



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

MCPB
ITEM # 6
4/5/07

MEMORANDUM

DATE: March 23, 2007

TO: Montgomery County Planning Board

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

Catherine Conlon, Supervisor *CAK*
Development Review Division

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

REVIEW TYPE: Request for an extension to the Adequate Public Facilities review validity period

PROJECT NAME: Decoverly Hall Property

CASE #: Preliminary Plan No. 119852450 (1-85245)

REVIEW BASIS: Chapter 50, Montgomery County Subdivision Regulations

ZONE: O-M Zone

LOCATION: Located in the Northeast corner of the intersection of Key West Avenue and Diamondback Drive

MASTER PLAN: Shady Grove Sector Plan

APPLICANT: DRA CRT Decoverly 15200, LLC

ATTORNEY: Linowes and Blocher

FILING DATE: February 20, 2007

HEARING DATE: April 6, 2007

STAFF RECOMMENDATION: Denial

BACKGROUND

The Decoverly Hall Preliminary Plan (1-85245) was originally approved by the Planning Board at a public hearing on October 2, 1986 for 832,100 square feet of office space. The opinion for that approval was mailed on December 10, 1986. (Attachment A) The finding of adequate public facilities (APF) for this non-residential development was set to expire July 25, 2001 as were all non-residential development projects approved prior to July 25, 1989. The previous property owner allowed the plan to expire on July 25, 2001, even after MNCPPC conducted a significant public noticing campaign. Subsequent to the expiration, an extension request pursuant to Section 50-20(c) and a waiver request pursuant to Section 50-38 of the Subdivision Regulations were filed on March 8, 2002, some eight months after the plan expired. The request sought to reinstate the plan and extend the APF review. In the Linowes and Blocher letter dated March 8, 2002 (Attachment B) the following request was made by the applicant's attorneys, "... *we request an extension of the APF approval validity period for 6 years, or until July 25, 2007 as allowed in Section 50-20(c)(3)(vii) of the Subdivision Regulations.*" (See Circle page 6, last paragraph) The Planning Board approved the request on March 21, 2002 with a letter being issued memorializing that action on April 25, 2002, some nine months after the plan's expiration.

DISCUSSION OF THE EXTENSION

The applicant's letter dated February 20, 2007 (Attachment C) represents a timely request to extend the APF validity period for the Decoverly Hall Preliminary Plan No. 1-85245. The letter requests an extension of the validity period for nine months pursuant to Section 50-20(c)(5) of the Montgomery County Subdivision Regulations. Staff surmises that the letter is apparently attempting to re-coup the nine months that were *lost* while the plan was otherwise expired from July 25, 2001 until April 25, 2002.

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

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

- (A) at least 40% of the approved development has been built, is under construction, or building permits have been issued, such that the cumulative amount of development will meet or exceed 40% ;
- (B) all of the infrastructure required by the conditions of the original preliminary plan approval has been constructed, or payments for its construction have been made, and
- (C) the development is an "active" project, meaning that occupancy permits have been issued or a final building permit inspection has been passed for at least 10 percent of the project within 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 a building.

The applicant's letter contends that the project meets all of the three criteria outlined in this section; staff does not dispute this finding and has no issue with this portion of the applicant's argument. Staff does take issue with the request because it asks for an additional nine months based on the applicant's belief that the previous 6 year extension should have commenced from the date the approval letter was mailed, April 25, 2002, which was nine months after the expiration date. Based on the text found within the previous extension request from the applicant's attorney (Linowes and Blocher), it is clear that all parties understood when the extension would commence and when it would again expire. As provided under the Subdivision Regulations Section 50-20(c)(8), extensions must not exceed 6 years for non-residential developments. The Regulations do not provide flexibility to re-coup time that may have been lost due to a plan being allowed to expire.

Approximately 105,000 square feet of approved density remains to be developed on the Decoverly Hall Property. Should the APF review for this plan expire, the result would be that all remaining building permits would need a new APF review using current review procedures. This can be accommodated without the need for a new plan of subdivision, site plan or record plat as part of the building permit process.

CONCLUSION

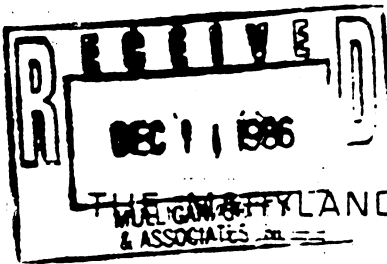
Staff does not believe that the plan should be extended to account for the period of time that it was otherwise expired. Section 50-20(c)(8) does not provide for an extension of APF beyond 6 years and is silent on any allowances for plans that have been allowed to expire. Staff's position is bolstered by the fact that the plan expired due to action, or inaction, of the previous owner, even after mailings by MNCPPC of the impending APF expiration date. Further, all parties seemingly understood that the existing extension period was from July 21, 2001 to July 25, 2007 and agreed to these dates. Staff is of the opinion that the first APF extension period was correctly applied to the plan and that there are no provision to extend it beyond an 18-year lifespan. Staff, therefore, recommends denial of the request.

Attachments:

Attachment A – Original Opinion

Attachment B - Previous extension request letter (March 8, 2002)

Attachment C – Current extension request letter (Feb. 20, 2007)



Attachment A

Date of Mailing: Dec. 10, 1986

THE MONTGOMERY COUNTY PLANNING BOARD AND PLANNING COMMISSION
8787 Georgia Avenue • Silver Spring, Maryland 20907

MONTGOMERY COUNTY PLANNING BOARD
OPINION

Preliminary Plan No. 1-85245
Project: Decoverly Hall, Parcel "S"

Action: Approval with Conditions (Motion of Comm. Krahnke, Seconded by Chm. Christeller, with a vote of 2-1. Comm. Keeney in favor; Comm. Floreen and Comm. Heiman absent.)

On November 19, 1985, Decoverly Corporation submitted an application for the approval of a preliminary plan of subdivision of property in the O-M Zone. The application was designated Preliminary Plan No. 1-85245. The application proposes to create 7 lots and 1 outlet on 44.27 acres of land.

The property which is the subject of this application is an existing single recorded lot. Development of the property is limited by a previously approved site plan (Site Plan Review No. 8-85034) to 832,069 sq. ft. of development.

The purpose of this application is to resubdivide the property into 7 fee simple lots and one outlet which will be used for stormwater management. The plan also proposes the abandonment of Diamondback Drive to the north of the property.

On October 2, 1986, Preliminary Plan No. 1-85245 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, the Planning Board finds Preliminary Plan No. 1-85245 to be in accord with the purposes and requirements of the Subdivision Regulations and approves Preliminary Plan No. 1-85245 subject to the following conditions:

- 1) Agreement with Planning Board limiting development to 832,100 sq. ft. of office space with reference on the plat. Such Agreement shall be incorporated into the Site Plan Enforcement Agreement.
- 2) Pro-Rata participation in intersection improvements at Shady Grove Road and Research Boulevard as described in a

Transportation Division Memo, dated September 29, 1986. No participation in this road improvement shall be required for the recordation of those lots containing buildings completed or under construction as of October 2, 1986.

- 3) Pro-Rata participation in widening of Key West Avenue to 4 lanes between Shady Grove Road and Great Seneca Highway as described in the September 29, 1986 Transportation Division Memo, as corrected. No participation in this road improvement shall be required for the recordation of lots containing existing buildings or buildings under construction as of October 2, 1986, or for those lots which are recorded after the execution by the County of a contract for the construction of this road improvement. Pro-rata participation shall be calculated on a per lot basis, based on the ratio of the square footage of the lot to the total square footage of all lots approved herein except those containing existing buildings or buildings under construction as of October 2, 1986.
- 4) Revision of approved site plan prior to recording, if necessary.
- 5) Planning Board approval of Abandonment Resolution.
- 6) Necessary Easements.
- 7) Dedication of Right-of-Way for A-284 as shown on the preliminary plan.

The only issue raised at the public hearing on the application was whether the Plan meets the requirements of the Adequate Public Facilities Ordinance that the proposed subdivision is adequately served by roads and public facilities. Based upon the testimony and evidence submitted, the Planning Board finds that with the conditions imposed as a part of this Opinion, Preliminary Plan No.1-85245 meets the requirements of the Adequate Public Facilities Ordinance.

MCPB Opinion
Preliminary Plan No. 1-85245
Page Three

At the time of the public hearing, the applicant urged the Planning Board to find that no review of the adequacy of public facilities was required for the application since it does not propose any increase in development over the existing approved site plan, but only involves "the drawing of individual lot lines for seven (7) lots on the record plat." The Planning Board rejects that contention. Preliminary Plan No. 1-85245 proposes to resubdivide the subject property and therefore the Planning Board is required, pursuant to Section 50-35(k) of the Subdivision Regulations, to make a determination that the public facilities are adequate to service the proposed subdivision.

The 832,069 sq. ft. of development previously approved has been considered "in the pipeline" and has been counted in the threshold calculations. The current plan proposes no increase in development. Therefore, the traffic impact analysis of the proposed resubdivision is focused on the Local Area Transportation Review.

Based upon the Transportation Division memo dated September 29, 1986, and Staff testimony, the Montgomery County Planning Board finds that if the road improvements set out in Conditions 2 and 3 of this Opinion are implemented, the public road facilities would be adequate to service the proposed development.

The Board accepts the Staff's conclusion that the staging element of the master plan was not an issue in this case since the project had already been counted in the threshold calculations.

LINOWES AND BLOCHER LLP

ATTORNEYS AT LAW

1010 Wayne Avenue, Tenth Floor
Silver Spring, MD 20910-5600
301.588.8580
Fax 301.495.9044
Website: www.linowes-law.com

March 8, 2002

John J. Delaney
301.650.7015
jjd@linowes-law.com
Scott C. Wallace
301.650.7024
scw@linowes-law.com

VIA HAND DELIVERY

Mr. Joseph Davis
Maryland-National Capital Park and Planning Commission
Development Review
8787 Georgia Avenue
Silver Spring, Maryland 20910-3760

Re: Discoverly Hall - Preliminary Plan No. 1-85245 (the "Preliminary Plan") – Application to Amend Approved Preliminary Plan/Extension of Adequate Public Facilities Approval Validity Period (the "Application")

Dear Mr. Davis:

Thank you for meeting with representatives of Boston Properties ("Boston") and us on March 6, 2002 to discuss the referenced Application. Further to our discussion at the meeting, we have provided below additional information in support of the Application.

As you are aware, Boston Properties is the owner and developer of a 44-acre office park known as "Discoverly Hall," located at the intersection of Key West Avenue and Omega Drive (the "Property"). The referenced Preliminary Plan for the Property was approved by Opinion dated December 10, 1986 for 832,100 square feet of office uses (Attachment 1). Subsequent Site Plans have been approved for the development of 7 office buildings with shared parking and common amenities to create a well-integrated office park for high-end corporate users (the "Project"). Most recently, Site Plan No. 8-88015A was approved on December 14, 1998 for the construction of a 260,000 square foot office building for the National Association of Securities Dealers, which was completed in 2000. To date, approximately 620,000 square feet of office space have been constructed in 5 buildings and approximately 211,000 square feet remain to be developed on Lots "KK" and "MM."

In this Application, Boston seeks an extension of the Adequate Public Facilities ("APF") approval validity period pursuant to Section 50-20(c)(3)(iv)(A-C) of the Subdivision Regulations, which provides:

Mr. Joseph Davis

March 8, 2002

Page 2

The determination of adequate public facilities for a preliminary plan of subdivision that allows non-residential development may be extended by the Planning Board if:

(A) At least forty percent (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 the percentage requirement of this paragraph;

(B) All of the infrastructure required by the conditions of the original preliminary plan approval has been constructed or payments for construction have been made; and

(C) The development is an "active" project as demonstrated by at least 10 percent of the project having been completed within the last four years before an extension request is made, or least 5 percent of the project having been completed within the last 4 years before an extension request is made, if 60 percent of the project has been built or is under construction.

We note that the Project qualifies for an extension under this Section because (1) approximately 75% of the approved development (620,000 square feet of the approved 831,100 square feet) has been built; (2) all of the infrastructure required by the conditions of the Preliminary Plan has been constructed; and (3) the development is "active" with the 260,000 square foot NASD building (which is approximately 30% of the approved development on the Property) having been completed in 2000.

In particular, all of the infrastructure required to support the development approved in the Preliminary Plan has been constructed. Conditions 2 and 3 of the Preliminary Plan required the following improvements:

2) Pro-Rata participation in intersection improvements at Shady Grove Road and Research Boulevard as described in a Transportation Division Memo, dated September 29, 1986.

3) Pro-Rata participation in widening of Key West Avenue to 4 lanes between Shady Grove Road and Great Seneca Highway as described in the September 29, 1986 Transportation

Mr. Joseph Davis

March 8, 2002

Page 3

Division Memo, as corrected. No participation in this road improvement shall be required for the recordation of lots containing existing buildings or buildings under construction as of October 2, 1986, or for those lots which are recorded after the execution by the County of a contract for the construction of this road improvement.

Boston has satisfied Condition 2 by payment of its required pro-rata share of the cost of improvements to the Shady Grove Road/Research Boulevard intersection and these improvements have been constructed. With regard to Condition 3, the improvement to Key West Avenue was constructed pursuant to County contract. Finally, although not required for APF purposes, Boston has constructed all intersection improvements on Diamondback Drive, and sidewalk and streetscape improvements required pursuant to the approval of Site Plan No. 8-88015A for the NASD building.

In addition to meeting the technical requirements for an extension, the Application, if granted, would further the planning and development strategies of the County to concentrate large employment centers in areas well served by transportation infrastructure and to promote the development of high-end office space to attract significant employers. As you may remember, the extension provisions were added to the Subdivision Regulations in 1999 to address the economic climate that slowed development in the mid-1990s. The intent of the extension provision was to allow large non-residential projects that were moving toward full build out a reasonable amount of time to be properly marketed and comprehensively developed. To date the thoughtful and deliberate development of the Project has resulted in a well-integrated office park that has attracted several quality employers including the NASD. The final stages of the Project will share common design elements and amenities with the existing development that are the hallmarks of an attractive employment center. The remaining development is especially significant because it offers the potential for a large block of office space in the I-270 Corridor that is highly sought after by major employers. Accordingly, both Boston and the County would benefit from allowing the remaining development to proceed to full build out as planned and approved.

In that regard, and while market conditions will ultimately dictate the schedule for the remaining development, Boston hopes to begin construction of a sixth building in the next one to three years, and the last building in the next four to six years. Accordingly, we request an extension of the APF approval validity period for 6 years, or until July 25, 2007 as allowed by Section 50-20(c)(3)(vii) of the Subdivision Regulations.

Mr. Joseph Davis

March 8, 2002


Page 4

In addition to the extension request, Boston also seeks in this Application a waiver of the requirement of Section 50-20(c)(3)(vi)(E) of the Subdivision Regulations that APF extension requests be filed before the expiration of the validity period. As we discussed, The APF validity period for the Property expired on July 25, 2001. Boston mistakenly believed that the provisions of Section 50-20(c)(3)(iv)(A-C) provided for an automatic extension for the Project and thus did not request an extension prior to the July 25, 2001, expiration. But for this oversight by Boston, an APF extension application would have been timely filed, and, we believe, granted for the reasons stated above. Further, as confirmed by Staff, there are no projects in the "queue" for the Research and Development Village policy area and therefore, the grant of this waiver and APF extension will not adversely affect the orderly application of the pipeline expiration provisions in the Subdivision Regulations. In summary, the waiver request (1) is the minimum necessary to provide Boston relief from the application of Section 50-20(c)(3)(vi)(E); (2) would not be inconsistent with the applicable Subdivision Regulations; and (3) would promote the public interest by allowing the completion of the final stages of a comprehensively designed office park as contemplated by the approved Preliminary and Site Plans.

If you have any questions regarding this matter, please do not hesitate to call. Thank you for your assistance.

Very truly yours,

LINOWES AND BLOCHER LLP


John J. Delaney


Scott C. Wallace

Attachment

cc: Mr. Karl Moritz
Mr. Malcolm Shaneman
Mr. John Wood Bolton, Jr., Boston Properties
Mr. Andrew Greene, Boston Properties

LINOWES
AND BLOCHER LLP
 ATTORNEYS AT LAW

February 20, 2007

Scott C. Wallace
 301.961.5124
 swallace@linowes-law.com

VIA HAND DELIVERY

Mr. Cathy Conlon
 Maryland-National Capital Park and Planning Commission
 Development Review
 8787 Georgia Avenue
 Silver Spring, Maryland 20910-3760

Re: Discoverly Hall - Record Parcel "KK" (the "Property") - Preliminary Plan No. 1-85245 (the "Preliminary Plan") – Application to Extend Adequate Public Facilities Approval Validity Period (the "Application")

Dear Ms. Conlon:

This office represents DRA CRT Discoverly 15200, LLC ("DRA"), the owner of the referenced unimproved Property in the Discoverly Hall office park located at the intersection of Key West Avenue and Omega Drive ("Discoverly Hall"). The referenced Preliminary Plan for Discoverly Hall, including the Property, was originally approved for 832,100 square feet ("SF") of office uses on seven lots by Planning Board Opinion dated December 10, 1986 (the "Preliminary Plan Opinion") (Attachment "1"). By letter dated April 25, 2002 (attached as Attachment "2"), the Planning Board, pursuant to the provisions of 50-20(c)(5) of the Subdivision Regulations, approved an extension of the Adequate Public Facilities ("APF") Validity Period for the development approved under the Preliminary Plan for 5 years and 3 months, until July 25, 2007 (the "First Extension Approval"). Pursuant to Section 50-20(c)(8) of the Subdivision Regulations, the Board may grant an extension of the APF Validity Period, under the provisions of Section 50-20(c)(5) for projects 150,000 square feet or greater for a cumulative amount of time of up to six years. Accordingly, as discussed in detail below, the purpose of this Application is to request an extension of the APF Validity Period for the development of the remaining permitted density on the Property for 9 months, until April 25, 2008, which is the balance of the six year extension permitted under Section 50-20(c)(8).

As noted above, the Preliminary Plan was originally approved for development of approximately 832,000 square feet of office uses on seven lots with shared parking and common amenities to create a well-integrated office park for high-end corporate users (the "Project"). Record plats for all of the approved development have been recorded and the Project has been partially implemented pursuant to Site Plan No. 8-88015, approved by Planning Board Opinion dated June 8, 1988 (the "Site Plan"), and a series of subsequent amendments to the Site Plan. The most recent office building on the Project, the NASD building on Parcel "LL", was constructed in 2000. Most recently, Parcel "MM" in Discoverly Hall, which was proposed in the Preliminary

Ms. Cathy Conlon
February 20, 2007
Page 2

Plan and the Site Plan for development of approximately 107,000 SF of office uses, was instead developed with approximately 170 multi-family units in several buildings pursuant to an Amendment to the Preliminary Plan designated Preliminary Plan No. 1-85245A, and Site Plan designated Site Plan No. 8-05002. Construction of the multi-family buildings began in 2006, and it is our understanding that occupancy permits have been issued for all of the buildings approved for Parcel "MM". Overall, the equivalent of approximately 727,000 SF of the total approved density under the Preliminary Plan has been developed at Decoverly Hall with approximately 105,000 SF of remaining density permitted to be developed on the Property.

In this Application, DRA seeks an extension of the APF Validity Period to April 25, 2008 for the remaining approved density on the Property pursuant to Section 50-20(c)(5)(A-C) of the Subdivision Regulations, which provides:

The Planning Board may extend a determination of adequate public facilities for a preliminary plan of subdivision that allows non-residential development beyond the otherwise applicable validity period if:

(A) At least 40% of the approved development has been built, is under construction, or building permits have been issued, such that the cumulative amount of development will meet or exceed 40%;

(B) All of the infrastructure required by the conditions of the original preliminary plan approval has been constructed, or payments for its construction have been made; and

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

As noted above, pursuant to Section 50-20(c)(8), the maximum extension that the Planning Board can grant under Section 50-20(c)(8) is the cumulative total of 6 years. The Project qualifies for an extension under this Section 50-20(c)(5) because (1) approximately 87% of the

Ms. Cathy Conlon
February 20, 2007
Page 3

approved development (the equivalent of 727,000 square feet, including the multi-family development on Parcel "MM" that was substituted for 107,000 square feet of office uses, of the approved 832,100 square feet) has been built; (2) all of the infrastructure required by the conditions of the Preliminary Plan has been constructed; and (3) the development is "active" with occupancy permits for the multi-family buildings on Parcel "MM", which as noted above was substituted for 107,000 square feet or approximately 12% of the approved office density, having been issued in 2006.

Further, as was determined by the Board and Staff in the First Extension Approval, all of the infrastructure required to support the development approved in the Preliminary Plan has been constructed. Conditions 2 and 3 of the Preliminary Plan required the following improvements:

- 2) Pro-Rata participation in intersection improvements at Shady Grove Road and Research Boulevard as described in a Transportation Division Memo, dated September 29, 1986.
- 3) Pro-Rata participation in widening of Key West Avenue to 4 lanes between Shady Grove Road and Great Seneca Highway as described in the September 29, 1986 Transportation Division Memo, as corrected. No participation in this road improvement shall be required for the recordation of lots containing existing buildings or buildings under construction as of October 2, 1986, or for those lots which are recorded after the execution by the County of a contract for the construction of this road improvement.

Condition 2 was satisfied by a prior owner of the Property by payment of its required pro-rata share of the cost of improvements to the Shady Grove Road/Research Boulevard intersection and these improvements have been constructed. With regard to Condition 3, the improvement to Key West Avenue was constructed pursuant to County contract. Finally, although not required for APF purposes, prior owners of the Property have constructed all intersection improvements on Diamondback Drive, and sidewalk and streetscape improvements.

In addition to meeting the technical requirements of Section 50-20(c)(5) for an extension, the Application, if granted, would further the planning goals of the County to concentrate large employment centers in areas well served by transportation infrastructure and to promote the development of high-end office space to attract significant employers. To date the phased development of the Project has resulted in a well-integrated office park that has attracted several quality employers, as well as the addition of a residential component that provides housing opportunities for employees to live within walking distance to a major employment center. The final stages of the Project will share common design elements and amenities with the existing

Ms. Cathy Conlon
February 20, 2007
Page 4

development that are the hallmarks of an attractive employment center. The intent of the extension provision was to allow large non-residential projects that were moving toward full build out a reasonable amount of time to be properly marketed and comprehensively developed. In this regard, the extension will allow DRA, which purchased the Property in 2005, additional time to market the Property to attract the type of significant employers that can commit to leasing significant blocks of office space, which is a prerequisite for the initiation of construction on the Property. Accordingly, both DRA and the County would benefit from allowing the remaining development to proceed to full build out as planned and approved.

For the reasons stated above, we request an extension of the APF approval validity period for 9 months, or until April 25, 2008 as allowed by Section 50-20(c)(8) of the Subdivision Regulations. Enclosed with this letter is an Extension Request Application with all required supporting materials, and Adjoining and Confronting Property owners list, with a set of mailing labels, and the required application fee.

If you have any questions regarding this matter, please do not hesitate to call. Thank you for your assistance.

Very truly yours,

LINOWES AND BLOCHER LLP



Scott C. Wallace

Attachment

cc: Mr. Joseph Petriello
Barbara A. Sears, Esquire

