



Date of Council Meeting: July 23, 2012

**TOWN OF LEESBURG
TOWN COUNCIL POCKET ITEM**

Subject: Information Item on Proffer Determination for K Hovnanian Homes: Proffer II.B.2. of TLZM-2006-0022, PMW Farms

Staff Contact: Christopher Murphy, AICP, Zoning Administrator

This memorandum is being provided to Town Council as an information item to apprise you of a pending Zoning Administrator's proffer determination that will verify compliance with and fulfillment of a proffered condition to construct specific transportation improvements along Fort Evans Road as part of the development of the PMW Farms project when certain conditions have been met by the project's developer, K Hovnanian Homes.

Issue: K Hovnanian Homes, (the Developer), has requested a proffer determination from the Zoning Administrator regarding proffer II.B.2 of TLZM-2006-0022 PMW Farms, (Attachment 1) specifically; will the Developer be in full compliance with proffer II.B.2 and therefore be allowed to obtain zoning permits for dwelling units beyond the 75th by entering into a Cost Sharing Agreement with Loudoun County for the construction of the Developer's proffered improvements to Fort Evans Road as part of Loudoun County's capital improvement project CPAP-2011-0053?

Recall that as part of TLZM-2006-0022, the Developer proffered to widen Fort Evans Road along the entire frontage of its property including beyond its frontage up to the intersection with Crosstrail Boulevard (State Route 773). Proffer II.B.2 promises completion of said improvements prior to the issuance of the zoning permit for the 75th residential dwelling unit.

The Developer has been notified by Loudoun County of the County's intent to widen Riverside Parkway starting from Crosstrail Boulevard and running east. This project also involves the improvement of the entire Ft Evans Road/Crosstrail Boulevard/Riverside Parkway intersection and Loudoun County intends that these improvements be completed as a single project by the County under the aegis of CPAP-2011-0053.

At the direction of Loudoun County, instead of constructing the proffered improvements to Fort Evans Road that extend beyond the Developer's property into Loudoun County and intersect with Crosstrail Boulevard, the Developer will enter into a Cost Sharing Agreement with Loudoun County whereby the Developer will provide the funding for the proffered improvements to off site Ft. Evans Road with Loudoun County who will then construct those improvements as part of CPAP-2011-0053. Regardless of the fact that the Developer is ready, willing and able to complete the proffered improvements himself, Loudoun County and/or VDoT will not authorize this construction by the Developer, but instead Loudoun County will complete the project itself.

The projected completion date of the improvements under CPAP-2011-0053 is summer 2013. As per the Developer's current absorption rate, it is estimated that the Developer will be ready to apply for the 100th residential zoning permit by spring of 2013. Under the current proffer the Fort Evans Road improvements must be in place prior to the 75th residential zoning permit. It is because of this anticipated

**Pocket Memorandum:
Zoning Administrator Determination
TLZM-2006-0022 Proffer II.B.2
July 9, 2012
Page 2 of 2**

delay, the Developer is seeking a determination that his participation in the Cost-Share Agreement for CPCP-2011-0053 stands as proffer II.B.2 being fulfilled.

Past Practice: In 2002 a similar situation arose with ZM#-110 Kincaid Forest who had proffered to post a performance bond for the construction of that portion of Battlefield Parkway from the intersection with Kincaid Boulevard to the bridge support structure that carries Battlefield Parkway over Tuscarora Creek.

At that time, a construction date for the planned bridge was undetermined. This would have required the developer to post the performance bond and maintain that bond for an undetermined amount of time. The Developer was not obligated to construct the bridge and therefore had no control over the exact location of the proffered improvements as they related to the design and location or timing of the construction of the bridge. As a result of this unusual circumstance, the Town relied on Section 15.2-2299 of the State Code and Town of Leesburg Subdivision and Land Development Regulations Section 13-92(a)(3) that enable a proffer bond to be posted to guarantee construction of the said proffered road improvements. The Kincaid Forest developer then paid a cash payment to the Town in lieu of posting the performance bond.

Determination: An unusual situation exists that makes it impossible for the Developer to comply with Proffer II.B.2 of TLZM-2006-0022 by completing the improvements to Fort Evans Road as a result of Loudoun County's and/or VDOT's refusal to issue permits to authorize construction by the Developer, though being ready, willing and able to begin, as a result of the intent of Loudoun County to complete construction of said improvements under the aegis of its capital improvement project CPAP-2011-0053.

Loudoun County will have the Developer enter into a Cost-Share Agreement whereby the Developer will secure the funds necessary to pay for its proffered improvements with Loudoun County who will then construct said improvements as part of CPAP-2011-0053.

It is the Town Attorney's intention to have Loudoun County's Cost-Share Agreement amended to add the Town as party to the Agreement and to have the Developer's financial guarantee posted with the Town thereby assuring in the event that Loudoun County does not complete those improvements the Town can.

Considering the facts of the situation and following the example established in the Kincaid Forest determination I was then able to make the following determination:

- In order to mitigate a condition that is completely out of the Developer's control that could affect his ability to apply for residential zoning permits beyond the 75th though being ready, willing and able to perform if it was not for Loudoun County's refusal to permit the Developer from constructing proffered road improvements himself;
- So long as the Developer is able to execute the Cost Share Agreement with Loudoun County that joins the Town as the holder of the financial guarantee from the Developer for his portion of CPAP-2011-0053 that includes his proffered improvements specified in Proffer II.B.2 of TLZM-2006-0022; and,
- As part of that Cost Share Agreement the Developer provides the Town with the funds for said proffered improvements for the Town to deliver to Loudoun County upon commencement of construction,

Upon said conditions stated in the July 6, 2012 letter, the Town will then acknowledge that the Developer has fully complied with the Proffer II.B.2 of TLZM-2006-0022.

July 6, 2012

Mr. Mike Irons
K. Hovnanian Homes
4090-A Lafayette Center Drive
Chantilly, VA 20151

RE: Proffer Compliance: TLZM-2006-0011 PMW Farms Proffer II.B.2 Off Site Dedication and Construction

Dear Mr. Irons:

I am in receipt of the request for proffer determination from David Pike, K. Hovnanian Homes, dated May 18, 2012 asking specifically about compliance with Proffer II.B.2 Off Site Dedication and Construction of TLZM-2006-0022 PMW Farms which establishes commitments to obtain off site rights-of-way for and construction of off site Fort Evans Road.

As indicated in Mr. Pike's letter, Loudoun County has incorporated the above mentioned proffered off site Fort Evans Road improvements as part of its capital improvement project known as CPAP-2011-0053 Ft Evans Rd PH 2 & Riverside Pkwy. Under this project K. Hovnanian will enter into a "Cost Share Agreement" with Loudoun County and the Town of Leesburg for the cost of the proffered improvements to Ft Evans Road and Loudoun County will manage and construct the proffered improvements as part of CPAP-2011-0053.

Mr. Pike's letter requests confirmation from this office that once K. Hovnanian Homes enters into the Cost Share Agreement and secures the funds with Loudoun County, which the County will then use to construct the proffered offsite Fort Evans Road improvements in conjunction with the Riverside Parkway widening (CPAP-2011-0053), the Town will consider TLZM-2006-0022 Proffer II.B.2 as being met *after* K. Hovnanian Homes provides evidence to the Town of the executed Cost Share Agreement, proof of funds having been posted, as well as any performance bonds required by the Town having been posted.

My analysis and determination are provided below:

Analysis:

As proffered, prior to the issuance of the 75th residential zoning permit in PMW Farms, K. Hovnanian Homes (the Owner) is obligated to widen Ft Evans Road from the easternmost

boundary of the Property to the edge of River Creek Parkway as a four-lane divided roadway with a five (5) foot wide sidewalk within the dedicated area shown on Sheet 3 of the approved Concept Plan for TLZM-2006-0022.

Mr. Pike's letter of May 18, 2012 indicates that Loudoun County has plans for the widening of Riverside Parkway that involves improvement of the entire Ft Evans Road/Crosstrail Boulevard/Riverside Parkway intersection and Loudoun County intends that these improvements be completed as a single project under the aegis of Loudoun County CPAP-2011-0053. Also, the Virginia Department of Transportation would not approve the improvements to Fort Evans Road as originally envisioned during the rezoning review. As a result, K. Hovnanian Homes is being prohibited from obtaining necessary extra-jurisdictional approvals and permits to begin construction of the proffered improvements for off site Ft. Evans Road under TLZM-2006-0022 Proffer II.B.2 though being ready and able to perform.

At the direction of Loudoun County, instead of constructing the proffered improvements, K. Hovnanian Homes will enter into a Cost Sharing Agreement with Loudoun County whereby K. Hovnanian Homes will secure the funding for the proffered improvements to off site Ft. Evans Road with Loudoun County who will then construct those improvements as part of CPAP-2011-0053. The projected completion date of the improvements under CPAP-2011-0053 is early summer 2013.

It is this projected completion date that causes concern for K. Hovnanian Homes. According to K. Hovnanian Homes' current absorption rates, it is anticipated that they will be in position to apply for their 100th residential zoning permit in spring 2013. Therefore, it appears that the proffered improvements are not anticipated to be completed in time to meet the "prior to the 75th residential zoning permit" condition of Proffer II.B.2.

Determination:

This determination is based in the following findings:

It is Loudoun County's intent to complete the widening of Riverside Parkway including improvements to the Ft. Evans Road/Crosstrail Boulevard/Riverside Parkway intersection shown in CPAP-2011-0053 as a single project administered by Loudoun County.

Loudoun County's CPAP-2011-0053 includes the same improvements to Ft Evans Road proffered to be completed by the Owner (K. Hovnanian Homes) in TLZM-2006-0022 Proffer II.B.2 Off Site Dedication and Construction.

Because of Loudoun County's intention to complete CPAP-2011-0053 as a single project under its administration, Loudoun County will not issue necessary permits to the Owner to commence construction of those proffered improvements even though the Owner is ready, willing and able to begin in time to complete construction prior to the issuance of the 75th residential zoning permit in compliance with Proffer II.B.2.

Instead, Loudoun County will have the Owner enter into a Cost Share Agreement whereby the Owner will secure the funds necessary to pay for the proffered improvements with Loudoun County who will then construct said improvements as part of CPAP-2011-0053.

It is the opinion of the Leesburg Town Attorney-hat Loudoun County's Cost Share Agreement for CPAP-2011-0053 must be amended to add the Town as a party to the Agreement (on the basis that the proffer was made to the Town of Leesburg to mitigate the impact of a development within the Town of Leesburg and the value of the proffer belongs to the Town of Leesburg. Further, the Developer must post a financial guarantee with the Town to assure that in the event that Loudoun County does not complete those improvements the Town will have the means to do so.

Based on the totality of the information available to me and the findings provided above I find it reasonable make the following determination:

So long as the Owner is able to provide evidence satisfactory to the Town of an executed Cost Share Agreement between Loudoun County, the Town and the Owner for the Owner's portion of CPAP-2011-0053 that includes construction of Ft. Evans Road improvements specified in Proffer II.B.2 of TLZM-2006-0022, and the Owner can provide evidence satisfactory to the Town that funds for said proffered improvements have been posted with Loudoun County as well as any performance bonds are posted as required by the Town, the Town will then acknowledge that the Owner has fully complied with the conditions specified in Proffer II.B.2 of TLZM-2006-0022.

The Owner is ready, willing and able to perform the road improvements specified in Proffer II.B.2 of TLZM-2006-0022. However, for reasons of economy and practicality Loudoun County desires that the Owner incorporate its improvements into a project that will complete all planned Fort Evans Road improvements, including improvements beyond those the Owner has proffered to complete. Otherwise, Loudoun County will not give its approval to the Owner's construction drawings. In order to mitigate a condition that is completely out of the Owner's control that could affect the Owner's ability to apply for residential zoning permits beyond the 75th permit, and to achieve the ultimate Fort Evans Road improvements in a more timely and fiscally responsible manner, the Town will acknowledge that the Owner has fully complied with the conditions specified in Proffer II.B.2 of TLZM-2006-0022 so long as the Owner does each of the following:

1. Executes a Cost Share Agreement with Loudoun County and the Town for the Owner's portion of CPAP-2011-0053 that includes construction of Ft. Evans Road improvements specified in Proffer II.B.2 of TLZM-2006-0022; and
2. As part of that Cost Share Agreement the Owner provides the Town with the funds for said proffered improvements to be paid to Loudoun County upon commencement of construction; and
3. The Owner must post a financial guarantee with the Town to assure that in the event that Loudoun County does not complete those improvements the Town will have the means to do so.

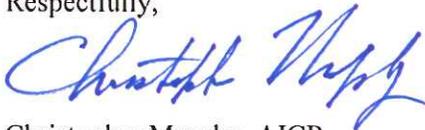
Right of Appeal:

Please note that this response is not a determination as that term is used in Sec. 15.2-2307 of the Code of Virginia, as amended, however, this response is a determination as that term is used in Sec. 15.2-2301 of the Code of Virginia, as amended.

Therefore, be advised that because this letter serves as an interpretation with regard to proffers, §15.2-2301 of the 1950 Code of Virginia, as amended, and Zoning Ordinance Section 3.15 provide you the opportunity to appeal this decision to the Town Council within thirty (30) days from the date of this written notice by filing the appeal with the Zoning Administrator and the Clerk of Council. This interpretation shall be final and unappealable if not appealed within thirty (30) days. To file an appeal you must (1) complete an application form available at the Department of Planning, Zoning and Development counter, second floor, 25 West Market Street, Leesburg, Virginia 20178; (2) include a copy of this notice; and (3) provide a written statement specifying the grounds for your appeal. **The appeal must be filed with the Zoning Administrator and the Clerk of the Town Council no later than thirty (30) days from the date of this written notice.**

Please feel free to contact me if you have any questions or are in need of any further assistance. I may be reached by telephone at (703) 737-7009, or via email at cmurphy@leesburgva.gov.

Respectfully,



Christopher Murphy, AICP
Zoning Administrator

ATTACHMENT 1. May 18, 2012 Request Letter from David Pike

cc: Jeanette Irby, Town Attorney
 Susan Berry Hill, Director, Dept of Planning & Zoning
 Brian Boucher, Deputy Director, Dept of Planning & Zoning
 Wade Burkholder, Deputy Zoning Administrator
File:



4090-A Lafayette Center Drive
Chantilly, Virginia 20151
703.885.7200



VIA Email & US Mail

May 18, 2012

Mr. Christopher Murphy, Zoning Administrator
Department of Planning and Zoning
25 West Market Street
Leesburg, Virginia 20176

**RE: TLZM 2006-0022, PMW Farms
Proffer Regarding Fort Evans Road Offsite Dedication and Construction**

Dear Mr. Murphy,

Pursuant to item II. B. 2 of the Proffer Statement associated with the approved rezoning #TLZM 2006-0022, PMW Farms, K Hovnanian is obligated to utilize its best efforts to acquire the necessary right-of-way and off-site easements for Off-Site Fort Evans Road prior to the issuance of the 75th residential zoning permit. If said right-of-way is acquired we are then required to construct to substantial completion Off-Site Fort Evans Road such that it becomes a four-lane divided roadway with a five (5) foot wide sidewalk prior to the issuance of the 100th residential zoning permit.

As you are aware, we are working with Loudoun County in the ratification of a Cost Share Agreement whereby the County would manage and construct our proffered road improvements in conjunction with the widening of Riverside Parkway under the Loudoun County CPAP 2011 0053. Pursuant to the terms of the Agreement, we would be required to post security with the County to complete the Fort Evans Road Improvements and release payments which would draw down on the security posted throughout various stages of completion. I have attached a copy of the Agreement for your review. To date, we have met with County Staff and the County Attorney on several occasions to address their concerns and have obtained final approval of the Agreement. It is my understanding that the Agreement has been placed on the Administrative Items Agenda for Board review and we anticipate to have approval shortly.

Currently, the Riverside Parkway and Fort Evans Road Improvements site plan is in the review process with the County and it is estimated that it will be approved in the June or July timeframe. The portion of the site plan for the improvements within the Towns' jurisdiction has been approved pending the posting of the bonds and recordation of the right-of-way dedication and easements. K Hovnanian has acquired the right-of-way dedication and easements from the Central Loudoun Little League and we have submitted them to the Town for signatures. Upon receipt we will have the documents recorded. For the portions under the control of the Potomac Station HOA, we have obtained and recorded the necessary easements and dedication that are located within the Town jurisdiction. Potomac Station HOA has also agreed to grant the necessary easements for the portion within the County jurisdiction, the easement plats and deeds have been

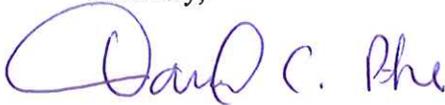
submitted to the County and I anticipate approval and recordation by the end of June. In speaking to the County, it is my understanding that the project will go out to bid in August and should be fully contracted by September or October. It is anticipated that the construction for the road improvements may begin as early as November 2012 with a scheduled completion date in the early summer of 2013.

Currently, our projected absorption pace for the PMW Farms project has us acquiring our 100th residential zoning permit in the spring of 2013 which is somewhat prior to the anticipated completion date of the road improvements based upon the schedule provided above. As we had previously discussed, K Hovnanian is diligently pursuing the completion of the Fort Evans Road improvements but we are dependent on the County in completing the Riverside Parkway improvements in order to satisfy our proffered obligations.

At this time I am requesting confirmation from the Town of Leesburg that once K Hovnanian Homes enters into a Cost Share Agreement and secures the funds with Loudoun County whereby the County would construct the Offsite Fort Evans Road improvements in conjunction with the Riverside Parkway widening they would consider our proffer obligation as being met. K Hovnanian would be required to provide evidence of an executed Agreement and proof that the funds for the Offsite Fort Evans Road improvements have been posted with the County as well as any performance bonds required by the Town of Leesburg.

If the terms of this letter meet with your approval I would appreciate your acknowledgement by signing where indicated below. Should you have any questions or require additional information feel free to contact me or Mike Irons at (301)683-6270. Thank you in advance for your assistance with this matter.

Sincerely,



David C. Pike, K Hovnanian Homes

Agreed and Accepted:

Christopher Murphy, Town of Leesburg Zoning Administrator

cc: Mike Irons, K Hovnanian Homes

Enclosures