



**MONTGOMERY COUNTY PLANNING DEPARTMENT**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

**MCPB**  
**Item #**  
**11/01/07**

**MEMORANDUM**

October 17, 2007

TO: Montgomery County Planning Board

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

FROM: Catherine Conlon, Development Review Division *CA* (301-495-4542)

SUBJECT: Request for extension of the Adequate Public Facilities validity period for Preliminary Plan 119960220 (1-96022), Brooke Grove

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**STAFF RECOMMENDATION:** Grant extension for four years until October 7, 2012<sup>1</sup>.

**BACKGROUND**

The Brooke Grove property ("Subject Property" or "Property") consists of 179 acres in the RE-2 zone, located on Slade School Road north of MD Rte. 108 in Sandy Spring (Attachment A). The Property contains a life care (continuing care) facility owned and operated by the Brooke Grove Foundation ("Applicant"), a non-profit organization. The facility was approved by Special Exception as a four-phase project consisting of an ultimate combination of a nursing and rehabilitation center, 8 group homes, 330 independent living apartments, and 40 villas. To date, two preliminary plan approvals have been obtained for the nursing and rehabilitation center, the group homes, the villas, and 101 of the apartment units (Preliminary Plan Nos. 119900180 and 119960220). The remaining 229 independent living apartments included in the Special Exception cannot be built without additional preliminary plan review. All the development approved by previous preliminary plans, except the 101 apartment units, are constructed or under construction on the Property.

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<sup>1</sup> The current APF validity expires on October 8, 2008.

The two preliminary plans for Brooke Grove were approved by the Planning Board on April 23, 1992 and December 21, 1995, respectively. The April, 1992 approval included the nursing and rehabilitation center, and four group homes (see Opinion in Attachment B). The December, 1995 approval added four group homes and enlarged the nursing home (see Opinion in Attachment C). On October 3, 1996, the second preliminary plan was revised to add the 40 villas, and 101 of the ultimately planned 330 independent residential apartment units (see Opinion in Attachment D). The initial preliminary plan approval was subject to an Adequate Public Facilities (“APF”) Agreement pursuant to the provisions of the FY 92 Annual Growth Policy for the special ceiling allocation for health care facilities. The 1996 approvals revised that APF Agreement pursuant to the FY 97 Annual Growth Policy, which created housing capacity in the Olney Policy Area, and established the start of the current APF validity period. Pursuant to Section 50-20(c)(3)(A) of the Montgomery County Code, Subdivision Regulations, this validity period is set at 12 years from the date of mailing of the last Planning Board Opinion, or October 8, 2008. As such, building permits for the remaining un-built 101 apartment units must be obtained prior to this date.

On May 8, 2007 staff received an application for extension of the APF validity period for the application. The request is for an additional 4 years until October 8, 2012. The basis for the request is summarized in two attached letters from the Applicant’s representative, dated May 1, 2007 and September 25, 2007 (Attachments E and F).

#### **REQUIRED FINDINGS FOR APF EXTENSION**

Sections 50-20(c)(4) and (5) establish the terms under which an APF validity period may be extended for certain types of projects. **Section 50-20(c)(4)** states:

“The Planning Board may extend a determination of adequate public facilities once for an exclusively residential subdivision beyond the otherwise applicable validity period if the Department [Montgomery County Department of Permitting Services] has issued building permits for at least 50 percent of the entire subdivision before the application for extension is filed. The Board may approve one or more extensions if the aggregate length of all extensions for the development do not exceed:

- (A) 2 ½ years for a subdivision with an original validity period of 5 years; or
- (B) 6 years for a subdivision with an original validity period longer than 5 years.”

**Section 50-20(c)(5)** states:

“ The Planning Board may extend a determination of adequate public facilities for a preliminary plan of subdivision for nonresidential development beyond the otherwise applicable validity period if:

- (A) at least 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 40%;

- (B) all of the infrastructure required by the conditions of the original preliminary plan approval has been constructed, or payments for its construction have been made; and
- (C) the development is an “active” project, meaning that either occupancy permits have been issued or a final building permit inspection has been passed for at least 10 percent of the project within the 4 years before an extension request is filed, or occupancy permits have been issued for at least 5 percent of the project within the 4 years before an extension request is filed if 60 percent of the project has been built or is under construction. If occupancy permits are not typically issued for the type of development for which an extension is requested, a part of the development can be treated as complete when its final inspection has been approved. The Board may treat a building as complete even if occupancy permits have been issued for only part of the building.”

As discussed below, the Applicant’s representative is making this request for extension with reference to both these sections.

### **Applicant’s Position**

The Applicant’s position regarding the grounds for extension are best described in the September 25, 2007 letter from Ms. Susan W. Carter of the law firm of Miller, Miller & Canby. In this letter, Ms. Carter argues that a life care facility does not fit squarely into either an “exclusively residential” or “non-residential” development category. She points out that staff’s approach to the traffic analyses that were conducted at the time of preliminary plan supports this view, since vehicle trips were counted as originating from both “housing” (the independent living units) and “jobs” (the nursing home and group assisted living facilities). She believes that a finding can be made that this request complies with the extension provisions for either category. She also believes that the Subdivision Regulations should not be so narrowly construed as to deny Brooke Grove an opportunity to request an extension (as any other type of project) simply because it does not fit neatly into one category or the other.

In her argument that the development complies with the requirements for extension as an “exclusively residential” development, Ms. Carter suggests that Brooke Grove can be considered residential because all of its facilities (the nursing home, assisted living group homes, and independent living units) provide housing and care to the residents. She believes a finding can be made that building permits have been issued for at least 50% of the entire subdivision because a total of 226,760 square feet, or 63% of the approximately 359,760 total square feet included in the approval, either has been constructed, or has received a building permit to be constructed.

In support of viewing this application as “non-residential”, Ms. Carter notes that while Brooke Grove serves as a residence, it is also an “institutional” facility which is arguably more akin to non-residential development. She notes that the development meets the requirements for a non-residential APF extension because: approximately 63% of the approved development has been constructed, is under construction, or has been issued building permits; all of the required infrastructure has been constructed; and at least 5% of the development has received occupancy permits within the past 4 years.

Ms. Carter also notes that Brooke Grove has been diligently pursuing the full development of the Subject Property, which was contemplated at the time of special exception approval to be a process that would take until the year 2012. She points out that the nature of the State approvals needed to obtain building permits for this unique type of facility necessitate additional time for the current phase. A life care facility is governed by state code requirements administered by the Maryland State Office on Aging that include a lengthy feasibility study and certification process, followed by certain "pre-sale" requirements, before construction can commence. The "pre-sale" process on a project this size is expected to take approximately 2 years, so realistically, the Applicant cannot obtain its building permit for the remaining 101 units prior to the expiration of the existing validity period.

### **Staff's Position**

In staff's opinion, the Section 50-20(c)(5) provisions for extension apply to the Brooke Grove project. The project is clearly not "exclusively" residential since the APF analyses counted vehicle trips from both housing and jobs. We agree with the statement that the provisions for extension should not be so narrowly construed as to prevent a mixed-use subdivision from applying for an extension. Therefore, since Section 50-20(c)(4) applies specifically to a project that is exclusively residential, the Section 50-20(c)(5) provisions for nonresidential development should be read to include a mixed use project.

Staff reviewed the subject extension request under the provisions of Section 50-20(c)(5) and finds that the application meets all requirements. Approximately 63% of the overall development covered by the preliminary plan has been constructed, or has received building permits for construction. The infrastructure required by the conditions of approval of the preliminary plan has been constructed<sup>2</sup>. And occupancy permits have been issued for at least 5% of the overall development in the 4 years prior to this extension request. The new phasing schedule outlined by the Applicant indicates that an additional four years will provide sufficient time to complete the State approvals needed to obtain the building permit for the proposed apartment building. These include a lengthy feasibility study and certification process, followed by a "pre-sale" process that can take up to two years, before construction can commence.

Another basis for staff's support of this extension request is our finding that the intersections adjacent to the site will operate, for the immediate future, well within the Olney Policy Area congestion standard of 1,475 critical lane volume (CLV). The attached Transportation Planning staff memorandum (Attachment G) summarizes these findings.

### **CONCLUSION**

The Subject Property meets the requirements of Section 50-20(c)(5) of the Subdivision Regulations for extension of the adequate public facilities validity period. The extension request was timely filed and remains valid, and the new phasing plan indicates that an additional four years will provide adequate time to construct the remaining development. Staff, therefore,

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<sup>2</sup> These improvements included a bypass lane at the intersection of Norwood Road and MD 108, and improvements to the intersection of Slade School Road and MD 108.

recommends approval of the Applicant's request to extend the APF validity period for four years, until October 7, 2012.

#### Attachments

Attachment A – Vicinity Map

Attachment B – May, 1992 Opinion

Attachment C – December, 1995 Opinion

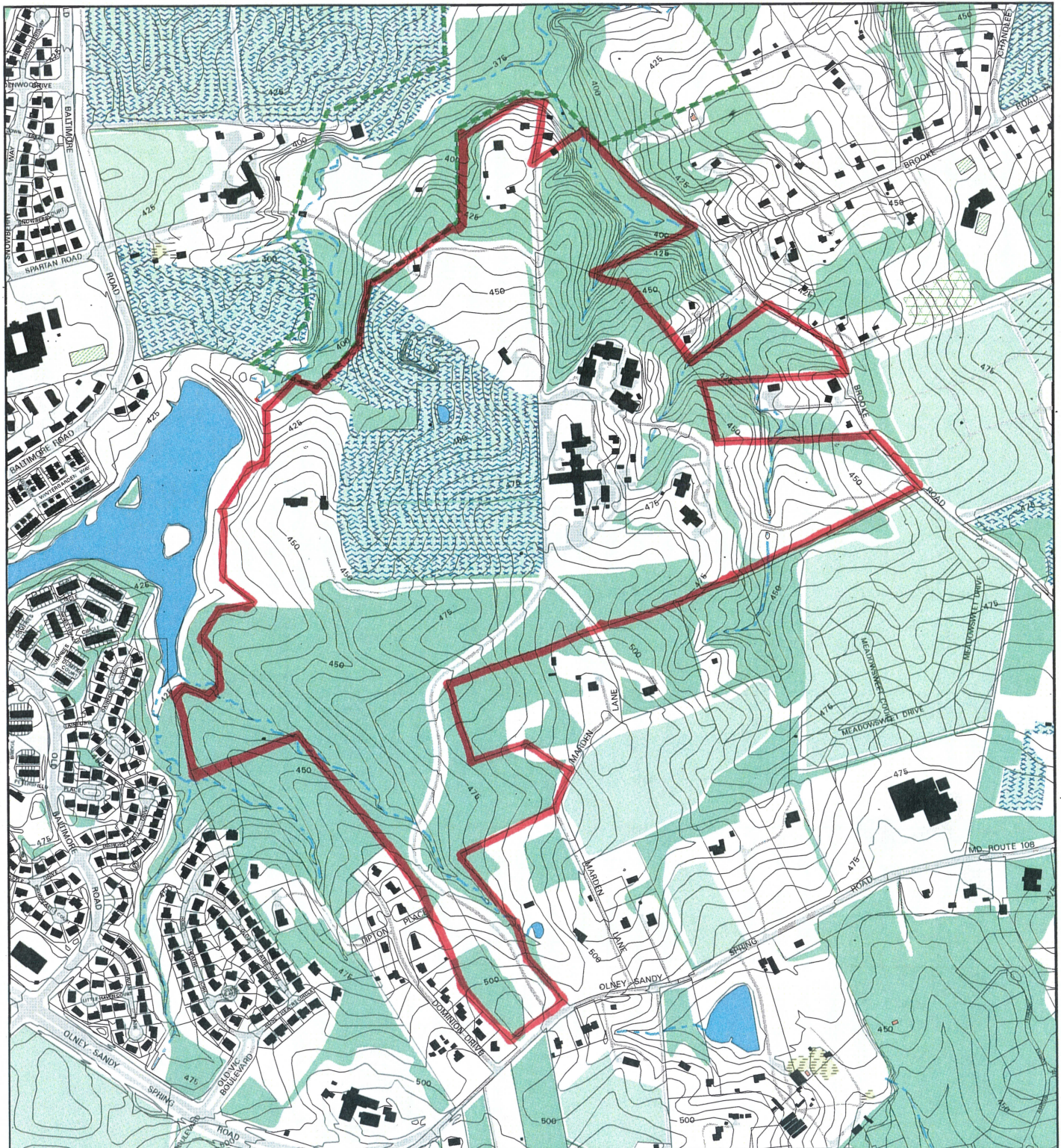
Attachment D – October, 1996 Opinion

Attachment E – Applicant's 5/1/07 Letter

Attachment F – Applicant's 9/25/07 Supplemental Letter

Attachment G – Transportation Planning Staff Analysis of the Extension Request

# BROOKE GROVE VICINITY MAP



Map compiled on October 19, 2007 at 11:16 AM | Site located on base sheet no - 224NW02

### NOTICE

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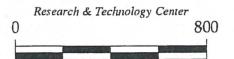
Property lines are compiled by adjusting the property lines to topography created from aerial photography and should not be interpreted as actual field surveys. Planimetric features were compiled from 1:14400 scale aerial photography using stereo photogrammetric methods.

This map is created from a variety of data sources, and may not reflect the most current conditions in any one location and may not be completely accurate or up to date. All map features are approximately within five feet of their true location. This map may not be the same as a map of the same area plotted at an earlier time as the data is continuously updated. Use of this map, other than for general planning purposes is not recommended. - Copyright 1998

Key Map




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1 inch = 800 feet  
1 : 9600

**MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING**  
 THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION  
 8787 Georgia Avenue - Silver Spring, Maryland 20910-3760



Date of Mailing: May 1, 1992  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION  
8787 Georgia Avenue • Silver Spring, Maryland 20910-3780

Action: Approved Staff Recommendation  
(Motion of Comm. Keeney, seconded by Comm. Floreen, with  
a vote of 5-0; Comm. Keeney, Floreen, Bauman, Baptiste  
and Richardson voting in favor.)

MONTGOMERY COUNTY PLANNING BOARD

OPINION

Preliminary Plan 1-90018  
NAME OF PLAN: BROOKE GROVE GROUP

On 01-09-90, BROOKE GROVE FOUNDATION, submitted an application for the approval of a preliminary plan of subdivision of property in the RE2 zone. The application proposed to create 1 lots on 41.11 ACRES of land. The application was designated Preliminary Plan 1-90018. On 04-23-92, Preliminary Plan 1-90018 was brought before the Montgomery County Planning Board for a public hearing. At the public hearing, the Montgomery County Planning Board heard testimony and received evidence submitted in the record on the application. Based upon the testimony and evidence presented by staff and on the information on the Preliminary Subdivision Plan Application Form attached hereto and made a part hereof, the Montgomery County Planning Board finds Preliminary Plan 1-90018 to be in accordance with the purposes and requirements of the Subdivision Regulations (Chapter 50, Montgomery County Code, as amended) and approves Preliminary Plan 1-90018, subject to the following conditions:

APPROVAL, pursuant to the provisions of the FY 92 Annual Growth Policy for the special ceiling allocation for health care facilities, subject to:

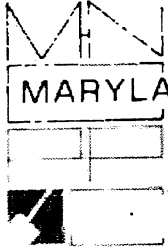
1. Agreement with Planning Board to limit development to a nursing home and exceptional care facility (group homes) with limitations as approved by Board of Appeals Case No. S-910 as modified
2. Provide minimum 40' wide non-disturbance limit along south and southwest property line adjoining proposed new building construction area
3. Record plat to reflect delineation of conservation easements over the areas of tree save, non-disturbance, stream valley buffer and 100-year floodplain (areas depicted on 1-16-92 plan)

- Continued -

1. Conditions of Health Department memo dated 2-14-92
2. Conditions of DEP stormwater management approval dated 7-20-90
3. Definition of Brooks Road 35' off center line



Date of mailing: December 27, 1995



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION  
8787 Georgia Avenue • Silver Spring, Maryland 20910-3760

Action: Approved Staff Recommendation  
(Motion of Comm. Holmes, seconded by Comm. Richardson, with a vote of 4-0; Comms. Holmes, Richardson, Baptiste, and Hussmann voting in favor, with Comm. Aron being absent).

## MONTGOMERY COUNTY PLANNING BOARD

## OPINION

Preliminary Plan 1-96022  
NAME OF PLAN: BROOKE GROVE

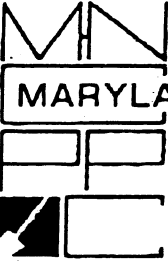
On 09-11-95, BROOKE GROVE FOUNDATION, submitted an application for the approval of a preliminary plan of subdivision of property in the RE2 zone. The application proposed to create 0 lots on 179.00 ACRES of land. The application was designated Preliminary Plan 1-96022. On 12-21-95, Preliminary Plan 1-96022 was brought before the Montgomery County Planning Board for a public hearing. At the public hearing, the Montgomery County Planning Board heard testimony and received evidence submitted in the record on the application. Based upon the testimony and evidence presented by staff and on the information on the Preliminary Subdivision Plan Application Form attached hereto and made a part hereof, the Montgomery County Planning Board finds Preliminary Plan 1-96022 to be in accordance with the purposes and requirements of the Subdivision Regulations (Chapter 50, Montgomery County Code, as amended) and approves Preliminary Plan 1-96022, subject to the following conditions:

- (1) Submit supplemental Adequate Public Facilities Agreement to Planning Board limiting development to an additional four group home facilities (maximum of 64 residents), an addition of 30 beds to Sharon Nursing Home and renovations as approved pursuant to Board of Appeals Case No S-2092. This agreement to supplement the agreement dated 8-19-92 under preliminary plan no 1-90018 approved 4-23-92
- (2) Compliance with Environmental Planning Division approval regarding the requirements of the Forest Conservation legislation (as part of the preliminary plan). Applicant must meet all conditions prior to recording of plats or MCDEP issuance of sediment and erosion control permit, as appropriate
- (3) Record plat to reflect delineation of conservation easements over the areas of 100 year flood plain, stream valley buffer and tree preservation
- (4) Compliance with conditions imposed under Preliminary Plan No 1-90018
- (5) Prior to MCPB release of building permit, submit landscape and lighting plan for technical staff approval as specified by Board of Appeals S-2092

④

- (6) Access and improvements as required and approved by MCDOT and MDSHA
- (7) Record plat to reference access easements
- (8) Conditions of MCDEP stormwater management approval dated 10-12-95
- (9) Other necessary easements
- (10) This preliminary plan will remain valid until January 27, 1999. Prior to the expiration of this validity period, a final record plat for all property delineated on the approved preliminary plan must be recorded or a request for an extension must be filed.

Date of Mailing: October 8, 1996



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION  
8787 Georgia Avenue • Silver Spring, Maryland 20910-3760

**Action: Approved Staff Recommendation**  
(Motion of Comm. Baptiste, seconded by Comm. Holmes with a vote of 4-0; Comms. Baptiste, Richardson, Holmes and Hussman voting in favor, Comms. Avon absent).

## MONTGOMERY COUNTY PLANNING BOARD

## OPINION

Preliminary Plan 1-96022  
NAME OF PLAN: BROOKE GROVE

On 09-11-95, BROOKE GROVE FOUNDATION, submitted an application for the approval of a preliminary plan of subdivision of property in the RE2 zone. The application proposed to create 4 lots on 179.00 ACRES of land. The application was designated Preliminary Plan 1-96022. On 10-03-96, Preliminary Plan 1-96022 was brought before the Montgomery County Planning Board for a public hearing. At the public hearing, the Montgomery County Planning Board heard testimony and received evidence submitted in the record on the application. Based upon the testimony and evidence presented by staff and on the information on the Preliminary Subdivision Plan Application Form attached hereto and made a part hereof, the Montgomery County Planning Board finds Preliminary Plan 1-96022 to be in accordance with the purposes and requirements of the Subdivision Regulations (Chapter 50, Montgomery County Code, as amended) and approves Preliminary Plan 1-96022, subject to the following conditions:

**PURPOSE:** The adoption of the FY 97 Annual Growth Policy provided additional housing capacity in the Olney Policy Area. This application is currently in queue and eligible to receive a portion of the available capacity. Previous Planning Board actions on 4/23/92 and 12/21/95 approved two phases of this development. Previous approvals included Group Homes and modifications to the Sharon Nursing Home. The addition of 141 residential units provided by the FY 97 AGP will be added to the previous conditions of approval. The conditions have been modified to reflect this additional development. All previous conditions remain in full force and effect.

**STAFF RECOMMENDATION:** Approval to revise Condition No. 1, as follows;

- 1) Submit revised Adequate Public Facilities Agreement with the Planning Board to reflect previous approval and the addition of 141 residential units
- 2) The approval of the 141 additional units will remain valid until November 8, 1999 (37 months from the date of mailing which is October 8, 1996). Prior to the expiration of this validity period, a final record plat for all property delineated on the approved preliminary plan must be recorded or a request for an extension must be filed.

LAW OFFICES

**MILLER, MILLER & CANBY**

CHARTERED

200-B MONROE STREET  
ROCKVILLE, MARYLAND 20850

(301) 762-5212  
FAX (301) 762-6044

SWCARTER@MMCANBY.COM

JAMES R. MILLER, JR.  
PATRICK C. MCKEEVER  
JAMES L. THOMPSON  
LEWIS R. SCHUMANN  
JODY S. KLINE  
ELLEN S. WALKER  
MAURY S. EPNER  
JOSEPH P. SUNTUM  
SUSAN W. CARTER  
ROBERT E. GOUGH  
DONNA E. McBRIDE  
GLENN M. ANDERSON\*  
MICHAEL G. CAMPBELL  
SOO LEE-CHO

*\*Licensed in Maryland and Florida*

May 1, 2007

Montgomery County Planning Board  
Maryland-National Capital Park and Planning Commission  
8787 Georgia Avenue  
Silver Spring, MD 20910

RE: Brooke Grove Foundation, Inc.  
Request for Extension of Determination of Adequacy of Public Facilities  
Preliminary Plan 1-96022

Dear Chairman Hanson and Members of the Planning Board:

I am writing to you on behalf of my client, the Brooke Grove Foundation, Inc., to request an extension of the determination of the adequacy of public facilities for Preliminary Plan 1-96022, in accordance with the provisions of Section 50-20(c) of the Subdivision Regulations. This approval, granted on October 8, 1996, is valid for a period of twelve years and will expire in 2008. **We are seeking an extension of time until October 8, 2012 in order to construct the remaining 101 independent living units for which Brooke Grove has already received adequate public facilities approval and has already completed the required intersection improvements in accordance with the Adequate Public Facilities Agreement.** As explained below, there are unique requirements applicable to a life care facility such as Brooke Grove which is regulated by the Maryland State Office on Aging (Article 70B of the Annotated Code of Maryland) that must be satisfied before Brooke Grove may proceed with its plans to construct the remaining 101 independent living apartment units for which it has APF approval. We believe that good cause exists for an extension of time for implementation of our prior approval and that circumstances dictate that we seek an extension at this time.

**Overview**

The Brooke Grove Foundation is a non-profit organization that has been providing care to the elderly since it was founded in 1950. When Brooke Grove initially opened its facilities, it obtained separate special exception approvals for each of the nursing or group home facilities that occupied its campus. However, in 1995, the Foundation obtained special exception approval to convert its facilities

to a life care (continuing care) facility and to consolidate all of its facilities under one special exception approval. **This special exception approval allows for implementation in four separate phases and contemplates the completion of the final phase in 2012.**

### **Phased Development**

When Brooke Grove received special exception approval to convert its existing campus to a life care facility (1995), the property was improved with two nursing homes (Brooke Grove Nursing Home and Sharon Nursing Home) and four group homes for assisted living. Four additional group homes were also approved but had not yet been constructed.

The Board of Appeals, in Special Exception Case No. S-2092, approved the renovation of existing facilities and expansion of the campus in four phases of development. Phases One and Two, which have now been completed, included the construction of additional group homes for assisted living, the closure and renovation of another group home for administrative office space, and the construction of a new wing to the former Sharon Nursing Home (now the "Brooke Grove Nursing and Rehabilitation Center").

Phases Three and Four involve construction of the independent living units and related facilities. The original concept was to construct approximately one-half of the villas and the apartments in each phase. However, Phase Three was subsequently modified to allow the villas to move forward ahead of the apartments. The construction of Phase Three is nearing completion and many of the villas are already occupied.

Phase Four involves the construction of 330 apartment units for independent living within three buildings that will be linked by enclosed walkways and by a community center that will provide the dining area and other amenities for the residents.

### **Adequate Public Facilities Approval**

The issue of adequate public facilities was reviewed by the Planning Board in conjunction with approval of Preliminary Plan 1-96022 following adoption of the FY 97 Annual Growth Policy that provided for additional housing capacity in the Olney Policy Area. **By written opinion dated October 8, 1996, the Planning Board made a finding of adequate public facilities that allowed for 141 of the proposed 370 independent living units to proceed.** This approval is valid for a period of twelve (12) years in accordance with the provisions of Section 50-20(c)(3)(A) of the Subdivision Regulations.

Brooke Grove subsequently entered into an Adequate Public Facilities Agreement dated October 30, 1997 that required that certain roadway improvements be bonded for construction prior to release of particular building permits. **All of the required roadway improvements have been completed, including roadway improvements that were not required to be completed until later in the process.**

One such roadway improvement (Slade School Road/MD 108 intersection) was required to be bonded only if the right-of-way could be acquired. The State Highway Administration subsequently concluded that Brooke Grove had satisfied its obligation to attempt to acquire this right-of-way and permitted alternative roadway work to be done in this location, which work has been completed. The other required roadway improvement – the construction of a bypass lane at the intersection of Norwood Road and Rt. 108 – was to have been bonded for construction prior to release of the building permit for the 107<sup>th</sup> unit of independent living. Although Brooke Grove has not yet obtained building permit approval for the 107<sup>th</sup> unit because modifications to its phasing schedule shifted the apartments to the final phase, **this condition has already been satisfied and, indeed, the required bypass lane has been fully constructed.**

### **Unique Circumstances that Justify the Requested Extension of Time**

Presumably, the rationale for an APF “validity period” is to ensure that projects that are not being diligently pursued, are “weeded out” of the process. In this way, other viable projects have the opportunity to move forward without some indefinite period of delay. The Planning Board is, however, permitted to extend a determination of adequate public facilities where it is evident that the development is an active project and is already well underway.

There should be no question that Brooke Grove is diligently and actively moving forward with the implementation of its special exception and subdivision approval. Since approval of its life care special exception in 1995, it has nearly completed three of the four phases for which it received approval. It was always contemplated that full build-out would not occur until 2012.

However, unlike a typical subdivision, Brooke Grove operates a life care facility that is subject not only to County law, but is also governed by a body of law that is codified in Article 70B of the Annotated Code of Maryland and is administered by the Maryland State Office on Aging. Because of the nature of the commitment made to residents – that is, to provide “life care” – each phase of development must undergo a lengthy feasibility study and certification process by the State, followed by certain “pre-sale” requirements, before construction can commence. As a result, the applicant lacks the same degree of control over the timing of its development that it would have with a typical subdivision.

By way of further explanation, a provider may not collect deposits for continuing care or begin construction of a new facility without approval of a feasibility study. This study involves a plan demonstrating the financial feasibility of the project, including funding sources, a study demonstrating the market for the project, and an actuarial forecast, among numerous other items. The preparation and then review by the State of the feasibility study takes up to 18 months. Once the feasibility study is approved, the State issues a “preliminary certificate of registration” that enables the provider to enter into “pre-sale” agreements with prospective residents. Only when 65 percent of the independent living units have been “pre-sold” and deposits equal to 10 percent of the total entrance fee for each contracted unit have been collected may the provider be issued an “initial certificate of registration” by the State.

The “pre-sale” process on a project of this size is expected to take approximately 2 years. It is only after the provider is issued the “initial certificate of registration” that it may obtain a building permit to commence construction.

For this reason, it is unrealistic to anticipate that Brooke Grove will be able to obtain its building permit for the remaining 101 units for which it already has APF approval (the first apartment building) prior to the expiration of the validity period for the adequate public facilities review in the fall of 2008. While it may seem premature to request an extension now for an approval that does not expire for another year, it is critical to have that approval in place in order to provide the State with the necessary assurances it requires to evaluate the feasibility of the project and to authorize Brooke Grove to begin the pre-sale process. Indeed, Brooke Grove could not, in good faith, enter into pre-sale contracts and collect deposits from elderly individuals without assurance that the APF approval will not expire before the units can be constructed.

#### Criteria for an Extension of a Determination of Adequate Public Facilities

Section 50-20 (c)(4) of the Subdivision Regulations provides that the Planning Board “may extend a determination of adequate public facilities for an exclusively residential subdivision beyond the otherwise applicable validity period if the Department has issued building permits for at least 50% of the entire subdivision before the application for extension is filed.” The APF approval for which we seek an extension was solely for the independent living units which have been treated as “residential” development for purposes of the transportation analysis.

The Planning Board has made a determination of adequate public facilities for “141 additional units”. Of these 141 independent living units, 40 have either been constructed or will be under construction within the next month. Thus, there remains APF approval for 101 additional units. This is approximately the number of units that will comprise one of the three apartment buildings. (110 units in each of the three buildings is a more desirable layout, but, if necessary, the first building can be designed with only 101 units.)

We believe that the Board can make the necessary finding that we have been “issued building permits for at least 50% of the entire subdivision” as required by the Subdivision Regulations. Although Brooke Grove has constructed 40 of the 141 units for which it has APF approval, Section 50-20(c)(4) is tied to “building permits”, not “units”. Each of the villas requires its own building permit (40 building permits) but the remaining 101 units will be located in a single structure that requires only 1 building permit. Thus, 40 of the required 41 building permits necessary to construct the residences for which Brooke Grove has APF approval have been (or shortly will be) issued.

Summary

In summary, the Brooke Grove Foundation has been diligent in its efforts to implement its special exception approval for a continuing care facility. This remains an active, viable project that is "on-track" with the special exception approval that contemplated that the project would be developed in phases extending to the year 2012. We recognize that it will be necessary to return to the Planning Board at a later date with an amended preliminary plan to obtain APF approval for the remaining 229 independent living units that will comprise the second and third apartment buildings and that any such approval will be subject to the Annual Growth Policy in effect at that time. However, the 101 units that will comprise the first apartment building have already received adequate public facilities approval and all of the necessary roadway improvements required to mitigate the trips associated with that approval have been completed. It is clear, however, that without the requested extension, there will be insufficient time to complete the State's certification process (including the 65% mandatory "pre-sale" requirement) and obtain building permits before the APF approval expires.

The Brooke Grove Foundation provides an important service to the community, particularly the County's ever-increasing elderly population. We urge the Board to approve this extension in order to allow Brooke Grove to continue to fulfill its mission.

Thank you for your attention to this request.

Very truly yours,

MILLER, MILLER & CANBY

  
Susan W. Carter

SWC/dlt

cc: Keith Gibb, President Brooke Grove  
Dennis Hunter, Vice-President  
Peter Oster  
Cathy Conlon  
Cherian Eapen



LAW OFFICES

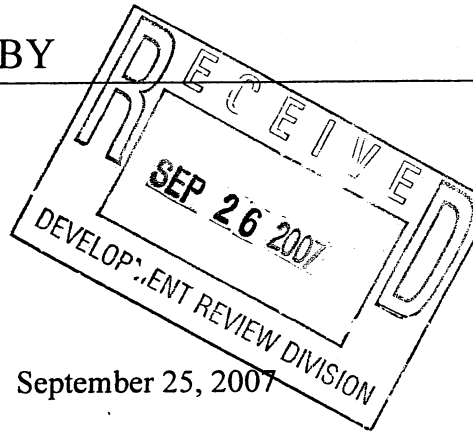
**MILLER, MILLER & CANBY**

CHARTERED

200-B MONROE STREET  
ROCKVILLE, MARYLAND 20850

(301) 762-5212  
FAX (301) 762-6044

SWCARTER@MMCANBY.COM



September 25, 2007

PATRICK C. MCKEEVER  
JAMES L. THOMPSON  
LEWIS R. SCHUMANN  
JODY S. KLINE  
ELLEN S. WALKER  
MAURY S. EPNER  
JOSEPH P. SUNTUM  
SUSAN W. CARTER  
ROBERT E. GOUGH  
DONNA E. McBRIDE  
GLENN M. ANDERSON\*  
MICHAEL G. CAMPBELL  
SOO LEE-CHO  
AMY C.H. GRASSO  
*\*Licensed in Maryland and Florida*

Montgomery County Planning Board  
Maryland-National Capital Park and Planning Commission  
8787 Georgia Avenue  
Silver Spring, MD 20910

RE: Brooke Grove Foundation, Inc.  
Supplement to Request for Extension of Determination of  
Adequacy of Public Facilities  
Preliminary Plan 1-96022

Dear Chairman Hanson and Members of the Planning Board:

This letter is written on behalf of our client, the Brooke Grove Foundation, Inc. as a supplement to our letter of May 1, 2007 requesting an extension of the determination of the adequacy of public facilities for Preliminary Plan 1-96022. A copy of that earlier letter is attached for your reference.

**Executive Summary**

To state it quite simply, Brooke Grove requires an extension of the validity period for its APF approval in order to construct one apartment building with 101 units for independent living.

At this time, most of the construction contemplated under Preliminary Plan 1-96022, has been completed. That is, Brooke Grove has completed construction of four additional group homes for assisted living (approximately 46,500 square feet), a major renovation and large addition (approximately 83,000 square feet) to the nursing and rehabilitation center, and 22 villas for independent living, and it will have permits to complete the remaining 18 villas in the very near future for a total of 40 villas (approximately 97,260 square feet). Construction activity has proceeded on schedule and consistent with the phasing schedule approved by the Board of Appeals. The only phase of the development approved by the Board of Appeals that has not yet been implemented is the final phase which includes the construction of three apartment buildings that will contain a total of 330 independent living apartment units and an ancillary community center to support these units.

Brooke Grove already has APF approval for 101 of these units which will comprise the first of the three apartment buildings (the remaining 229 units will require approval at a later date). However, this approval will expire before the Foundation is able to pull the building permit. (For the reasons stated in my earlier letter, a life care facility cannot get a building permit until 65% of the units are "pre-sold" and it can't, in good faith, "pre-sell" these units if the APF approval will expire before it can move forward.) Brooke Grove can neither afford nor risk the costs, delays, and added uncertainties that would be involved with obtaining a new APF approval for this particular building that has already been approved and for which the infrastructure is already in place. Brooke Grove, a non-profit corporation, has already spent somewhere between \$75,000 and \$100,000 on roadway improvements which were required by the current APF approval. These roadway improvements were completed well ahead of the schedule set forth in the APF Agreement. It would be a tremendous hardship, indeed, for Brooke Grove to be required to go back through the entire APF process, especially insofar as the roadway improvements supporting the approval have been completed and are fully operational.

The problem is that the law is fairly specific about the circumstances under which an applicant may be granted an extension of the APF approval. "Exclusively residential" projects follow one set of rules (Section 50-20(c)(4)) and "Non-residential" projects follow another set of rules (Section 50-20(c)(5)). These rules are intended to ensure that only "active" projects be granted extensions. Projects that have stalled for one reason or another cannot be granted extensions and must come back through the process and obtain a new APF approval. As explained in more detail below, we don't fit squarely under either definition. However, we believe that the Planning Board has the reasonable discretion to make a finding that we comply with **either** Section 50-20(c)(4) **or** (c)(5). Moreover, we hope the Board will consider the fact that Brooke Grove is a non-profit corporation that provides a valuable service to the community and will recognize that it is in the public interest to approve this extension request.

## **In-Depth Discussion**

### **1. "Exclusively Residential" vs. "Nonresidential" Development**

One of the difficulties with which we are confronted in seeking this extension of the APF validity period, however reasonable and appropriate that request may be, is that the Subdivision Regulations presuppose that a project can be categorized as "exclusively residential" development or as "nonresidential" development. The specific criteria which must be satisfied in order to justify an extension of the APF validity period are specific to one type of development or the other. However, a continuing care (life care) facility does not fit squarely under either category. By its very definition, a life care facility must include dwelling units for either independent or assisted living, or both, plus a nursing home of a suitable size to provide treatment or care of the residents. It may also provide ancillary facilities for the further enjoyment, service or care of the residents. Brooke Grove provides all of these facilities and services.

When the original traffic analyses were conducted for purposes of evaluating the adequacy of public facilities, we faced a similar conundrum in determining how trips should be counted. At that time, Staff determined that the best approach would be to count trips associated with the independent living units as "housing" (that is, residential development) and the trips associated with the nursing home and group assisted living facilities as "jobs" (that is, nonresidential development). That seemed the most logical approach in light of the fact that the trips associated with the nursing and group homes

are more likely to involve employees rather than the residents, while it is more likely that the residents of the independent living units may be able to drive. However, unlike an office park or an apartment complex, a life care facility is something of a “hybrid” and simply doesn’t fit neatly into either category. Not only are the facilities available to provide for different levels of care, but the arrangements are flexible such that residents of the independent living may find themselves temporarily cared for in the assisted living or nursing home or their health may decline, creating the need for longer term care. Likewise, while the residents of the nursing and assisted living require a greater concentration of care from the nursing staff and other employees, the residents of the independent living units also receive meals and other services prepared by the same staff.

Preliminary Plan 1-96022 was initially approved on May 1, 1992 for the nursing home addition and new group homes. It was subsequently amended on October 8, 1996 to incorporate not only the addition of 141 residential units (40 villas and 101 apartment units), but also the previously approved nursing home addition and four group homes. Condition #1 provided as follows:

*“(1) Submit revised Adequate Public Facilities Agreement with the Planning Board to reflect previous approval and the addition of 141 residential units.” (emphasis added)*

The opinion very clearly states that it is intended to reflect the previous approval as well as the additional development and goes on to provide that “**all previous conditions are to remain in full force and effect.**” The Adequate Public Facilities Agreement referenced in Condition #1 was subsequently executed on October 30, 1997. In paragraph 2 of that Agreement, it provides that

*“[d]evelopment on the Property shall be limited to the existing facilities, the additional four group home facilities, with a maximum of 64 residents in these four group homes (a net of 54 new group home residents upon closure of Westbrooke Group Home), the net nursing home addition of 30 beds, the addition of 141 independent living residential units and renovations as approved pursuant to Board of Appeals Case Nos. S-637, S-77, BA- 2478, BA-790, BA-1639, S-910, S-910A and S-2092. Development and use of the property is also restricted in the manner specified by the conditions of the Planning Board in Preliminary Plan No. 1-96022... This Agreement supplements the Agreement dated August 19, 1992 under Preliminary Plan No. 1-90018.” (emphasis added; footnotes omitted)*

Accordingly, it is entirely appropriate to consider not only what development has occurred in connection with the most recent amendment to the preliminary plan (141 residential units) but the other facilities that were also approved by Preliminary Plan 1-96022 and the subsequent APF Agreement with the Planning Board.

## **2. Approval in Accordance with Section 50-20(c)(4)**

- *Section 50-20(c)(4) requires that building permits for at least 50 percent of the “entire subdivision” must have issued in order to be eligible for an extension of APF approval for an “exclusively residential” project.*

Section 50-20(c)(4) addresses the circumstances under which the Board may grant an extension for an “exclusively residential” project:

*“The Planning Board may extend a determination of adequate public facilities for an exclusively residential subdivision beyond the otherwise applicable validity period if the Department has issued building permits for at least 50 percent of the entire subdivision before the application for extension is filed...”*

- *Is this an “exclusively residential” subdivision that is eligible for an extension in accordance with Section 50-20(c)(4)?*

One approach is to treat Brooke Grove’s request as a request for an extension of an “exclusively residential” project because all of its facilities (the nursing home, assisted living group homes, and independent living units) provide housing and care to the residents of each such facility. While it may seem somewhat incongruous to have viewed the nursing home and assisted living group homes as a non-residential use for purposes of the original traffic analyses, we understand why Staff required that the trips generated by the independent living units be counted as “housing” and the trips generated by the nursing and group homes be counted as “jobs”. However, just because this was the approach used for purposes of the traffic analyses, it doesn’t necessarily follow that these facilities need be characterized in the same way for purposes of determining whether this is an “exclusively residential” subdivision or a “non-residential” subdivision. The thresholds established by Sections 50-20(c)(4) and (5) are there as a means to evaluate whether a project is sufficiently “active” to merit an extension that would allow development to continue as planned.

- *Has the 50 percent threshold been satisfied? It depends upon whether one considers whether 50 percent of the development within the “entire subdivision” has received building permit approval or whether the focus should be limited only to the status of the 141 units of independent living that were approved by the amended opinion.*

If all of the facilities at Brooke Grove are deemed “residential” facilities by virtue of the fact that they all provide housing and care for the elderly residents, then it is appropriate to focus on the percentage of development *within the entire subdivision* that has already been constructed. The “entire subdivision” includes the independent living units, the nursing home addition and the group homes.

In our letter of May 1<sup>st</sup>, we focused only on the independent living units and explained that, strictly speaking, we have satisfied the 50% threshold contained in 50-20(c)(4) because it relates to the number of building permits that have been approved, not the number of units that have the necessary building permit approval to allow for construction. That is, each villa requires a single building permit (40 permits altogether) while each apartment building requires only 1 permit. Broadening the focus to include the “entire subdivision” that was approved by 1-96022, we will have received 45 of 46 required building permits prior to expiration of the validity period. That is because the nursing home and each of the group homes requires only one building permit, regardless of the number of resident rooms each provides. If the calculation is based upon the number of “units” that have been (or will be) constructed (40) versus the number remaining to be constructed (101), then we could not pass the test, despite the fact that we have clearly satisfied the spirit and intent of the law.

A more logical approach to the issue of whether we've satisfied the 50% threshold for an "exclusively residential" subdivision is to refer to the approach used for non-residential development and to consider whether the threshold has been satisfied based upon the total square footage that will have been issued building permits. In this case, the entire development that was the subject of this approval consists of approximately 359,760 square feet of gross floor area. Of this total square footage, 226,760 square feet or **sixty-three (63%) percent will have been issued permits and/or constructed prior to expiration of the APF validity period.**

3. **Approval in Accordance with Section 50-20(c)(5)**

- *It is equally appropriate to evaluate this request by applying the threshold criteria for a "non-residential" project to the extent that a life care facility is an institutional use that may more appropriately be considered "non-residential".*

We have submitted this supplemental letter to clarify our position and because we believe, upon further reflection, that it is equally appropriate to consider this request under the provisions of Section 50-20(c)(5) which establish the basis upon which an extension of APF approval for a "non-residential" development may be granted. While Brooke Grove serves as a residence, it is also an "institutional" facility which is arguably more akin to non-residential development.

Moreover, we do not believe that the Subdivision Regulations should be so narrowly construed as to deny Brooke Grove the same opportunity to request an extension as any other project simply because it cannot be pigeon-holed as "exclusively residential" or as "non-residential". When deciding which model to apply, there must be some reasonable construction of the law that also takes into account the reason for the test in the first place. Only those projects that are "active" and "on-track" should be eligible for an extension.

Section 50-20(c)(5) provides that the Planning Board may extend a determination of adequate public facilities for a preliminary plan of subdivision for nonresidential development beyond the otherwise applicable validity period under the following circumstances:

- "(5) The Planning Board may extend a determination of adequate public facilities for a preliminary plan of subdivision for nonresidential development beyond the otherwise applicable validity period if:*
- (A) at least 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 40%;*
  - (B) all of the infrastructure required by the conditions of the original preliminary plan approval has been constructed, or payments for its construction have been made; and*

- (C) *the development is an "active" project, meaning that either occupancy permits have been issued or a final building permit inspection has been passed for at least 10 percent of the project within the 4 years before an extension request is filed, or occupancy permits have been issued for at least 5 percent of the project within the 4 years before an extension request is filed if 60 percent of the project has been built or is under construction. If occupancy permits are not typically issued for the type of development for which an extension is requested, a part of the development can be treated as complete when its final inspection has been approved. The Board may treat a building as complete even if occupancy permits have been issued for only part of the building.*"

Subparagraph (c)(5)(A) requires the applicant to demonstrate that at least 40% of the approved development has been built, is under construction, or that building permits have been issued for this development. **Of the development that has received APF approval, approximately 63% of the square footage has been completed.**

Subparagraph (c)(5)(B) requires that the infrastructure required by the conditions of the original preliminary plan approval have been constructed or that payments for construction have been made. As explained in our letter of May 1<sup>st</sup>, **Brooke Grove has already completed the necessary road improvements that were associated with its APF approval**, including roadway improvements that were not required to be completed until later in the process. These roadway improvements were made at considerable expense to this non-profit corporation (approximately \$75,000 - \$100,000). Indeed, the bypass lane improvement made by Brooke Grove at the intersection of Md. Rt. 108 and Norwood Road has created capacity well beyond that required to accommodate the traffic generated by the approved development at the site, relieving congestion in the westbound direction.

Subparagraph (c)(5)(C) requires that the applicant demonstrate that this is an "active" project. As previously indicated, if evaluated on the basis of gross square footage, **63% of the development approved by Preliminary Plan 1-96022 has been or will be constructed prior to the expiration of the validity period.** Since more than 60% of the project has already been built or is under construction, the regulations require that **occupancy permits must have been issued for at least 5 percent of the project within the 4 years before the extension request (or, if occupancy permits are not typically issued, then final inspection approval).** That means that there must have been final inspection approval or occupancy permits issued for 17,988 square feet (5% of 359,760 square feet) within the past 4 years. **This requirement is easily satisfied** just with the 22 villas that have been constructed and occupied during the past 4 years as the gross square footage of just these units amounts to approximately 51,540 square feet.

## Summary

In summary, the Brooke Grove Foundation has been diligent in its efforts to implement its special exception approval and it is most certainly both an active and viable project. We believe that the Planning Board has the legal authority to grant the requested extension of the APF validity period for an

additional four year period and that this extension is appropriate under the circumstances. We urge the Planning Board to support this request.

Very truly yours,

MILLER, MILLER & CANBY



Susan W. Carter

SWC/dlt

cc: Cathy Conlon  
Cherian Eapen  
Dennis Hunter  
Mary Fertig  
Craig Hedberg



**MONTGOMERY COUNTY PLANNING DEPARTMENT**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

October 17, 2007

**MEMORANDUM**

TO: Catherine Conlon, Supervisor  
Development Review Division

VIA: Shahriar Etemadi, Supervisor  
Transportation Planning

FROM: Cherian Eapen, Planner/Coordinator  
Transportation Planning  
301-495-4525

SUBJECT: Brooke Grove Retirement Village  
Brooke Grove Foundation, Inc.  
Preliminary Plan No. 119960220  
Request for Extension of Adequate Public Facilities Approval by 48 months  
(October 8, 2008 to October 7, 2012)  
18100 Slade School Road  
Olney Policy Area

This memorandum summarizes Transportation Planning staff's review of the subject Adequate Public Facilities (APF) extension request by Brooke Grove Foundation, Inc. for Preliminary Plan No. 119960220, based on supplementary information (to the original request letter dated May 1, 2007) provided by the applicant on September 25, 2007.

**RECOMMENDATION**

Transportation Planning staff recommends that the Planning Board approve the APF extension request by Brooke Grove Foundation, Inc. for Preliminary Plan No. 119960220 for 48 months. This recommendation is based on the determination that intersections adjacent to the site will operate well within the Olney Policy Area congestion standard of 1,475 CLV in the immediate future. Additionally, the applicant has already implemented all of the APF transportation improvements that were required for the approval of Preliminary Plan No. 119960220.



## **BACKGROUND**

Prior to 1995, the Brooke Grove Retirement Village consisted of the Brooke Grove Nursing Home (which was not located on the property) with 100 patients/beds, the Sharon Nursing Home with 48 Alzheimer's patients/beds, and four group homes with 52 residents. Preliminary Plan No. 119960220 – Brooke Grove Phases I and II – was approved by the Planning Board on December 21, 1995. Phase I added two group homes and 32 new residents, and closed the oldest group home (that housed 10 residents) on the site. Phase II added two more group homes with 32 new residents to the site. At this time, a new wing was constructed to the existing Sharon Nursing Home on the site and the 100 off-site patients/beds at the Brooke Grove Nursing Home were moved to this new facility. This plan was subsequently amended by the applicant to add Phases III and IV, which included 30 additional patients/beds at the Sharon Nursing Home (this being achieved by moving the 48 Alzheimer's patients in the old wing of Sharon Nursing Home to a renovated Brooke Grove Nursing Home), 370 independent living units (40 villa and 330 apartment units), and ancillary community and visitor centers on the site. The Planning Board approved this amendment on October 3, 1996, but limited the number of independent living units that could be constructed to a total of 141 because of limited housing capacity available under Policy Area Transportation Review for the Olney Policy Area at that time. The remaining 229 independent living units will require Planning Board approval at a later time.

Of the 141 independent living units that were approved by the Planning Board, 22 villa units have been constructed and 18 villa units have been issued building permits for construction. APF approval for the remaining 101 apartment units is valid until October 7, 2008, as provided for under Section 50-20(c)(3)(A) of the Montgomery County Code. The applicant is requesting that the Planning Board extend the APF validity period for the 101 apartment units by 48 months to October 7, 2012.

## **ANALYSIS**

To determine traffic impacts associated with the APF extension being requested by Brook Grove Foundation, Inc., we completed a basic examination of traffic conditions at intersections along MD 108 that are to the east (MD 108/Norwood Road) and west (MD 108/Dr. Bird Road) of Slade School Road, the primary access roadway to Brooke Grove Retirement Village.

For the purposes of this analysis, traffic data for the above intersections (pre-Good Counsel High School opening date data) and associated background development traffic information were obtained from traffic studies completed for recent developments in the area. To this data, traffic associated with the remaining unbuilt 119 units (traffic related to the 101 apartment units that are subject of this APF extension request and the 18 villas that are permitted, but not built) at Brooke Grove Retirement Village were added. A summary of this trip generation is provided in Table 1, and a summary of intersection capacity analysis (using Critical Lane Volume (CLV) methodology) is provided in Table 2.

**TABLE 1  
TRIP GENERATION – REMAINING UNBUILT UNITS  
BROOKE GROVE RETIREMENT VILLAGE – APF EXTENSION REQUEST**

Trip Generation	Morning Peak Hour			Evening Peak Hour		
	In	Out	Total	In	Out	Total
119 units	4	3	7	11	9	20

Source: Institute of Transportation Engineers, Trip Generation; Land Use Code 253 – Congregate Care Facility

**TABLE 2  
SUMMARY OF CAPACITY CALCULATIONS  
BROOKE GROVE RETIREMENT VILLAGE – APF EXTENSION REQUEST**

Intersections	Traffic Conditions					
	Existing		Background		Total (Build)	
	AM	PM	AM	PM	AM	PM
MD 108/Norwood Road	1,175	1,168	1,286	1,282	1,288	1,286
MD 108/Dr. Bird Road	1,025	1,188	1,164	1,251	1,165	1,255

The above analysis indicates that the two intersections nearest to the site will operate within the Olney Policy Area congestion standard of 1,475 CLV. We therefore recommend that the Planning Board approve the APF extension request by Brooke Grove Foundation, Inc.

SE:CE:tc

- cc: Ed Axler  
Barbara Kearney  
Khalid Afzal  
Ray Burns  
Greg Leck  
C. Craig Hedberg  
Sue Carter, Esq.

mno to cc on BGF APF Ext.doc