



MCPB
ITEM NO. 11
11-18-04

November 15, 2004

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Richard Hawthorne, Chief Transportation Planning *RCH*
Shahriar Etemadi, Supervisor Transportation Planning

FROM: Cherian Eapen, Planner/Coordinator Transportation Planning *CE*

SUBJECT: Building Permit Application No. 337171
M-NCPPC recommendation to Montgomery County Department of Permitting Services regarding validity of adequate public facilities determination for the Silo Inn Property/Martins Dairy/Higgins Tavern Site
Parcel B and Outlot A, Block 2
Brooke Manor Farms Subdivision (Burka-Goldman Property)
Southwest quadrant of Georgia Avenue and Silo Inn Drive
Olney Policy Area

RECOMMENDATION: Authorize Transportation Planning Staff to transmit to the Department of Permitting Services a recommendation that a new adequate public facilities is required for the proposed development that is the subject of Building Permit Application No. 337171, based on the finding that the previous adequate public facilities determination has expired and is no longer valid.

DISCUSSION

Site Location/Features

The subject property is located within the Brooke Manor Farms subdivision along the west side of Georgia Avenue (MD 97), south of Silo Inn Drive and east of Martin's Dairy Circle. The property is comprised of two parcels of land: (1) Parcel B, Block 2, which is presently zoned C-1 (except for a small portion in the northeast corner zoned R-200) ("Parcel B"), and (2) Outlot A, Block 2, which is zoned R-200 ("Outlot A") ("Property"). Access to the site is via a right-turn in/right-turn out driveway to Georgia Avenue. (*See Attachment 1*).

In the past, Parcel B was improved with up to six commercial structures and a building known as Higgins' Tavern, which is located on the Locational Atlas and Index of Historic Sites in Montgomery County, Maryland (Resource #23/105). Presently, only Higgins' Tavern exists on the property--the other buildings having been demolished in or about the year 2000 or earlier, prior to the current owner, Finmark Management, Inc.'s ("Owner") purchase of the Property.

Regulatory History and Current Review/Finding

On June 21, 1990, the Planning Board approved Preliminary Plan No. 1-89086 (Burka-Goldman Property) ("Preliminary Plan"), which included approval for up to 32,500 square-feet of commercial uses on the Property (comprising of Parcel B and Outlot A), and 120 residential lots (48 townhouses and 72 single-family detached) to the west/southwest of the subject property. On August 6, 1990, the Planning Board approved Site Plan No. 8-90034 for Burka-Goldman Property. On September 9, 1992, a plat was recorded among the land records of Montgomery County (Plat No. 586-42) as Brooke Manor Farms, which included the Property.

Preliminary Plan Condition No. 1 required the applicant to enter into an "[a]greement with Planning Board limiting commercial development to 32,500 square feet with no additional expansion of floor area until further APF review." (*See Attachment 2*.) The square footage limit for the Property was based on the size of those commercial structures existing on the Property at the time of subdivision. Pursuant to Preliminary Plan Condition No. 1, an APF Agreement was executed between the Planning Board and the applicant on September 3, 1991, which agreement, among other things, covered future development of the Property as a commercial lot with a limit of 32,500 square-feet. (*See Attachment 3*.)

At the time of subdivision in 1990, Outlot A included a portion of one commercial building (no longer existing) and parking that served the commercial structures on Parcel B. On November 3, 1994, following a determination that Outlot A had been continuously used for off-street parking in conjunction with the commercial uses on Parcel B since before 1957, DPS issued a letter to a previous owner's representative approving the non-conforming use of Outlot A for off-street parking. (*See Attachment 4*.) It appears that the latter DPS position was subsequently confirmed by DPS at a December 20, 2002, meeting, as stated in a January 2, 2003, confirmation letter. (*See Attachment 5*.)

On February 5, 2003, C. Robert Dalrymple, Esquire, issued a letter to Development Review staff on behalf of a former owner of the Property, through which letter the former owner sought to confirm the opinion of a Development Review Division ("DRD") staff person concerning the application of the APF ordinance to the Property, and the former owner's intent to construct certain commercial improvements on the Property. On February 24, 2003, a DRD staff person countersigned that letter, effectively stating his view that the former owner could obtain a building permit for the Property without having to undergo further APF review. (*See Attachment 6.*) However, it is unclear from the language in the countersigned letter that the DRD staff person was aware, at the time he countersigned the letter, that the APF validity period for the Property had expired or, moreover, that the commercial buildings that had once existed on the Property had been demolished and not been in use for a number of years. The Property was subsequently sold.

On December 18, 2003, DPS issued a letter to the current owner of the Property, reversing its earlier position and advising the Owner that DPS no longer considered the off-street parking (i.e. parking proposed on Outlot A) to be a legal nonconforming use. (*See Attachment 7.*) DPS informed the Owner that its reversal was based on the fact that "off-street parking had ceased on [Outlot A] for a period exceeding six (6) months...." In its letter, DPS noted that it had found that "the use was abandoned and cannot be reestablished."

The Owner filed a building permit application on March 12, 2004, to develop the Property with 27,200 square-feet of commercial space. This application was subsequently suspended by the DPS, in or about April 2004, on the ground that the proposal provided for parking on Outlot A. Given the suspension of the building permit by the DPS at that time, Transportation Planning staff suspended its review of the building permit application as well.

In April 2004, as part of the ongoing development of the Draft Olney Master Plan, Community-Based Planning staff recommended rezoning of Parcel B within the Property from C-1 to R-200. The Planning Board endorsed the Staff recommendation and the recommended rezoning of Parcel B is included in the Staff Draft that was transmitted to, and is presently being considered by, the District Council.

On or about August 24, 2004, the Owner's engineer informed Transportation Planning staff that DPS has lifted the suspension of the permit application because the Owner had revised its development proposal (with a reduced density of 22,400 square-feet) such that no parking would be required/provided on the adjacent outlot. Staff promptly recommenced its review of the application with information provided by the Owner's engineer.¹ Soon thereafter, however, staff realized that the validity of the APF Agreement associated with the underlying Burka-Goldman Property Preliminary Plan had expired. Being advised that a potentially conflicting opinion, on the question of the validity of the APF determination, had been provided to a former owner of the Property by a DRD staff person, Staff has opted against transmitting its recommendation to

¹ Staff has sought independent confirmation from DPS that the suspension had been lifted; and, additionally, attempted to obtain, directly from the DPS, copies of the revised site plans that the Owner had submitted to the DPS for its review and approval. To date, Staff has not received such plans from DPS.

DPS until the Planning Board has considered the matter and provided Staff with direction on how to proceed.

The absence of a recommendation from Planning Board Staff on a permit application would ordinarily preclude issuance of a building permit. On November 10, however, Staff was advised that the subject building permit had been mistakenly issued by the DPS.² On November 12, 2004, DPS imposed a "Stop Work Order" pending receipt by the DPS of the recommendation of Planning Board Staff.³

STAFF POSITION

Given that the Planning Board had approved the underlying Burka-Goldman Property Preliminary Plan on June 21, 1990, Transportation Planning staff, pursuant to §50-20(c)(3)(i) of the County Code (*see Attachment 8*), concludes that the APF Agreement for the preliminary plan/subject property expired on June 21, 2002 (12 years after the date of original Planning Board approval of the Burka/Goldman Property Preliminary Plan), and was no longer valid at the time the current owner applied for the building permit on March 12, 2004.

For subdivisions such as the subject one, which were approved between July 25, 1989 and November 1, 1999, an APF determination is timely and remains valid for 12 years from the date of preliminary plan approval. An APF finding is "timely and valid" if the APF time limit applied at subdivision has not yet been reached or if the landowner applied for and was granted an extension of the APF time limit for his subdivision. There are no automatic extensions, and an applicant must file a request for extension prior to the expiration date of the APF finding. To receive an extension, the Planning Board must approve the request following the holding of a public hearing⁴. It is Staff's view that a property does not vest its APF finding beyond the time

² DPS records recently obtained by Staff indicate that the building permit was issued in September 2004.

³ At the time of issuance of this memorandum, Staff has been unable to ascertain whether the Owner has commenced construction on the Property. DPS staff has advised Planning Board Staff that a pre-construction meeting was held between DPS and a representative of the Owner on October 29, 2004.

⁴ Under Montgomery County Code § 50-20(c)(3)(iv),

[t]he determination of adequate public facilities for a preliminary plan of subdivision that allows nonresidential development may be extended by the Planning Board beyond the [applicable] validity period . . . if:

(A) At least forth percent (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 the percentage requirement of this paragraph;

(B) All of the infrastructure required by the conditions of the original preliminary plan approval has been constructed or payments for construction have been made; and

(C) The development is an "active" project as demonstrated by at least 10 percent of the project having been completed within the last four years before an extension request is made, or at least 5

limits set by the Planning Board. Additionally, as long as the APF finding remains “timely and valid”, there is no limit on the number of times a developer may build or replace buildings on a property. Construction of a building does not, in and of itself, shorten or extend the time limit of an APF finding.

Based on the above, the subject building permit application did not have a “timely and valid” APF since it was filed outside of the 12-year APF window. Additionally, neither the Owner, nor any prior owner of the Property filed a request to extend the APF determination. Therefore, in Staff’s view, the subject application must receive a new APF determination prior to the issuance of a building permit. It is Staff’s further opinion that, pursuant to Montgomery County Code § 50-20(c)(5), the procedures set forth in Montgomery County Code § 8-34 would apply to the review and approval of the new APF determination.⁵

CURRENT OWNER’S POSITION

C. Robert Dalrymple, Esquire, submitted a written statement of the Owner’s position, through a letter dated September 29, 2004, addressed to Chairman Derick P. Berlage. (*See Attachment 9.*) In that letter, the Owner contends that no further APF review is required simply because the entire Burka-Goldman tract has been built out and all APF conditions have been satisfied. The Owner appears to argue that, because at the time the Preliminary Plan was approved there existed on the Property commercial buildings totaling 32,500 square-feet, the 12-year validity period on APF determinations is irrelevant, notwithstanding the fact that the commercial buildings were demolished a number of years ago. In effect, the Owner argues that there is a perpetual placeholder for the 32,500 square feet of commercial density on the Property.

percent of the project having been completed within the last 4 years before an extension request is made, if 60 percent of the project has been built or is under construction.

⁵ Staff also considered any trip credits the Owner may receive during an APF review. A developer may use the trips generated by an existing development on a property as credit against trips generated by a future development, provided the applicant is still within the validity period of the APF Agreement. It is important to note, however, that in those instances where a developer is replacing an existing development with a new development, which generates fewer weekday peak hour trips, an APF test is still required, even though the outcome will likely be one where the developer is not required to make transportation improvements or mitigate trips. An APF test is still required even when the result of the APF test is known in advance, and even if it is almost certain that the subdivision will “pass” the APF test. For existing development to be credited, the building(s) must be currently or recently occupied. (It has been Planning Board practice to provide such APF credit if a structure was occupied within six (6) months of the time of application). However, in this case, since the buildings that existed on the Property were demolished several years before the permit was applied for, and no replacement buildings were built before the expiration of the APF determination, the Owner would not have received any trip credit.

CONCLUSION

For the reasons set forth above, Transportation Planning Staff requests that the Planning Board authorize Staff to transmit to DPS a recommendation that a new adequate public facilities (“APF”) determination is required for the proposed development that is the subject of Building Permit Application No. 337171, based on the finding that the previous APF determination has expired and is no longer valid.

CE:kew
Attachments

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