

**MEMORANDUM**

September 19, 2005

TO: Montgomery County Planning Board

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

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

SUBJECT: Request for an extension of the validity period – Preliminary Plan
No. 120020480 (formerly 1-02048), Gateway Commons

STAFF RECOMMENDATION: Approval of a six-month extension of the validity period to March 13, 2006.

BACKGROUND

The preliminary plan for Gateway Commons was approved by the Planning Board at a regularly scheduled public hearing on July 18, 2002. The date of mailing of the Planning Board Opinion for the plan was August 13, 2002. As a condition of that approval the validity period of the preliminary plan was set at 37 months from the date of mailing of the Planning Board Opinion, or September 13, 2005 (Attachment A). On September 9, 2005 staff received a request for an extension of the validity period for an additional six month period (Attachment B). The request was therefore, timely, as it was received prior to the date of expiration.

REQUIRED FINDINGS FOR AN EXTENSION OF THE VALIDITY PERIOD

Section 50-35 (h)(3)(d) of the Montgomery County Code, Subdivision Regulations, states that the Planning Board may grant extension of the validity period of a preliminary plan if persuaded that:

- (i) Delays, subsequent to the plan approval by the government or some other party, central to the applicant's ability to perform the terms or conditions of the plan

approval, have materially prevented the applicant from validating the plan, provided such delays are not created or facilitated by the applicant; or

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

Applicant's Position

The applicant's letter of September 9, 2005 requests a six month extension for the validity period of the preliminary plan. The applicant cites delays in obtaining required TDRs and significant delays in reviews which have prevented the applicant from validating the plan. Specifically, the applicant cites inability to timely satisfy road improvement conditions because of the numerous regulatory approvals, off-site commitments and coordination between government agencies and adjacent landowners, and various actions by the county government and third parties which caused significant delays. They also cite unusually complex issues related to the review of the Site Plan Signature Set which delayed that approval and thus shortened the time frame for recording plats.

Staff's Position

Staff believes that the applicant has submitted sufficient grounds to justify the extension of the validity period for the subject preliminary plan. Plats have been recorded for 224¹ of the 292 approved dwelling units and are pending for the remaining units. The final record plat for the remaining 68 dwelling units has been approved by the Planning Board and DPS and is awaiting recordation pending this extension. Staff believes that the applicant's inability to acquire the necessary TDRs at a time when the market was high and availability scarce constitutes an unusual circumstance that justifies the requested six-month extension. The applicant now has the necessary TDRs and expects to have the plat recorded in the requested time frame.

CONCLUSION

Staff believes that a sufficient argument has been made regarding the request to extend the validity period for preliminary plan 120020480, Gateway Commons, as prescribed in Section 50-35(h)(3)(d). The statements made by the applicant in their letter lead staff to believe that unanticipated events have materially prevented the applicant from validating the plan. Staff concludes that the argument provided by the applicant is valid and recommends extending the validity period for six months to March 13, 2006.

¹ As anticipated in the applicant's letter, plats 2-04277 and 2-04278 which had been sent for recordation have since been recorded.

Attachments

Attachment A – Approved Opinion

Attachment B – Extension Request Letter

Attachment C – Approved Preliminary Plan

Action: Approved Staff Recommendation
Motion of Comm. Robinson, seconded-
Comm. Perdue with a vote of 4-0;
Comms. Berlage, Perdue, Robinson
and Wellington voting in favor with
Commissioner Bryant absent

MONTGOMERY COUNTY PLANNING BOARD

OPINION

Preliminary Plan 1-02048
NAME OF PLAN: GATEWAY COMMONS

On 12/12/01, US HOMES submitted an application for the approval of a preliminary plan of subdivision of property in the R-200 TDR zone. The application proposed to create 292 Units on 45.25 Acres of land. The application was designated Preliminary Plan 1-02048. On 07/18/02, Preliminary Plan 1-02048 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 1-02048 to be in accordance with the purposes and requirements of the Subdivision Regulations (Chapter 50, Montgomery County Code, as amended) and approves Preliminary Plan 1-02048.

Approval, Including Waivers of Open-Section Roadways and Pursuant to Section 59-C-1.395, Waiver for the Minimum Percent of Single Family Detached Dwelling Units, and the Maximum Number of Allowed Multi-Family Units, Subject to the Following Conditions:

- (1) Limit approval under this preliminary plan to a maximum of 292 residential dwelling units
- (2) Satisfy the APF test by paying the Development Approval Payment (DAP) under the Alternative Review Procedure for Limited Residential Development provision of the FY 02 Annual Growth Policy for the proposed residential development. The APF test includes:
 - a. Policy Area Review: Site-generated traffic has to be mitigated within the Clarksburg Policy Area, which is in a moratorium. There is no capacity available for residential development as of June 30, 2002 (-8,717 units) in the Clarksburg Policy Area. The applicant is satisfying policy area review by paying the DAP under the FY 02 Annual Growth Policy staging ceiling capacity.
 - b. Local Area Transportation Review: A traffic study (to analyze the traffic impact at nearby intersections) is required since the proposed land use generates more than 50 total peak-hour trips during the weekday morning peak period (7:00 a.m. to 9:00 a.m.) and the evening peak period (4:00 p.m. to 6:00 p.m.).

- (3) As a condition of site access, construct the outside lanes of Stringtown Road (A-260 from Gateway Drive to intersection with Observation Drive as a two-lane arterial road including a five-foot sidewalk, an eight-foot bike path, street trees, and grading for a future four-lane divided roadway.
- (4) As a condition of site access, construct the outside lanes of Observation Drive (A-19) from Stringtown Road to the on-site intersection with relocated MD 355 by-pass as a two-lane arterial road with a future transit way in the median including a five-foot sidewalk, an eight-foot bike path, street trees, and grading for a future four-lane divided roadway.
- (5) For the first 200 building permits as a condition of site access, construct the outside lanes of MD 355 by-pass through the property as a two-lane arterial road including a five foot sidewalk, an eight foot bike path, street trees, and grading for a future four-lane divided roadway.
- (6) Prior to issuance of the 201st building permit, but not later than eighteen (18) months after approval of the Preliminary Plan, obtain two (2) appraisals of the fair market value of the right-of-way for the By-Pass ("ROW") and make a cash offer to the owners of this ROW of up to 110 percent of the highest appraised value ("maximum cost") via certified letter.
 - a. If the offer is not accepted by the owner(s), or no response is received, the County shall act to acquire the ROW. The applicant shall be responsible to reimburse the County the maximum cost and to construct a half-section of the roadway in accordance with County standards at their sole cost and expense.
 - b. In the event neither the applicant nor the County acquires the ROW within three years of preliminary plan approval of Gateway Commons, the applicant shall be free to proceed with full build-out of Gateway Commons and be issued all remaining building permits without obtaining the ROW or constructing the By-Pass.
- (7) As a condition of site access, construct Woodport Road from Public Road "B" to MD 355 (as a right-in/right-out at MD 355) as a tertiary residential street.
- (8) At the time of site plan address issues of transition and compatibility of height of units along Stringtown Road with existing and proposed development to create the "gateway" to the Town Center. Maintain 25-foot building setbacks along Stringtown Road and 20 feet along Observation Drive to achieve an appropriate "gateway" transition from I-270 into Clarksburg's Town Center. Applicant to explore, with MCDPS, relocation of the proposed SWM pond located in the northeastern quadrant of the intersection with MD 355 and Observation Drive to better implement street oriented development as per Master Plan recommendations.
- (9) Applicant to dedicate "Parcel H" consisting of 2.84 acres and located at the corner of Route 355 and extended Stringtown Road to M-NCPPC. Said land to be conveyed free of trash and unnatural debris and the boundaries staked and signed by Applicant to delineate between parkland and private properties
- (10) Applicant and M-NCPPC staff to discuss possible use of portions of Parcel H for needed re-forestation requirements and passive recreation amenities compatible with the historic significance and use of the site.
- (11) Any agreed re-forestation or construction of passive recreational amenities being done by Applicant on Parcel H to be coordinated with M-NCPPC staff to prevent damage to historic areas and artifacts.
- (12) Access and improvements as required to be approved by MCDPWT prior to recordation of plat(s)

- (13) Record plat to include note "No Driveway Access to MD 355"
- (14) Compliance with conditions of MCDPS approval of the Preliminary Special Protection Area Water Quality Plan
- (15) No clearing, grading or recording of plats prior to site plan enforcement agreement approval
- (16) Final approval of the number and location of dwelling units, parking, site circulation, sidewalks, and bikepaths will be determined at site plan
- (17) Record plat to identify all homeowners association parcels and stormwater management parcels and any common ingress/egress easements
- (18) Provide a minimum number of forty-four (44) MPDU's and one hundred and (127) TDR's dependent upon condition number 16 above
- (19) A landscape and lighting plan must be submitted as part of the site plan application for review and approval by technical staff
- (20) Prior to recording of plat provide an affidavit to verify the availability of a TDR for each existing and proposed dwelling unit shown on the approved preliminary plan. Include a note referencing recorded covenant regarding the TDR's on record plat
- (21) This preliminary plan will remain valid for thirty-seven (37) months from the date of mailing of the Planning Board opinion. Prior to this date, a final record plat must be recorded for all property delineated on the approved preliminary plan, or a request for an extension must be filed
- (22) The Adequate Public Facility (APF) review for the preliminary plan will remain valid for sixty-one (61) months from the date of mailing of the Planning Board opinion
- (23) Other necessary easements

LINOWES
AND BLOCHER LLP
ATTORNEYS AT LAW

September 9, 2005

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Ms. Cathy Conlon
Maryland-National Capital Park and
Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Gateway Commons; Preliminary Plan No. 1-02048 (the "Preliminary Plan")

Dear Ms. Conlon:

On behalf of our client, Gateway Commons, L.L.C. ("Gateway Commons" or the "Applicant"), owner and developer of the property that is the subject of the above-referenced Preliminary Plan, and pursuant to Sections 50-35(h)(3) of the Montgomery County Code (the "Code"), the purpose of this letter is to request an extension of the validity period for the Preliminary Plan to March 16, 2006 (a six month extension).

Factual Background

The Preliminary Plan was approved by the Planning Board by Opinion dated August 13, 2002, a copy of which is attached hereto as Exhibit "A" (the "Opinion"). Pursuant to Condition 21 of the Opinion, the standard preliminary plan validity period of 37 months was approved, resulting in an expiration date of September 13, 2005. The Preliminary Plan did not include a phasing schedule.

The site plan for the project, Site Plan No. 8-03023, was submitted on January 21, 2003 and approved by the Planning Board by opinion dated November 18, 2003 for 292 units. The final signature set was approved on August 10, 2004. Currently, final record plats for 118 dwelling units and all rights of way have been recorded. These include Plat Number 23097, covering Lots 1-14 of Block 3 (14 single family units), recorded on February 10, 2005, and Plat Number 23127, covering Parcel A, Block 1 (56 townhouse units, 16 two over two units, and 32 one over one units), recorded on April 7, 2005. Further, we currently anticipate that two additional plats (Plat File Numbers 2-04277 and 2-04278), covering a total of 106 additional dwelling units,

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will be recorded on September 12, 2005.¹ The remaining plat, covering the final 68 units, including Lots 1-13, Block 5 and Parcels C, E,F, Block 4 (13 single family units, 9 townhouse units, 24 two over two units, and 22 one over one units) has been approved by the Planning Board and Montgomery County Department of Permit Services ("MCDPS") and is awaiting final MCDPS signatures, which cannot be obtained until all TDRs for this plat have been recorded. This plat has been assigned file number 2-04279. Gateway Commons expects that this plat will be ready for recordation within the next six months, which Gateway Commons believes is the minimum additional time required for validation of the Preliminary Plan.

Request for Preliminary Plan Extension

Pursuant to Section 50-35(h)(3) of the Code, an applicant may request an extension of the validity period for an approved preliminary plan, which does not contain a phasing schedule, prior to the previously established validity period expiration. As grounds for such an extension request, an applicant must demonstrate that 1) delays, subsequent to the plan approval by the government or another party, essential to the applicant's ability to perform the terms or conditions of the plan approval, have materially prevented the applicant from validating the plan, or 2) that the occurrence of significant, unusual and unanticipated events have substantially impaired the applicant's ability to validate its plan and that exceptional hardship (as evidenced by the efforts undertaken by the applicant to implement the terms and conditions of the plan approval in order to validate the plan) would result to applicant if the plan were not extended. See Section 50-35(h)(3)(d) of the Code.

In support of the instant request, Gateway Commons notes that the project is a large development with extraordinary road improvement conditions. These road improvement conditions have necessitated numerous regulatory approvals, off-site commitments and coordination with numerous governmental agencies and adjacent landowners, responses to government requests, and various actions by the County Government and third parties, all of which have caused significant delays in satisfying the conditions of approval, materially preventing Gateway Commons from recording all of the plats within three (3) years. Other delays caused by governmental processes, and similarly impairing Gateway Commons' ability to fully validate the Preliminary Plan, include the complexities of the review of the Site Plan

¹ Plat File Number 2-04277 covers Parcel A, Block 2 and Parcel A, Block 3 (18 townhouse units and 28 two over two units), and Plat File Number 2-04278 covers Parcel C, Block 1 (10 townhouse units, 20 two over two units, and 30 one over one units).

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Signature Set, which needed to address the improvement of Dowden's Ordinary (a legacy open space property to be dedicated by Gateway Commons to the Planning Board) and treatment of the Dowden's Ordinary Historical Marker. The nature of the complex roadway acquisition and construction conditions of the Preliminary Plan, and the issues surrounding Dowden's Ordinary and the park site, were unusual and unanticipated, resulting in substantial impairment of the Applicant's ability to record plats for the entire property. Finally, the extensive process and requirements for acquisition of the 128 TDRs associated with the project, the breadth of which was unusual and unanticipated, also substantially impaired Gateway Common's ability to validate its plan within three (3) years.

More specifically, Condition 6 of the Opinion initially required Gateway Commons to obtain at least two separate appraisals for each property and offer to purchase the off-site right-of-way for the Maryland Route 355 Bypass ("355 Bypass"). This involved an effort to acquire property from four different land owners. In order to obtain the descriptions of the land to be acquired and the appraisals necessary to make offers, the alignment for the Bypass needed to be determined by the State Highway Administration ("SHA"), Montgomery County Department of Transportation and Public Works ("MCDPW&T") and the Planning Board. Gateway Commons engaged in numerous discussions with the County, SHA, and Park and Planning regarding the proper alignment of the Bypass, during which varying alignments were put forth and evaluated by the different agencies and, in the case of the SHA, by private engineering consultants. Until this alignment was sufficiently identified, the land for acquisition could not be properly identified, appraisals completed and offers made. Moreover, the lot layout and road alignment for this section of the project could not be finalized. This effort spanned over nearly a two-year period.

While Gateway Commons was pursuing satisfaction of Condition 6, MCDPW&T requested that Gateway Commons consider entering into a participation agreement with the County to combine Gateway Commons' responsibilities regarding Stringtown Road, namely construction of the outside lanes of Stringtown Road from Gateway Center Drive through the intersection with Observation Drive as a two-lane arterial road with grading for a future four-lane divided highway, with the County's CIP project to construct the two inside lanes of Stringtown Road from Gateway Center Drive through the intersection with Observation Drive, extend Stringtown Road between Observation Drive and Maryland Route 355, and construct intersection improvements to the Stringtown Road and Gateway Center Drive intersection. Through negotiations with MCDPW&T regarding the possibility of such an agreement, it became apparent that consolidation of all of these improvements to Stringtown Road (those to be done by the County and those to be done by Gateway Commons) would not only serve to

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facilitate and accelerate the construction of these important improvements, but would also address the provision and coordination of critical construction issues, such as stormwater management. Therefore, to expedite the construction of all of the Stringtown Road Extension improvements at one time, thereby reducing disruption to the traveling public, Gateway Commons and the County agreed to enter into a Road Participation Agreement ("RPA") for the construction of the Stringtown Road Extension, which agreement was finally executed by Gateway Commons and the County on July 29, 2005.

Finalization of the RPA took approximately two and a half years, during which numerous issues, such as storm drains, street grades, stormwater management, right-of-way acquisitions, etc. had to be addressed and coordinated. For example, to handle stormwater quantity for the whole of the Stringtown Road Extension, Gateway Commons had to negotiate for and purchase an off-site stormwater management pond. This acquisition alone took approximately 16 months. Moreover, uncertainty over the finalization of the RPA, resulting from these lengthy and complex negotiations on various issues, caused the County to delay review and approval of street grades and other necessary engineering plans, which further impeded the finalization of the plats for the project. Additionally, pursuant to the terms of the RPA, a Preliminary Plan amendment was sought by Gateway Commons and approved by the Planning Board on August 4, 2005.

Other issues affecting Gateway Commons' ability to record all of the plats for the project within three years of Preliminary Plan approval include the time required for finalization of the Site Plan Signature Set. Although the site plan for the project was submitted on January 21, 2003, just 5 months after Preliminary Plan approval, and the Planning Board approved the plan on July 24, 2003, the Board's opinion was not issued until November 18, 2003 and the final signature set was not approved by Park and Planning until August 10, 2004. The almost 13 month delay from the Board's action until signature set approval was due largely to staff workload and the aforementioned negotiations regarding Dowden's Ordinary, and therefore was beyond the control of Gateway Commons. Until the signature set was finalized, the record plats could not be fully addressed.

In furtherance of the approved Preliminary and Site Plans, Gateway Commons has prepared the following engineering plans and obtained the following governmental approvals:

- Final Plats for dedications of all rights-of-way including Observation Drive, Stringtown Road and 355 Bypass have been recorded.

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- Final Plats covering 118 dwelling units have been recorded.
- Final Plats (File Nos. 2-04277 and 2-04278) for an additional 106 units are fully approved and are anticipated to be recorded on September 13, 2005.
- Grading, storm drain and paving plans have been approved and permits issued by MCDPS.
- Stormwater management and sediment control plans have been approved and permits issued by MCDPS.
- RPA has been negotiated and executed.
- Preliminary Plan has been amended by the Planning Board to allow implementation of the RPA.

The preparation of these plans and acquisition of these approvals demonstrate the significant efforts the Applicant has made to implement the terms and conditions of the Preliminary Plan in order to validate the plan, and exceptional hardship would result if the Preliminary Plan were not extended.

Finally, the Preliminary Plan requires the purchase of 128 TDRs. Acquisition of these TDRs came at a time when demand in the market was high and availability scarce. Gateway Commons has been able to acquire 114 TDRs and now has the remaining 14 under contract, which are awaiting serialization by Montgomery County so that final transactions may take place and the plat recorded. The purchase, transfer, and serialization of these TDRs has been onerous and time consuming. Gateway Commons experienced several incidents where the TDRs contracted for could not obtain clean title or settlement was otherwise unsuccessful. Without the purchase and final serialization of the TDRs, no plats for those units could be recorded, which directly affected the delay in the recordation of the plats for the remaining 68 units within the three-year period since Preliminary Plan approval.

Based on the foregoing, this application requests the creation of a phasing schedule for the recordation of plats as follows:

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- Phase I Right of way plat for all road improvements and record plats for first 118 units to be recorded by September 13, 2005 (the original deadline).²
- Phase II All remaining plats to be recorded by May 13, 2006. This phase will also include Plat File Numbers 2-04277 and 2-04278 if not recorded on September 12, as currently anticipated.

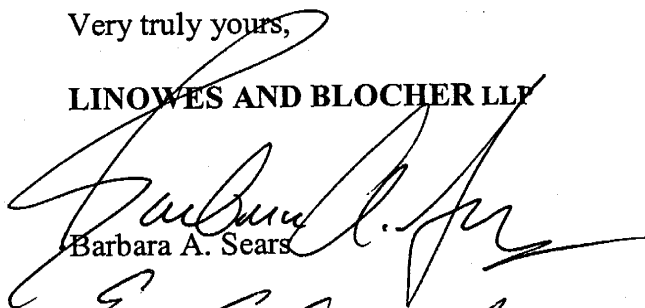
We note that the requested modifications would not extend the recordation beyond the existing APF approval of 61 months (currently expiring on September 13, 2007).

Conclusion

Based on the foregoing, we believe a six-month preliminary plan extension to allow for the recordation of the final record plats is justified and reasonable. Associated with these requests, enclosed please find a completed application and filing fee. Thank you for your consideration of this request. If you have any questions or concerns, or require any additional information, please feel free to contact us.

Very truly yours,

LINOWES AND BLOCHER LLP



Barbara A. Sears



Erin E. Girard

² As noted above, there is a possibility that Plat File Nos. 2-04277 and 2-04278, covering an additional 106 units, may be recorded by this date. However, since at the time of this request the Applicant cannot be certain that recordation of these plats will, in fact, occur prior to September 13, 2005, this request for a preliminary plan extension includes an extension for the areas covered by Plat File Nos. 2-04277 and 2-04278 (i.e. the remaining 174 units and all areas of the Preliminary Plan not yet recorded as of the date of this letter).

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Enclosures

cc: Mr. Richard Weaver
Mr. Shahriar Etemadi
Mr. Edgar Gonzalez
Mr. Bruce Johnston
Mr. Bill James
Mr. Ron Mijan