**MEMORANDUM**

March 24, 2006

TO: Montgomery County Planning Board

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

Catherine Conlon, Supervisor *CAC*
Development Review Division

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

SUBJECT: Request for reinstatement of an expired preliminary and an extension of the validity period – Preliminary Plan 120020680 (1-02068), Fairfield at Germantown

STAFF RECOMMENDATION: Denial of the request to reinstate the expired preliminary plan and to extend the preliminary plan validity period.

DISCUSSION

A Project plan (9-02002) and Preliminary plan, 1-02068 (120020680), for Fairfield at Germantown were approved by the Planning Board concurrently at a regularly scheduled public hearing on June 13, 2002. The project plan approved residential development (Phase I) on 36 acres of the 62 acre site for 610 units, and conceptually approved commercial development on the remaining 26.4 acres (Phase II). Both the project and preliminary plans were approved conditioned on future site plan approval. The approvals also specifically noted that the project plan would need to be amended when the Phase II site plan was submitted.

The preliminary plan for Fairfield approved development under the Adequate Public Facilities Ordinance (APFO) for the entirety of the 62 acre site, and tied specific road improvements to either Phase I or Phase II. Phase I, the residential portion of the site, received

the required site plan approval and is well under construction. Phase II, the commercial portion has not received site plan approval, nor has it been subjected to the aforementioned project plan amendment. The preliminary plan conditions set the validity period for both Phase I and Phase II at 37 months from the date of mailing of the Planning Board Opinion, or August 16, 2005. That date passed without a timely request to extend the validity period and, therefore; a portion of the preliminary plan has expired as of that date. The request before the Planning Board is to reinstate the preliminary plan and retroactively extend the validity period to August 16, 2007, which coincides with the validity period for the approved Adequate Public Facilities review.

The applicant's letter dated February 27, 2006, (Attachment 1) provides a detailed account of the original staff report and the conclusions reached by staff and the Planning Board. Staff agrees with the portrayal of events in the letter. The understanding at the time was that the property would develop in two phases as described above. Immediate development of the commercial portion of the site was not viable given the amount of residential development in Germantown. The expectation was that the development of the residential portion of the Fairfield plan would jump start the commercial portion. As stated, the residential component of the approved preliminary and site plan has moved forward.

The applicant's letter requests reinstatement and extension of the expired preliminary plan pursuant to Section 50-35(h)(3)(c)(2) of the Montgomery County Subdivision Regulations which states:

"In instances where a preliminary plan has been allowed to expire due to applicant's failure to file a timely request for an extension, the Board on a case-by-case basis in unusual circumstances may require submission and approval of a new plan, including a new APFO review; or, where practical difficulty or undue hardship is demonstrated by the applicant, may reinstate an expired plan and establish a new validity period for the plan. The Board, when considering a request to extend an otherwise expired plan, may require applicant to secure a new APFO review and approval by the Board, as a prerequisite or condition of its action to validate and extend the expired plan. Only the Planning Board is authorized to extend the validity period."

Applicant's Position

The applicant's letter requests reinstatement and extension of the expired preliminary plan based on unusual circumstances and hardship that would be suffered if the preliminary plan were not reinstated and extended. The applicant cites the fact that the original approval clearly anticipated this plan as a phased development, and that the development of the second phase was tied to completion of the first phase. The commercial development was a critical component to the RMX-2 development. The letter suggests that the economic conditions for the development of the commercial section made it difficult to find a suitable user because it was heavily tied to the success of the residential portion. The applicant now believes these conditions have changed so this commercial project can proceed. A developer for the commercial section has been identified, and the applicant is concerned that the existing window of opportunity for commercial development may pass if this request is not approved and they lose this developer.

Although a condition extending the validity period to reflect project phasing is not included in the Planning Board's approval, the applicant argues that it was always understood this project would proceed as two phases and it is unusual that this condition was not included.

Staff's Position

In staff's opinion, the applicant's unusual circumstances and undue hardship argument does not justify reinstatement and extension of the validity period. The applicant's basis for hardship is the time and economic impact that they would experience if they lose the commercial user that is now associated with the project. Staff does not consider time and money to be sufficient justification for reinstatement and extension of an expired plan.

Staff acknowledges that phasing is incorporated in several of the conditions of the approved preliminary plan, but the approval clearly does not phase the standard 37-month plan validity period. Phasing of validity periods in a project such as this is certainly not unprecedented, however, the lack of the condition is not necessarily an "unusual circumstance" in staff's opinion. Therefore, staff recommends disapproval of the extension request.

Staff has researched the effect a having a "portion" of a preliminary plan expire. This is discussed in the Subdivision Regulations under Section 50-35(h)(3)e... *Effect of Failure to Timely validate Plan or Secure an Extension*. Section 50-35(h)(3)e(i), recognizes that portions of preliminary plans can expire, and that the result is that the portion that has expired is void as well as the balance of the preliminary plan that has not yet been validated. Section 50-35(h)(3)e(ii) allows the validated portion of a partially expired plan to develop, however the developer of the validated portion must fully comply with all of the terms, conditions and other requirements, associated with the validated portion of the plan. Therefore, the platted residential portion of this preliminary plan can proceed as long as all conditions of approval for Phase I are satisfied.

CONCLUSION:

It is staff's determination that the applicant has not demonstrated that a practical difficulty or undue hardship exists whereby the Planning Board should grant the reinstatement and extension. The difficulties cited in the applicant's letter appear to be self imposed by the owner of the Phase II section who was simply not aware of the pending expiration date. The owner failed to timely request extension of the validity period and has not presented a convincing argument for reinstatement. If the Planning Board agrees with the staff recommendation, a portion of the plan and its APFO validity will expire. As noted above, the validated portion (Phase I) of the preliminary plan approval will not be adversely affected and can proceed.

Attachments

Attachment 1 – Extension Request Letter

February 27, 2006

VIA HAND-DELIVERY

Derick P. Berlage, Esquire
Chairman
Montgomery County Planning Board
The Maryland-National Capital
Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Request for Extension of a Portion of Preliminary Plan No. 1-02068

Dear Chairman Berlage:

The purpose of this letter is to request an extension of a portion of Preliminary Plan No. 1-02068, entitled "Fairfield at Germantown" (the "Preliminary Plan"), on behalf of the property owner and Costco (collectively, the "Applicant"). The property that is the subject of this request is a 26.4-acre tract located east of the CSX tracks between Maryland Route 118 and Father Hurley Boulevard in Germantown (the "Property"). For the reasons set forth below, the Applicant requests that the Preliminary Plan be retroactively extended from August 16, 2005 until August 16, 2007.

I. BACKGROUND

The Property is zoned RMX-2 (Residential-Mixed Use Development, Specialty Center) and was part of a larger tract consisting of 62.4 acres (the "Original Property"). The Original Property was the subject of the Preliminary Plan approved by the Planning Board on June 13, 2002 (Opinion mailed on July 16, 2002) (A copy of the Preliminary Plan Opinion is attached as Exhibit 1). Record plats for a 36.0-acre portion of the Original Property were recorded on August 14, 2003 (plats number 22665 and 22666). The Property, the remainder of the Original Tract, has not been recorded.

This letter requests that the Planning Board, pursuant to its authority under Sections 50-35(h)(3)c and 50-35(h)(3)d of the Subdivision Regulations, grant a retroactive extension of the portion of the Preliminary Plan that encompassed the

Property. Because of the complexity of the factual background of this request, a detailed discussion of the facts and prior approvals relating to the Original Property are set forth below.

II. THE PROJECT PLAN AND THE PRELIMINARY PLAN APPROVALS

The Planning Board approved a project plan application (Project Plan No. 9-02002) for all of the Original Property for development under the optional method of development regulations of the RMX-2 Zone on June 13, 2002 (the "Project Plan") (Opinion mailed on June 19, 2002). A copy of the Project Plan Opinion is attached as Exhibit 2. The Project Plan was approved for a residential development proposed by Fairfield Residential on 36 acres (the "Residential Portion") and for a commercial development, depicted in the Project Plan and approved in concept only, for the remaining 26.4 acres (the "Commercial Portion"). Fairfield Residential proposed the development of only the Residential Portion. At the time the Project Plan was considered by the Planning Board, there was no developer of the Commercial Portion and, therefore, only a very conceptual plan for the Commercial Portion was proposed and approved. Even though the property owner signed the Preliminary Plan and Project Plan applications for the Original Property, the owner did not appear at the public hearing, did not otherwise enter an appearance, and did not actively participate in obtaining the Project Plan approval or the Preliminary Plan approval (the Preliminary Plan approval is described below). The approval of the Project Plan was conditioned on the submission of a project plan amendment at a later date which would detail the development for the Commercial Portion (See Project Plan Opinion, condition no. 1).

The Preliminary Plan was considered simultaneously with the Project Plan at a public hearing before the Planning Board on June 13, 2002 (hereinafter, the Project Plan and Preliminary Plan will be referred to collectively as the "Approvals"). The Preliminary Plan Opinion approved one lot on the Original Property (62.4 acres). The Preliminary Plan approval was conditioned on certain transportation improvements (the "Transportation Improvements") being provided and identified whether the improvements would be required in connection with the Phase I (residential) or Phase II (commercial) portions of the development (See Preliminary Plan conditions no. 1 (a)-(i)). In other respects, the Preliminary Plan Opinion contained standard conditions and boilerplate language, including the following:

- (10). 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.

(11). 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.

(13). Record plat to indicate residential density of 610 units is calculated over entire 62.4 acres site and [n]o additional residential density is available on any of the 62.4-acre lot."

A review of the record of the Approvals reveals that the Staff and Planning Board considered the Original Property, consisting of the Residential Portion and the Commercial Portion, as a unified, inter-related development as required under the optional method of development regulations for the RMX-2 Zone (Section 59-C-10.3 of the Zoning Ordinance). Both the Planning Board and the Planning Staff, however, recognized that the Commercial Portion would be finalized at a later date sometime in the indefinite future because of the uncertainty associated with the commercial market in the Germantown Town Center ("Town Center"). The Staff and the Planning Board, during the public hearing on the Project Plan and the Preliminary Plan, recognized that there were not sufficient residential uses in the Town Center at that time to support a large scale commercial development such as that conceptually proposed for the Commercial Portion. The Staff and the Planning Board, after careful consideration, decided to secure the proposed Residential Portion in the hope that the development of the residential component would be the catalyst for the future commercial development of the Commercial Portion. The Staff and the Board recognized that the project would have to be a phased project, but the Staff, Board, Fairfield (whose interest and involvement was only with respect to the Residential Portion) and the owner (who did not actively participate in the processing of the Approvals) all failed to recognize that the phasing of the project was a critical component to ensure that the Commercial Portion could be processed as soon as market conditions turned favorable.

The Planning Board and Staff both recognized that the Project Plan and Preliminary Plan were unusual applications because the Residential Portion of the mixed-use project would be allowed to proceed without a detailed development plan for the Commercial Portion. They specifically discussed the unique posture of the Commercial Portion and the reasons the Project Plan and Preliminary Plan should be allowed to proceed with the Commercial Portion depicted only conceptually:

- Economic conditions for the development of the Commercial Portion were not favorable because there were not sufficient residential uses in the Town Center to support commercial development (Staff Report on Project Plan ("Staff Report"), p. 5);

- The owner of the Original Property was actively marketing the site for a commercial partner but had been unsuccessful in securing a commitment (Staff Report, p.11);
- Any prospective commercial developers needed the assurance that residential uses would be in place as an incentive to commit extensive resources to commercial development in the Town Center (Transcript of June 13, 2002 public hearing ("Tr."), p. 32);
- Staff wanted to build into the Approvals the ability for the commercial development to happen "at the right time," while recognizing that the timing was uncertain because market forces could not be accurately predicted (Tr., pp. 19-22);
- To ensure that both the Residential Portion and the Commercial Portion could ultimately be developed, a condition was imposed in both Approvals that the residential density would be calculated for the Original Property (62.4 acres) and that no additional residential density would be available for any portion of the Original Property (See Project Plan condition no. 8 and Preliminary Plan condition no. 13);
- The Approvals, including the Transportation Improvements, contemplated that the Original Property would not be developed as a single-phase project but as a two-phase project: Phase I consisting solely of the Residential Portion; and Phase II consisting of the Commercial Portion. Staff described the phasing of the project at the public hearing as consisting of "610 multi-family units and 250,000 square feet of office and retail in two phases" (Tr., p. 4).

The Approvals, coupled with the uncertainty associated with the economic forces that dictated the timing of development of the Commercial Portion and that were beyond Applicant's control, create an unusual situation. The unusual situation is further complicated by the fact that the Preliminary Plan approval for the Commercial Portion expired because a record plat was not recorded by August 16, 2005 and an extension request was never filed.

III. APPLICABLE SUBDIVISION REGULATIONS

Section 50-35(h)(3)c. of the Subdivision Regulations ("Regulations") provides, in pertinent part:

In instances where a preliminary plan has been allowed to expire due to applicant's failure to file a timely request

for an extension, the Board on a case-by-case basis in unusual situations ... where practical difficulty or undue hardship is demonstrated by the applicant, may reinstate an expired plan and establish a new validity period for the plan. ...

Section 50-35(h)(3)d.ii describes one of the grounds upon which the Planning Board may grant a request for an extension:

- 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. (Emphasis added)

The Applicant believes that this request is supported by the following:

- The unusual nature of the Approvals that contemplated a residential development on a portion of the Original Property and a commercial development on the remainder. Due to the fact that economic conditions favorable to commercial development could not be predicted, the residential development was to proceed immediately and the commercial was to proceed at some point in the indefinite future;
- The fact that the contemplated commercial development is a critical component to the RMX-2 development;
- The fact that it took years to find a suitable developer for the Commercial Portion, despite the property owner's continued effort to market the Property;
- The fact that the Transportation Improvements, that support both the Residential Portion and the Commercial Portion, were based on the residential and the commercial components being developed in two phases at two different times;

- The fact that the owner of the Commercial Portion did not actively participate in the processing of the Approvals and the Commercial Portion was considered only tangentially;
- The fact that even though at the time of the public hearing, the Applicant, the Planning Staff, and the Planning Board all understood and agreed that the Residential Portion and the Commercial Portion would be built in two phases at different times, a phasing schedule, required under Section 50-35(h)(2)b of the Subdivision Regulations, was never approved at the time the Planning Board approved the Preliminary Plan;
- The fact that the Preliminary Plan approval contained standard conditions (with the exception of the Transportation Improvements described therein) that may have obscured the necessity for imposing conditions to ensure the Commercial Portion could proceed without any procedural irregularities;
- The fact that exceptional or undue hardship will result to the Applicant if the extension is not granted.

V. RELIEF REQUESTED

The facts set forth above create an unusual set of circumstances for which Section 50-35(h)(3)c, set forth on pages 4-5 of this letter, was designed to address. The Applicant faces a practical difficulty and an undue hardship in attempting to develop the Commercial Portion of the mixed-use project if the Preliminary Plan is not extended. Economic conditions are finally ripe for commercial development in the Town Center. The original owner of the Property, after many years of concentrated effort to interest a national retailer in developing the Property, has succeeded in finding such a retailer. The Staff and the Planning Board both recognized that the Commercial Portion was necessary and desired it to be in place as soon as possible. The property owner was not actively involved in the process and no one recognized the fact that Preliminary Plan approval, as it related to the Commercial Portion, might expire before a developer of the Commercial Portion could be found. The Preliminary Plan that contemplated the development of a unified mixed-use project on the Residential Portion and the Commercial Portion did, in fact, expire on the Commercial Portion. Unless the Preliminary Plan is retroactively extended, the Commercial Portion is in jeopardy of not being developed in the near future. The Applicant faces practical difficulty and undue hardship if the Preliminary Plan is not extended because of the time loss that the Applicant would suffer in bringing the commercial development to the site. This time loss renders the proposed commercial development less certain and, therefore,

less attractive to commercial developers than if the Applicant is not required to file and process a new preliminary plan for the commercial development.

There is no substantive reason that the Preliminary Plan should not be extended. The APF approval for the Preliminary Plan was valid for 61 months (see Condition No. 11 of the Preliminary Plan). This request for an extension, if granted, will extend the Plan for the same period of time as the APF approval. In addition, the Transportation Improvements were based on full development of both the Residential Portion and the Commercial Portion. The Preliminary Plan expired for a mechanical reason only; to deny this request for a retroactive extension of the Plan would be to exalt form over substance.

Moreover, it would be in the public interest and in the interest of justice for the Preliminary Plan to be extended retroactively. The requested extension would avoid a duplication of effort and a waste of resources by the Applicant, Staff, and Planning Board in processing another preliminary plan for the Commercial Portion of the mixed-use development. Such an extension would ensure that the Commercial Portion, anticipated at the time the Project Plan and Preliminary Plan were approved, will not be jeopardized and can be developed (as anticipated for many years) now that the economic conditions are favorable. Requiring a new preliminary plan to be filed for the Commercial Portion threatens the ability of the Applicant to bring a long-awaited commercial component to a mixed-use project that has been only partially realized.

Therefore, for all the foregoing reasons, the Applicant requests that the Preliminary Plan be extended retroactively from August 16, 2005 until August 16, 2007.

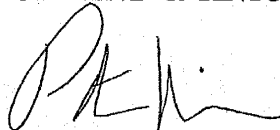
The following is submitted in support of this request: a completed Extension Request form and checklist; a completed fee schedule and worksheet; three (3) copies of the approved plan; a list of current adjacent and confronting property owners and labels; a copy of the Planning Board Opinion on the Preliminary Plan; and a check in the amount of \$925.00.

Derick P. Berlage, Esquire
February 27, 2006
Page 8

Thank you for your consideration of this request.

Very truly yours,

HOLLAND & KNIGHT LLP



Patricia A. Harris



Susan M. Reutershan

cc: Ms. Cathy Conlon, Development Review
Margaret McCulla, Esquire
Mr. Rusty Collins
Mr. Russell Hazzard

3567129_v1