



TOWN OF MIDDLEBURG

Loudoun County, Virginia

MEMORANDUM

TO: Chairman Cooke and Members of the Planning Commission

STAFF CONTACT: William M. Moore, Deputy Town Manager

MEETING DATE: July 27, 2020

SUBJECT: SD 20-01 - Request of MIDDLEBURG LAND 1 LLC for approval of the preliminary plat of subdivision for 38 lots on approximately 570.873 acres of land consisting of Parcels 503-46-4523, 502-28-1672 and 502-39-8957 zoned Agricultural Rural-2 (AR-2)

Background

The application under consideration is a preliminary plat of subdivision for 38 lots on approximately 570.873 acres of land which is located generally to the north of US 50, to the east of Sam Fred Road, and to the west of Carters Farm Lane. The proposal consists of 28 cluster lots and 10 rural economy lots as permitted in the Loudoun County AR-2 Cluster Subdivision Option. This by-right option allows for the subdivision of a tract of land with a more compact residential design plus one or more large lots suitable for rural economy uses and/or common open space. This option allows for a maximum yield of one dwelling unit per 15 acres. The subject land is wholly outside the corporate limits of the Town of Middleburg; a portion of the land, and the majority of the proposed lots, is within the Town of Middleburg extraterritorial Subdivision Control Area.

Per Ordinance, Cluster Lots using onsite water and wastewater (as the proposed lots in this subdivision do) must have a minimum lot size of 40,000 sf (just under one acre) and a maximum size of 4 acres. The applicant is proposing 28 Cluster Lots ranging in size from 2.0 to 3.9 acres, with an average lot size of 3.0 acres (the smallest proposed lot is more than double the minimum required size; the average is more than three times the minimum). The minimum lot size for Rural Economy Lots is 25 acres; there is no maximum size. The applicant is proposing 10 Rural Economy Lots ranging in size from 25.2 to 69.5 acres. A minimum of 70% of the gross land area of the development must be comprised of Rural Economy Lots or a combination of a Rural Economy Lots and Common Open Space. In addition to 414.38 acres of land from the 10 combined Rural Economy Lots, a Common Open Space Parcel of 69.6 acres is also proposed. In total, this equates to 483.98 acres of land, or 84.8% of the gross land area.

As the Commission is aware, the preliminary plat was refiled in January 2020, after the Commission denied the initial application, due to certain deficiencies in the initial preliminary plat in September 2019. With the resubmission, the applicant initially waived the otherwise mandatory timeline in which the Commission would need to act for this refiled application, thus allowing staff and referral agency reviews to proceed in a thorough, iterative process in order to more substantively resolve any outstanding issues and comments prior to the applicant again requesting action on the preliminary plat.

On June 26, Town staff was notified by Loudoun County's Land Development Division Manager, Scott Berger, that the County is prepared to approve the preliminary plat subject to three conditions. An analysis of those conditions is provided in the following section. Loudoun County preliminary subdivision approval is handled administratively, whereas the Middleburg Planning Commission is the approval authority for preliminary plats

in the Town and within its extraterritorial Subdivision Control Area. As the subject land area is both partially within and partially outside of this Subdivision Control Area, both jurisdictions must approve the preliminary plat. The Town used its consulting engineer (Bowman) to evaluate the preliminary plat based on the Middleburg Subdivision Ordinance, as well as to provide cursory analysis on compliance with the controlling Loudoun County Zoning Ordinance and Facilities Standards Manual. To date, in addition to multiple reviewing agencies within Loudoun County, all comments pertaining to the preliminary plat issued by Town staff, its consulting engineer and the Virginia Department of Transportation have been addressed and resolved.

Subdivision approval will take place in three distinct stages: the preliminary plat (this current application), construction plans and profiles (CPAP), and final/record plat. Preliminary plat approval does not authorize the construction of improvements within the subdivision. A preliminary plat is a schematic representation of the land proposed to be divided, but is not in a final form for recording. Among other things, a preliminary plat allows the locality to review the proposed subdivision for compliance with the applicable regulations before the subdivider has all of the necessary engineering work performed, which is included in the CPAP and final plat.

Loudoun County Conditions of Approval

As referenced above, the June 26 notification from the County that it is prepared to approve the preliminary plat identified three conditions to which the approval will be subject (see Attachment 1), as follows:

1. *In concert with the comment letter from (the County), dated June 22, 2020, the accompanying construction plans and profiles shall fully comply with FSM §2.330.A by providing the required fire tanks. Tanks shall be depicted on the construction plans and profiles, the cost shall be included in the bond estimate, and locations and design shall be approved by the Fire Marshal's Office prior to approval of the construction plans and profiles.*

Town staff comments:

As there is no centralized water system to provide fire protection (through interconnected fire hydrants, for example), the subdivision will provide for storage tanks or other water sources and "dry hydrants" that can extract from these water sources in order to meet fire protection requirements. Earlier iterations of the plat showed proposed tank locations appropriately serving the Cluster Lots, but not the Rural Economy Lots. As of the last County review, two additional tank locations are required to serve Lots 29 & 32, plus one additional dry hydrant to pull water from an existing pond to serve Lot 34. The County will require these to be addressed during the subsequent, more technical CPAP stage.

2. *Prior to approval of the accompanying construction plans and profiles, the applicant shall comply with all requirements contained within the referral memo written by Dr. Steve Thompson, Department of Planning and Zoning, dated June 3, 2020.*

Town staff comments:

The referenced memo is that of County Archaeologist Dr. Steve Thompson (see Attachment 2) pertaining to the associated Phase I Cultural Resources report. There are three recommendations that Dr. Thompson has made that the County will require to be satisfied during the CPAP stage.

- a. See memo comment #5. There is a derelict historic building (referred to as Nellie Church House) and an adjacent archaeological site on the property. Previous comments from the County Archaeologist recognized that these are located outside of the limits of construction-related disturbances, however noted that a planned walking/equestrian trail along a section of an Open Space Parcel will pass within 150 feet of the site. Dr. Thompson previously suggested including some measures to make these sites less accessible to those who might be using the trail and potentially want to venture off and explore. The applicant addressed this in the 3rd submission by proposing enclosure of the site with a three-board fence. This additional protection is satisfactory for the preliminary plat stage. The County

Archaeologist now recommends that a more intense (Phase II) study of the site be conducted so that it may be better documented and recorded. The County will require this documentation to be completed prior to CPAP approval.

- b. See memo comment #6. There are existing records (V-CRIS site forms) with the Virginia Department of Historic Resources for historic resources on the property that have been previously identified and recorded. The County Archaeologist previously recommended that certain V-CRIS site forms be updated based on research findings from the completed Phase I survey. However, when this was completed, there was an inconsistency between the way a barn was documented on the VCRIS site form as a primary resource and the way it is referred to in the Phase I survey as a secondary resource. The recommendation is that there needs to be consistency in the way by which these sites are recorded. The County will require this documentation to be squared prior to CPAP approval.
- c. See memo comment #10. Information that was discovered in the research during the Phase I report related to the resource being referred to “Nellie Church House” suggests that this may not be the most appropriate name to which it should be referred. The County Archaeologist recommends that the VCRIS site form be updated to include the findings of the additional research that suggests “Mt. Airy” may be a more appropriate name. The County will require the VCRIS form to be appropriately updated prior to CPAP approval.

In the time since the County indicated its intention to conditionally approve, the applicant has since prepared a Draft addendum to the Phase I Cultural Resources Report (see Attachment 3) in response to Dr. Thompson’s memo to address these conditions. That addendum has been submitted for to the County review.

- 3. *Prior to the approval of the accompanying construction plans and profiles, the applicant shall record the offsite Ingress/Egress Easement identified as Highland Estate Lane that crosses PIN #502-48-6535 currently owned by Traveller’s Rest, LLC.*

Town staff comments:

A related Boundary Line Adjustment (BLA) application was previously underway that would have incorporated a separate parcel fronting on Sam Fred Road into the land subject to the preliminary plat application. One of the proposed roads serving as access to the subdivision will traverse this lot. The BLA has since been withdrawn and the lot will remain separately platted and outside the area of land subject to this application. As such, an Ingress/Egress Easement will need to be dedicated over this parcel and recorded. (See Attachment 4; parcel in yellow will remain - easement will be dedicated over it.) The County will require this to be recorded prior to CPAP approval.

Water Resources

The Commission has received many comments pertaining to water resources, including the availability of water to meet the needs of the 38 proposed dwellings, concerns on potential drawdown of water from surrounding wells (inc. the Town’s source water), and speculative concerns related to uses - and the water that those uses might require - that may be introduced in the future on the Rural Economy lots or on land surrounding the subdivision. A private citizen contracted with an outside firm (aquafUSION) to conduct a review of the Hydrogeologic Study by EGGI dated February 2019 (see Attachment 15) that was submitted by the applicant and reviewed and approved by Loudoun County. The aquaFUSION review (see Attachment 5) raised some questions as to the methodology and contents of the Hydrogeologic Study. Town staff reached out to County staff regarding the aquaFUSION letter. The County gave a cursory response that the Report was “prepared by a certified professional, and reviewed by a third-party certified professional. It was found to be compliant within the parameters established in the Loudoun County Facilities Standards Manual.”

Subsequent to the Commission's June 29 meeting during which Commissioners expressed a desire to have a more detailed response as to the questions raised by aquaFUSION, Town staff again reached out to County staff and made that request. The County declined to give a more detailed response and reiterated its previous statement that the Report "was determined, by third-party experts, to meet all requirements."

Given the County's response, Town staff then worked through its own consulting engineer (Bowman) to commission an independent review of the Hydrogeologic Report and, in particular, the questions raised by aquaFUSION. While awaiting this review, EGGI (the original preparer of the Hydrogeological Report) prepared and submitted its own response on July 14 (see Attachment 6).

The review commissioned by the Town through Bowman was completed by its subconsultant Cardno on July 17 (see Attachment 7). Staff has reviewed the results and discussed with our consulting engineer. In summary:

- On points 1, 2, and 5 of the aquaFUSION letter, Cardno found that the EGGI Report met the Facilities Standards Manual (FSM) requirements. Cardno opined that EGGI could have done more detailed modeling along with additional analysis, but the FSM requirements were met.
- On points 3 and 4, Cardno found that EGGI did not completely meet the FSM requirement for mapping the contours. (The relevant data is present in the report; however, it was not mapped per the FSM requirement.) EGGI explained in their July 14th response why they believed it did not make sense to meet the FSM requirements for these two points. Upon discussion with our consulting engineer, it is reasonable to believe that the County felt the intent of the FSM requirements were met (as per EGGI's response), however this is speculative. It is difficult to say if that is the reasoning that was employed absent a more detailed response from the County.

As presented, the findings of the EGGI Hydrogeologic Report are very clear as to both the availability of water to easily meet the needs of the 38 lots and of lack of impacts/drawdown on surrounding properties and wells. Any concerns about water requirements for future uses on the Rural Economy lots or other surrounding land would need to be evaluated by the appropriate processes and officials at the time of such proposals. The pertinent question is whether the methodology that went into the study and provided the relevant data to support these findings was appropriate per the established requirements of the FSM. Points 1, 2 and 5 of the aquaFUSION letter are geared toward the methodology and were found to be in compliance with the FSM. Our independent reviewer believes more detailed modeling could have been done, but this point speaks to whether the FSM requirements are stringent/detailed enough, not to whether the applicant met the requirements. Points 3 and 4 relate to the method in which the data is presented in the report, not to whether the methodology was appropriate.

On July 22, the applicant submitted a response letter, with accompanying exhibits, to the Cardno review (see Attachment 17). The additional exhibits, according to the response, now provide the mapping that was previously not included (referenced above as points 3 and 4). As of the publishing of this memo, staff is reviewing with our consulting engineer and will report our findings to the Commission.

Ultimately, the review and approval of the Hydrogeologic Study required at the preliminary plat stage is the responsibility of the County. Per Ordinance, the determination that applicable County requirements have been met is done by review of such application by the appropriate County officials, even when the site is within the Town's extraterritorial subdivision control area. The County has already accepted and approved the Hydrogeologic Study.

Section 4-900 of the Loudoun County Zoning Ordinance

Several of the written comments received in advance of the hearing from organizations and individuals include a statement that Middleburg “is protected under Section 4-900 of the current Loudoun County Zoning Ordinance addressing Village Conservancy Areas” or include other similar references to § 4-900. The referenced section pertains to Loudoun’s PD-CV Planned Development-Countryside Village Zoning District. This is a Special District that land may potentially be rezoned to in the County’s Transition Policy Area in order to provide for new, compact, moderately dense development. One element of the PD-CV District is a “Village Conservancy Area” which is open space surrounding the dense development and buffering it from neighboring properties. This Zoning Ordinance section/Zoning District has no applicability or bearing on the subject land, the Middleburg area, or the greater Rural Policy Area.

Ministerial function, not a land use policy decision

Localities variously assign subdivision plat review and approval to the locality’s designated subdivision agent (as does Loudoun County), to the Planning Commission or to the governing body itself. *1991 Va. Op. Atty. Gen. 68*. The Middleburg Subdivision and Site Plan Ordinance designates the Planning Commission as the approval authority for preliminary plats within the Town, as well as within its extraterritorial subdivision control area. The Commission’s consideration of the preliminary subdivision plat is not a land use policy decision. [A Subdivision Ordinance may not include provisions that effectively allow a locality to make a land use policy decision when considering a subdivision plat. *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999).]

If a subdivider has complied with all applicable laws, the approval of a subdivision plat is a ministerial function. *Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc.*, 216 Va. 582, 221 S.E.2d 534 (1976). A ministerial function is performed according to legal authority, established procedures, or instructions; it does not involve discretion or the exercise of agent’s (the Commission’s) own judgment.

The applicant’s counsel, Nicholas V. Albu of Reed Smith LLP has submitted a letter requesting approval of the application and citing some additional case law regarding subdivision approval being a ministerial and non-discretionary function (see Attachment 8).

Recommendation

Staff recommends that the Commission conduct the public hearing as advertised and in accordance with its adopted Public Hearing Procedures (see Attachment 9). As part of those procedures, the Chair may, at his discretion, establish time limits for speakers during the hearing.

Subsequent to the hearing, the Commission should deliberate on the application on its technical merits. During its deliberation, the Commission may ask questions of staff and the applicant if further clarification on any issues is necessary.

The Commission may wish to globally address some concerns that have been expressed in written comments received to date (see Attachments 10-13) and others that may be presented during the hearing that are of a non-technical nature (i.e. that do not speak to the compliance of the preliminary plat to the associated regulations) such as general opposition to clustered development, potential improvements needed in the County’s associated development regulations, concerns related to how such development might change the character of Middleburg, etc. If it chooses to address or have dialogue on such concerns, the Commission should be clear in bifurcating its discussion of any such non-technical considerations from its deliberation on the ministerial action of plat approval. The Planning Commission may also choose to provide formal input to the Town Council or Loudoun County Board of Supervisors, expressing its desire to see certain policy changes implemented in the County’s development policies and regulations.

Based on the applicant successfully addressing all previous review comments from Town staff, the Town's consulting engineer, and VDOT, and based on the County's June 26 notification that it is prepared to approve the preliminary plat subject to three limited conditions, **staff recommends the following motion:**

I **MOVE** that the Middleburg Planning Commission conditionally approve the request of MIDDLEBURG LAND 1 LLC for approval of the preliminary plat of subdivision for 38 lots on approximately 570.873 acres of land consisting of Parcels 503-46-4523, 502-28-1672 and 502-39-8957 zoned Agricultural Rural-2 subject to the applicant satisfactorily addressing the following three conditions contained in the June 26 notification from Loudoun County:

1. In concert with the comment letter from (Loudoun County), dated June 22, 2020, the accompanying construction plans and profiles shall fully comply with FSM Section 2.330.A by providing the required fire tanks. Tanks shall be depicted on the construction plans and profiles, the cost shall be included in the bond estimate, and locations and design shall be approved by the Fire Marshal's Office prior to approval of the construction plans and profiles.
2. Prior to approval of the accompanying construction plans and profiles, the applicant shall comply with all requirements contained within the referral memo written by Dr. Steve Thompson, Loudoun County Department of Planning and Zoning, dated June 3, 2020.
3. Prior to the approval of the accompanying construction plans and profiles, the applicant shall record the offsite Ingress/Egress Easement identified as Highland Estate Lane that crosses PIN #502-48-6535 currently owned by Traveller's Rest, LLC.

"Satisfactorily" means to the reasonable satisfaction of the locality or department submitting the comment. *(end draft motion)*

Alternatively, a motion to disapprove must state the reasons for the disapproval and state what corrections or modifications to the plat will permit its approval. *Virginia Code § 15.2-2260(C)*. Such reasons for disapproval must only include express requirements of the applicable regulations as grounds for disapproval. A motion to disapprove could read:

I **MOVE** that the Middleburg Planning Commission disapprove the request of MIDDLEBURG LAND 1 LLC for approval of the preliminary plat of subdivision for 38 lots on approximately 570.873 acres of land consisting of Parcels 503-46-4523, 502-28-1672 and 502-39-8957 zoned Agricultural Rural-2 for the following reasons:

1. (Reason for disapproval - express requirement of applicable regulation not met)
2. (Reason for disapproval - express requirement of applicable regulation not met)
3. etc.

In order to permit approval, the following corrections or modifications to the plat must be made:

1. (correction or modification)
2. (correction or modification)
3. etc.

(end draft motion)

Attachments:

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|---|---------------------------------------|
| 1. Loudoun Co - final comments - conditions of approval | 9. Public Hearing Procedures |
| 2. County Archaeologist memo | 10. Consolidated public comments |
| 3. Draft addendum to Cultural Resources report | 11. Goose Creek Association letter |
| 4. Exhibit - no BLA | 12. LCPCC Exec. Comm. letter |
| 5. aquaFUSION letter | 13. Mosby Heritage Area Assoc. letter |
| 6. EGGI response to aquaFUSION letter | 14. Preliminary Plat Set |
| 7. Cardno review | 15. Hydrogeological Report |
| 8. Reed Smith letter | 16. Phase I Cultural Resources Report |
| | 17. EGGI response to Cardno review |

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If you have any questions or require additional information regarding this report, please do not hesitate to contact Will Moore by phone at (540) 687-5152 or by email at wmoore@middleburgva.gov