



March 28, 2011

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Glenn Kreger, Acting Chief
Area 2 Division 

FROM: Shahriar Etemadi, Supervisor, I-270 Corridor Team (301-495-2168)
Area 2 Division

SUBJECT: Termination of Traffic Mitigation Agreement - Meadowsweet Subdivision,
Preliminary Plan No. 1-04011 in Olney

RECOMMENDATION

1. Staff recommends that the Planning Board terminate a condition of the Montgomery County Planning Board's approval for Meadowsweet Preliminary Plan No. 1-04011. The condition reads:

"Satisfy PATR component of the APF test by entering into a TMA with MCPB and DPWT to sponsor and implement a trip reduction program for 12 years."
2. Agree to terminate the TMA provided that the Pulte Homes Corporation makes available the remaining fund of \$341,772.00 in the posted security instrument for the cost of operating the Program over 12 years to the Montgomery County Department of Transportation (DOT) for use in the implementation of other traffic mitigation projects in the Olney Policy Area.

BACKGROUND

The Montgomery County Planning Board (MCPB) approved Meadowsweet Preliminary Plan No. 1-04011 on February 19, 2004 for 32 single-family dwelling lots on 70.5 acres of land in Olney. The Board's Opinion was mailed on March 10, 2004. The plan was approved subject to many conditions including one requiring the applicant satisfy Policy Area Transportation Review (PATR) by entering into a Traffic Mitigation Agreement (TMA) with the Department of Public Works (DPWT) and MCPB to implement a trip reduction program for 12 years.

When the subject application was reviewed in December of 2003, the Olney Policy Area had a staging ceiling capacity for an additional 82 dwelling units as of November 30, 2003. However, there were several other applications in the "development queue" ahead of the Meadowsweet development that resulted in exceeding the available capacity for housing in the Olney Policy Area. In order for the applicant to satisfy the PATR test and gain approval of their proposed development, Pulte Homes Corporation had to mitigate all of their 36 PM peak hour trips which was the higher of the two AM and PM peak hour trips. A TMA was signed on February 8, 2006 that included many provisions dealing with how the program will be funded, operated and monitored to ensure that all PM peak hour trips are mitigated.

In order to ensure sufficient funds available to operate the program, a performance bond was signed on December 29, 2005 for \$368,832.00

The agreement executed in 2006, required the applicant to offer transit fare subsidies to residents of the area to offset the 36 trip traffic impact of the Pulte residential development. The program has been unsuccessful in terms of attracting a sufficient number of people to take advantage of the transit subsidies during any of the year since the program was initiated. The applicant has met with DOT and M-NCPPC staff and suggested changes to the program have not been successful to attract enough riders to offset the traffic impact of 36 peak hour trips.

Section 3 of the TMA provides for a possible termination of the program if it was not successful. The section 3 of the TMA states that:

"if for two successive years the Program fails to meet its goal of a minimum of 36 participants, the County may, following consultation with the Planning Board or its designee, call the security instrument as described in Section 1.06 and use the remaining funds for other traffic mitigation projects in the Policy area agreed to by the DPWT and Planning Board or its designee and the Applicant shall be fully released from the obligations of this Agreement."

Pursuant to requests for termination of TMA by the applicant (see attached request letters dated July 31, 2009, Attachment 1, and November 24, 2010, Attachment 2), staff from DOT and the Planning Department have met internally and with the applicant's representatives and discussed the issue at length. Staff has concluded that the Planning Board may terminate the TMA provision of the condition of approval if the applicant makes available to DOT, the remaining security funds of \$341,772 for other traffic mitigation programs in the Olney Policy Area. DOT has agreed to terminate the TMA and receive the Security Fund.

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Attachments

1. Request letter dated July 31, 2009
2. Request letter dated November 24, 2010

ATTACHMENT 1

Attachment "1"

LINOWES
AND BLOCHER LLP
ATTORNEYS AT LAW

July 31, 2009

Scott C. Wallace
301-961-5124
swallace@linowes-law.com

By Email and Overnight Delivery

Cliff Royalty, Esq.
Montgomery County Office of the County Attorney
101 Monroe Street, 10th Floor
Rockville, Maryland 20850

Mr. Shahriar Etemadi
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Pulte Homes -- Meadowsweet Traffic Mitigation Agreement (the "TMA")

Dear Cliff and Shariar:

This office represents Pulte Homes ("Pulte"), the developer of a residential subdivision known as Meadowsweet located in the Olney area. In 2006, Pulte entered into the referenced TMA with the Montgomery County Planning Board (the "Planning Board") and Montgomery County (the "County") as a condition of approval of approval of Preliminary Plan of Subdivision No. 1-04011 (the "Preliminary Plan") and Site Plan No. 8-04004 (the "Site Plan") for Meadowsweet. A copy of the TMA is attached as Attachment "1". Pursuant to the terms of the TMA, Pulte operates a trip reduction program that consists of marketing subsidized transit passes to residents of Meadowsweet and commuters in the vicinity of Meadowsweet (the "Program"). As discussed in detail below, in accordance with Section 3 of the TMA the purpose of this letter is to request that Pulte be allowed to make a final payment to the County in the amount of the security instrument provided by Pulte for the costs of the Program and, upon making such payment, that Pulte be released from the obligations of the TMA.

By way of background, Meadowsweet is a 32-unit residential subdivision developed pursuant to the Preliminary Plan, approved by Opinion dated March 10, 2004 (the "Preliminary Plan Opinion") and the Site Plan, approved by Opinion also dated March 10, 2004 (the "Site Plan Opinion"), attached to the TMA as Exhibits "A" and "B". All of the houses in Meadowsweet have been constructed and sold by Pulte to third parties.

Condition No. 2 of the Preliminary Plan Opinion and Condition No. 7(b) of the Site Plan Opinion required Pulte to enter into the TMA with the Planning Board and the Department of

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Mr. Shahriar Etemadi
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Public Works and Transportation, now known as the Department of Transportation ("DOT"), to implement a trip reduction program consisting of a transit fare subsidy program to offset 36 weekday peak period trips generated by residents of Meadowsweet (previously defined herein as the "Program"). The terms of the TMA provide, in Section 1.03, that Pulte would initially target residents of Meadowsweet and residents of multi-family buildings in the Olney Policy Area for participation in the Program. The TMA also provides, in Section 1.05, that Pulte is not required to expend more than \$368,832.00 for the Program during the term of the TMA.

In addition, the TMA requires, in Section 1.06, that Pulte post a security instrument with the County for the costs of the Program as follows:

Prior to issuance of the 20th building permit for the Project, Applicant shall post with the County an unconditional and irrevocable bond or letter of credit in a standard commercial form reasonably acceptable to DPWT in the amount of \$368,832.00 (the "Initial Security"). The Initial Security shall have an expiration date no earlier than twenty-four (24) months after its effective date. Twelve months prior to the expiration of the Initial Security, and every twelve (12) months thereafter during the Term of this Agreement, and any extension thereto, the Applicant or its successors or assigns shall deliver to the County a replacement bond or letter of credit with an expiration date of no earlier than twenty-four (24) months after its effective date ("Replacement Security") The Applicant or its successors or assigns may decrease the face value of the Replacement Security by the amount the Applicant has expended in the prior 12 month period for the Program Costs, up to a maximum of one-twelfth (1/12) of the Program Costs (\$25,613.00)

In 2006, Pulte began to operate the Program through a third-party administrator and provided DOT with a performance bond in the amount of \$368,832.00 (the "TMA Bond"). A copy of the TMA Bond is attached as Attachment "2".¹ In 2007, Pulte, through its third-party

¹ Pursuant to Section 1.06 of the TMA noted above, Pulte has the right to reduce the amount of the TMA on a yearly basis in the amount of \$25,613. In this regard, during the course of operating the Program under the TMA, Pulte has repeatedly requested the County allow reduction of the TMA Bond in accordance with the terms of the TMA. However, the County has not responded to Pulte's requests. Accordingly, Pulte wishes to renew its request to reduce the TMA Bond in the amount of \$76,839 to \$291,993. If Pulte's request for termination of the TMA as set forth in this letter is approved on or before December 31, 2009, Pulte would propose paying to the County \$291,993, with the condition that the County release the TMA Bond.

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administrators, began submitting yearly reports detailing marketing activities and undertaken pursuant to the Program and the level of participation in the Program.² Copies of the reports for 2007-2008 are attached as Attachments "3", "4" and "5".

Upon review of the Reports, you will note that despite significant marketing efforts by the Pulte's administrators, only one individual participated in the Program during the reporting period covered by the 2007 Report and no participants were reported in the 2008 and 2009 Reports. In this regard, the TMA provides, in Section 1.04(vii), that:

If four (4) consecutive [quarterly] Reports indicate that the number of active Participants is below 36, the Applicant will submit monthly reports to the Planning Board and the County, and will initiate actions to increase the number of active Participants to 36 as approved by the Planning Board, or its designee and DPWT, provided that Applicant will not be required to expend an amount greater than the Program Costs (as defined below) plus the contingency amount (set forth below) during the Term of the Agreement. At Planning Board and DPWT Staff's discretion, approved in writing, the Applicant may expand the program to adjacent policy areas, beginning with the adjacent portions of the Patuxent Policy Area (Ashton and Sandy Spring area).

In accordance with Section 1.04(vii) of the TMA cited above, due to the lack of Program participants from multi-family projects on the Olney Planning Area, in the spring of 2008, at Pulte's request, Planning Board Staff agreed to allow Pulte to expand its marketing efforts to Montgomery General Hospital and Pulte's administrator began marketing efforts to Hospital employees. This expanded marketing program is noted in the 2008 Report (Attachment "4"). However, based on the 2009 Report, no hospital employees, or other commuters, are utilizing the Program.

In this regard, Section 3 of the TMA provides that the Program may be terminated, and Pulte released of its obligations under the TMA, as follows:

² The TMA requires, in Section 1.04, that Pulte submit a written report to the Planning Board and the County on a quarterly basis verifying the number of transit passes distributed and participants in the Program. The requirement for quarterly reporting was modified to a yearly reporting requirement by Planning Board Staff.

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If for two successive years the Program fails to meet its goal of a minimum of 36 Participants, the County may, following consultation with the Planning Board or its designee, call the security instrument as described in Section 1.06 and use the remaining funds for other traffic mitigation projects in the Policy Area agreed to by DPWT and Planning Board or its designee and the Applicant shall be fully released from the obligations of this Agreement.

As detailed above, despite Pulte's marketing efforts and expenditures for the Program pursuant to the TMA, the Program has not achieved its goal of 36 participants for three successive years. Accordingly, pursuant to Section 3 of the TMA, Pulte requests the County accept a final payment of \$291,993, which is the current amount of the TMA Bond Pulte is obligated to maintain with the County and release Pulte from the obligations of the TMA.

Please contact us to set up a meeting for further discussion. In the interim, if you have any questions, please do not hesitate to call.

Thank you for your consideration of this matter.

Very truly yours,

LINOWES AND BLOCHER LLP



Scott C. Wallace

Attachments

cc: Ms. Samantha Steketee
Barbara A. Sears, Esq.

ATTACHMENT 2

LINOWES |
AND BLOCHER LLP
ATTORNEYS AT LAW

November 24, 2010

Scott C. Wallace
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By Email and Overnight Delivery

Ms. Sandra Brecher
Chief, Commuter Services Section
Division of Transit Services
Montgomery Co. Department of Transportation
101 Monroe Street, 10th Floor
Rockville, MD 20850

Re: Pulte Homes Corporation ("Pulte") – Meadowsweet Traffic Mitigation Agreement (the "TMA")

Dear Sande:

As you are aware, this office represents Pulte, the developer of the Meadowsweet subdivision located in the Olney area. On behalf of Pulte, I want to thank you and Beth Dennard for speaking via conference call with me, Samantha Stekete of Pulte, and Cynthia Fondriest of Strategic Transportation Initiatives, Inc. ("STI") regarding the status of the TMA. As discussed in our conference call, and in greater detail below, the purpose of this letter is to confirm Pulte's request to terminate the TMA.¹

By way of background, Meadowsweet is a 32-unit residential subdivision developed pursuant to Preliminary Plan No. 1-04011, approved by Opinion dated March 10, 2004 (the "Preliminary Plan Opinion") and Site Plan No. 8-04004, approved by Opinion also dated March 10, 2004 (the "Site Plan Opinion"). All of the houses in Meadowsweet have been constructed and sold by Pulte to third parties.

¹ As you are aware, Pulte initially requested termination of the TMA by letter from Linowes and Blocher to Cliff Royalty of the County Attorney's Office and Shahriar Etemadi of Planning Department of Transportation Staff dated July 31, 2009, attached as Attachment "1". In this regard, on October 28, 2009, representatives of Pulte, the County Department of Transportation Staff ("DOT") and Planning Board Staff met to discuss Pulte's request to terminate the TMA. At that meeting you requested Pulte expand its marketing efforts to homeowners' associations in the Olney Planning area. Pulte initiated this effort through STI shortly after the October 28th meeting. The most recent reports for the period of March 1, 2010 through May 31, 2010 and June 1, 2010 through August 31, 2010, which were previously submitted to DOT and Planning Board Staff by STI, detail Pulte's expanded marketing efforts and are discussed further below.

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Condition No. 2 of the Preliminary Plan Opinion and Condition No. 7(b) of the Site Plan Opinion required Pulte to enter into the TMA with the Planning Board and the Department of Public Works and Transportation, now known as DOT, to implement a trip reduction program consisting of a transit fare subsidy program to offset 36 weekday peak period trips generated by residents of Meadowsweet (the "Program"). The terms of the TMA provide, in Section 1.03, that Pulte would initially target residents of Meadowsweet and residents of multi-family buildings in the Olney Policy Area for participation in the Program. The TMA also provides, in Section 1.05, that Pulte is not required to expend more than \$368,832.00 for the Program during the term of the TMA. In addition, the TMA requires, in Section 1.06, that Pulte post a security instrument with the County for the costs of the Program.

In 2006, Pulte began to operate the Program through a third-party administrator and provided DOT with a performance bond in the amount of \$368,832.00 (the "TMA Bond").

As we discussed in our conference call, reports regarding the Program submitted to DOT and Planning Board Staff by Pulte, as required under the TMA, from the initiation of the Program in 2006 through August 2010, demonstrate that despite significant marketing efforts by Pulte through professional transit benefit program administrations such as STI, and the expansion of marketing efforts over the last two years as directed by Planning Board and DOT Staff, the Program has not attracted a significant number of participants.

In this regard, Section 3 of the TMA provides that the Program may be terminated, and Pulte released of its obligations under the TMA, as follows:

If for two successive years the Program fails to meet its goal of a minimum of 36 Participants, the County may, following consultation with the Planning Board or its designee, call the security instrument as described in Section 1.06 and use the remaining funds for other traffic mitigation projects in the Policy Area agreed to by DPWT and Planning Board or its designee and the Applicant shall be fully released from the obligations of this Agreement.

Accordingly, pursuant to Section 3 of the TMA, and as discussed in our November 17th conference call, Pulte requests the County accept a final payment of \$341,772.00, which is the amount of the TMA Bond Pulte has maintained with the County, minus the amounts expended by Pulte on the Program from March 1, 2009 through August 31, 2010, and release Pulte from the obligations of the TMA.²

² A spreadsheet detailing Pulte's expenditures on the Program from March 1, 2009 to August 31, 2010 is attached as Attachment "2".

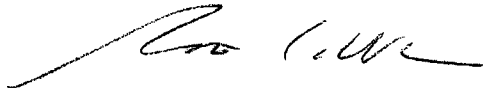
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Based on our November 17th conference call, it is our understanding that you support this request, subject to confirmation with other DOT Staff as to the process of accepting the proposed payment. In this regard, we hope to confirm your agreement with the request to terminate the TMA as outlined above as soon as possible. In the interim, if you have any questions, please do not hesitate to call.

Thank you for your continued assistance on this matter.

Very truly yours,

LINOWES AND BLOCHER LLP



Scott C. Wallace

Attachments

cc: Mr. Shahriar Etemadi
Ms. Samantha Steketee
Ms. Cynthia Fondriest
Barbara A. Sears, Esq.