site Plan. See aerial map of the Decoverly Hall development area, attached as Attachment "1". The Property is the last remaining unimproved office lot at Decoverly Hall. As detailed further below, construction of the multi-family buildings, the most recent phase of the project, began in 2006 and occupancy permits were issued between November 2006 and February 2007.

FINRA is the largest independent regulator for all securities firms doing business in the United States. Previously known as the National Association of Securities Dealers, Inc. ("NASD"), FINRA oversees nearly 47,000 brokerage firms, about 167,000 branch offices and approximately 635,000 registered securities representatives. FINRA has nearly 3,000 employees in Montgomery County, Washington, DC, New York and offices around the country.

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In 2000, FINRA, partnered with a former owner of Decoverly Hall to construct a 260,000 SF office building and 1,465 space parking garage on Parcel "LL". FINRA's expansion in the region was deemed significant enough to economic development in the County and Maryland, that both the County and the Maryland Department of Business and Economic Development provided financial incentives to attract FINRA and encourage its continued expansion.

The Property is located adjacent to FINRA's building on Parcel "LL". Importantly, the Property is located in the center of the Decoverly Hall project, along the landscaped, ceremonial central court and, because of its current unbuilt and unlandscaped-state, presents the appearance of an incomplete project. Construction of Proposed Building 7 on the Property will complete the planned vision for Decoverly Hall. Moreover, the Proposed Building 7 will share the existing parking garage, which was constructed to serve both FINRA's existing building on Parcel "LL" and Proposed Building 7.

In addition to the office and residential buildings constructed at Decoverly Hall, the on-site infrastructure for the entire project, including the access driveways, sidewalks and surface parking areas, water, sewer, other utilities, stormwater management and landscaping features, has been completed. Furthermore, the developers of Decoverly Hall have financed and/or constructed all of the required off-site infrastructure, which includes improvements to Key West Avenue, Shady Grove Road, Research Boulevard and Diamondback Drive.

### **Purpose of Application**

As noted above, approval of the Application is critical to allow FINRA to purchase the Property and construct Proposed Building 7 to address its desire to consolidate operations and employees from other locations in the region and provide for future expansion needs. In this regard, FINRA currently locates 1,500 of its 3,000 employees in two buildings in Decoverly Hall including a 110,000 SF data and operations center and the 260,000 SF operations facility on Parcel "LL" discussed above. FINRA also has 420 employees in two buildings in Washington D.C. In order to accomplish its strategic growth objectives, FINRA has determined it would prefer to expand its presence in Decoverly Hall rather than relocate to a new location.

Accordingly, earlier this year FINRA entered into negotiations with DRA to purchase the Property. FINRA's purchase of the Property is contingent upon maintaining the validity of the underlying land use approvals, including extending the APF Validity Period for the Approved Density for an adequate length of time to allow its existing leases elsewhere to expire, and for FINRA to complete construction plans, obtain permits and construct Proposed Building 7 in accordance with its plans for future growth and needs for additional space. In this regard, the

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Application seeks a six-year extension of the APF Validity Period from the date of approval of this Application.

### **The APF Extension**

DRA seeks to extend the APF Validity Period pursuant to Section 50-20(c)(5)(A-C) of the Subdivision Regulations, which provides:

The Planning Board may extend a determination of adequate public facilities for a preliminary plan of subdivision that allows non-residential 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 approval 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... .

The Project qualifies for an extension under the Subdivision Regulations because (1) approximately 87% of the 832,000 SF of development approved under the Preliminary Plan ( the equivalent of 727,000 SF, including the multi-family development on Parcel “MM” that was substituted for 107,000 square feet of office uses) has been built; (2) all of the infrastructure required by the conditions of the Preliminary Plan has been constructed; and (3) the development is “active” with occupancy permits for the multi-family buildings on Parcel “MM”, which as noted above was substituted for 107,000 square feet or approximately 12% of the approved

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office density, having been issued between November 2006 and February 2007. *See* DPS Permit Information Sheets, attached as Attachment "2"<sup>1</sup>

With regard to the off-site infrastructure required to support the development approved in the Preliminary Plan, Conditions 2 and 3 of the Preliminary Plan required the following improvements:<sup>2</sup>

2) Pro-Rata participation in intersection improvements at Shady Grove Road and Research Boulevard as described in a Transportation Division Memo, dated September 29, 1986.

3) Pro-Rata participation in widening of Key West Avenue to 4 lanes between Shady Grove Road and Great Seneca Highway as described in the September 29, 1986 Transportation Division Memo, as corrected. No participation in this road improvement shall be required for the recordation of lots containing existing buildings or buildings under construction as of October 2, 1986, or for those lots which are recorded after the execution by the County of a contract for the construction of this road improvement.

Condition 2 was satisfied by the prior owners and developers of Decoverly Hall by payment of its required pro-rata share of the cost of improvements to the Shady Grove Road/Research Boulevard intersection, and these improvements have been constructed. With regard to Condition 3, the improvement to Key West Avenue was constructed pursuant to a County contract. Finally, although not required for APF purposes, prior owners at Decoverly Hall have constructed intersection improvements on Diamondback Drive and sidewalk and streetscape

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<sup>1</sup> The Use and Occupancy permit for one of the five multifamily buildings (with the address of 9701 Skyhill Road) could not be located by DPS Staff. However, based on a visual inspection of this property, the building is occupied. In this regard, DPS Staff advises that a Use and Occupancy permit for this building would not have been issued any earlier than November 6, 2006.

<sup>2</sup> On March 8, 2002, the prior owner of the Property applied for an initial APF Validity Period Extension Request to allow completion of the sixth and seventh buildings approved in the Preliminary Plan ("2002 Extension Request"). On March 21, 2002, the Planning Board approved the 2002 Extension Request to extend the Validity Period to July 25, 2007. The 2002 Extension Request included the following information regarding the status of off-site improvement requirements. Staff confirmed in its report to the Planning Board on the 2002 Extension Request that the off-site improvement conditions of the Preliminary Plan had been met.

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improvements, and, currently, FINRA operates a successful shuttle to the Shady Grove Metro to provide transportation choices to its employees.

In addition to meeting the technical requirements of Section 50-20(c)(5) for an extension, the Application, if granted, would further the planning and economic goals of the County and the recently adopted Great Seneca Science Corridor Master Plan, which includes the Property (the "Master Plan"), to concentrate large employment centers in areas well served by transportation infrastructure and to promote the development of high-end office space to retain existing employers by meeting their expansion needs in place. To date the phased development of Decoverly Hall has resulted in a well-integrated office park that has attracted several quality employers, as well as the addition of a residential component that provides housing opportunities for employees to live within walking distance to a major employment center. With regard to promoting growth around transit stops, the Master Plan recommends an alignment for the Corridor Cities Transitway ("CCT") that locates a station stop across Diamondback Drive from Decoverly Hall, approximately 800 feet from the Property, which will provide excellent transit service to the Property in the future. Furthermore, the approval of the Application will facilitate the retention and expansion of FINRA, which is an important national regulatory entity that provides quality jobs for County residents. Accordingly, the County, DRA and FINRA will benefit from approval of the Application to allow Decoverly Hall to proceed to completion as planned and approved.

### **Waiver Request**

In addition to the APF Extension request, DRA also requests the waiver of Section 50-20(c)(7)(D) of the Subdivision Regulations, which requires an applicant to "file an application for an extension with the Board before the applicable validity period has expired." Pursuant to Section 50-38 of the Subdivision Regulations, the Planning Board may grant a waiver after determining 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 will be discussed below, a waiver is appropriate in the current situation.

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As a preliminary matter, practical difficulties and unusual circumstances prevented DRA from filing the extension request prior to the expiration of the APF Validity Period. As referenced above, the APF Validity Period was scheduled to expire on July 25, 2007. In February of 2007, DRA filed a request to extend the APF Validity Period for the Approved Density to better evaluate a short-term window for construction of Proposed Building 7 on a speculative basis (the "2007 Extension Request"). At that time, DRA did not have a prospective tenant or purchaser for Proposed Building 7 because FINRA had not then made plans for its further growth at Discoverly Hall. The Planning Board denied the 2007 Extension Request,<sup>3</sup> but, prior to the expiration of the APF Validity Period, DRA applied for and was issued building permits for the construction of Proposed Building 7. Unfortunately, at that time, the national and local economy began to soften, which caused demand for office space in the County to flatten dramatically and DRA had no tenant/purchasers for the building had it proceeded at that time. Although DRA requested and received several extensions of the building permit from DPS, without a potential purchaser or developer, DRA could not obtain the financing necessary to construct an office building on speculation, and, therefore, the building permits expired in September of 2009. Accordingly, DRA did not proceed with construction of Proposed Building 7 before the expiration of the building permits because of the severe economic downturn over the last several years that has been unusual (if not unprecedented) in both duration and depth. Without the approval of the Application, FINRA cannot purchase the Property or expand here, and no development on the Property will proceed for the foreseeable future. Such an outcome is certainly a practical difficulty which necessitates the granting of the Waiver.

Next, the Waiver is the "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." Taking these issues in turn, the six-year extension requested in the Application is the minimum necessary because, although FINRA will purchase the Property immediately upon approval of the APF Extension, it needs this amount of time to complete important long-term strategic expansion plans, including completion of its lease obligations elsewhere, hiring new employees and expanding its services, that are prerequisites to the construction of a building on the Property. In this regard, despite the expanding regulatory environment and potential for significant growth in FINRA's industry, the local economy is still recovering from the effects of the recent recession.<sup>4</sup>

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<sup>3</sup> To the extent that the same limits on extensions apply to this Application, then DRA requests a waiver of such limits for the reasons stated herein in support of the Application.

<sup>4</sup> Ordinance No. 16-35, adopted by the County Council on March 31, 2009, recognized the difficult economic conditions affecting development in the County by adding two years to the APF Validity Period



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November 5, 2010  
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Further, the waiver is consistent with the Master Plan, which, as discussed above, recommends retaining office use for the Property and proposes improving public transit access by locating a CCT station within walking distance of Discoverly Hall. Furthermore, the Master Plan recognizes the need to allow for opportunities for near-term projects to move forward because it expressly exempts development subject to an approved preliminary plan, including the applicable Preliminary Plan, from long-term staging requirements. In this regard, traffic from the Proposed Building 7 is already reflected in the traffic conditions for the planning area and, accordingly, is considered a "pipeline project" that has been already accounted for in the traffic projections of surrounding developments. As such, the various other projects that have been approved since the Project Plan was approved have included development of the Property and its traffic in their forecasted projections

Finally, the Waiver is in the public interest. As noted above, the prior developers of Discoverly Hall paid for and built the required off-site infrastructure to support the full-build-out of the office park, including the development of the Property. In addition, although the project met all of its transportation obligations years ago, FINRA will have to pay a Transportation Impact Tax of \$1,092,000 under today's regulations. Finally, retaining FINRA as a key County employer, bringing new employees to the County and expanding the County's tax base is directly in the public interest. The County and State, as well as FINRA, have invested significant money in making Discoverly Hall, home for FINRA. This request enables the County to build on that investment and reap even greater returns than originally planned, without any further public funds.

For the reasons stated above, we respectfully request the Board approve the Application to extend the APF Validity Period for six years. Enclosed with this letter are an Extension Request Application and a Waiver Application with all required supporting materials, and Adjoining and Confronting Property owners list, with a set of mailing labels, and checks in the amount of the required fees for the Extension and Waiver applications.

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of all pending projects to allow property owners additional time to complete the approved projects. We believe Ordinance No. 16-35 should be interpreted as applying to projects with valid building permits as of March 31, 2009, which included Proposed Building 7. However, the Planning Board need not reach this issue if it approves the Application for extension of the APF Validity Period.

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November 5, 2010  
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If you have any questions regarding this matter, please do not hesitate to call. Thank you for your assistance.

Very truly yours,

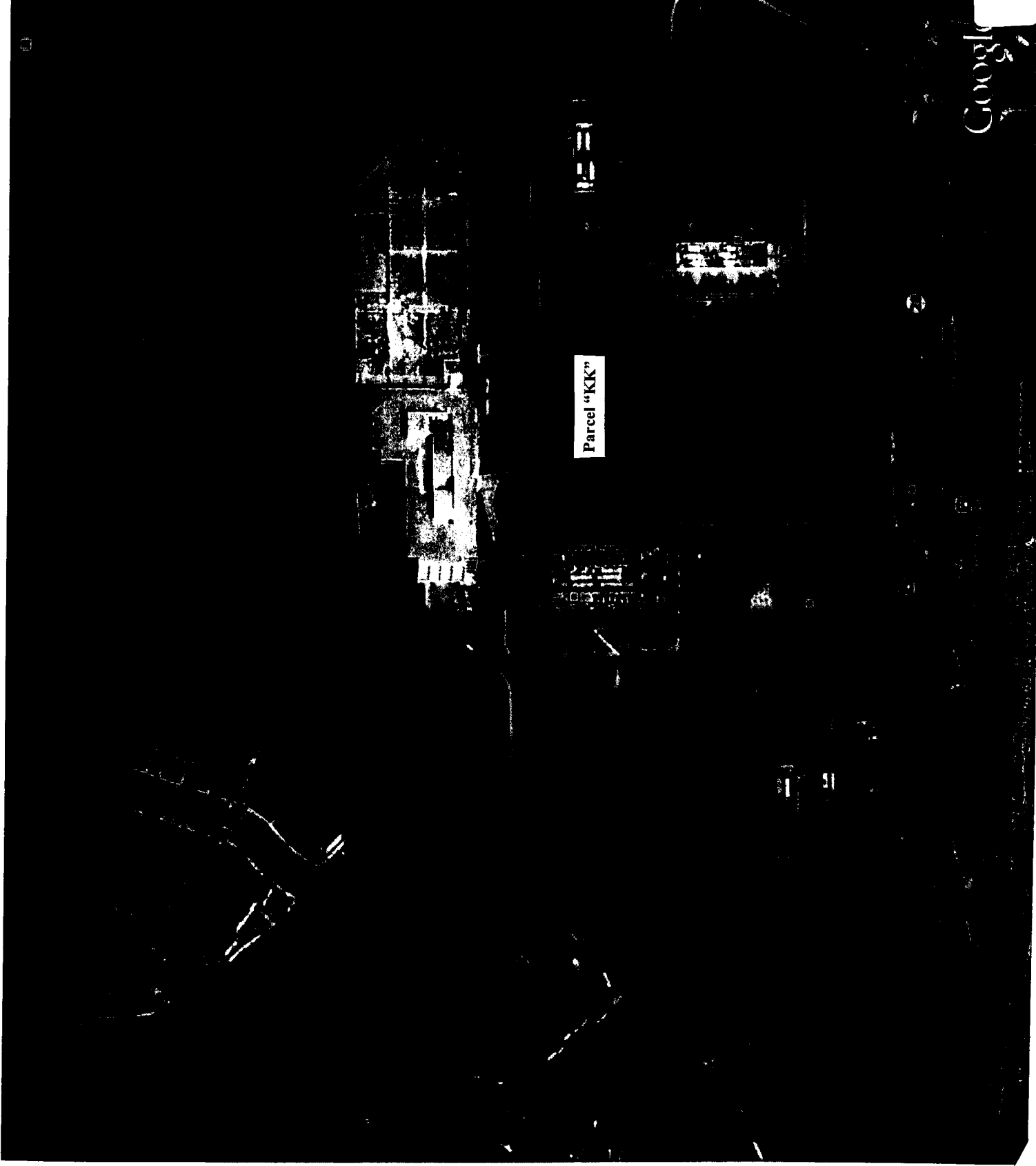
**LINOWES AND BLOCHER LLP**



Scott C. Wallace

Attachments

cc: Mr. Dan Goldman  
Ms. Valla Brown  
Mr. Steven Moxham  
Robert Harris, Esq.  
Samantha L. Mazo, Esq.





## DPS/Application Details

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### Status

#### Use & Occupancy Permit

Permit/License: 234333

#### Application Details

[Help](#)

Permit Number 234333

#### Site Address

Application Date 02/17/2005

9700 Skyhill WAY

Issue Date 01/30/2007

Rockville

Final Date

MD 20850-4824

Work Type Occupy

**Lot - Block -**

Square Footage 37496

**Subdiv.**

Value \$.00

#### Application Status

Permit Issued

#### Contractors

ID	Name	Address
Not available		

Not available

#### Licenses

Contractor License	Name	Address
Not available		

Not available

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**Attachment "2"**



## DPS/Application Details

**Status****Use & Occupancy Permit****Permit/License: 234334****Application Details**[Help](#)

Permit Number 234334

**Site Address**

Application Date 02/17/2005

9701 Skyhill WAY

Issue Date

Rockville

Final Date

MD 20850-4835

Work Type Occupy

**Lot - Block -**

Square Footage 31904

**Subdiv.**

Value \$.00

**Application Status**

In Process

**Contractors**

ID	Name	Address
Not available		

Not available

**Licenses**

Contractor	License	Name	Address
Not available			

Not available

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## DPS/Application Details

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### Status

#### Use & Occupancy Permit

#### Application Details

**Permit Number** 234330  
**Application Date** 02/17/2005  
**Issue Date** 11/06/2006  
**Final Date**  
**Work Type** Occupy  
**Square Footage** 31023  
**Value** \$.00

**Permit/License:** 234330

[Help](#)

**Site Address**  
 9710 Skyhill WAY  
 Rockville  
 MD 20850-4330  
**Lot - Block -**  
**Subdiv.**

**Application Status**  
 Permit Issued

#### Contractors

ID	Name	Address
Not available		

#### Licenses

Contractor License	Name	Address
Not available		

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## DPS/Application Details

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### Status

#### Use & Occupancy Permit Application Details

**Permit Number** 234335  
**Application Date** 02/16/2005  
**Issue Date** 02/09/2007  
**Final Date**  
**Work Type** Occupy  
**Square Footage** 52474  
**Value** \$.00

**Permit/License:** 234335

[Help](#)

**Site Address**  
 9711 Skyhill WAY  
 Rockville  
 MD 20850-4832  
**Lot - Block -  
 Subdiv.**

**Application Status**  
 Permit Issued

#### Contractors

ID	Name	Address
Not available		

#### Licenses

Contractor License	Name	Address
Not available		

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## DPS/Application Details

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### Status

#### Use & Occupancy Permit

**Permit/License: 234336**

#### Application Details

[Help](#)

**Permit Number** 234336  
**Application Date** 02/17/2005  
**Issue Date** 12/06/2006  
**Final Date**  
**Work Type** Occupy  
**Square Footage** 31023  
**Value** \$.00

**Site Address**  
 9720 Skyhill WAY  
 Rockville  
 MD 20850-4603  
**Lot - Block -**  
**Subdiv.**  
**Application Status**  
 Permit Issued

#### Contractors

ID	Name	Address
Not available		

#### Licenses

Contractor License	Name	Address
Not available		

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