

City of Takoma Park, Maryland

Office of the Mayor
Kathryn H. Porter

Telephone: (301) 891-7100
Fax: (301) 270-8794



7500 Maple Avenue
Takoma Park, MD 20912

December 27, 2004

Ms. Catherine Conlon
Development Review Division
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Re: East Hampshire Center Extension Request
Preliminary Plan 1-01067E

Dear Ms. Conlon:

The City of Takoma Park asks the Montgomery County Planning Board to reject the request to extend the preliminary plan approval for the East Hampshire Center. Our concerns are based on the importance of the site, the goals of the master plan for this area, changes in zoning that have now been in place for four years, and the particulars of the case.

Importance of the Site and Master Plan Goals

The East Hampshire Center property is the gateway property to the State of Maryland, Montgomery County and the City of Takoma Park on New Hampshire Avenue at its border with Washington, D.C. The Takoma Park Master Plan, adopted in December 2000, refers to this location as the "Maryland Gateway at Eastern and New Hampshire Avenues."

This property is the first of a string of unattractive and underutilized commercial properties along New Hampshire Avenue. Because of its important location and need for economic redevelopment, the Master Plan recommended that a new "Commercial Revitalization Overlay Zone" be applied to these commercial properties. This Overlay Zone, which requires Site Plan Review for most development, became effective on January 1, 2001. This area is also a key component of the Takoma Park/Long Branch Enterprise Zone, a joint Takoma Park/Montgomery County effort to encourage appropriate redevelopment along New Hampshire Avenue. These designations were designed to implement the Master Plan vision for this area "to serve as a highway commercial gateway area that also provides neighborhood retail service to area residents."

For many years, the building on the East Hampshire property was a grocery store, serving the surrounding neighborhood. As smaller-sized grocery stores were phased out, the building

became an auto parts store. Although the building was remodeled, the overall site is unattractive and dominated by an unimproved surface parking lot. The City and surrounding neighborhood residents have long wished to see the property improved with neighborhood commercial uses and attractive gateway signage and streetscaping.

The desire to improve the appearance of the area is shared by the Maryland State Highway Administration, Prince George's County, and Washington, D.C. The Maryland State Highway Administration worked with Takoma Park and Prince George's County residents and business owners for over a year on streetscaping plans, before the funds for the Neighborhood Conservation Program were eliminated two years ago. Prince George's County was looking at gateway improvements at the location in conjunction with State Highway's efforts. Washington, D.C. recently completed significant improvements on its already attractive part of New Hampshire Avenue near Eastern. It is unfortunate that a person driving north on New Hampshire Avenue passes through a lovely Washington, D.C. neighborhood into an unattractive commercial hodgepodge when entering Maryland.

The City is concerned that an unattractive or poorly designed development at this critical gateway will make it much more difficult for us to encourage redevelopment of the other properties on New Hampshire Avenue. For this reason, we need to have site plan review over this development to ensure that it is the type of development that will be an asset to the area.

The Commercial Revitalization Overlay Zone (CROZ) and Site Plan Review

The Commercial Revitalization Overlay Zone (CROZ) was adopted on December 12, 2000 and became effective January 1, 2001. Placement of the Overlay Zone over all Takoma Park and many East Silver Spring commercial properties indicated the Planning Board's strong appreciation for the need for appropriate economic redevelopment in this area of Montgomery County.

The City of Takoma Park pushed for site plan review for commercial properties within the City limits during the 1996-2000 Master Plan process. Before Unification in 1997, when the County line was changed to place all of Takoma Park within Montgomery County, all of the commercial properties within the Prince George's County portion of Takoma Park had site plan review requirements. As the bulk of the City's commercial properties had been in Prince George's County, the City did not want to lose this important regulatory provision when moving into Montgomery County.

There have already been successes with the site plan review process. The owners of a recently-approved self storage building on Holton Lane, about 1½ miles north on New Hampshire Avenue, embraced the provisions of the CROZ and designed an attractive building with first-level retail space opening onto the street; adequate and safe circulation for trucks, cars and pedestrians; and streetscape improvements. The City of Takoma Park and the Planning Board both endorsed their application, and the project is moving forward.

Problems with the Design of East Hampshire Center

Unfortunately, the plans for a self storage building at East Hampshire Center are not well-designed. The proposal includes no neighborhood-serving retail space and the new building would be six feet taller than that permitted under site plan regulations. The design for circulation on-site does not adequately accommodate trucks, which is a serious concern for a self-storage facility which will be patronized by customers driving trucks who are not skilled in truck driving. Even worse, the location of this property at the Eastern/New Hampshire intersection makes circulation off-site even more problematic.

While the property may be easily-accessed from southbound New Hampshire Avenue, access from northbound New Hampshire Avenue is difficult—it requires either a u-turn across three lanes of traffic further north on New Hampshire or an awkward entrance down a hill off Eastern Avenue. Drivers wishing to exit the site and go northbound on New Hampshire must either cross three lanes of traffic in time to make a u-turn just before the intersection or must exit onto Eastern Avenue. In either case, traffic waiting at the light will block the exit. If traffic is waiting on Eastern, it would be easy to block westbound traffic, especially due to the topography on Eastern Avenue. While these maneuvers would be challenging for a professional truck driver, they would likely be quite difficult for a person renting a truck for a day.

For all these reasons, we would be very concerned if the first redevelopment project on New Hampshire Avenue for many years is a use that is not in keeping with the vision of the Master Plan, that is not neighborhood serving, and is of a design that would aggravate congestion and unsafe conditions on New Hampshire Avenue at the “Maryland Gateway.”

Why Require Site Plan Now for this Project?

If the site plan review requirement had been recently imposed, and if the applicant had begun the project before the requirement was effective and had been making real and continuous efforts to pursue the project since that time, we would understand that imposition of a site plan review requirement could be a hardship. However, the site plan review provisions have been in place for **four years**. There is no indication that the project has ever been close to breaking ground. This is not a development in progress.

The Takoma Park City Attorney will also be sending a letter, making the case that the request for an extension of the East Hampshire Center preliminary plan should be denied for a number of reasons, primarily due to significant problems with the applicant’s request.

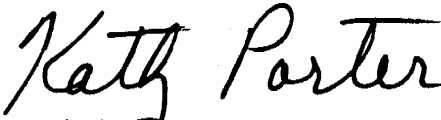
The City of Takoma Park respectfully asks the Planning Board to deny the extension of the preliminary plan approval for East Hampshire Center. The first development along New Hampshire Avenue since the placement of the Commercial Revitalization Overlay Zone and the designation of the area as an Enterprise Zone will set the tone for the future—and it should be a

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positive one.

If the Planning Board grants the extension, we ask that the approval be conditioned on site plan review. The City of Takoma Park is looking to New Hampshire Avenue as a significant opportunity for economic redevelopment in our community. Please help us work to advance the vision of the Master Plan by requiring the provisions of the Commercial Revitalization Overlay Zone to apply to this very visible and important gateway property.

Sincerely,



Kathy Porter
Mayor



Bruce Williams
Councilmember, Ward Three

cc: Takoma Park City Council
Pinecrest Citizens Association

City of Takoma Park, Maryland

Office of the Mayor
Kathryn H. Porter

Telephone: (301) 891-7100
Fax: (301) 270-8794



7500 Maple Avenue
Takoma Park, MD 20912

February 17, 2005

Mr. Derick Berlage, Chairman
Montgomery County Planning Board
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Re: East Hampshire Center Extension Request
Preliminary Plan 1-01067E

Dear Chairman Berlage:

We are writing to you to request that the Planning Board apply the Commercial Revitalization Overlay Zone (CROZ) to the East Hampshire Center site, regardless of whether the developer's extension request is granted. Our concerns are based on the importance of the site, the goals of the master plan for this area, changes in zoning that have now been in place for four years, and the particulars of the case.

In a separate letter sent to Park and Planning staff, the City's attorney makes a comprehensive argument for why the Planning Board should deny the developer's extension request. Attached, in support of the City Attorney's letter, is a chronology of actions relevant to this case that have taken place over the last several years.

Importance of the Site and Master Plan Goals

The East Hampshire Center property is the gateway property to the State of Maryland, Montgomery County and the City of Takoma Park on New Hampshire Avenue at its border with Washington, D.C. The Takoma Park Master Plan, adopted in December 2000, refers to this location as the "Maryland Gateway at Eastern and New Hampshire Avenues."

This property is the first of a string of unattractive and underutilized commercial properties along New Hampshire Avenue. Because of its important location and need for economic redevelopment, the Master Plan recommended that a new "Commercial Revitalization Overlay Zone" be applied to these commercial properties. This Overlay Zone, which requires Site Plan Review for most development, became effective on January 1, 2001. This area is also a key component of the Takoma Park/Long Branch Enterprise Zone, a joint Takoma Park/

Montgomery County effort to encourage appropriate redevelopment along New Hampshire Avenue. These designations were designed to implement the Master Plan vision for this area "to serve as a highway commercial gateway area that also provides neighborhood retail service to area residents."

For many years, the building on the East Hampshire property was a grocery store, serving the surrounding neighborhood. As smaller-sized grocery stores were phased out, the building became an auto parts store. Although the building was remodeled, the overall site is unattractive and dominated by an unimproved surface parking lot. The City and surrounding neighborhood residents have long wished to see the property improved with neighborhood commercial uses and attractive gateway signage and streetscaping.

The desire to improve the appearance of the area is shared by the Maryland State Highway Administration, Prince George's County, and Washington, D.C. The Maryland State Highway Administration worked with Takoma Park and Prince George's County residents and business owners for over a year on streetscaping plans, before the funds for the Neighborhood Conservation Program were eliminated two years ago. Prince George's County was looking at gateway improvements at the location in conjunction with State Highway's efforts. Washington, D.C. recently completed significant improvements on its already attractive part of New Hampshire Avenue near Eastern. It is unfortunate that a person driving north on New Hampshire Avenue passes through a lovely Washington, D.C. neighborhood into an unattractive commercial hodgepodge when entering Maryland.

The City is concerned that an unattractive or poorly designed development at this critical gateway will make it much more difficult for us to encourage redevelopment of the other properties on New Hampshire Avenue. For this reason, we would like to have the CROZ apply to this development to ensure that it is the type of development that will be an asset to the area.

The Commercial Revitalization Overlay Zone (CROZ) and Site Plan Review

The CROZ was adopted on December 12, 2000 and became effective January 1, 2001. Placement of the Overlay Zone over all Takoma Park and many East Silver Spring commercial properties indicated the Planning Board's strong appreciation for the need for appropriate economic redevelopment in this area of Montgomery County.

The City of Takoma Park pushed for site plan review for commercial properties within the City limits during the 1996-2000 Master Plan process. Before Unification in 1997, when the County line was changed to place all of Takoma Park within Montgomery County, all of the commercial properties within the Prince George's County portion of Takoma Park had site plan review requirements. As the bulk of the City's commercial properties had been in Prince George's County, the City did not want to lose this important regulatory provision when moving into Montgomery County.

There have already been successes with the site plan review process. The owners of a recently-approved self storage building on Holton Lane, about 1½ miles north on New Hampshire Avenue, embraced the provisions of the CROZ and designed an attractive building with first-level retail space opening onto the street; adequate and safe circulation for trucks, cars and pedestrians; and streetscape improvements. The City of Takoma Park and the Planning Board both endorsed their application, and the project is moving forward.

The attorney for the developer in the case before you now has argued that the developer's effort to work with the City in 2001 constitutes *de facto* site plan review. We disagree. The developer's attorney referenced a letter sent on July 17, 2001 by the City to the Planning Board with a resolution passed by the Takoma Park City Council as an attachment as evidence that a *de facto* site plan review process took place. This resolution states that "the following improvements are critical to the success of this difficult proposal." Some of these improvements have either yet to be addressed by the developer or made conditions of any formal agreement, including "prohibition of mechanical equipment on the roof... provision of an attractive building facade... that the building shall be designed and constructed in a manner that provides an appearance that is consistent with the abutting residential properties..."

We have never been shown any elevations or other drawings that would help us understand what the proposed building would look like. It is our understanding that elevations and other drawings are typically part of the site plan review process. In the case of the ezStorage development that was recently approved by the Planning Board, the elevations were instrumental in helping all parties work together to achieve a successful plan for the site. In this case, elevations would be critical to helping residents along Sligo Mill Road see how the self-storage building across the street from their homes would look.

Problems with the Design of East Hampshire Center

Unfortunately, the plans that we have seen so far for a self storage building at East Hampshire Center are not well-designed. The proposal includes no neighborhood-serving retail space and the new building would be six feet taller than that permitted without a waiver under the CROZ. The design for circulation on-site does not adequately accommodate trucks, which is a serious concern for a self-storage facility which will be patronized by customers driving trucks who are not skilled in truck driving. Even worse, the location of this property at the Eastern/New Hampshire intersection makes circulation off-site even more problematic.

While the property may be easily-accessed from southbound New Hampshire Avenue, access from northbound New Hampshire Avenue is difficult—it requires either a u-turn across three lanes of traffic further north on New Hampshire or an awkward entrance down a hill off Eastern Avenue. Drivers wishing to exit the site and go northbound on New Hampshire must either cross three lanes of traffic in time to make a u-turn just before the intersection or must exit onto Eastern Avenue. In either case, traffic waiting at the light will block the exit. If traffic is

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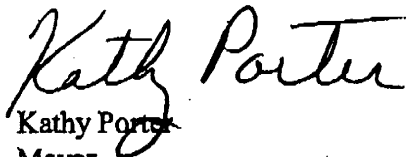
For all these reasons, we would be very concerned if the first redevelopment project on New Hampshire Avenue for many years is a poorly designed project that would aggravate congestion and create unsafe conditions on New Hampshire Avenue at the "Maryland Gateway."

Why Require Site Plan Now for this Project?

If the site plan review requirement had been recently imposed, and if the applicant had begun the project before the requirement was effective and had been making real and continuous efforts to pursue the project since that time, we would understand that imposition of a site plan review requirement could be a hardship. However, the site plan review provisions have been in place for **four years**. There is no indication that the project has ever been close to breaking ground. This is not a development in progress.

The City of Takoma Park respectfully asks the Planning Board to apply the Commercial Revitalization Overlay Zone (CROZ) to the East Hampshire Center site, regardless of whether the developer's extension request is granted. If the Planning Board grants the extension, we ask that the approval be conditioned on the requirements of the CROZ. The City of Takoma Park is looking to New Hampshire Avenue as a significant opportunity for economic redevelopment in our community. Please help us work to advance the vision of the Master Plan by requiring the provisions of the Commercial Revitalization Overlay Zone to apply to this very visible and important gateway property.

Sincerely,


Kathy Porter
Mayor



Bruce Williams
Councilmember, Ward Three

cc: Takoma Park City Council
Pinecrest Citizens Association

Chronology of Events
Preliminary Plan No. 1-01067E
East Hampshire Center, 6300 New Hampshire Avenue

- December, 12, 2000 Date Montgomery County Council, sitting as the District Council, approved the Takoma Park Master Plan. Plan included a recommendation to create a Commercial Revitalization Overlay Zone, with a Site Plan Review requirement, to be applied to commercial areas along New Hampshire Avenue among other locations.
- January 1, 2001 Effective date of Montgomery County Ordinance No. 14-33, which established the Takoma Park/East Silver Spring Commercial Revitalization Overlay Zone.
- April 11, 2001 Applicant filed application for preliminary approval of the subdivision plan. Did not own the property at the time.
- April 26, 2001 Applicant filed building permit application. Did not own the property at the time.
- June 4, 2001 Applicant settled on purchase of 6300 New Hampshire Ave.
- July 5, 2001 Trak Auto filed for bankruptcy.
- July 10, 2001 Sectional Map Amendment adopted implementing the Takoma Park/East Silver Spring Commercial Redevelopment Overlay Zone.
- July 26, 2001 Date Applicant's building permit application, if valid, should have expired under Montgomery Co. Code, § 8-24(i), because Applicant did not request an extension.
- August 17, 2001 Planning Board granted preliminary subdivision plan approval.
- March 30, 2004 Applicant requested an extension of its building permit application.
- June 29, 2004 Date extension of building permit should have expired (assuming the March 30th extension request was properly granted), given 90 day limitation on extensions pursuant to Montgomery Co. Code, § 8-24(i).
- September 13, 2004 Applicant requested 120 day extension of preliminary subdivision plan approval.

September 17, 2004

Expiration of 37 month validity period of preliminary subdivision plan approval.

January 31, 2005

Date 120 day extension of preliminary subdivision plan approval requested by Applicant would have expired.

24

Silber & Perlman, P.A.

ATTORNEYS AT LAW

Susan Silber
Linda S. Perlman
Kenneth T. Sigman
Metody A. Tilev ♦

♦ ALSO ADMITTED IN VIRGINIA

7000 Carroll Avenue, Suite 200
Takoma Park, Maryland 20912-4437

(301) 891-2200
Fax: (301) 891-2206

Attachment F

Practicing in
Maryland and the
District of Columbia

WRITER'S E-MAIL:
SIGMAN@SP-LAW.COM

December 27, 2004

VIA FACSIMILE

Catherine Conlon
Development Review Division
Tariq El-Baba, Esq.
Office of the General Counsel
M-NCPPC
8787 Georgia Ave.
Silver Spring, MD 20910

Re: Preliminary Plan 1-01067E, East Hampshire Center, Maisel-Hollins Development Company ("Applicant")

Dear Ms. Conlon and Mr. El-Baba:

I am writing on behalf of the City of Takoma Park to explain the legal basis for the City's position that the Planning Board should deny the extension of the preliminary subdivision plan approval in the above referenced proceeding and the City's position that the Takoma Park/East Silver Spring Commercial Revitalization Overlay Zone ("CROZ"), including its site plan review requirement, is applicable to the development at issue.

The Developer has not satisfied its burden of proof regarding its extension request.

Section 50-35(h)(3) of the *Montgomery County Code* (hereinafter, all statutory references shall be to the *Montgomery County Code* unless noted otherwise) governs extensions of preliminary subdivision approvals. Section 50-35(h)(3)b provides that a developer's failure to submit a "detailed, written request in a timely fashion voids all non-validated portions of the preliminary plan" 50-35(h)(3) requires developers to prove the following before the Board may extend the validity of a preliminary subdivision plan approval:

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

ii. the occurrence of significant, unusual, and unanticipated events, beyond applicant's control and not facilitated or created by applicant, have substantially impaired applicant's ability to validate its plan and that exceptional or undue hardship (as evidenced, in part, by the efforts undertaken by applicant to implement the terms and conditions of the plan approval in order to validate its plan) would result to applicant if the plan were not extended.

(emphasis added).

In this case, the applicant's written request for an extension, rather than stating a detailed reason for the delay in validating the subdivision plan, vaguely alleges that its tenant's filing for bankruptcy placed it "in limbo." In support of the extension request, rather than submitting an order of the bankruptcy court, the developer submitted only a motion filed by the debtor dated March 5, 2002. Moreover, the plan drawings reveal that the proposed development will not impact the building subject to the lease at issue in the bankruptcy proceeding.

Assuming, *arguendo*, that the applicant's request was adequately detailed, the status of a lease has no bearing on a developer's ability to validate a preliminary subdivision plan. See §50-35A ("The creation of deed, mortgage or lease line within a commercial, industrial or multi-family residential lot does not require the approval of a new subdivision plan. At the owner's discretion, the creation or deletion of internal lots to reflect a new deed, mortgage or lease line may be platted under the minor subdivision procedure."); see also *Capital Commercial Properties v. Montgomery County Planning Board*, 158 Md. App. 88, 102-03 (2004) (refusing to consider a ground lease holder's claim's that the property owner's preliminary site plan conflicted with its rights under the lease and explaining that a lessee's rights under a lease are not relevant in the zoning context) (citing *Perry v. County Board of Appeals for Montgomery County*, 211 Md. 294, 509).¹

In addition, the applicant's efforts to validate the subdivision plan as soon as it realized that the City intended to seek site plan review demonstrate that the applicant's inaction was the sole cause of the delay.

If the Board grants an extension of its preliminary subdivision plan approval, then it should condition the grant of the extension on compliance with the site plan review requirement of the Takoma Park/East Silver Spring Commercial Revitalization Overlay Zone.

Section 50-35(h)(3)d authorizes the Board to condition an extension on the applicant's compliance with changes in applicable laws following preliminary approval.

¹ In *Perry*, the Court of Appeals left open the question of whether a lessee is a party of interest who must sign off on a subdivision plan before a final plat may be recorded pursuant to Section 50-36(d)(4). The applicant's immediate efforts to record the plat before the Board ruled on the City's motion to reconsider, despite its request for a 120 day extension of the preliminary approval, demonstrate that the applicant does not consider the lessee to be a party of interest, as the applicant did not wait .

The Takoma Park/East Silver Spring Commercial Revitalization Overlay Zone (“CROZ”), which includes the lots at issue in this proceeding, now requires site plan review of developments such as the construction proposed by the applicant. See § 59-C-18.214(a). The CROZ was established by Montgomery County Ordinance No. 14-33, which became effective on January 1, 2001, and was implemented by Sectional Map Amendment on July 10, 2001. The CROZ provides that “*construction* pursuant to a building permit applied for as of the effective date of the Sectional Map Amendment implementing the CROZ may proceed under the provisions of the underlying zone. *If a building permit expires, then the provisions of the overlay zone must be met.*” § 59-C-18.216(a) (emphasis added).

In this case, the applicant filed a building permit application on April 26, 2001, and the applicant has not yet obtained a permit or started construction. Pursuant to Section 8-24(i), DPS shall deem an application for a building permit to have been abandoned after six months unless the director, for reasonable cause shown, grants one or more ninety-day extensions of the application’s validity. The only evidence of an extension of the validity of the application is a March 30, 2004, letter from the applicant initialed by Mr. Shahriar Amiri of DPS purportedly granting a one-year extension of the application. This extension is unlawful, and the Board should deem the building permit to have expired, because (1) the application expired as a matter of law in September 2001; (2) DPS granted the extension of the building permit application without a statement of cause; and (3) even assuming the building permit application remained valid on March 30, 2004, when the applicant requested the extension, the maximum lawful extension under Section 8-24(i) is 90 days—which has already passed since the granting of the extension. Because the applicant’s building permit application has expired, it is now subject to the site plan requirements of the CROZ.

Assuming, *arguendo*, that the building permit application has not expired, the CROZ is intended to apply to the applicant’s proposed development because the applicant has not yet begun construction, as is required by Section 59-C-18.216. The requirement that an applicant begin construction pursuant to a building permit in order to avoid the requirements of the CROZ is consistent with Maryland common law regarding vested rights in the zoning context. Under Maryland law, the right to proceed with construction without compliance with newly enacted zoning requirements vests when the following conditions are met:

‘1) there must be the actual physical commencement of some significant and visible construction; 2) the commencement must be undertaken in good faith, to wit, with the intention to continue with the construction and to carry it through to completion; and 3) the commencement of construction must be pursuant to a validly issued building permit.’

Powell v. Calvert County, 368 Md. 400, 409 (2002) (quoting *Sykesville v. West Shore Communications, Inc.*, 110 Md. App. 300, 305 (1996)).

In this case, the applicant does not have a building permit and has not commenced construction.

Several additional factors in this proceeding weigh in favor of the Board exercising its express authority to condition the extension upon compliance with the site plan review requirement of the CROZ. First, as City of Takoma Park Mayor Kathryn Porter explained in her letter of

December 27, 2004, the location of the property at the gateway to Montgomery County and the City of Takoma Park from Washington, D.C., and Prince George's County and the legislatively recognized need to revitalize the area justify the imposition of a site plan review requirement. Second, fairness dictates that the applicant should be subject to site plan review, as a proposed self-storage facility to be constructed approximately 1½ miles from the applicant's property recently underwent site plan review.

Especially compelling is the conduct of the applicant in this case. The applicant's conduct demonstrates that it intends to proceed with the development without regard for the impact of the development on surrounding area. On December 7, 2004, Harvey Maisel of Maisel-Hollins Development Company met with the Mayor and Mayor Pro Tem of the City of Takoma Park and a citizens group to discuss the proposed development, the City's desire for site plan review, and the City's motion to reconsider the Board's granting of an extension of the preliminary subdivision plan approval. Mr. Maisel expressed his willingness to consider uses for the property other than self storage and asked that the City consent to postponing the Board's reconsideration to facilitate further discussions. On December 8th, the Applicant began efforts to record the plat before the Board ruled on the motion to reconsider on December 9th, which would have made the motion to reconsider moot and enabled him to proceed with the development without further input from the City. To that end, the Applicant physically removed the site plan from the M-NCPPC office.

On December 7, 2004, the applicant, through its engineer, falsely represented to the Takoma Park City Arborist, Brett Linkletter, that it held a building permit in order to persuade the Arborist to begin the tree removal permit process, when the applicant's building permit application was, at best, still pending (the status of the Building Permit Application is discussed in detail above). See Exhibit A, attached. Then, on December 10, 2004, the applicant, again through its engineer, requested an extension of its Takoma Park Stormwater Management Permit. The request included a copy of Ms. Conlon's October 5, 2004, letter notifying the applicant that the Board had extended the preliminary subdivision plan approval (see Exhibit B, attached), despite the fact that the Board had revoked the extension on December 9th, when it granted the City's Motion to Reconsider the extension. See Planning Board Rules of Procedure §11 C.

Given the applicant's conduct in this case, the Board cannot trust the applicant to develop the property in a satisfactory manner unless the Board exercises its discretion and requires site plan review.

Conclusion.

The applicant has failed to even allege sufficient grounds for the granting of an extension of the preliminary subdivision plan approval, and the Board should deny the extension. If the Board does grant an extension, it should utilize its express authority to impose conditions upon the extension and require the applicant to comply with the site plan requirements of the CROZ. Such a requirement is particularly appropriate in light of the fact that the development is now subject to site plan review as a matter of law because the applicant did not begin construction prior to the Sectional Map Amendment implementing the CROZ and because the applicant abandoned its building permit application.

Thank you for your consideration of this matter. Please attach this correspondence to the Staff Report regarding the extension request.

Very truly yours,

Susan Silber

Susan Silber
City Attorney
City of Takoma Park

cc: Michele Rosenfeld, Office of the General Counsel, M-NCPPC

F:\WPDOCS\TAKOMA\Zoning\East Hampshire Cent. Plng Bd. Staff letter.wpd



LETTER OF TRANSMITTAL

To: City of Takoma Park
Public Works Department
31 Oswego Avenue
Takoma Park, Maryland 20910

Attn: Mr. Brett Linkletter

From: Doug Sievers
Email: jdsievers@mhgpa.com

Project: East Hampshire Center (Parcel 016)
MHG Project No. 01-102-12

Date: December 7, 2004

Subject: Sediment Control Permit & confirmation of 1-year extension

We are sending you the attached items via:

- Mail FEDX MHG Courier Orient Express Courier Your Pickup

Copies	Dwg/Doc Date	Description
1	3/29/02	Sediment Control Permit
1	3/30/04	Letter confirming 1-year extension of permit

THESE ITEMS ARE TRANSMITTED as checked below:

- For Approval Approved As Submitted For Your Records For Your Information
 For Your Use For Review and Comment As Requested Returning To You

Permit should be valid thru 3/29/05 with the extension. Please let me know if there is further information needed to post the Tree Removal Permit Application.

Thanks.

Signed,

Doug Sievers

*need site plan
and tree protection
plan extension
(AR)*



DEPARTMENT OF PERMITTING SERVICES

Douglas M. Duncan
County Executive

Robert C. Hubbard
Director

SEDIMENT CONTROL
PERMIT

Issue Date: 3/29/2002

Permit No: 203243
Expires: 3/29/2004
Ref. No:
ID: ACS64574

THIS IS TO CERTIFY THAT: MAISEL-HOLLINS DEVELOPMENT CO.
8627 16TH STREET
SILVER SPRING MD 20910

HAS PERMISSION TO: DISTURB 48,370 SQUARE FEET

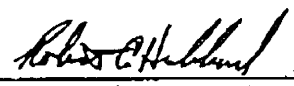
PURPOSE: CONSTRUCTION

PREMISE ADDRESS 6300 NEW HAMPSHIRE AVE
TAKOMA PARK MD 20912-

LOT
LOCK

The permittee must contact the Department of Permitting Services at (240) 777-6366 to obtain an inspection prior to:
1. Commencing land-disturbing activity;
2. Installing sediment-control basins or stormwater-management structures;
3. Removing sediment-control devices; and
4. Changing ownership of the permitted area.

LIBER PARCEL 016
FOLIO ELECTION DISTRICT
PERMIT FEE: \$1,596.21 SUBDIVISION EAST HAMPSHIRE CENTER


Director, Department of Permitting Services

MAISEL - HOLLINS DEVELOPMENT COMPANY

March 30, 2004

Mr. Shahriar Amiri
Department of Permitting Services
Montgomery County
255 Rockville Pike
2nd Floor
Rockville, MD 20850-4166

Via Fax: (240) 777-6258

Re: Permit 246444
6300 New Hampshire Ave. Takoma Park, MD
Storage

Dear Mr. Amiri:

Per our conversation this morning, this fax will confirm a one year extension on the referenced pending permit.

If you are in agreement with this understanding, please initial and date this memo and fax back to us at (301) 589-0445.

Thank you for your consideration and assistance.

Sincerely,


Harvey Maisel

Initial: SA

Permit application remains valid unless application has not been diligently prosecuted or a permit issued. 8-24 (i) MCC has not been



FACSIMILE TRANSMITTAL SHEET

TO: MR. ALI KHALILIAN

FROM: DOUG SIEVERS

COMPANY: TAKOMA PARK DPW

DATE: 12/10/04

FAX NUMBER: 301 585-2405

NO. OF PAGES INCLUDING COVER:

3

PHONE NUMBER: 301 891-7620

SENDER'S REFERENCE NUMBER:
01-102

RE: EAST HAMPSHIRE CENTER

YOUR REFERENCE NUMBER:

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY FYI

NOTES/COMMENTS:

Attached is letter from Mont. Co. DPS dated 10/18/04. The "associated plans" that are included in the extension include stormwater management. Soil Erosion, Sediment Control, and Stormwater Management are all part of the same plan. The SESC & SWM Plans show proposed grading and proposed SWM facilities that will be permanent. If any significant grading change or change in SWM Facility location, dimensions, etc. were made, they would be revealed in the As-Built Drawings that will be required prior to the release of bonds. Changes could cause forfeiture of bonds if facilities didn't function per design. The SWM facilities will be built from the SESC/SWM Plans and not the Site Plan.

Although Steve Goley previously supplied a copy of the Preliminary Plan extension, I am including it with this FAX. The site did not go through the 59C-3 process and therefore Site Plan approval was not required by M-NCPPC. I can send you a copy of the Site Plan if you would like to check it against the approved Preliminary Plan. It is essentially the same.

I will check with Steve Wilde Monday regarding the SWM Application you emailed him and \$100.00 fee.

Attachment B

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12/10/04 - Fee TO STRIKE



DEPARTMENT OF PERMITTING SERVICES

Douglas M. Duncan
County Executive

Robert C. Hubbard
Director

October 18, 2004

Harvey Maisel
Maisel-Hollins Development Co.
8627 16th Street
Silver Spring, MD 20910

Re: East Hampshire Center
Parcel: 016

Dear Mr. Maisel:

Since your project was never stated until this time, by request of your Sediment Control Inspector, Haywood Johnson, the Department of Permitting Services has extended the above mentioned Sediment Control Permit #203243. The permit and associated plans have been conditionally extended until March 29, 2005 with no fee required. Be advised that you must request a further extension 30 days prior to the March 29, 2005 date. The fee to extend would then be \$159.62 and that extension would be for one year.

2343

The construction of all stormwater management facilities must meet the Montgomery County design and materials standards, which are in place at the time of actual construction.

If you have questions or comments, Please contact your inspector.

Bill Cambie

Sincerely,

Elaine Miller, Permit Technician
Division of Casework Management

Cc: SC File 203243

Mike Reah, Manager SC Inspectors

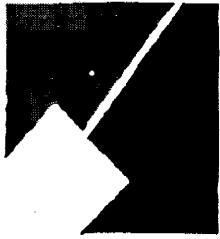
Y:\Land Development\LD\SC\ISM\Plan Review\Shell Documents\Extension\Receipt.doc



255 Rockville Pike, 2nd Floor • Rockville, Maryland 20850-4166 • 240/777-6300, 240/777-6256 TTY

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M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppc.org

RECEIVED
OCT 08 2004

October 5, 2004

Mr. Harvey Maisel
8627 16th Street
Silver Spring, Maryland 20910

Preliminary Plan No. 1-01067E
Request for an extension of the validity date for the EAST HAMPSHIRE CENTER

This is to inform you that the Montgomery County Planning Board considered your request for an extension to the validity period of the above-mentioned plan at its regularly scheduled meeting of September 30, 2004. At that time, the Planning Board voted 4-0 to grant an extension to January 30, 2005. (Commissioner Bryant made the motion; Commissioner Wellington seconded; Commissioners Berlage, Bryant, Perdue and Wellington voted in favor, Comm. Robinson temporarily absent)

Please give me a call at 301/495-4542 if you have any questions concerning this Planning Board action.

Sincerely,

Catherine Conlon
Development Review Division

cc: Robert Dalrymple

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Silber & Perlman, P.A.

ATTORNEYS AT LAW

Susan Silber
Linda S. Perlman
Kenneth T. Sigman
Metody A. Tilev
♦ ALSO ADMITTED IN VIRGINIA

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Maryland and the
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WRITER'S E-MAIL:
SIGMAN@SP-LAW.COM

February 14, 2005

VIA FACSIMILE

Catherine Conlon
Development Review Division
Tariq El-Baba, Esq.
Office of the General Counsel
M-NCPPC
8787 Georgia Ave.
Silver Spring, MD 20910

Re: Preliminary Plan 1-01067E, East Hampshire Center, Maisel-Hollins Development Company ("Applicant")

Dear Ms. Conlon and Mr. El-Baba:

I am writing on behalf of the City of Takoma Park in response to the December 29, 2004, letter and January 26, 2005, electronic mail message of Robert Dalrymple (which enclosed a January 12, 2005 letter from Kenneth West) on behalf of Maisel-Hollins Development Company ("Applicant"). Despite ample opportunity to make a coherent presentation of the reasons for the Applicant's three year delay in validating its preliminary subdivision plan, the Applicant has submitted no documentary evidence of the cause of the delay and makes only vague factual allegations intended to confuse the Planning Board. The undisputed facts of this case demonstrate that the Applicant is not entitled to an extension as a matter of law, and that the proposed development should be subject to site plan review. For the reasons stated below, and for the reasons stated in our letter of December 27, 2004, the City of Takoma Park is opposed the extension of the preliminary subdivision plan approval in this case.

The Applicant was not qualified to file its application for preliminary subdivision approval because the Applicant did not own the property at the time of filing.

The Board can not grant an extension of the preliminary subdivision plan approval because the Applicant did not have standing to apply for preliminary plan approval when it filed its application with the Board. Section 50-34(b) of the Montgomery County Code provides that only a property owner or the owner's agent may file an application for preliminary subdivision plan

approval. Section 50-1 defines "owner" as "[a] person or corporation holding a legal title in the land, but not including a mortgagee, a lienor, a lessee or a contract purchaser." (Emphasis added.) The Applicant concedes that it settled on the property on June 4, 2001. The Applicant filed the application for preliminary approval of the plan at issue in this proceeding on April 11, 2001. Accordingly, the application was premature, the preliminary approval is invalid, and Applicant is not entitled to an extension. In addition, the Applicant's premature filing of the application demonstrates its intent to circumvent the site plan approval requirements of the Takoma Park/East Silver Spring Commercial Revitalization Overlay Zone ("CROZ"), which had been enacted on January 1, 2001. Therefore, even if the Board overlooks the invalidity of the application, it should exercise its broad discretion under section 50-35(h)(3)d¹ to impose the site plan review requirement of the CROZ as a condition of the extension.²

The proposed development must undergo site plan review because the Applicant was not qualified to apply for the building permit at the time it filed its application.

The Applicant claims that it is not subject to site plan review because it applied for a building permit before the adoption of the Sectional Map Amendment implementing the CROZ.³ The Applicant, however, was not qualified to apply for the building permit at the time it filed its application, and, therefore, is not entitled to rely on its permit application to circumvent the site plan review requirements of the CROZ and undermine the Master Plan.

Section 8-24(c) of the Montgomery County Code, which governs applications for building permits, provides as follows:

(c) *Qualified applicants.* Applicants for a permit shall be made by the owner or lessee of the building or structure, or agent of either or by the licensed engineer or architect employed in connection with the proposed work. If the application is made by a person other than the owner in fee, it shall be accompanied by a duly verified affidavit of the owner or the qualified person making the application that the proposed work is authorized by the owner in fee and that the applicant is authorized to make such application.

¹Section 50-35(h)(3)d provides that "[t]he Planning Board, in considering a request for an extension, may condition the 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."

²As City of Takoma Park Mayor Kathy Porter and Councilmember Bruce Williams indicated in their letter of December 27, 2004, the property at issue is of great importance because it is located at the gateway to Montgomery County and the City of Takoma Park from the District of Columbia and Prince George's County.

³ The Sectional Map Amendment giving effect to the CROZ was adopted on July 10, 2001.

As noted above, the Applicant did not own the property at issue until June 4, 2001. Accordingly, it was not a "qualified applicant" at the time it applied for the building permit, and the Board should not allow the applicant to rely upon its building permit application⁴ to avoid site plan review. This premature application for a building permit, like the premature application for preliminary site plan review, evidence the Applicant's intent to circumvent the requirements of the CROZ, and, at the very least, demonstrates that the Board should exercise its discretion to condition the extension of the preliminary approval on the Applicant's compliance with the site plan review requirements of the CROZ.

The Developer has not satisfied its burden of proof regarding its extension request.

Section 50-35(h)(3) of the *Montgomery County Code* governs extensions of preliminary subdivision approvals. Section 50-35(h)(3)d requires applicants to prove one of the following before the Board may extend the validity of a preliminary subdivision plan approval:

- i. delays, subsequent to the plan approval by the government or some other party, essential to the applicant's ability to perform terms or conditions of the plan approval, have materially prevented applicant from validating the plan, provided such delays are not created or facilitated by the applicant; or
- ii. the occurrence of significant, unusual, and unanticipated events, beyond applicant's control and not facilitated or created by applicant, have substantially impaired applicant's ability to validate its plan and that exceptional or undue hardship (as evidenced, in part, by the efforts undertaken by applicant to implement the terms and conditions of the plan approval in order to validate its plan) would result to applicant if the plan were not extended.

The City maintains that the Applicant has failed to prove (1) that the bankruptcy of Trak Auto prevented it from validating its preliminary site plan, and (2) that the consent of either Trak Auto or Advanced Auto was necessary for the Applicant to record the plat. As noted in our letter of December 27, 2004, the Applicant removed the preliminary plan from the M-NCPPC office and attempted to record the plat without the consent of Advance Auto, once it learned of the City's opposition to the extension. However, even if the Applicant is able to prove that the bankruptcy of Trak Auto and its dispute with Advanced Autos actually prevented it from recording the plat, the facts of this case demonstrate that the Applicant is not entitled to an extension.

Since filing its inadequate request for an extension, the Applicant has had five months to provide the Board with a coherent explanation (with supporting documentation) of the cause of the three year delay in validating its preliminary site plan. The Applicant's position has been that the bankruptcy of its tenant, Trak Auto, and a subsequent landlord/tenant dispute with Advanced Auto,

⁴ The fact that the building permit application has expired as a matter of law is discussed in our letter of December 27, 2004.

which assumed the lease from Trak Auto, has prevented it from validating the preliminary subdivision plan.

Rather than providing support for its claim, the Applicant simply reasserts its vague arguments. For example, the Applicant's December 29th letter simply claims that "[p]ursuant to bankruptcy laws, the Applicant was precluded from recording a plat until the issues of bankruptcy were finally resolved" The Applicant goes on to assert that, subsequent to the bankruptcy proceeding, it "initiated efforts with Advanced Autos" to obtain the necessary consent to proceed with the development. The Applicant still has not provided the Board with any documentation from the bankruptcy proceeding in support of its claim. Nor has it presented any documentation of its efforts to negotiate with Advanced Auto or any documentation of its "landlord/tenant" litigation with Advanced Auto. Most telling, however, is the fact that the Applicant has not even attempted to explain to the Board exactly why the bankruptcy prevented the validation of the preliminary plan, why Advanced Auto refuses to consent to the proposed development, what the Applicant has done to obtain the consent of Advanced Auto, or how the Applicant's litigation with Advanced Auto relates to its ability to record the plat in this case.

Obviously, the Applicant is fully cognizant of the facts that explain its delay in validating the preliminary subdivision plan. If the facts supported its claim, the Applicant would provide the Board with a detailed explanation of its efforts to obtain preliminary approval. Instead the Applicant provides the Board with unsupported allegations and attempts to divert the Board's attention with misleading claims that it has cooperated with the City of Takoma Park and has undergone "de facto" site plan review.

The bankruptcy of the Applicant's tenant does not warrant an extension of the preliminary subdivision plan approval under Section 50-35(h)(3)d.i because the tenant filed for bankruptcy before the Board approved the plan.

Section 50-35(h)(3)d.i authorizes the Board to extend preliminary subdivision plan approval if the applicant proves that "delays, subsequent to the plan approval . . . have materially prevented applicant from validating the plan." (Emphasis added.) The record is clear that the Applicant's tenant filed for bankruptcy on July 5, 2001, and the Board did not grant preliminary approval of the plan until August 17, 2001. Therefore, as a matter of law, the bankruptcy of the Applicant's tenant does not justify the granting of an extension in this case under section 50-35(h)(3)d.i.

The events that allegedly delayed the Applicant's validation of the preliminary subdivision plan do not justify a delay under section 50-35(h)(3)d.ii.

Under section 50-35(h)(3)ii, the Applicant must prove several elements before the Board can grant an extension of a preliminary subdivision plan approval. First, the Applicant must prove that the event causing the delay was "significant, unusual, and unanticipated." In this case, the Applicant claims that, after Trak Auto declared bankruptcy, Advanced Auto's refusal to consent to the dedication of a portion of the leased premises to the State Highway Administration has caused the delay. Schedule B of Trak Auto's lease, which the Applicant submitted to the Board with its January 26th e-mail, explicitly requires the Applicant to obtain the consent of the tenant before

making changes to the premises. Therefore, it was foreseeable that Trak Auto might not consent to the dramatic changes of the proposed development. The Applicant, which has the burden of proof, claims to have obtained the consent of Trak Auto to the proposed development. However, the Applicant has provided no written evidence of such consent. In addition, if Trak Auto had entered into a binding agreement with the Applicant prior to filing for bankruptcy, presumably such consent would be binding on Advanced Auto.

The second element that the Applicant must prove under section 50-35(h)(3)d.ii is that the events causing the delay were "beyond [the] applicant's control and not facilitated or created by [the] applicant." In this case, the alleged cause of delay is the refusal of Advanced Auto to consent to the proposed development. The Applicant has not submitted any evidence of its efforts to negotiate with Advanced Auto, has not submitted any evidence regarding the alleged litigation with Advanced Auto, and has not even attempted to explain the sticking point in its negotiations with Advanced Auto. Therefore, there is no way for the Board to know whether the applicant has facilitated or caused the delay. In addition my review of the Trak Auto bankruptcy proceeding reveals that the Applicant attempted to prevent the assignment of the lease to Advanced Auto because of a dispute over tax payments, thereby causing further delay. The Applicant's pleading in the bankruptcy proceeding is attached. Given the Applicant's failure to prove that it is not responsible for the delay and the evidence that it contributed to the delay during the bankruptcy proceeding, the applicant has not satisfied this element of section 5-35(h)(3)d.ii.

The final element that the Applicant must prove under 50-35(h)(3)d.ii is "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." In this case, in an effort to avoid the requirements of the CROZ, the Applicant rushed into this proceeding facing several known risks. First, the Applicant applied for a building permit and filed its preliminary subdivision plan application before it even owned the property to be developed and without first obtaining the consent of its tenant to the proposed development. From the date the Applicant settled on the property, June 4, 2001, through the date Trak Auto declared bankruptcy, July 15, 2001, the applicant proceeded with full knowledge that it did not have the binding consent of Trak Auto. Beginning on July 15, 2004, the Applicant proceeded with full knowledge that Trak Auto had filed bankruptcy and that the bankruptcy would prevent it from validating the subdivision plan. Because the Applicant undertook every effort to obtain and validate its site plan approval in the face of several known risks, denial of the extension will not cause the applicant "undue" hardship. The Applicant could have avoided this situation if it had waited to proceed until it had the binding written consent of its tenant, rather than recklessly pushing forward in an attempt to avoid site plan review.

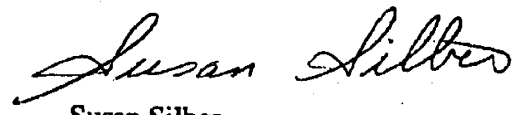
The time requested for original extension has passed and the Applicant has not yet obtained the consent of Advanced Auto.

The Applicant originally sought, and the Board granted, an extension of the preliminary site plan approval until January 31, 2005. That date has come and gone and the Applicant still does not have the consent of Advanced Auto. Just as the Applicant is unable to present any evidence to support its claim that Trak Auto had consented to the proposed development before Trak declared

bankruptcy, the Applicant now claims, without any supporting evidence, to have obtained the consent of Advanced Auto. Presumably, the Applicant would have a signed agreement with Advanced Auto, or at least correspondence memorializing an agreement in principle. Instead, as of January 12, 2005, the Applicant was blaming the current delay on the holiday travel of the attorney for Advanced Auto.

Thank you for your consideration of this matter. Please attach this correspondence to the Staff Report regarding the extension request.

Very truly yours,



Susan Silber
City Attorney
City of Takoma Park

- cc: **Rose Krasnow**
- Mayor Kathy Porter**
- Councilmember Bruce Williams**
- Rob Inerfeld**
- Suzanne Ludlow**

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