

Montgomery County Planning Board

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB No. 22-103
Preliminary Plan No. 11987190C
Ellsworth Place (formerly City Place)
Date of Hearing: November 10, 2022

NOV 30 2022

RESOLUTION

WHEREAS, under Montgomery County Code Chapter 50, the Montgomery County Planning Board is authorized to review preliminary plan applications; and

WHEREAS, on August 11, 1988, the Planning Board, by Opinion mailed on October 26, 1988, approved Preliminary Plan No. 119871900, creating two lots (lots 16 & 17) on 2.46 acres of land in the CBD-3 (CR-8.0, C-6.0, R-7.5, H-200T) zone, located on Fenton Street between Colesville Road and Ellsworth Drive, in the Silver Spring CBD Policy Area and 1975 Silver Spring CBD Sector Plan (“Sector Plan”) area; and

WHEREAS, on July 26, 2007, the Planning Board approved Preliminary Plan Amendment No. 11987190A (MCPB No. 07-176) to increase the density allowed on lot 16 (“Subject Property”); and

WHEREAS, on June 20, 2022, VIKA on behalf of Avante Ellsworth Ventures, LLC (“Applicant”) filed an application for approval of an amendment to the previously approved preliminary plan(s) to extend the approved Adequate Public Facilities validity period by 30 months (2.5 years) per Section 50.4.3.J.7.d of the Subdivision Ordinance, with Waiver of the 60 percent requirement of Section 50.4.3.J.7.d.i(c)(2) on the Subject Property; and

WHEREAS, Applicant’s application to amend the preliminary plan was designated Preliminary Plan Amendment No. 11987190C¹, Ellsworth Place (“Preliminary Plan,” “Amendment,” or “Application”); and

WHEREAS, following review and analysis of the Application by Planning Board staff (“Staff”) and other governmental agencies, Staff issued a memorandum to the

¹ An application was accepted on July 1, 2020, assigned Preliminary Plan Amendment No. 11987190B, to request an APF extension and was subsequently withdrawn after the adoption of SRA No. 20-01 which automatically extended the APF validity period an additional two years.

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Approved as to
Legal Sufficiency: /s/ Allison Myers
M-NCPPC Legal Department

Planning Board, dated October 28, 2022, setting forth its analysis and recommendation for approval of the Application, subject to certain conditions (“Staff Report”); and

WHEREAS, on November 10, 2022, the Planning Board held a public hearing on the Application and voted to approve the Application subject to conditions, on the motion of Commissioner Hill, seconded by Vice Chair Presley, with a vote of 4-0; Chair Zyontz, Commissioners Branson, Hill and Presley voting in favor with Commissioner Piñero absent.

NOW, THEREFORE, BE IT RESOLVED that the Planning Board APPROVES Preliminary Plan Amendment No. 11987190C to extend the approved Adequate Public Facilities validity period by 30 months (2.5 years) per Section 50.4.3.J.7.d of the Subdivision Ordinance, with Waiver of the 60 percent requirement of Section 50.4.3.J.7.d.i(c)(2) by modifying Condition 9 of Preliminary Plan Amendment No. 11987190A and adding Conditions 10 and 11 as follows:²

MODIFIED CONDITION:

9. The Adequate Public ~~Facilities~~ (“APF”) review for the Preliminary Plan will remain valid for ~~sixty one (61) months~~ 30 months (2.5 years) from the date of expiration of the prior APF validity period (November 16, 2022) or until May 16, 2025.

NEW CONDITIONS:

10. Before the certification of Preliminary Plan Amendment No. 119871910C, the Applicant must revise the phasing as identified in Preliminary Plan Amendment No. 119871910C.
11. Before the issuance of any permits for Phase III, the Applicant must submit and receive approval for an amendment to Site Plan Amendment No. 81988046F.

BE IT FURTHER RESOLVED that all other preliminary plan conditions of approval for this project remain valid, unchanged, and in full force and effect.

BE IT FURTHER RESOLVED that having considered the recommendations of its Staff as presented at the hearing and/or as set forth in the Staff Report, which the Board hereby adopts and incorporates by reference (except as modified herein), and upon consideration of the entire record, the Planning Board FINDS, with the conditions of approval, that:

² For the purpose of these conditions, the term “Applicant” shall also mean the developer, the owner or any successor(s) in interest to the terms of this approval.

Unless specifically set forth herein, this Amendment does not alter the intent, objectives, or requirements in the originally approved preliminary plan as revised by previous amendments, and all findings not specifically addressed remain in effect.

3. *Public facilities will be adequate to support and service the area of the subdivision.*

d) Adequate Public Facilities Extension

50.4.3.J.7.a.i. The applicant must file an application for extension of an adequate public facilities determination or amendment of a phasing schedule before the applicable validity period or validity period phase expires.

The Application for Preliminary Plan Amendment No. 11987190C was accepted on June 30, 2022, before the APF validity period expiration on November 16, 2022.

- ii. ***The applicant must submit a new development schedule or phasing plan for completion of the project for approval.***

With this Preliminary Plan Amendment and APF extension request, the Applicant proposes to modify the previously approved phasing from 2 phases to 3 phases as follows:

Phase I: up to 491,235 square feet of existing retail space including a potential theatre and a cellar space of 91,772 square feet resulting in a gross floor area of 399,463 square feet.

Phase II: up to 491,235 square feet of development consisting of 439,962 square feet of retail space, and up to 51,273 square feet of office space, including a cellar space of 91,772 square feet, maintaining a gross floor area of 399,463 square feet. The theater may or may not be converted to office space in the future pursuant to this approval, but the footprint of the building will not change whether the theater is used as office space or retail space.

Phase III: completion of the approved maximum development of 739,269 square feet (647,497 square feet of gross floor area) including up to 439,962 square feet of retail space (which includes 91,772 square feet of cellar space), and up to 299,307 square feet of office space.

As the development currently exists today, it is within Phase II: the existing mall and office lobby have been constructed totaling 344,498 square feet of gross floor area

(GFA). State of Maryland Department of Assessments and Taxation (SDAT) records show a total of 436,270 square feet of building, which includes 91,772 square feet of cellar space that by definition is not counted towards GFA.

The Applicant states the APF extension of 30 months (2.5 years) will allow the Applicant to determine how to move forward with Phase III given the changes in market demand. The Application has been conditioned to require the Applicant to update the phasing within the Preliminary Plan sheets and submit a Site Plan Amendment before the start of Phase III.

iii. ***For each extension of an adequate public facilities determination:***

(a) the applicant must not propose any additional development above the amount approved in the original determination;

No additional development is proposed as part of this Preliminary Plan Amendment No. 11987190C, which remains at a maximum of 739,269 square feet (including the cellar space of 91,772 square feet).

(b) the Board must not require any additional public improvements or other conditions beyond those required for the original preliminary plan;

No additional conditions are recommended for additional public improvements with this Preliminary Plan Amendment application. The added conditions are procedural in nature.

(c) the Board may require the applicant to submit a traffic study to demonstrate how the extension would not be adverse to the public interest;

The Applicant is not proposing any additions or modifications to the approved density. A finding for adequate public facilities was made with the approval of Preliminary Plan Amendment No. 11987190A. Projects within the vicinity of the Site requiring transportation impact analysis have included the approved but unbuilt density associated with this Site as a pipeline project, which was incorporated into the background and total future scenarios of those transportation impact studies. The validity period for the Preliminary Plan Amendment is still valid and therefore a transportation impact study is not required as part of the Subject Application.

(d) an application may be made to extend an adequate public facilities period for a lot within a subdivision covered by a previous adequate public facilities determination if the applicant provides sufficient evidence for the Board to determine the amount of previously approved development attributed to the lot; and

The Applicant has provided sufficient evidence for the Board to determine the amount of previously approved development. The lot was approved for a maximum of 739,269 square feet of development including 91,772 square feet of cellar space, for a total gross floor area of 647,467 square feet.

(e) if the remaining unbuilt units would generate more than 10 students at any school serving the development, the Board must make a new adequate public facilities determination for school adequacy for the remaining unbuilt units under the school test in effect at the time of Board review.

Not applicable because the Preliminary Plan Amendment No. 11987190C allows up to 739,269 square feet (647,497 square feet gross floor area) of maximum density for commercial development including retail and office. No residential density was approved or proposed as part of this Amendment Application; therefore school adequacy does not apply.

b. The Board may approve an amendment to the new development schedule approved under Section 4.3.J.7.a.ii if the applicant shows that financing has been secured for either:

i. completion of at least one new building in the next stage of the amended development schedule; or

ii. completion of infrastructure required to serve the next stage of the amended development schedule.

All infrastructure required by Preliminary Plan Amendment No. 11987190A has been constructed and all financing satisfied. These include improvements required by the Montgomery County Department of Transportation (Condition No. 5 of Preliminary Plan Amendment No. 11987190A) related to street standard upgrades to Fenton Street and Ellsworth Drive, sidewalks along Colesville Road, Fenton Street, and Ellsworth Drive, as well as streetscaping amenities along all frontages. These improvements are adequate to serve all future phases as well.

c. Exclusively residential subdivisions. The Board may extend a determination of adequate public facilities for an exclusively residential subdivision beyond the otherwise applicable validity period if the Department of Permitting Services has issued building permits for at least 50 percent of the entire subdivision before the application for extension is filed. The Board may approve one or more extensions if the aggregate length of all extensions for the development does not exceed:

i. 2.5 years for a subdivision with an original validity period of 7 years or less; or

ii. 6 years for a subdivision with an original validity period longer than 7 years.

Not applicable, this approval is not for an exclusively residential subdivision.

d. Nonresidential or mixed-use subdivisions.

i. The Board may extend a determination of adequate public facilities for a preliminary plan for nonresidential or mixed-use development beyond the otherwise applicable validity period if:

(a) the Department of Permitting Services issued building permits for structures that comprise at least 40% of the total approved gross floor area for the project;

Currently, per the State of Maryland Department of Assessments and Taxation (SDAT), the existing square footage of the building totals 344,498 square feet of the approved 647,497 square feet of gross floor area. This totals 53.2% of the total approved gross floor area, in excess of the required 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

Per Finding 4.3.J.7.b.ii above, all infrastructure required by Preliminary Plan Amendment No. 11987190A has been constructed.

(c) the Department of Permitting Services either issued occupancy permits or completed a final building permit inspection for:

(1) structures that comprise at least 10 percent of the total gross floor area approved for the project within the 4 years before an extension request is filed; or

(2) structures that comprise at least 5 percent of the total gross floor area approved for the project within the 4 years before an extension request is filed, if structures that comprise at least 60 percent of the total gross floor area approved for the project have been built or are under construction.

As documented in the Table below, occupancy permits and/or final building permit inspections within the last four (4) years comprise at least 5% of the total gross floor area approved for the project, as required by paragraph (c)(2) above. This is allowed when at least 60% of the total gross floor area of the development has been built or is under construction. The Applicant requests a Subdivision Regulation Waiver to allow this section to be applied to the Project while only 53% of the total gross floor area of the development has been built or is under construction.

Table – Building permit inspections and/or use and occupancy permits issued within the last four years

DPS permit number	Date Issued	Date Finaled	Square Footage	Suite#/Tenant
838042	7/11/2018	9/11/2018	9,715 sf	C-107 (Five Below)
867065	3/13/2019	6/21/2019	3,415 sf	8661
895539	2/25/2020	7/28/2020	3,167 sf	B-103 (Don Pollo)
969785	1/13/2022	8/04/2022	17,506 sf	DSW
969504	5/18/2022	Under construction	13,224 sf	C-101 (Commas)
Total sf of Permits Issued/Finaled			33,803 sf (5.2%)	
Minimum requirement (5% of GFA)			Required 32,375 sf (5%)	
Gross Floor area approved			647,497 sf	
Gross Floor area built			344,498 sf	
% of Gross Floor area built			Required – 60% / Existing – 53.2%³	

The table demonstrates that five building permits have been issued and four building permits have been finaled within the last four (4) years totaling 33,803 square feet or 5.2% of the total approved gross floor area. Further, as discussed below, a Waiver is being requested to reduce the 60% requirement of construction to 53%.

ii. For any development that consists of more than one preliminary plan, the requirements of 7.d.i apply to the combined project. A project consists of more than one preliminary plan if the properties covered by the preliminary plans of subdivision are contiguous and were approved at the same time.

³ The Applicant is seeking a Subdivision Waiver per Section 50.9.3 of the Subdivision Ordinance and discussed below.

Not applicable because the Subject Property is only subject to one preliminary plan, Preliminary Plan No. 119871900, as amended, and is not combined with any other project or site.

iii. The length of any extension of the validity period granted under 7.d.i must be based on the approved new development schedule under 7.a.ii, but must not exceed:

(a) 2.5 years for a subdivision with an original validity period of 7 years or less; or

(b) 6 years for a subdivision with an original validity period longer than 7 years.

This Amendment requests a 30-month (2.5-year) extension of the APF validity period as limited by this Section of the Subdivision Ordinance. If approved, the validity period would be extended from November 16, 2022, to May 16, 2025.

Section 50.9.3 – Subdivision Waiver of Section 50.4.3.J.7.d.i(c)(2)

Section 50.4.3.J.7.d.i(c)(2) requires that, for the APF validity period to be extended, the Department of Permitting Services must have completed the final building permit inspections for at least 5 percent of the gross floor area approved for the project within the last four years for projects with at least 60 percent of the gross floor area built or under construction. As noted above, the Applicant requests a waiver from this requirement to have the project at least 60 percent complete or under construction. The Board finds that the waiver can be granted based on the following findings.

1. Due to practical difficulty or unusual circumstances of a plan, the application of a specific requirement of the Chapter is not needed to ensure the public health, safety, and general welfare.

The existing building, minus the Phase III office tower, is fully built out, and through the COVID-19 pandemic, the Applicant has worked to maintain tenants and renovate as necessary to accommodate a rapidly changing retail environment. The office market, however, is under even more strain and uncertainty given changing remote work and office design evolution. The continuing pandemic and office market uncertainty is exacerbated by rising interest rates and supply chain issues. Under these practical difficulties and unusual circumstances, additional time is necessary to get a sense of future prospects to start construction. This additional time –30 months (2.5 years) of the APF validity – will not adversely impact public health, safety, and welfare as the

existing building and operations have existed for many years and will continue to serve the community.

2. The intent of the requirement is still met.

The intent of the 60% provision is to ensure that buildings are being constructed in a timely manner and to a substantial extent. Ellsworth Place continues to invest in upgrades and modifications to retain and attract tenants in a very uncertain retail climate. While many of these upgrades such as exterior signage and façade improvements are not reflected in the built gross floor area, they are an important part of, and contribute to, Silver Spring's vital downtown. The 53% of approved and built square footage is attributed to the retail component, however, due to market demand, the remaining gross floor area attributed to the office remains infeasible. For these reasons, Staff recommends approval of the waiver as it allows for continued investment as the office tower option is explored.

3. The waiver is:

a. The minimum necessary to provide relief from the requirements.

The request – allowing 53.2% of the approved gross floor area as the threshold rather than 60% - is the minimum necessary to provide relief from the requirements.

b. Consistent with the purposes and objectives of the General Plan.

The waiver is consistent with the General Plan that encourages mixed-use development in downtown, metro-accessible areas. Ellsworth Place is an excellent example of commercial development in difficult times for retail and non-residential buildings. This waiver supports continued investment in a vibrant downtown Silver Spring.

BE IT FURTHER RESOLVED that this Resolution constitutes the written opinion of the Board in this matter, and the date of this Resolution is NOV 30 2022 (which is the date that this Resolution is mailed to all parties of record); and

BE IT FURTHER RESOLVED that any party authorized by law to take an administrative appeal must initiate such an appeal within thirty days of the date of this Resolution is consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules).

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CERTIFICATION

This is to certify that the foregoing is a true and correct copy of a resolution adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission on the motion of Commissioner Hill, seconded by Commissioner Branson, with a vote of 4-0; Chair Zyontz, and Commissioners Branson, Hill, and Piñero, voting in favor of the motion, Commissioner Presley absent, at its regular meeting held on Thursday, November 17, 2022, in Wheaton, Maryland and via video conference.



Jeffrey Zyontz, Chair
Montgomery County Planning Board