

**MEMORANDUM**

November 28, 2005

TO: Montgomery County Planning Board

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

Cathy Conlon, Supervisor *CC*
Development Review Division

FROM: Richard A. Weaver, Coordinator (301) 495-4544 *RAW*
Development Review Division

SUBJECT: Request for reinstatement of an expired preliminary and an extension of the validity period – Preliminary Plan 120020170 (1-02017), Henderson Corner Property

STAFF RECOMMENDATION: Denial of the request to reinstate the expired preliminary plan.

DISCUSSION

The preliminary plan for Henderson Corner, No. 120020170 (1-02017) was approved by the Planning Board at a regularly scheduled public hearing on September 12, 2002. The date of mailing of the Planning Board Opinion for the plan was October 1, 2002. As a condition of that approval the validity period of the preliminary plan was set at 37 months from the date of mailing of the Planning Board Opinion, or November 1, 2005. On February 7, 2005, the applicant submitted a site plan for the Henderson Corner project. The site plan remains under review.

While not accurately stated in the November 8, 2005 letter, the engineer is seeking reinstatement of an otherwise expired preliminary plan and an extension of the plan validity

period for one year pursuant to Section 50-35(h)(3)(c) of the Montgomery County Subdivision Regulations. This section reads as follows:

“In instances where a preliminary plan has been allowed to expire due to applicant’s failure to file a timely request for an extension, the Board on a case-by-case basis in unusual circumstances may require submission and approval of a new plan, including a new APFO review; or, where practical difficulty or undue hardship is demonstrated by the applicant, may reinstate an expired plan and establish a new validity period for the plan. The Board, when considering a request to extend an otherwise expired plan, may require applicant to secure a new APFO review and approval by the Board, as a prerequisite or condition of its action to validate and extend the expired plan. Only the Planning Board is authorized to extend the validity period.”

Staff believes the Board must make two separate findings under this request: one to reinstate the plan and the second, to extend the validity period. The finding the Board must make to reinstate and extend the validity period of an expired plan must be based on practical difficulties or undue hardship. In defining practical difficulties or undue hardship, staff and the Board refer to Section 50-35(h)(3)(d), Grounds for Extension of the Validity Period for guidance:

- (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 the 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.*

Applicant’s Position

The applicant’s engineer, PG Associates, submitted the extension request letter dated November 1, 2005 (attachment 1), on November 9, 2005, eight days after the expiration date of the preliminary plan. Since the letter was not submitted in a timely manner, the preliminary plan approval expired on November 1, 2005. No explanation of the late submittal date was discussed in the letter; staff believes it to be an unfortunate oversight.

The applicant is requesting that the Planning Board extend the validity period of the preliminary plan, which they believe to be justified due to delays in finding a purchaser/user of the property for which a detailed site plan could be submitted. A site plan could not be submitted until a use, and eventual layout, could be established. The letter also infers that the engineer believed the site plan approval and platting could have been achieved within the validity period of the preliminary plan, however, unanticipated and unspecified delays in addressing DRC comments related to the site plan have extended the expected approvals into Spring 2006. Therefore, the applicant is requesting a one-year extension to complete the site plan and platting process.

Staff's Position

- Reinstatement

Staff does not believe that the applicant has adequately justified grounds to reinstate the expired preliminary plan. The delay in filing a timely application to extend that validity period is a result of the applicant and/or engineer's actions and not necessarily due to a practical difficulty or undue hardship. There appears to have been some confusion on the engineer's part about the actual expiration date that led to the late submittal. The engineer's letter, with a drafting date of November 1, 2005, does show a vague intent to submit the application in a timely manner; however, it was not received until November 8. The applicant has also proceeded with the submission of a site plan which does demonstrate intent to keep the application valid by platting the property. However, staff does not believe that the applicant's intent to file for extension, and failure to do so, constitutes a practical difficulty or an unusual circumstance. The applicant failed to argue that the expiration of the plan would result in an undue hardship.

- Extension of the Validity Period

Should the Planning Board find that there is the ability to support reinstatement of the preliminary plan, staff believes there is a reasonable unusual event that was not anticipated early on in the process, specifically, the difficulty in finding a user of the property for the uses approved as part of the preliminary plan approval. This would have delayed the preparation of a site plan that met the specific needs of an individual "high turnover restaurant", and that an extension would be warranted to complete the review of the pending site plan and eventual plat process.

CONCLUSION

Staff does not believe that a sufficient argument has been made regarding the request to reinstate preliminary plan No. 1200020170 (1-02017), Henderson Corner, because the failure to make the request in a timely manner was due to an applicant oversight and not to a practical difficulty or undue hardship. Should the Board find there to be adequate justification to reinstate the preliminary plan, staff believes that justification exists to extend the validity period for one

year to November 1, 2006. This should be sufficient time to allow completion of the site plan and record plat process. It should be noted that the APF review for this plan is valid until November 1, 2007.

Attachments

Attachment 1 – Extension Request Letter

Attachment 2 – Approved Opinion