

**MEMORANDUM**

February 18, 2005

TO: Montgomery County Planning Board

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

FROM: Catherine Conlon, Acting Supervisor *CC* 301-495-4542
Development Review Division

SUBJECT: Request for an extension to the validity period – Preliminary Plan
No. 1-01067E, East Hampshire Center

STAFF RECOMMENDATION: Grant extension of validity period for Preliminary Plan No. 1-01067 to May 8, 2005, pursuant to Section 50-35 (h)(3)d of the Montgomery County Code, Subdivision Regulations and conditioned upon compliance with Section 59-C-18.21 of the Montgomery County Code, Zoning Ordinance, Takoma Park/East Silver Spring Commercial Revitalization Overlay Zone, as applicable.

BACKGROUND

The subject preliminary plan application was submitted on April 11, 2001 to create one lot on 2.51 acres of land in the C-2 zone within the limits of the City of Takoma Park. The preliminary plan was brought before the Planning Board for a public hearing on July 19, 2001 and was approved for 8,551 square feet of retail with 10,884 square feet of storage, and 86,046 square feet of self-storage warehouse, subject to conditions as set forth in the Opinion of the Board mailed on August 17, 2001 (Attachment "A"). Per Condition No. 13, the preliminary plan remained valid for 37-months from the date of the mailing, or September 17, 2004, unless, prior to that date, the applicant either (1) recorded a plat among the land records of Montgomery County or (2) submitted a request to extend the validity period.

On September 13, 2004, the Applicant, Harvey Maisel ("Applicant"), requested a 120 day extension of the validity period for the preliminary plan citing voluntary bankruptcy of a tenant and subsequent court proceedings to award assets, as significant, unusual, and unanticipated events that substantially impaired the applicant's ability to validate its plan

(Attachment "B" is a copy of the extension request). On September 30, 2004, the Planning Board approved the extension request and extended the validity period of the preliminary plan to January 31, 2005.

Subsequent to the extension, the City of Takoma Park, the Pinecrest Community Association, and Lea S. Chartock requested that the Planning Board reconsider its decision to extend the preliminary plan, citing inadequate notice having been provided to the City of the extension hearing (Attachment "C" is a copy of the reconsideration request). On December 9, 2004, the Board voted to reconsider the extension request thus suspending the extension of the preliminary plan validity period. The original extension request remains timely noted pursuant to Section 50-35 of the Subdivision Regulations.

ISSUES RELATED TO THE EXTENSION REQUEST

City of Takoma Park's Position

The City of Takoma Park has submitted four letters stating their opposition to the extension of the validity period for the preliminary plan: two from Mayor Kathy Porter and Councilmember Bruce Williams (Attachments "D" and "E") on December 27, 2004 and February 17, 2005, and two from City Attorney Susan Silber (Attachments "F" and "G") on December 27, 2004 and February 14, 2005. They request that if the Planning Board decides to grant the extension, it be conditioned upon the applicant undergoing site plan review pursuant to Sections 59-C-18.214(a) and 59-D-3 of the Montgomery County Code.

The City's position with regard to the extension request is that the Applicant did not fulfill its burden of proof by providing adequate grounds for the extension. The original extension request alleged that a tenant's filing of bankruptcy placed the project "in limbo", but the city attorney notes that this was not supported by submittal of an order of the bankruptcy court. The City does not believe the status of a lease has any bearing on a developer's ability to record the property. The city attorney believes that the Applicant has not supplied the facts and documentation which support the claim that the bankruptcy of the original tenant (Trak Auto), and lease agreement with the subsequent tenant (Advanced Auto), prevented the recordation of a plat to validate the preliminary plan. For these reasons, the City believes the Board should deny the extension request.

If the Planning Board decides to grant the requested extension of the preliminary plan, the City is requesting that it be conditioned on compliance with the site plan review requirement of the Takoma Park/East Silver Spring Commercial Revitalization Overlay Zone (CROZ). Section 50-35(h)(3)d of the Subdivision Regulations authorizes the Board to condition grant of an extension on a requirement that the applicant revise its plan to conform with changes to applicable laws or regulations that may have occurred since the time of the plan approval, and that are intended to have application to the project. The City believes that the location of the property at the gateway to Montgomery County and the City of Takoma Park from Washington, D.C., and Prince Georges County, and the legislatively recognized need to revitalize the area justify the imposition of a site plan review requirement. Problems noted by the City for the approved plan include: lack of neighborhood-serving retail space, inadequately designed on-site

and off-site truck circulation plans, and new building height in excess of that permitted under CROZ site plan regulations.

Section 59-C-18.216 of the Zoning Ordinance states that construction pursuant to a building permit applied for as of the date of the Sectional Map Amendment implementing the Takoma Park/East Silver Spring CROZ (which was July 10, 2001) may proceed under the provisions of the underlying zone. The Applicant applied for a building permit for the proposed construction on April 26, 2001 ("Building Permit"). Montgomery County Department of Permitting Services (DPS) considers that permit to still be valid (see letter at Attached © page 32). DPS staff has also verbally confirmed this status to Planning staff. Takoma Park's City Attorney believes that, since the Applicant did not own the subject property at the time of the building permit and preliminary plan applications, he should not be permitted to rely upon the building permit application to avoid the site plan requirements of the CROZ.

Applicant's Position

By letters of December 29, 2004 and January 12, 2005, attorneys for the Applicant have provided further detail and clarification of the applicant's justification for extension of the preliminary plan validity period (Attachments "H" and "I"). The basis for the extension request continues to relate to the inability of the Applicant to record the plat validating the preliminary plan due to pending bankruptcy and litigation issues involving tenants. Further clarified, these issues precluded the altering of the premises (because of the cloud on title resulting from the bankruptcy/litigation) which would occur with dedication requirements associated with the preliminary plan and subsequent record plat. The December 29, 2004 letter includes the following additional justification:

- During the pendency of the bankruptcy proceedings and subsequent litigation, the Applicant pursued a building permit with Montgomery County DPS, a tree removal permit and stormwater management approval from the City of Takoma Park, and all other necessary regulatory approvals (including SHA approvals) for the self-storage facility. Without record plat approval, it was not possible for the applicant to have permits issued and to implement the development approvals.
- The bankruptcy and subsequent litigation proceedings, which precluded the Applicant from being able to finalize and record the subdivision plat, were delays created by other parties essential to the Applicant's ability to record the plat, and prevented the Applicant from doing so, even though the applicant diligently worked to remove the obstacles during the validity period but simply ran out of time.
- The extensive architectural and engineering which has been initiated and completed by the Applicant to secure the government approvals to build the project, as evidenced by fully completed building permit, tree permit and stormwater management applications, SHA approvals, and other regulatory approvals necessary to construct the project, all evidence efforts undertaken by the Applicant to implement the terms and conditions of the preliminary plan approval in order to validate the plan.

With regard to applicability of the Takoma Park/East Silver Spring CROZ, the December 29, 2004 letter notes that the requirement for site plan review (and generally for the application

of the provisions of the overlay zone) is not associated with the subdivision process but rather, relates to whether or not a building permit application was applied for as of the effective date of the mapping of the overlay zone. Because this project has a currently pending building permit application which predated the mapping of the overlay zone, the Applicant believes site plan (and application of the provisions of the overlay zone) should not be required.

Although not required, the Applicant believes that the original preliminary plan did undergo voluntary, *de facto* site plan review with substantial involvement of the City and Planning Board staff. The December 29 letter cites the attached July 17, 2001 letter from the Mayor of Takoma Park, and City Council Resolution (Attachment "J"), as evidence of this site plan level review. The resolution sets forth several conditions of approval requested by the City which the Applicant states were voluntarily agreed to as part of the preliminary plan approval and the subsequent applications for building permit, tree removal permit, stormwater management and other regulatory approvals.

The January 12, 2005 letter provides further background information concerning the Applicant's attempts to negotiate an agreement with Advanced Auto after they purchased the lease for a portion of the subject property from Trak Auto. The Applicant's attorney states that the Applicant had to file landlord-tenant action in September, 2003 against Advanced Auto, and did not reach agreement in principal to allow platting to proceed until December, 2004. Attached to the January 12 letter are pages from the landlord/tenant lease agreement which include language stating that the "Lessor will not do or permit any changes to the Premises without the prior consent of Lessee, not to be unreasonably withheld, conditioned or delayed". This language supports the Applicant's claim that the record plat could not be recorded prior to agreement being reached with Advanced Auto.

The December, 2004 letter requested reinstatement of the preliminary plan approval until February 20, 2005. This represents the 73 days remaining in the Board's original 120 day extension period when the City of Takoma Park's request to reconsider the extension was received on November 19, 2004. The Applicant believes this extension will afford adequate time for the approved preliminary plan to be recorded by plat. Based on the date this request is now being heard, a 73-day extension would reinstate the validity of the preliminary plan until May 8, 2005.

Staff's Position

Section 50-35 (h)(3)(d) of the Montgomery County Code, Subdivision Regulations, states that the Planning Board may grant extension of the validity period of a preliminary plan if persuaded that:

- “(i) Delays, subsequent to the plan approval by the government or some other party, central to the applicant's ability to perform the terms or conditions of the plan approval, have materially prevented the 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."

Staff believes that the applicant has submitted sufficient grounds to justify the extension of the validity period for the subject preliminary plan. The bankruptcy filing by an existing tenant, and subsequent litigation between the applicant and a new tenant, were significant, unusual, and unanticipated events, beyond the applicant's control, which substantially impaired the applicant's ability to validate the plan. These events resulted in delaying the applicant's achievement of clear title to the property, which was essential to the applicant's ability to meet the land dedication requirements of the record plat. The language from the lease agreement between the Applicant and Trak Auto/Advanced Auto contained in Schedule "B" of Attachment "I"¹ supports the Applicant's claim that the lack of an agreement being reached with either of the tenants in regards to development of the property prevented the Applicant from recording the plat. Therefore, staff recommends extension of the validity period for an additional 73 days, which staff believes is minimally sufficient time to record the plat.

Per Section 50-35(h)(3)d of the Subdivision Regulations, the Board may condition grant of an extension on a requirement that the Applicant revise its plan to conform with changes to applicable laws or regulations that may have occurred since the time of the plan approval, and that are intended to have application to the project. The City of Takoma Park has requested that the Applicant be required to comply with the site plan review requirements of the Takoma Park/East Silver Spring CROZ. The Subdivision Regulations provide the Board with authority to condition the extension request upon compliance with the provisions of the CROZ. However, in staff's view, the Applicant may proceed with construction under the provisions of the C-2 zone, and the provisions of the overlay zone are applicable only in the event the Building Permit expires. As stated above, staff has confirmed that the Building Permit was applied for prior to the effective date of the overlay zone and remains valid. The authority to determine the validity of the pending building permit application belongs to DPS, not the Planning Board.

Notwithstanding the above, staff is recommending that the Planning Board condition extension of the preliminary plan on compliance with the provisions of the Takoma Park/East Silver Spring CROZ, as applicable. Such a condition will ensure that the project will be subject to the provisions of the CROZ, including site plan review, if the permit expires. With this condition, staff recommends approval of the extension request.

Attachments

Attachment A – Planning Board Opinion dated 8/17/01

Attachment B – Applicant's Original Extension Request dated 9/13/04

Attachment C – City of Takoma Park's Request for Reconsideration dated 11/10/04

¹ "Except for changes required by any legal authority having jurisdiction or necessitated by any act or omission of Lessee, Lessor will not do or permit any changes to the Premises without the prior consent of Lessee, not to be unreasonably withheld conditioned or delayed."

Attachment D – Letter from Mayor Kathy Porter and Bruce Williams dated 12/27/04
Attachment E – Letter from Mayor Kathy Porter and Bruce Williams dated 2/17/05
Attachment F – Letter from City Attorney Susan Silber dated 12/27/04
Attachment G – Letter from City Attorney Susan Silber dated 2/14/04
Attachment H – Applicant’s Revised Extension Request dated 12/29/04
Attachment I – Additional Applicant Explanation dated 1/12/05
Attachment J – City of Takoma Park Preliminary Plan Recommendations