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: August 10, 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

As noted at the July 27 meeting, Loudoun County is prepared to approve the preliminary plat subject to three limited conditions. In addition to multiple reviewing agencies within Loudoun County, all comments pertaining to the preliminary plat issued by Town staff, the Town's 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 the necessary engineering work performed, which occurs during the CPAP and final plat stages. Per Ordinance, the Town is an approving authority for the both the preliminary and final plats for land within its extraterritorial subdivision control area. The County is the sole approving authority for the CPAP. However, in response to concerns stated by the Commission about not having a role in the CPAP, the applicant has offered - in an email dated August 5 (see Attachment 6, bullet number 3) - to copy the Town on each submission of the CPAP to the County and to be open to discussion with the Town on any desired enhancements. Once the CPAP is approved by the County, the Town will be a reviewer of the final/record plat, and the Commission will be required to take action on the final/record plat.

The Commission conducted a Public Hearing on the preliminary plat at its July 27 meeting. Following the Hearing and a period of deliberation, the Chairman requested of the applicant as to whether he would be agreeable to the Commission tabling the item in order to have time to address some concerns. The applicant verbally consented to a tabling of the item for up to two weeks. The intent of the additional two weeks was to give the opportunity to further discuss any concerns that Commissioners may have and to give the applicant the opportunity to submit clarifying facts to the Commission.

Water Resources

Prior to and during the Hearing, the Commission 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 (including 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.

The County has reviewed and approved the required Hydrogeological Study associated with the application. Although the Ordinance clearly states that it is the responsibility of "appropriate County officials" to determine compliance of the application with County requirements, even when the site is within the Town's extraterritorial subdivision control area, the Town also conducted an independent review due to questions that had been raised by a third party and due to the level of public concern being stated for water resources. The Town's own independent review concluded that the County's requirements have been satisfied. The findings of the Hydrogeologic Study are very clear as to both the availability of water to easily meet the needs of the 38 lots and the lack of impacts/drawdown on surrounding properties and wells. In fact, the Study shows that, even in drought conditions, there will be significantly more water available than needed.

Subsequent to the hearing, the preparer of the Study - EGGI - provided a document that provides a more concise summary of the Study's findings to help clarify for the Commission (see Attachment 1). Also, in response to a query from the Chairman as to the perceived adequacy of the County's requirements, EGGI provided a document in response opining that the County's hydrostudy requirement "was and remains the standard that other Counties and States have tried to emulate" (see Attachment 2).

Again, the review and approval of the Hydrogeologic Study required at the preliminary plat stage is the responsibility of the County. The County has already accepted and approved the Hydrogeologic Study.

Middleburg Subdivision Ordinance requirements (13) and (21)

During the hearing on July 27, a speaker - Attorney Stephen Price - claimed that the application failed to meet two requirements of the Middleburg Subdivision Ordinance and that the Plat should be disapproved as a result. Mr. Price provided his comments in written form to staff (see Attachment 3). During the deliberation that followed, staff gave a brief explanation as to why Mr. Price's claims were inaccurate. The following is a more detailed explanation. The two requirements he referenced were Sections 4.2.4 B (13) and (21), which are as follows:

B. All preliminary plats shall contain the following information:

(13) Preliminary layout of provisions for collecting and discharging surface drainage.

The requirement at this stage is for **preliminary** layout. (Again, the preliminary plat is not the stage where full engineering must be provided.) The initial submission by the applicant in 2019 did not meet the requirement in subsection (13) and this deficiency was noted in a review comment by the Town's consulting engineer. Staff and the consulting engineer met with the applicant's engineer to discuss the first round of review comments, including this specific item and how it would need to be addressed. The second submission included locations of proposed culverts, provided directions of surface flow and outfall, and included a typical lot detail showing the ditch section. This fully satisfied the requirement for preliminary layout in subsection (13). The design of stormwater ponds and associated best management practice devices is an engineering requirement for the CPAP stage, not the preliminary plat.

(21) Location of approved well sites, if applicable.

Mr. Price argued that this requirement was not met because wells have not already been approved and installed for all 38 proposed lots. This is an incorrect interpretation of the requirement. The requirement is to show the location of approved wells that already exist on the property. This requirement ensures that the general layout of the proposed development would avoid conflict with any existing wells. It is unreasonable to interpret that all wells for a development would need to be permitted and installed prior to applying for a

preliminary plat of subdivision for the land. All approved well sites on the property, including the 11 test wells that were installed to meet the hydrogeological testing requirements, are accurately shown on the plat; the requirement of subsection (21) is fully satisfied.

Future Uses on the Rural Economy Lots

There was discussion during the July 27 Hearing and subsequent deliberation regarding potential future uses, in particular commercial ones, on the Rural Economy Lots. The property is subject to the associated use regulations for the AR-2 District per the Loudoun County Zoning Ordinance (see Attachment 4). The Town does not and cannot control the use of the land outside our corporate limits. While the preliminary plat proposes only single family detached dwellings, other uses could potentially be established in the future subject to compliance with the County's requirements. Still, the applicant expressed a willingness during discussion with the Commission on July 27 to consider limiting future uses on the lots.

In a letter of the following day (July 28; see Attachment 5), the applicant stated that he has voluntarily agreed to limit the majority of approved uses and that he will record the uses not allowed in covenants running with the land with the final/record Plat. (Again, the Commission will be an approving authority for the final plat.) In a subsequent email and attachment dated August 5, the applicant includes an enumerated list of 35 uses to potentially be excluded (see Attachment 6, bullet number 1 and the following page). The Commission should seek and heed advice from the Town Attorney regarding the extent to which it should discuss use limitations with the applicant.

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.

Recommendation

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:
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> 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:

1. EGGI response to July 27 PC meeting
2. EGGI response to adequacy of County regs
3. Price memo re: S.O. requirements
4. Loudoun County ZO - AR-2 excerpt
5. July 28 letter from Applicant
6. August 5 email from Applicant
7. July 27 agenda with linked attachments

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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