



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

MCPB
ITEM #
3/20/08

MEMORANDUM

March 7, 2008

TO: Montgomery County Planning Board

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

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

SUBJECT: Preliminary Plan No. 119950420 (formerly 1-95042), Clarksburg Town Center – Request for extension of the validity periods for the preliminary plan and the adequate public facilities approval.

STAFF RECOMMENDATION: Grant a three-year extension of validity period for Preliminary Plan No. 119950420 until March 26, 2011. Grant a six-year extension of the adequate public facilities (APF) approval until March 26, 2014.

BACKGROUND

The subject Clarksburg Town Center preliminary plan application ("Preliminary Plan") was submitted on November 23, 1994 to create a mixed-use development on 267.5 acres of land in the RMX-2 zone located in the southeast quadrant of the intersection of Clarksburg Road (MD 121) and Snowden Farm Parkway in Clarksburg (Attachment A). The Preliminary Plan was brought before the Planning Board for a public hearing on September 28, 1995 and was approved for a maximum of 1,300 dwelling units, 150,000 square feet of retail uses, and 100,000 square feet of commercial office uses. Approval was granted subject to conditions as set forth in the Opinion of the Board mailed on March 26, 1996 (Attachment B). Per Condition No. 17, the Preliminary Plan remained valid for 109-months from the date of the mailing, or March 26, 2005 unless, prior to that date, the applicant either (1) recorded plats among the land records of Montgomery County or (2) submitted a request to extend the validity period.

On March 24, 2005, the first of several requests for extension of the Preliminary Plan was made on behalf of Newland Communities (the "Applicant"). The first extension was granted so that review and discussion of alleged violations and other significant issues related to the Clarksburg

Town Center development could be completed. Four other extensions have been granted since that time to maintain the validity of the underlying Preliminary Plan while a compliance plan for the project was completed and amended project and preliminary plans, and a site plan for the final phase of the project, were prepared. The current Preliminary Plan validity period, established by Planning Board action on April 26, 2007, expires on March 26, 2008. This is also the expiration date of the project's adequate public facilities ("APF") approval.

As the Board is aware, the Clarksburg Town Center plan was significantly delayed while discussion and approval of the Clarksburg Town Center Compliance Program ("Compliance Program") took place. After the Board's approval of the Compliance Program in June, 2006, the Applicant and the Clarksburg Town Center Advisory Committee, Inc. ("CTCAC") worked continuously to revise the plan in accordance with the requirements of the Compliance Program. Applications to amend the existing Project Plan and Preliminary Plan approvals, as well as an application for approval of a new overall site plan for the project, were submitted on April 26, 2007. Nearly a year later, these applications have still not gone to the Board. In fact, staff is still waiting for plan revisions that respond to agency comments made at the initial Development Review Committee (DRC) meeting held in July, 2007. Many of these comments involve complex technical and policy issues that the Applicant has attempted to resolve in subsequent meetings with senior county officials, Council members and the County Executive. Despite the meetings that have already occurred, the Applicant states that continued efforts are needed to assure that the plans to be considered by the Board have been thoroughly vetted and modified to meet all requirements of the regulating agencies.

The previous extensions of the Preliminary Plan validity were granted as interim measures to keep the plan valid while the Compliance Program was developed, and until subsequent plan amendments were submitted and reviewed. They also allowed building permits to be issued for the remaining dwelling units approved within the first stage of the compliance program, and it was anticipated that the previous extensions would also allow issuance of building permits for dwelling units that were recently approved with the Interim Amendment to the Site Plan. Establishment of a new plan validity period and an extension of the APF approval were intended to be done as part of the now-pending preliminary plan amendment. But the aforementioned delays associated with the review of this and other associated plans have prevented that from happening prior to the expiration of both validity periods. Therefore, by letter of February 15, 2008, the Applicant is requesting that the Board grant Preliminary Plan and APF extensions prior to any action on the pending plan amendment.

DISCUSSION

Extension of the Plan Validity

Pursuant to Section 50-35(h)(3)(d) of the Subdivision Regulations, "the Planning Board may only grant a request to extend the validity period of a preliminary plan if the Board is persuaded that:

- 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 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 Applicant's letter (Attachment C) seeks extension of the plan validity based on the significant, unusual and unanticipated nature of events associated with the preparation and review of the Compliance Program that has substantially impaired the Applicant's ability to validate the plan; and on the exceptional hardship that will result to the Applicant if the extension is not granted. Specifically, they state that the level of coordination among citizen groups, county agencies, staff and the Applicant has been significantly greater for this plan than typically encountered because of the complexities of the project's redesign and the thoroughness with which the community has been evaluating all aspects of the project. They also note that exceptional hardship will result to the Applicant if the validity is not extended, particularly considering the efforts already made by the Applicant and others to implement the Compliance Program up to this point. In the Applicant's opinion, three years is the minimum time needed to allow all pending amendments and the final site plan to be considered and acted upon by the Board, for certified site plans to be prepared, reviewed and approved, and for all remaining plats to be prepared, reviewed and recorded.

In staff's opinion, the Applicant's request for a three-year extension of the Preliminary Plan is justified by the significant, unusual, and unanticipated events associated with both the approval of the Compliance Program and the preparation and review of the plan amendments that the Compliance Program requires. Approval of the Compliance Program was unusual in that a significant amount of time was needed to permit a mediated agreement between the Applicant and community members to be reached. The subsequent preparation of the necessary plan amendments has also required an unprecedented level of coordination between the parties to ensure compliance with this agreement. The many elements of the desired plan amendments that involve complex technical and policy decisions have also led to unusual and significant delays. In addition, the Applicant has made significant efforts to implement the terms and conditions of the Compliance Program and would suffer exceptional hardship if the extension is not granted. For these reasons, staff supports the requested three-year extension of the Preliminary Plan validity, until March 26, 2011.

Extension of the Adequate Public Facilities (APF) Validity

The Planning Board approved the Preliminary Plan for Clarksburg Town Center by Opinion dated March 26, 1996. Pursuant to Section 50-20(c)(3)(A) of the Montgomery County Code ("Subdivision Regulations"), the APF determination for this plan is timely and remains valid for 12 years after that date, or until March 26, 2008. The Applicant is requesting a six-year extension of this validity period, until March 26, 2014.

Section 50-20(c)(5) of the Subdivision Regulations contains the provisions for extension of the APF for a preliminary plan such as this one. The section states:

“The Planning Board may extend a determination of adequate public facilities for a preliminary plan of subdivision for nonresidential development¹ 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 payment 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.”

In regard to the length of an extension granted under this section, the Subdivision Regulations state in section 50-20(c)(8):

“The length of any extension of the validity period, or all extensions taken together if more than one extension is allowed, under paragraph (5) must be based on the approved new development schedule under paragraph 7(A), but must not exceed 2 ½ years for any development with less than 150,000 square feet, or 6 years for any development with 150,000 square feet or greater. The extension expires if the development is not proceeding in accordance with the phasing plan unless the Board has approved a revision to the schedule or phasing plan.”

The Applicant’s letter requests the maximum six-year extension of the APF for the Preliminary Plan. In support of the request, the letter provides details concerning how the project meets the requirements of 50-20(c)(5)(A)-(C), above. Staff reviewed the information and has determined that the application complies with some, but not all, of the requirements.

Based on the submitted data, 40% of the overall development has been built and the development is an “active project” as demonstrated by the fact that at least 10% of the project has received final inspection within the last four years. In staff’s opinion, however, the application does not meet the requirement that all infrastructure required by the conditions of the original preliminary plan approval be constructed or payments for construction made.

¹ Nonresidential development includes any project that is not exclusively residential.

The conditions of approval for the Preliminary Plan required construction of specific roadway infrastructure in stages tied to the release of building permits. Based on the number of permits that have been issued so far, the necessary amount of infrastructure has been provided and the Applicant's representatives believe that the additional un-built infrastructure is not required to justify the APF extension. In staff's opinion, the requirements of section 50-20(c)(5) represent the minimum commitments that must be made toward completion of an approved project during the initial APF validity period to justify extension. Paragraph (B) requires that this minimum commitment include construction of "all the infrastructure required by the conditions of approval" (emphasis added). If this were not the case, the paragraph would specify a minimum requirement as the other applicable paragraphs do. Although the Applicant has provided the infrastructure required for the number of building permits received, they have not completed all the infrastructure required by the preliminary plan for the entire project. It is, therefore, staff's opinion that the project does not meet the requirements for APF extension under paragraph (B) of this section; however, the grounds for a waiver do exist.

Section 50-38 of the Subdivision Regulations contains the provisions under which the Planning Board may grant waivers. The section states:

“(a) Authority of the Board.

- (1) The Board may grant a waiver from the requirements of this Chapter upon a determination that practical difficulties or unusual circumstances exist that prevent full compliance with the requirements from being achieved, and that the waiver is: 1) the minimum necessary to provide relief from the requirements; 2) not inconsistent with the purposes and objectives of the General Plan; and 3) not adverse to the public interest.
- (2) Large Scale Development or Preservation of Open Space, Forest and Tree Conservation, Environmentally Sensitive Areas, or Prevention of Soil Erosion. The standards and requirements of this Chapter may be modified by the Board if it determines that:
 - a. a plan and program for a new town, a complete community or a neighborhood until will provide adequate public spaces and improvements for the circulation of traffic, recreation, light, air, and service needs of the tract when fully developed and populated, and that legal provisions to assure conformity to the plan are satisfactory; or...”

In a supplemental letter submitted on February 28, 2006 (Attachment D), the Applicant's representatives outline why they believe the application qualifies for a waiver of section 50-20(c)(5)(B) pursuant to either section 50-38(a)(1) or (2) above. Staff supports the waiver request pursuant to section 50-38(a)(1). Both practical difficulties and unusual circumstances exist that prevent this Preliminary Plan from meeting the requirement that all infrastructure be constructed.

The practical difficulties include the fact that construction of the project and associated infrastructure has been significantly delayed by both stop-work orders and the time it has taken to prepare, review, and approve the Compliance Program and associated plan amendments. In

addition, the Compliance Program, and the extraordinary amount of time it has taken to address its requirements, also constitute unusual circumstances that have prevented the requirement from being met. For these reasons, staff supports a waiver of section 50-20(c)(5)(B) pursuant to section 50-38(a)(1). The waiver is the minimum necessary to provide relief from the requirement that infrastructure be constructed, is not inconsistent with the purposes and objectives of the General Plan, and is not adverse to the public interest.

Staff also supports an APF extension period of the maximum six years. It is staff's opinion that six years are justified by the size, complexity and mixed-use nature of the development. Although a new development schedule was not submitted with the extension request, it is required by the Compliance Program to be a part of the Board's future action on the pending plan amendments and new site plan.

CONCLUSION

Staff finds that the Applicant's request for a three-year extension of the Preliminary Plan validity period is justified by the significant, unusual and unanticipated events associated with both the approval of the Compliance Program, and the preparation and review of the plan amendments that the Compliance Program requires. With regard to the requested six-year extension of the APF validity period, staff finds that the Preliminary Plan meets two of the requirements of section 50-20(c)(5)(A)-(C), and qualifies for a waiver of the third pursuant to section 50-38(a)(1) based on practical difficulties and unusual circumstances that have prevented the applicant from completing the necessary construction of infrastructure. Therefore, staff recommends approval of a three-year extension of the validity period for the Preliminary Plan until March 26, 2011, and a six-year extension of the APF approval until March 26, 2014.

Attachments

Attachment A – Vicinity Map

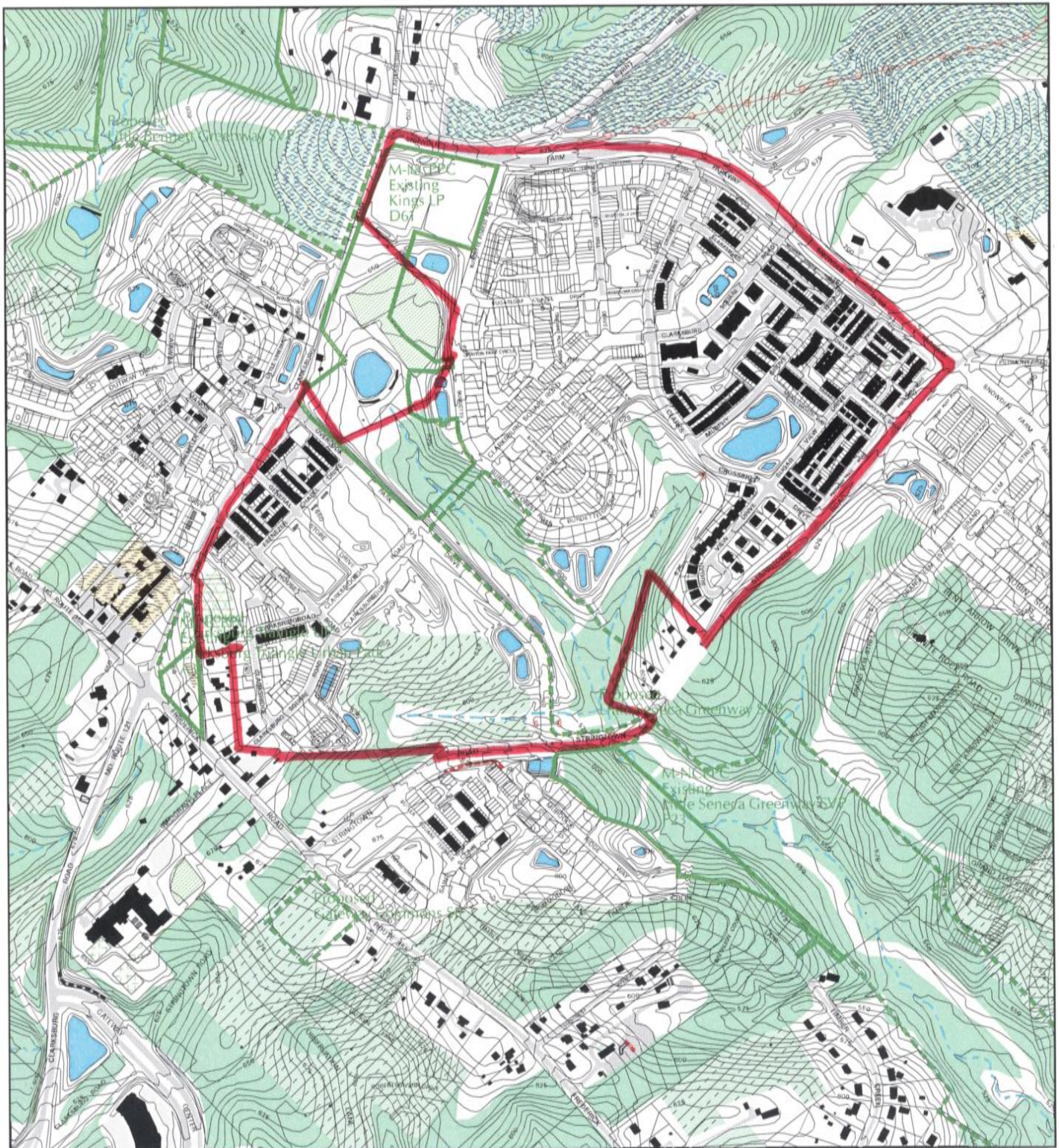
Attachment B – Planning Board Opinion dated 3/26/96

Attachment C – Applicant's Extension Request dated 2/15/08

Attachment D – Applicant's Supplemental letter dated 2/28/08

CLARKSBURG TOWN CENTER

Attachment A VICINITY MAP



Map compiled on March 09, 2008 at 9:44 AM | Site located on base sheet no - 233NW13

NOTICE

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

Key Map



N



Research & Technology Center



1 inch = 800 feet
1 : 9600

(i)

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

8787 Georgia Avenue • Silver Spring, Maryland 20910-3760



Date of mailing: March 26, 1996

MONTGOMERY COUNTY PLANNING BOARD
REVISED OPINIONPreliminary Plan No.: #1-95042
Name of Plan: Clarksburg Town Center

Action: Approval, subject to conditions. (Motion by Commissioner Aron; seconded by Commissioner Holmes; with a vote of 5 to 0, Commissioners Aron, Holmes, Hussmann, Baptiste and Richardson voting in favor of the motion).

INTRODUCTION

On September 28, 1995, the Montgomery County Planning Board ("Board") held a public hearing to consider Preliminary Plan 1-95042, an application for subdivision approval in the RMX-2 zone. The proposed uses include residential, retail and commercial development. The Applicants, Piedmont & Clarksburg Associates, proposed to create 834 lots on 267.50 acres of land.

At the hearing, the Board heard testimony and received evidence submitted in the record on the application. Based upon the testimony and evidence presented, the Board finds Preliminary Plan 1-95042 to be in accordance with the purposes and requirements of the Subdivision Regulations (Chapter 50, Montgomery County Code, as amended) and approves Preliminary Plan 1-95042, subject to the conditions listed at the end of this opinion.

BACKGROUND

The property is located northeast of Maryland Route 355 between Clarksburg Road and Stringtown Road (A-260 on the Master Plan). Piedmont Road crosses through the northern portion of the property. The Applicant proposes construction of 1,300 dwelling units, including townhomes, multi-family and single-family residences. The proposal also includes 150,000 square feet of retail space and 100,000 square feet of office/development space.

The underlying development authority, Project Plan No. 9-94004, was approved by the Planning Board on May 11, 1995, after two prior Planning Board meetings (held on April 6 and 20, 1995). The record for Preliminary Plan 1-95042 specifically includes the records from those prior hearings.

DISCUSSION AND FINDINGS

The Planning Department staff evaluated the transportation effects of the subject application as required by the Subdivision Regulations and as recommended in the Master Plan. First, the Board must determine that public facilities, including roads, will be adequate to support and service the area of the proposed subdivision. Staff evaluated the impact of the proposed development on nearby roads and intersections in accordance with the Local Area Transportation Review Guidelines. Necessary local area transportation review improvements for this project are identified in condition #2 for Project Plan No. 9-94004.

The second level of transportation review was based on the Master Plan recommendation that development districts, or alternative financing mechanisms, be implemented prior to new development, to ensure that road infrastructure be provided to support recommended Master Plan development. The Clarksburg Master Plan specifically addressed the County's fiscal concerns that the timing and sequence of development in the area should be responsive to the fact that capital improvements funding required to support new growth will have to come from a variety of sources, including government sources and private development. As part of the Project Plan discussion, the Board requested staff to conduct an analysis of the Master Plan road network, determine the amount of road infrastructure required, evaluate how the roads would be built, and recommend when they should be built.

The Master Plan anticipated a funding shortfall for the construction of schools, local roads and other community facilities recommended in the Master Plan to serve the expected new growth. In response to this, the Master Plan recommended that development in Clarksburg should occur in stages conditioned upon the ability of private developers to fund a significant portion of the infrastructure improvements or the availability of other new sources of revenues. The Planning Board expressed a desire to address the Master Plan's stated need to comprehensively allocate among developers a responsibility to construct portions of road infrastructure in a fair and equitable manner.

To ensure that the Applicant fund its share of road infrastructure, as best can be determined at this time, staff recommended that the Applicant improve Stringtown Road (A-260), to County standards as a two lane road within the Master Plan Alignment, No. 2. as of August 25, 1995. Staff's assessment was based on the 1993 Fiscal Impact Analysis prepared by the Montgomery County Office of Planning Implementation (OPI), as part of the Clarksburg Master Plan review. The OPI study projected a funding gap of approximately \$89 million for required infrastructure. The Study also projected approximately \$37 million in revenues to be generated by the Construction Excise Tax (CET). Since the CET has been repealed, this loss of

anticipated revenue must be added to the capital gap, with a total estimated funding gap of approximately \$126 million. Staff thus estimated the Applicant's share of this infrastructure to be approximately 10 percent, or \$12.5 million, with no County or State input. The Planning Board concluded that the Stringtown Road improvement, which will be the responsibility of the applicant, represents the current best estimate of the Town Center's share of the Master Plan road infrastructure (as more particularly identified in revised traffic staff memo of 09/26/95.)

Staff noted that if the Council adopts an impact tax or other alternative road infrastructure funding mechanism, then the Applicant's contribution (in the form of improvements to Stringtown Road) will be assessed and, if found lacking, will be augmented by additional tax requirements. The Board determined that the infrastructure schemes proposed by the Master Plan are legislative in nature, will be implemented by the Council, and may or may not grandfather development predating any such legislation. The Board concluded that to anticipate the Council's actions would be presumptive, and premature.

MCDOT has requested that the hiker/biker trail shown in the Clarksburg Master Plan along Stringtown Road (A-260) be constructed along P-5 from Frederick Road (MD 355) to Piedmont Road (A-305), in lieu of the Master Plan Alignment. The developer has agreed to construct the hiker/biker trail along P-5.

Applicant also will be required to dedicate approximately 8 acres of land for a future school site, to be used in the interim as public parkland. At the time the school is developed, if ever, the parkland adjoining the school site will be jointly used as school athletic facilities and public parkland under an easement agreement between The Maryland-National Capital Park and Planning Commission and Montgomery County Public Schools (MCPS). MCPS staff asked that the entire future school site (10-12 acres) be dedicated to MCPS at this time. Under normal circumstances this would be the usual procedure. In this instance, however, staff recommended and the Board agreed that within the Clarksburg Town Center, a planned park/school site provides a more efficient use of land than separate facilities. In addition, if the land ultimately is not needed as a school site, then the land should be retained as public parkland. The Board determined that this joint use, with the recreational facilities remaining under The Maryland-National Capital Park and Planning Commission ownership, would afford the most efficient public use of the land.

Therefore, with all of the evidence heard and all testimony taken, The Planning Board, approved the plan, including (1) waiver of the distance between intersections requirements as contained in Section 50-26 of the Subdivision Regulations and (2) approval of closed street sections subject to MCDOT approval. The approval is subject to the following conditions:

1. Agreement with Planning Board to limit development to a maximum of 1300 dwelling units, 150,000 square feet of retail uses and 100,000 square feet of commercial office uses, subject to the following requirements:
 - (a) Agreement with the Planning Board to provide the necessary roadway improvements as identified in the phasing section of the revised Transportation Planning Division Memorandum dated 09/26/95.
 - (b) The recordation of the subdivision plats for the Clarksburg Town Center project shall be phased over a nine year period. Plats may be recorded in three separate phases with each phase being completed within a thirty-six month period. Applicant to record plats for at least 200 residential units during Phase 1. Applicant must submit a plat recordation schedule for Phases 2 and 3 for Planning Board approval as part of the Phase 1 site plan review.
2. Compliance with Environmental Planning Division approval regarding the requirements of the forest conservation legislation. Applicant must meet all conditions prior to recording of plat or MCDEP issuance of sediment and erosion control permit, as appropriate.
3. The commercial area's stormwater management forebay, sand filter #6 and associated grading that cannot be forested must be located outside of the required stream buffer. The SWM facilities should be designed to promote aesthetics and effectiveness.
4. Agricultural areas within the environmental buffer will be taken out of production and stabilized with a suitable grass cover no later than Spring, 1996.
5. Dedication of the following roads as shown on plan must be provided as follows:
 - (a) Clarksburg Road (MD RT 121) for ultimate 80' right-of-way.
 - (b) Piedmont Road (Master Plan A-305) for ultimate 80' right-of-way.
 - (c) Stringtown Road (Master Plan A-260) for ultimate 120' right-of-way.
6. Dedication of the proposed park/school, as shown on the Applicant's revised preliminary plan drawing, is to be made to M-NCPPC. In order to facilitate the implementation of the combined park/school facilities, the following provisions apply:

- (a) M-NCPPC and the Applicant will enter into an agreement specifying that an exchange of land, identified as areas "B1" and "B2" on the park/school concept drawing set out on Circle Page 49 of the staff report, will occur prior to the execution of the Site Plan Enforcement Agreement.
 - (b) Dedication of the approximately 8 acre area, identified as area "A" on the same park/school concept drawing identified above, will occur either at the time of recordation of the plats for the adjacent phase of the project or at such time as funds for construction of the future elementary school are added to the County CIP, whichever occurs first.
 - (c) The Applicant will provide site grading, infield preparation and seeding of the replacement athletic fields on the approximately 8 acres of dedicated land at a time which insures that there will be no disruption in the continued use of the existing athletic fields prior to completion of the replacement athletic fields.
 - (i) In the event that dedication occurs when funds for the proposed school are shown in the CIP, Applicant will complete work on the replacement fields prior to the construction of the proposed school.
 - (ii) In the event that dedication occurs prior to funding for the school being shown in the CIP, then upon construction of Street "F", as shown on the revised preliminary plan, Applicant will commence work on replacement of the baseball field. In addition, if at site plan it is determined that there is sufficient earth material on site to construct both replacement fields, then Applicant will also rough grade and seed the replacement soccer field when construction of Street "F" begins. Area tabulations for the proposed park/school complexes to be submitted for technical staff review at site plan. Final grading plan for the park/school site to be submitted for technical staff approval as part of the site plan application.
7. In accordance with Condition #6 above, Applicant to enter into an agreement with the Planning Board to provide for site grading, infield preparation and seeding of the replacement athletic fields in accordance with Parks Department specifications, as shown on the preliminary plan drawing, and as specified in the Department of Parks' Memorandum dated September 22, 1995. The construction of

the replacement athletic fields must occur as specified in Condition #6.

8. Record plats to reflect delineation of conservation easements over the areas of the 100 year floodplain, stream valley buffer, wetland buffer and tree preservation and/or reforestation and greenway dedications.
9. No clearing, grading, or recording of plats prior to site plan approval.
10. Final number and location of units to be determined at site plan.
11. Access and improvements as required to be approved by MCDOT and MDSHA.
12. Conditions of MCDEP stormwater management approval dated 07/28/95.
13. Final number of MPDU's to be determined at site plan dependent on condition #10 above.
14. Preliminary Plan 1-95042 is expressly tied to and interdependent upon the continued validity of Project Plan No. 9-94004. Each term, condition, and requirement set forth in the Preliminary Plan and Project Plan are determined by the Planning Board to be essential components of the approved plans and are, therefore, not automatically severable. Should any term, condition, or requirement associated with the approved plans be invalidated, then the entirety of the approved plan must be remanded to the Planning Board for further consideration. At that time, the Board shall determine if all applicable requirements under State and County law will be met in the absence of such term, condition and requirement, and if some alternative, lawful conditions or plan revisions related to the severed term, condition, or requirement are then required.
15. Other necessary easements.
16. The following phasing requirements are conditioned upon issuance of building permits for the subject preliminary plan:
 - (a) The first 44 dwelling units without any off-site road improvements.
 - (b) After the 44th building permit, the developer must start reconstruction of the southbound right turn lane along MD 355 at MD 121 to provide a "free flowing" movement.

(c) After the 400th building permit, the developer has two options:

- 1) Construction of A-260 from MD 355 to the southern access road of the commercial site (commercial access road between A-260 and P-5) and construction of P-5 across the stream valley into the residential area north of stream valley.
- 2) Construction of A-260 from MD 355 to the northern access road of the residential development and construction of a northbound right-turn lane along MD 355 at A-260 should be included in this phase.

(d) After the 800th building permit, the developer must start construction of remaining section of A-260 to A-305, and intersection improvements at MD 355 and MD 121 to construct eastbound & westbound left-turn lanes along MD 121.

(e) Construction of A-305 from A-260 to MD 121 must begin when the developer starts building any of the residential units on blocks 11, 12, 13, and the northern half of block 10.

17. This preliminary plan will remain valid until March 26, 2005. (9 years and 1 month from the date of mailing which is February 26, 1996). The recordation of plats shall occur in accordance with the phasing identified in Condition 1(b) of this opinion, and as further stipulated in the Planning Board's approval of the phase 1 site plan review. Prior to the expiration of the validity period for each phase, a final record plat for all property delineated in a particular phase must be recorded or a request for an extension must be filed. The first phase of the preliminary plan must be recorded by March 26, 1999 or a request for an extension must be filed.

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**LINOWES
AND BLOCHER LLP**
ATTORNEYS AT LAW

Attachment C

February 15, 2008

Stephen Z. Kaufman
301.961.5156
skaufman@linowes-law.com
Todd D. Brown
301.961.5218
tbrown@linowes-law.com

By Hand Delivery

Dr. Royce Hanson, Chair
and Members of the Montgomery County
Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Clarksburg Town Center – Request for Extension of Adequate Public Facilities
Determination, Preliminary Plan Validity Period and Project Plan Review Period

Dear Dr. Hanson and Members of the Planning Board:

On behalf of the Applicant, NNPII – Clarksburg LLC, the purpose of this letter is to request a six-year extension of the adequate public facilities approval for the Clarksburg Town Center development, a three-year extension of the Preliminary Plan validity period and a 120-day extension of the Project Plan review period. The project's APF determination and the Preliminary Plan validity period are scheduled to expire on March 26, 2008. A previous request to extend the Project Plan review period is pending and is superseded by this request.

Background

As the Board is aware, the Town Center is a mixed-use project containing residential, commercial and public use spaces. The mixed-use Core of the project was the subject of considerable discussion during the formation and approval of the Clarksburg Town Center Compliance Program ("Compliance Program"). Development of the redesigned Core is dependant on the Board's approval of pending Project Plan Amendment (91994004B), Preliminary Plan Amendment (11995042B) and Site Plan Application (820070220). Completion of the project, including the mixed-use Core, is also dependant on the extension of the adequate public facilities approval.

Since the approval of the Compliance Program, the Applicant and the Clarksburg Town Center Advisory Committee, Inc. ("CTCAC") have worked continuously to revise the plans for the Town Center consistent with the intent of the Compliance Program and the requirements of County agencies such as MCDPS and MCDPWT. To this end, plans have been submitted to MNCPPC and other agencies to amend the existing Project Plan and Preliminary Plan approvals

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Dr. Royce Hanson, Chair
and Members of the Montgomery County
Planning Board
February 15, 2008
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and for approval of a new overall site plan for the project. A lengthy Development Review Committee (DRC) meeting was held and subsequent meetings with senior county officials, Councilmembers and the County Executive have occurred in an effort to resolve a number of complex technical and policy issues associated with the revised plans. Continued efforts in this regard are needed to assure the plans to be considered by the Board have been thoroughly vetted and modified as appropriate to meet all requirements of the regulating agencies to assure the "buildability" of the revised design from a regulatory perspective.

As the Board will recall, the Town Center, and the mixed-use Core in particular, incorporate a uniquely urban design in what was until recently a rural setting. The introduction of mixed-use buildings, live/work units, concealed parking facilities, strong building relationships to the street, and a number of non-standard right-of-way sections is needed to fulfill the vision set forth in the Compliance Program. However, these design elements create a unique set of technical and public policy issues. Moreover, the multiple agency review process in Montgomery County creates the need for extensive coordination among regulatory staff to minimize regulatory conflicts and to address these complex issues. This has taken considerable time.

It is also important to remember the Project was shut down completely while various site plan and permitting issues were being investigated and while stop work order(s) issued by the County remained in effect. As the Board will also recall, its approval of the Compliance Program was the culmination of extensive efforts by MNCPPC staff, County agency staff, CTCAC, the Applicant and the Board itself. The Compliance Program and the pending applications provide the means to complete the project.

Since the Compliance Program was approved, the Applicant has continued to pursue road completions within the community, including final asphalt lifts. The Applicant has also made interim enhancements to Murphy's Grove Pond and continued to construct stormwater management facilities serving the community. As discussed in greater detail below, the First and Second Stages of the Compliance Program have also been approved, including the Interim Site Plan Amendments. Certified site plans and subdivision plats are being prepared for submission, review and ultimate recordation (for plats). Once these steps are completed, building permits can be issued for units within the Interim Site Plan amendment areas. Completion of these areas will leave only the mixed-use Core to be completed.

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Extension of APF

The Planning Board approved the Town Center Preliminary Plan (11995042, formerly 1-95042) by its Opinion dated March 26, 1996. Pursuant to Section 50-20(c)(3)(A) of the Montgomery County Code, a determination of adequate public facilities is timely and remains valid for 12 years after the date of preliminary plan approval for any plan approved on or after July 25, 1989, but before October 19, 1999. Accordingly, the Town Center APF determination will remain valid until March 26, 2008.

Pursuant to Section 50-20(c)(5) of the Subdivision Regulations, the Planning Board is authorized to extend a determination of adequate public facilities for a preliminary plan of subdivision for nonresidential development beyond the applicable validity period if:¹

- (A) at least 40% of the approved development has been built;
- (B) all of the infrastructure required by the conditions of the original preliminary plan approval have been constructed, or payments for its construction have been made; and
- (C) the development is an "active" project.

In this case, the original Preliminary Plan authorized 1,300 dwellings and 250,000 square feet of nonresidential uses. As detailed on Attachment 1, the approved development is comprised of 2,850,000 total square feet based on the size of an average single-family detached home, townhome and multi-family unit and the amount of nonresidential development approved by the Board. To date, 753 dwellings have been constructed comprising 1,603,000 total square feet, based on the same average unit sizes. Therefore, 56% of the approved development has been constructed, and the first criterion set forth above is satisfied.

Second, the approved preliminary plan required the following phasing in relation to specified road improvements:

- (a) The first 44 dwelling units without any off-site road improvements.

¹ Nonresidential development includes any project that is not exclusively residential.

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- (b) After the 44th building permit, the developer must start reconstruction of the southbound right turn lane along MD 355 at MD 121 to provide a "free flowing" movement
- (c) After the 400th building permit, the developer has two options:
 - 1) Construction of A-260 [Stringtown Road] from MD 355 to the southern access road of the commercial site (commercial access road between A-260 and P-5) and construction of P-5 across the stream valley into the residential area north of stream valley; or
 - 2) Construction of A-260 from MD 355 to the northern access road of the residential development and construction of a northbound right-turn lane along MD 355 at A-260 should be included in this phase.
- 753 (d) After the 800th building permit, the developer must start construction of remaining section of A-260 to A-305 [Snowden Farm Parkway], and intersection improvements at MD 355 and MD 121 to construct eastbound & westbound left-turn lanes along MD 121.
- (e) Construction of A-305 [Snowden Farm Parkway] from A-260 [Stringtown Road] to MD 121 must begin when the developer starts building any of the residential units on blocks 11, 12, 13, and the northern half of block 10.

To date, fewer than 800 building permits have been issued, and all road improvements required by the original Preliminary Plan approval to be constructed by this stage of the development have been constructed as follows:

- (a) the southbound right-turn lane along MD 355 (Frederick Road) at MD 121 (Clarksburg Road) to provide "free flowing" movement;
- (b) two lanes of A-260 (Stringtown Road) from MD 355 (Frederick Road) to the southern access road of the commercial site;

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- (c) northbound right-turn lane along MD 355 (Frederick Road) at A-260 (Stringtown Road);
- (d) A-305 (Snowden Farm Parkway) from A-260 (Stringtown Road) to approximately 390 feet south of MD 121 (Clarksburg Road); and
- (e) eastbound left-thru lane along MD 121 (Clarksburg Road) at MD 355 (Frederick Road).

All infrastructure improvements have been constructed that were required for the existing level of development by the conditions of the original Preliminary Plan approval. Thus, the second criterion above is also satisfied. Although additional infrastructure must be constructed after release of the 800th building permit, such construction is not required at this time by the conditions of the original Preliminary Plan approval. Considering the unique phasing of the road improvements required by the original Preliminary Plan Opinion, it would be incongruous to interpret Section 50-25(c)(5)(B) to require the Applicant to have already constructed improvements that are not yet required by the Preliminary Plan approval in order to extend the APF determination. To the contrary, extension of the APF will allow the project to proceed which will include construction of all infrastructure required to support the remaining stages of the development. The remaining off-site road improvements and intended construction sequence are identified on Attachment 2.

Third, the development is an "active" project. Occupancy permits have been issued and/or final inspections passed for in excess of 10 percent of the project within the past 4 years. As the Board is aware, the project was placed on hold for a period of time in 2006 while the Board considered and approved the Compliance Program. However, the project was an active site until that point with housing and infrastructure construction ongoing. In addition, the First and Second Stages of the Compliance Program have now also been approved, including the Interim Site Plan Amendment. Lastly, the Project Plan, Preliminary Plan and Site Plan applications comprising the Third Stage of the Compliance Program have also been filed. Final adjustments to the Third Stage plans are being made to reflect input from CTCAC and to address agency comments. Final submission of the revised Project Plan and Preliminary Plan amendment drawings is anticipated within 90 days. Final submission of the revised overall Site Plan is anticipated within 60 days after Board action at its hearing on the Preliminary Plan and Project Plan amendments.

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With respect to the APF extension, we also emphasize that the transportation impacts associated with the pending plan amendments, including the redesigned mixed-use Core, are *less* than the transportation impacts associated with the original Project Plan and Preliminary Plan approval. As indicated in the transportation impact analysis filed with the Preliminary Plan Amendment, the amended Preliminary Plan will generate approximately 8 percent *fewer* trips in the AM peak hour and approximately 3 percent *fewer* trips in the PM peak hour.

Lastly, we note the Montgomery County Council specifically exempted Clarksburg development from the new Growth Policy. In Resolution No. 16-376, adopted November 13, 2007, the County Council provided: *"This resolution does not apply to any amendment or extension of a preliminary plan of subdivision in the Clarksburg policy area that was approved before this resolution took effect if the amendment or extension does not increase the amount of housing units or non-residential development previously approved."*

For the foregoing reasons, the Applicant requests a six-year extension of the APF determination.

Extension of Preliminary Plan Validity

The Preliminary Plan validity period is also scheduled to expire on March 26, 2008. As detailed above, the Applicant has undertaken extensive efforts to prepare final plan amendments in accordance with the Compliance Program. These efforts included the preparation and processing of the Interim Site Plan Amendments which have now been approved. In addition, the level of coordination among citizen groups, county agencies, MNCPPC staff and the Applicant has been significantly greater than typically encountered given the complexities of the project's redesign and the thoroughness with which the community has been evaluating all aspects of the project to assure its successful implementation. The significant, unusual and unanticipated nature of events have substantially impaired the Applicant's ability to validate the Plan. Moreover, exceptional hardship will result to the Applicant if the validity period is not extended, particularly considering the efforts undertaken by the Applicant and others to implement the Compliance Program.

The requested three-year extension of the Preliminary Plan validity period is believed to be the minimum time sufficient to allow all pending plan amendments and the final site plan to be considered and acted on by the Board, for certified site plans to be prepared, reviewed and approved, and for all remaining subdivision plats to be prepared, reviewed and recorded.

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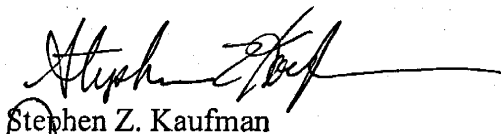
Extension of Project Plan Review Period

By our letter dated December 21, 2007, we requested an extension of the Project Plan review period until March 26, 2008 to coincide with the expiration dates of the Preliminary Plan validity period and the APF determination. At that time, we anticipated Board action on the Project Plan Amendment, Preliminary Plan Amendment and overall Site Plan before March 26, 2008 and a concurrent determination of new validity periods for both the Preliminary Plan and the APF. However, as indicated above, some limited additional time is needed to finalize modifications to the pending Project Plan Amendment to address agency and community comments and to prepare the Amendment for the Board's consideration. Therefore, a limited 120-day extension of the Project Plan review period is requested. This limited (and hopefully final) extension will not result in any prejudice to the parties.

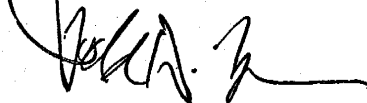
Thank you for your consideration.

Sincerely,

LINOWES AND BLOCHER LLP



Stephen Z. Kaufman



Todd D. Brown

cc: Mr. Douglas Delano
Mr. Robert Ditthardt
Ms. Rose Krasnow
Ms. Cathy Conlon
Ms. Robert Kronenberg
David Brown, Esq.

Attachment 1

Average Unit Sizes:

SFD - 3,000 sf
TH - 2,000 sf
MF - 1,500 sf

Original Preliminary Plan Approval:

1,300 dus @ 2,000 sf avg.
+250,000 sf nonresidential
= 2,850,000 sf

Original Preliminary Plan Approval (with original Project Plan Unit Mix):

195 SFD @ 3,000 sf ea.
+ 650 TH @ 2,000 sf ea.
+ 455 MF @ 1,500 sf ea.
+ 250,000 sf
= 2,817,500 sf

Completed Development:

168 SFD @ 3,000 sf ea.
+ 443 TH @ 2,000 sf ea.
+ 142 MF @ 1,500 sf ea.
= 1,603,000 sf

= 56% completed based on Original Preliminary Plan

= 56% completed based on Original Preliminary Plan (w/original Project Plan Unit Mix)

Attachment 2

These remaining off-site road improvements are intended to be constructed in the following sequence:

- (a) the section of A-260 (Stringtown Road) immediately east of the southern access road of the commercial site, consisting of the installation of a new culvert at the stream crossing, together with the lowering of the intersection at A-305 (Snowden Farm Parkway);
- (b) the westbound two lanes (north half of the right-of-way) of the remaining section of A-260 (Stringtown Road) between the new culvert and A-305 (Snowden Farm Parkway), conditioned upon the prior completion of the eastbound two lanes (southern half of the right-of-way) in this same section by the developer of Clarksburg Village;
- (c) the reconstruction of Clarksburg Road (A-27) along the west-side project frontage generally between Spire Street and King's Pond Park. This improvement will be constructed first if the receipt of all construction approvals for the Stringtown Road culvert replacement will not allow construction to commence until after the March through June brown trout spawning season;
- (d) the reconstruction of Clarksburg Road (A-27) between MD 355 (Frederick Road) and Spire Street, including the west-bound turn lane at MD 355;
- (e) the reconstruction of Clarksburg Road (A-27) from King's Pond Park frontage to Snowden Farm Parkway, including the remaining section of A-305 (Snowden Farm Parkway) immediately south of the Clarksburg Road intersection.

February 28, 2008

Stephen Z. Kaufman
301.961.5156
skaufman@linowes-law.com
Todd D. Brown
301.961.5218
tbrown@linowes-law.com

Dr. Royce Hanson, Chair
and Members of the Montgomery County
Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Clarksburg Town Center – Supplement to Request for Extension of APF Determination

Dear Dr. Hansen and Members of the Planning Board:

On behalf of the Applicant, NNPII-Clarksburg, LLC, the purpose of this letter is to supplement our letter to you dated February 15, 2008 requesting, *inter alia*, a six-year extension of the adequate public facilities ("APF") determination for the Clarksburg Town Center.

As demonstrated in our February 15, 2008 letter, the project has proceeded to a state of completion that meets the criteria for an extension of the APF determination as set forth in Section 50-20(c) of the Subdivision Regulations. Namely, (i) at least 40% of the approved development has been built; (ii) all the infrastructure required by the original Preliminary Plan conditions of approval to have been constructed at this stage of development has in fact been constructed; and (iii) the development is active. The project therefore qualifies for an extension of the APF, and Section 50-20(c)(8) authorizes such extension for a period of 6 years.

Waiver Pursuant to Section 50-38(a)(1)

Alternatively, and without prejudice to its position that the criteria established for extension of the APF determination have been met, the Applicant requests a partial waiver of the infrastructure construction criterion for extending the APF. As noted above, to extend the APF determination, Section 50-20(c) requires construction of all the infrastructure required by the original preliminary plan conditions of approval. Pursuant to Section 50-38, the Board may grant a waiver of this requirement if it determines that practical difficulties or unusual circumstances have prevented full compliance with the requirements, and that the waiver is: (i) the minimum necessary to provide relief from the requirements; (ii) not inconsistent with the purposes and objectives of the General Plan; and (iii) not adverse to the public interest.

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In the instant case, and as further detailed in our February 15, 2008 letter, both practical difficulties and unusual circumstances justify a flexible interpretation of the requirements for an APF extension with respect to the amount of infrastructure constructed (*i.e.*, criteria No. 2 above). As previously noted, all infrastructure required by the original Preliminary Plan approval to have been constructed at this time has been constructed. While additional infrastructure must be constructed to complete the development, the original Preliminary Plan conditions did not require such additional infrastructure to in fact be constructed at this stage of the development. This is because the original Preliminary Plan required phasing of road improvements in relation to the issuance of specified numbers of building permits, and the Project is in compliance with the road improvement phasing based upon the number of building permits issued to date.

As the Board is aware, through the issuance of stop work orders the Department of Permitting Services (DPS) halted development activity on the project while site plan compliance issues were being investigated and resolved through the Board's adoption of the Compliance Program. The considerable time required to (i) investigate alleged compliance issues; (ii) provide the parties with an opportunity to address the Board regarding all allegations; (iii) facilitate the mediation process that resulted in a settlement agreement among the parties; and (iv) prepare and adopt the Compliance Program created very practical difficulties in completing the project prior to the expiration of the APF approval, including the remaining infrastructure improvements that would otherwise have been constructed had building permits continued to be issued. In our experience, the amount of time, attention and effort expended by public and private individuals and governmental regulators to create a means for completing this project is unique in the recent history of the County.

The Compliance Program itself also creates a unique set of circumstances for this project. The complexities of the project design and the extensive coordination among public agencies, the Applicant and community representatives to finalize and implement the design are substantial. For example, the revised design for the mixed-use Core requires not only an amendment to the Project Plan, Preliminary Plan and a new Site Plan, but also approval of pending applications to abandon previously platted rights-of-way and approval by DPWT of modified street sections to accommodate the urban design of the project. Until these and other important approvals have been obtained and development of the redesigned Core of the project is authorized, construction of the remaining infrastructure improvements needed to support the redesigned Core and

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remaining unbuilt sections of the project cannot reasonably be expected to have already occurred.

We further note that in accordance with Section 50-38(a)(1), the specific relief requested from the strict interpretation of the infrastructure construction criterion for the APF extension is the minimum necessary to provide relief from the requirements. The Applicant is not requesting that previously required and still necessary public improvements not be constructed. Viewed another way, the Applicant requests that the Board interpret Section 50-20(c) so that its decision to grant an APF extension is not dependent on the Applicant's prior construction of road improvements that are not yet required to be in place by the original Preliminary Plan conditions of approval.

Lastly, with respect to Section 50-38(a)(1), the waiver request is neither inconsistent with the purposes and objectives of the General Plan nor adverse to the public interest. To the contrary, approval of the waiver will allow and facilitate completion of the Town Center. As indicated in the Resolution approving the Compliance Program, the Compliance Program conforms to the guidelines in the Approved and Adopted Clarksburg Master Plan, and the public interest will be served by completion of the Compliance Program according to its terms because it provides "substantial enhancements to community amenities and facilities planned for the area designated as the Clarksburg Town Center project and Montgomery County as a whole."

Modification Pursuant to Section 50-38(a)(2)

In addition to the waiver provisions at Section 50-38(a)(1), we note Section 50-38(a)(2) provides alternative criteria for Board approval of a modification to the standards and requirements of the Subdivision Regulations. In this respect, for a large scale development such as the Clarksburg Town Center, the Board may modify the subdivision requirements if it determines that "*a plan and program for a new town, a complete community or a neighborhood unit will provide adequate public spaces and improvements for the circulation of traffic, recreation, light, air, and service needs of the tract when fully developed and populated, and that legal provisions to assure conformity to the plan are satisfactory.*"

In the instant case, the Clarksburg Town Center constitutes a large-scale development of the type contemplated by Section 50-38(a)(2). Moreover, through its approval of the Compliance Program the Board assured the development of the project will result in a complete community providing adequate public spaces, improvements, recreation opportunities, light, air and service

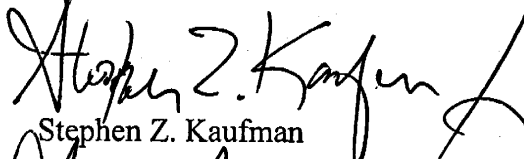
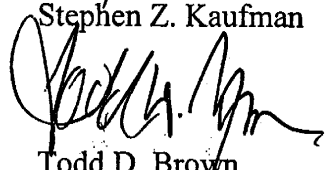
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needs. As noted above, the Compliance Program states expressly "*the Board finds that the public interest will be served by completion of the Compliance Program according to its terms because it provides substantial enhancements to community amenities and facilities planned for the area designated as the Clarksburg Town Center project and Montgomery County as a whole.*" The Board's Resolution approving the Compliance Program further states the plan conforms to the guidelines in the Approved and Adopted Clarksburg Master Plan that developed "*high expectations for building a complete community in the Town Center area.*" The Resolution also states the plan of Compliance "*provides significant civic spaces and recreation facilities, and a new mixed-use center.*" In short, the implementation of the Compliance Program will achieve precisely the objectives set forth in Section 50-38(a)(2). Accordingly, in light of the unique circumstances of the present case, approval of Applicant's suggested interpretation (or at least a flexible interpretation) of the infrastructure construction requirements for an APF extension is therefore appropriate.

For the foregoing reasons, the Applicant respectfully requests a six-year extension of the Clarksburg Town Center APF determination either pursuant to the criteria for such extension set forth in Section 50-20(c) or by requesting a waiver or modification of such criteria in accordance with Section 50-38(a)(1) or (2).

Sincerely,

LINOWES AND BLOCHER LLP


Stephen Z. Kaufman

Todd D. Brown

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and Members of the Montgomery County
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cc: Ms. Rose Krasnow
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