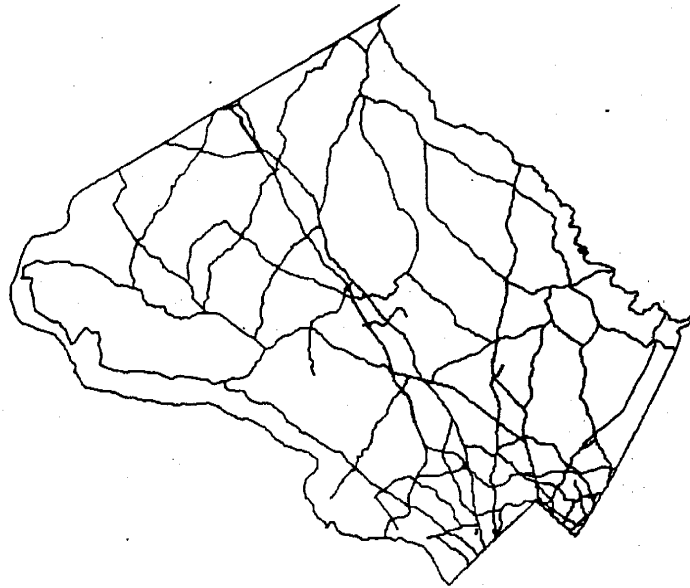


*Approved
and
Adopted
July 1, 2004*

Local Area Transportation Review Guidelines

Attachment 3

*Guidelines of the
Montgomery County Planning Board for the
Administration of the
Adequate Public Facilities Ordinance*



Published by:



**THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION**

Montgomery County Department of Park and Planning
8787 Georgia Avenue
Silver Spring, MD 20910-3760

Transportation staff has 15 working days after submittal to notify the applicant as to whether or not the traffic study is complete.

For a trip mitigation program or an intersection improvement to be considered for more than one application, the program or improvement must provide enough capacity to allow all the applications participating in the program or improvement to satisfy the conditions of LATR. An intersection improvement may be used by two or more developments if construction of the improvement has not been completed and open to the public. In order to be considered, the program or improvement must provide sufficient capacity to:

- result in a calculated CLV in the total traffic condition that is less than the congestion standard for that policy area, or
- mitigate the traffic impact if the calculated CLV in the total traffic condition exceeds the intersection congestion standard for the applicable policy area. Mitigation is achieved when the CLV in the total traffic condition that includes traffic from each contributing development *with* the improvement is equal to or less than the CLV in the background traffic condition without the improvement.

When development is conditioned upon improvements, those improvements must be bonded, under construction, or under contract for construction prior to the issuance of building permits for new development. Construction of an improvement by one applicant does not relieve other applicants who have been conditioned to make the same improvement of their responsibility to participate in the cost of that improvement.

If the Planning Board grants an extension to an approved preliminary plan, Transportation Planning staff will determine if the traffic study needs to be updated based on the APF validity period, usually three years, originally approved by the Planning Board.

B. Scope of Traffic Study

At a meeting or in written correspondence with Transportation Planning staff, the following aspects of the traffic study will be proposed by the applicant and/or provided by staff and agreed upon:

1. intersections that are to be included in the traffic study. The number of intersections to be included will be based upon the trips generated by the development under consideration (see Section II.A. for specific criteria regarding "land at one location"). As a general guideline, Table 2 indicates the number of significant signalized intersections from the site

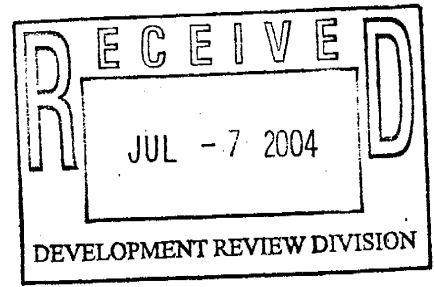
Item #15
Attachment 2

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July 1, 2004



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Derick Berlage, Esq.
Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Fairland View – Townhouse Unit Mix
Preliminary Plan of Subdivision

Dear Chairman Berlage:

On behalf of Winchester Homes, Inc. (the "Applicant"), and pursuant to Section 59-C-1.621, fn 1 of the Montgomery County Zoning Ordinance (the "Zoning Ordinance" or "MCZO"), we are requesting that the Planning Board approve townhouse units on property known as Fairland View. Fairland View is located in the northeast quadrant of Fairland Road and U.S. Route 29 (the "Property"). The Property is zoned R-60, and is situated within the Fairland Master Plan area.

On May 20, 2004, the Planning Board reviewed a pre-preliminary plan (7-04059) for Fairland View. The issue being considered by the Planning Board was the development of Fairland View with 100% townhouses, pursuant to Section 59-C-1.621, fn 1 of the Zoning Ordinance. As part of its pre-preliminary plan review, Park & Planning Staff recommended that it had no objection to the Applicant's 100% townhouse proposal. At the May 20, 2004 hearing, the Planning Board agreed with this recommendation. Through the Planning Board's consideration of the pending preliminary plan for the Property, we ask that the Planning Board confirm and approve the 100% townhouse plan, as proposed.

Mr. Derick Berlage

July 1, 2004

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I. Introduction.

Development in the R-60 zone may contain 100% townhouses (beyond the 60% base) upon a finding by the Planning Board that the proposed development is: (1) more desirable from an environmental perspective than a development that would result from limiting townhouses to 60% of the total dwelling units on-site; and (2) compatible with adjacent existing and approved development. MCZO §59-C-1.621, fn 1. Under a 100% plan, the Applicant would be allowed 76 town house units. The Applicant is proposing 74, inclusive of 10 MPDUs. For the reasons stated herein, the proposed development more than satisfies the provisions of §59-C-1.621, fn 1 of the Zoning Ordinance.

II. Allowing 100% townhouses is more desirable from an environmental perspective than a development that would result from the adherence to the 60% limit.

The Property is located in the northeast quadrant of a heavily traveled transportation corridor - Fairland Road and US Route 29. The Intercounty Connector (ICC) is proposed to the north of the site and the interchange of the ICC with US 29 directly adjoins the Property. US 29 is also actively used for bus service. Because of the existing and proposed transportation system, and associated noise constraints, as recognized in the Fairland Master Plan, the 100% clustered townhouse option is the best method to enable the provision of interior recreational areas, open space and wide buffers for noise attenuation.

A. Fairland Master Plan.

The County Council, in its adoption of the Fairland Master Plan recognized the urban environment of the Property and acknowledged that single family development on the property is unlikely. The Council provided that "[c]onstraints on Area 5b [the subject Property] include no access to Fairland Road because of the proposed US 29 interchange (access will be through the existing townhouse community via Stravinsky Drive), and potential noise impacts from the proposed interchanges." Master Plan at 39. The Council also stated that the ". . . proximity to the proposed interchanges of US 29/ICC and US 29/Fairland Road and access through an existing townhouse development, make detached housing unlikely on this site, from a marketing perspective." Master Plan at 39 (emphasis added). The Council has encouraged "clustering for traffic noise mitigation and access constraints." Master Plan at 40.

B. Significant buffers.

A plan providing for 100% townhouse units allows the Property to be designed with a bermed buffer area that is more than 50 feet in width and runs

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along the entire northwest frontage of the Property. This buffer area will be planted with trees and placed in a conservation easement for forest preservation. The townhouses will be set back no less than 100 feet from the property line abutting the adjacent right-of-way. The townhouse configuration, and the associated clustering also allows the townhouses themselves to serve as noise attenuation for recreation area (both backyards and overall recreational space) that is interior to the site.

C. Open Space and Recreational Areas.

The proposed plan results in significant open space and recreational areas that are interior to the site and away from the heavily traveled external road system. The Applicant proposes a 1,500 square foot play area in the middle of the site. The play area will be landscaped and buffered from the external road system by surrounding townhouses. In addition, the Applicant proposes two sitting areas and a third picnic sitting area. The plan also shows an open play area to the north, which is 10,000 square feet in size and is far removed from US. Route 29 and Fairland Road. The Applicant has proposed two storm water management facilities on the Property; one to the south, along Fairland Road, and another to the east adjacent to the existing townhouses. Although significantly more expensive, the Applicant is proposing to install underground water quality facilities in both of these locations. The Applicant proposes to keep both areas as open space. The proposed open space and interior location of the recreational amenities is all made possible by the provision of 100% townhouses on the Property.

III. A 100% townhouse plan will ensure compatibility with adjacent existing and approved development in this area.

The Fairland View townhouse plan is compatible with adjacent development in the area. As discussed above, US Route 29 is located to the west of the Property, with Fairland Road located to its south. The Fairland Park townhouse community is located to the Property's east, and is zoned R60/TDR.

The Fairland View project, as proposed, represents the best option for achieving compatibility of housing with the existing townhouses and the adjacent road system. As discussed herein, the proposal allows for significant buffers adjacent to the road system, and recreational facilities interior to the housing development.

In addition, the Fairland View townhouse development is compatible with the large townhouse project to the east of the site. The existing townhouses are approximately 2.5 stories tall. The Fairland View townhouses are approximately the same height. The Fairland View town homes are set back

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Page 4

over 20 feet from the Property line, and will be approximately 50 feet from the closest townhouse within the adjacent Fairland Park townhouse community. The Applicant will provide significant landscaping within the Property and between the subject Property and the adjacent Fairland Park townhome community.

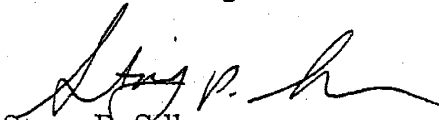
IV. Conclusion.

As discussed herein, the applicant's 100% town home proposal represents the best option in developing the Property. The proposed plan provides for flexibility in design, thereby allowing for larger buffer areas, and a significant amount of open space; and ensures compatibility with the road systems to the north and west, and the townhouse community to the east. The 100% town home Fairland View community is also consistent with the recommendations of the Fairland Master Plan.

For all of the reasons stated herein, we ask that the Planning Board grant Applicant's request to provide 100% town homes on the subject Property. Please contact us should you have any questions.

Sincerely,

Holland & Knight LLP



Stacy P. Silber

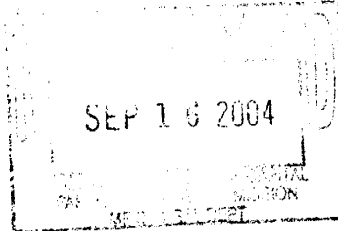
cc: Mr. Richard Weaver
Mr. Mike Lemon
Mr. Al Blumberg

Stacy P. Silber
301 664 7621
stacy.silber@hklaw.com@hklaw.com

September 15, 2004

VIA HAND DELIVERY

Michele Rosenfeld, Esq.
Associate General Counsel
M-NCPPC
8787 Georgia Avenue
Silver Spring, MD 20910-3760



FOR SETTLEMENT PURPOSES ONLY

Re: Fairland View
Preliminary Plan No. 1-05002
Site Plan No. 8-05007

Dear Michele:

On behalf of our client Winchester Homes, Inc. we appreciate you agreeing to meet with us to discuss the Fairland View project and the pending applications for subdivision and site plan approvals. This letter will provide you with a brief overview of our legal analysis regarding why the subject plans do not show any reservation of land for the State Highway Administration's ("SHA") contemplated ICC and US 29 improvements.

I. BACKGROUND

As of today, the SHA has not initiated any proceedings for the condemnation of any part of the Fairland View property. The route for the ICC and any access roads has not been finally established and, as you know, there has been no Master Plan approval depicting the ICC or other improvements in the vicinity of the Fairland View property. Winchester, as developer of the site, has filed with the Maryland-National Park & Planning Commission ("Park & Planning" or "M-NCPPC" or the "Commission") a preliminary plan and site plan depicting 73 town homes, including 10 much needed Moderately Priced Dwelling Units. In designing the community, we have deliberately not used the entire property envelope but have, instead, squeezed the

development onto a portion of the site. Our intent was to make reasonable accommodation to the possibility of a taking of part of the north west side of the site and still allow for development as allowed by law. Although the SHA has made no formal request for any of the Fairland View property, we understand that the SHA has asked that some of the Fairland View property be placed in reservation for the potential construction of the ICC and US 29 and associated improvements.

This issue of the SHA's desire for part of the Fairland View property was raised at a Development Review Committee meeting for Preliminary Plan No. 1-05002. At the DRC, Park & Planning staff suggested that part of the Fairland View property should be placed in reservation pending final action by SHA. Winchester has not shown this reservation on any of its plans because application of section 50-31(a) of the Montgomery County Code (the "Code") to the subject property would be unconstitutional.

II. LEGISLATION AND CASE LAW.

Section 50-31(a) of the Code states that Park & Planning is allowed to prevent owners from building on lands which have been reserved for future public use. For roads or streets, the period of reservation may not exceed three years. While the property is exempt from taxation during the period of reservation, there is no compensation paid to the owner during the period of reservation.

Back in 1979, the Court of Appeals held that Section 50-31(a) effected an unconstitutional taking of property without just compensation when Park & Planning denied a subdivision application and placed property in reservation for three years because it was within Park & Planning's take line for the Little Seneca Regional Park as well as within the limits of a proposed lake site shown on the final draft of the Boyds Master Plan. Maryland-National Capital Park & Planning Comm'n v. Chadwick, 286 Md. 1, 405 A.2d 241 (1979). The Court ordered as a remedy for the unconstitutional taking that the Commission "forthwith" approve the subdivision plan.

We know that you are familiar with the Chadwick decision and its clear statements that reservation statutes can only be applied reasonably with reference to duration and severity. We think that if M-NCPPC tries to impose a reservation for the Fairland View project, Chadwick will control and the court will order approval of the plan without such a reservation. Indeed, the current case is even more stark that Chadwick. In that case, the Commission was acting to preserve *its own prerogatives* regarding the construction and operation of parks proposed for its jurisdiction and as reflected in approved or close-to-final plans. Here, the Commission would be asked to reserve property for a potential project of the SHA where there are no approved or interim plans. The only rationale for "reserving" the property here would be to try to hold down the cost of the property in the event of a later acquisition by SHA. Respectfully, that should not be a concern of MNCPPC. If property is acquired by SHA, the government should pay the appropriate fair market price as directed by the law. M-NCPPC should not be holding down the price by freezing the use of the property in advance.

Although Chadwick has been the law for 25 years, we acknowledge that the County and developers have been working around it ever since. Fairland View cannot be worked around in that way and we believe that if M-NCPPC calls the question by imposing a reservation and denying the subdivision in this case, the matter will have to be resolved in court.

Once the issue is back in court, we will point not only to Chadwick but to all the developments in temporary and regulatory takings jurisprudence over the last quarter-century which we believe favor the owners' position in this case. On the federal level, the U.S. Supreme Court has taken a harder look at regulatory takings and development moratoria. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Court held that regulations that deny all economically beneficial or productive use of land require that compensation be paid for a taking. In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002), the Court recognized that development moratoria can effect a taking, depending upon the circumstances. This latter decision is fully consistent with the Chadwick analysis.

The Court of Appeals has recently rejected M-NCPPC's attempt to "freeze" property prior to actual condemnation. In J.L. Matthews, Inc. v. Maryland-National Capital Park and Planning Comm'n, 368 Md. 71, 792 A.2d 288, 307 (2002), the Court held that M-NCPPC (lacking "quick-take" power) could not enjoin an owner from using his property prior to an actual condemnation: "A condemning authority is not entitled to utilize injunctive relief as a means of preserving its financial valuation of private property." If the Court will not uphold the use of an injunction to prevent construction on property that might be subject to later condemnation, we do not think the Court will condone an alternative of denying approval of a plan which is otherwise proper because the owner will not agree to limit lawful development in an area that the Commission wants "reserved.". Moreover, here, M-NCPPC is not seeking to reserve property that *it* needs but, rather, is reserving property for the potential later condemnation by a different government agency. See also Utilities, Inc. of Maryland v. Washington Suburban Sanitary Comm'n, 362 Md. 37, 763 A.2d 129 (2000)(parties cannot use declaratory judgment procedures to deal with condemnation issues).

In the closely-related area of conditions for variances, again the Maryland courts have taken a harder and harder look at government impositions. See Steel v. Cape Corp., 111 Md. App. 1, 677 A.2d 634 (1996)(developer's request for rezoning was denied because of application of adequate public facilities regulation; denial was improper taking of property). In Howard Co. v. JJM, Inc., 301 Md. 256, 482 A.2d 908 (1984), the Court declared that the County could not require a reservation of a right of way for a proposed state road without payment of compensation when the reservation was of seemingly endless duration and was limited to road use.

III. CONCLUSION

Our point is that since Chadwick, the trend of both state and federal cases has been against the kind of lengthy prohibition of use exemplified by the reservation powers of Section 50-31. In addition, as noted, M-NCPPC is using this reservation power not to further its own plans but only in aid of a fluid and amorphous plan by SHA. No one knows whether SHA will ever build where some imagine it will build the ICC or US 29 improvements. Again, SHA has made no formal offer to condemn the subject property, and such improvements are not shown on an adopted Master Plan for the area. M-NCPPC's reservation powers, having already been held unconstitutional, cannot reasonably be applied to prohibit construction for the ICC and US 29 under these circumstances. To delay or deny approval of Winchester's plans based on such a reservation would be improper and ultimately reversible by the court.

Sincerely,

Holland & Knight LLP


Paul Kiernan


Stacy Silber