

MEMORANDUM

TO: County Council

FROM: Planning Commission

DATE: June 6, 2013

RE: Report and Recommendation on Proposed Amendments to the 2009 Subdivision Ordinance

Summary:

The current Berkeley County Subdivision regulations were adopted by the County Council on July 30, 2009 and became effective on September 1, 2009. As the Subdivision Regulations should be considered a living document staff and other professionals continue to discuss ways to improve the regulations. The amendment being proposed is the result of comments made at a Roundtable meeting that staff holds on a quarterly basis with all interested individuals and groups. The idea was proposed as Jefferson County introduced a Bond Tolling policy a few years ago and it was requested that Berkeley County consider a similar policy.

Staff presented the concept to the planning commission on at least two occasions and the commission felt the idea was worth consideration. The option is not one that is expected to be utilized extensively. In Jefferson County approximately eight projects have utilized the provisions, while staff has determined at least two projects would be eligible in Berkeley County. With the planning commission determination that the idea should be given consideration, staff drafted language following the model used in Jefferson County for two changes to the 2009 Subdivision Regulations and presented the language to the Roundtable at their meeting in April. Staff then revised the language taking into consideration suggestions made by the planning commission and Roundtable. This language was presented to the Council at their meeting on April 25, 2013 at which time the Council set the date and time for tonight's public hearing in accordance with Section 1209 of the regulations.

There are two parts to the proposed amendments dealing with Bond Modifications. First, is a new Section 602.1.1, which would permit a developer to request of the Planning Commission to modify their bonding obligation prior to the "start of construction." At the Roundtable meeting, a question was asked as to what constituted "start of construction." In response, staff added the following into the proposed language: start of construction, which means: the installation of any water, sewer, gas, electric, roads or stormwater management facilities.

In response to another comment another modifications was made to add a provision for obtaining an extension to the request. The proposed amendment, as presented, calls for the agreement to be

for a period of four years, with the ability to request a one-time amendment for two additional years upon signing a new agreement with the County.

The second part of the proposed amendment is the adding of Appendix H. This appendix will be the language of the agreement a developer will have to sign and record if they desire to utilize the Bond Modification provisions. The language of this document is essentially that utilized by Jefferson County as part of their program. The language has been reviewed by Mr. Bentley, who suggested a few minor changes to the wording. This agreement requires, among other things, the developer to post a \$10,000.00 stabilization bond for the project, provide the county with a merger deed combining the property into its original configuration, and requires the posting of a new bond based on prevailing rates prior to the start of any construction. The agreement will be recorded in the Office of the County Clerk.

In accordance with the regulations, the proposed amendments have been advertised for at least thirty days. During this time the amendments were forwarded to the planning commission for a report and recommendation. The planning commission took up the proposals at their regular meeting on May 6, 2013.

RECOMMENDATION;

At the conclusion of their discussions, the planning commission voted unanimously to recommend to the Council the approval of the proposed text amendments with one change to 602.1.1. The planning commission recommended that language be added to specifically exclude the installation of stabilized construction entrances from the items constituting the “start of construction.” This change has been incorporated in the proposed language before the Council.

(More information on next page)

Section 602.1.1 Modification of Bonding Obligation

A developer of a subdivision may request a modification of their bonding obligation for an approved project (development or phase) for which a surety has been posted prior to the start of construction, means: the installation of any water, sewer, gas, electric, roads or stormwater management facilities, but does not include stabilized construction entrances. The request would relieve the developer of the requirement for posting the surety until such time as the development/phase starts construction of the infrastructure improvements and a new surety is posted in accordance with Section 602.1. If the Planning Commission decides it is in the best interest of the County, the developer shall enter into a binding agreement prepared by the County regarding bonding obligations with the County (see Appendix H). Said agreement shall be for a period of four years, but maybe amended one-time with a new amended agreement for up to an additional two years.

(More information on next page)

**AGREEMENT REGARDING BONDING OBLIGATIONS AND
DECLARATION OF COVENANT, CONDITIONS AND
RESTRICTIONS**

Subdivision name

THIS AGREEMENT REGARDING BONDING OBLIGATIONS AND DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS (this “Declaration”) is made and entered into as of the Date, by developer name (“Declarant”), and the **PLANNING COMMISSION OF BERKELEY COUNTY, WEST VIRGINIA** (the “Planning Commission”).

WHEREAS, Declarant is the owner of a certain tract of land in Berkeley County, West Virginia, legally described in the deed found recorded in the Berkeley County Clerk’s Office in Deed Book xxx, Page xxx (the “Land”); and

WHEREAS, the Land has been legally subdivided (the “Subdivision”) into xxxxx Subdivision consisting of (xxx) single family, (xxx) townhouse, (xxx) other residential lots (the “Lots”) pursuant to and in accordance with the subdivision ordinance of Berkeley County, West Virginia in effect at the time of approval, as amended (the ”Subdivision Ordinance”), and shown on that certain plat of the xxxx subdivision, Lots xx-xx, recorded in the Office of the County Clerk for Berkeley County, West Virginia, in Plat Book xx at Page xx (the “Final Plat”); and

WHEREAS, Declarant posted a surety with the Planning Commission, in the form of a letter of credit, bond or cash escrow in the amount of \$xxxxxxx (the “Existing Infrastructure Bond”) to secure the completion of all public infrastructure improvements to be made in connection with the development of the Subdivision name (the “Infrastructure Improvements”) as itemized on the Construction Bond – Estimate, dated (date) (the “Bond Estimate”), and approved by the Berkeley County Engineering Department (the ”Department”) on (date); and

WHEREAS, due to the economic conditions of the home building industry, the Declarant has decided to delay construction of the Infrastructure Improvements and accordingly, has requested that the Planning Commission modify the Declarant’s original bonding obligations with respect to the Subdivision (the “Original Bonding Obligations”) until such time as the Declarant commences construction of the Infrastructure Improvements; and

WHEREAS, the Planning Commission has determined that it is in the best interests of Berkeley County to modify the Original Bonding Obligations until such time as the Declarant commences construction of the Infrastructure Improvements subject to the condition that Declarant execute and record this Declaration which shall run with the Land and be enforceable by the Planning Commission.

NOW, THEREFORE, in consideration of the premises and the covenants and agreements hereinafter set forth, Declarant declares the following:

- 1. Incorporation of Recitals; Defined Terms.** The foregoing recitals are hereby incorporated into this Declaration by this reference as if fully set forth herein.

Capitalized terms not defined or cross-referenced herein shall have the meanings ascribed to such terms in the Subdivision Ordinance.

2. Modification of Original Bonding Obligations.

(a) The Planning Commission's agreement to modify the Original Bonding Obligations are subject to the satisfaction of the following conditions precedent (the "Modification Conditions"):

- (i) The Declarant submits to the Department a surety in the amount of \$10,000.00 for the purpose of assuring site stability.
- (ii) The Declarant submits to the Department a merger deed for all of the property in question merging the property's subdivided lots into its original configuration prior to the recording of the subdivision.

(b) Upon satisfaction of the Modification Conditions, the Planning Commission shall release the Existing Infrastructure Bond and return it to the Declarant and the Original Bonding Obligation shall thereafter be deemed modified as follows:

- (i) Unless and until Declarant commences the construction of any Infrastructure Improvement, the Declarant's bonding obligations with respect to the Subdivision are limited to posting a \$10,000 surety to assure site stability; provided, however, that no infrastructure improvements shall be required to be made to the Land as a condition of keeping such surety in place.
- (ii) No Infrastructure Improvements, including without limitation any Site Stability Work, shall occur or be permitted on the Land (other than the continuance of any agricultural use existing on the land immediately prior to execution of this agreement, and/or mowing and other routine maintenance required to preserve the appearance of the Land and the health and safety of the community) unless and until the Declarant submits to the Department, and the Department approves, a new cost estimate for all Infrastructure Improvements, and the Declarant posts an approved surety with the Planning Commission in the amount of 115% of said estimate in accordance with the Bonding Policy (the "New Infrastructure Bond"). Upon posting the New Infrastructure Bond or similar surety, and provided the Declarant is not then in default under this Declaration, the Planning Commission shall return the surety for site stability to the Declarant.
- (iii) Once the New Infrastructure Bond/Surety has been posted with the Planning Commission, the Planning Commission shall hold the New Infrastructure Bond/Surety in accordance with the Bonding Policy and the

subdivision regulations. Declarant shall thereafter comply with all provisions of the Bonding requirements and may commence construction of required infrastructure pursuant to the approved final plan.

(3) Covenant Not to Commence Construction. In consideration of the Planning Commission's agreement to modify the Original Bonding Obligations, Declarant covenants and agrees that prior to satisfying the conditions set forth in Section 2(b)(ii) above, Declarant shall not commence, or cause any third party to commence, the construction of any Infrastructure Improvements, including without limitation any Site Stability Work.

(4) Covenant Prohibiting Construction of Homes or Sale or Transfer of Lots. In consideration of the Planning Commission's agreement to modify the Original Bonding Obligations, Declarant covenants and agrees that prior to satisfying the conditions set forth in Section 2(b)(ii) above, (a) Declarant shall not commence , or cause a third party to commence, the construction of any single or multi- family residence or other structure on any portion of the Land, and (b) Declarant shall not sell or transfer any Lot. Notwithstanding the foregoing, Declarant may transfer the entire Subdivision to a single transferee subject to the terms and provisions of this Declaration; provided, that such transferee expressly assumes the obligations of the Declarant memorialized by written agreement with the Planning Commission.

(5)Covenant to Maintain "Good Standing" with the State of West Virginia and Berkeley County. In consideration of the Planning Commission's agreement to modify the Original Bonding Obligations, Declarant covenants and agrees that at the time of submission of the Site Stability Surety, Declarant must be in "good standing" with the State of West Virginia and Berkeley County with regard to this parcel/property. This shall include:

- (a) Maintaining any necessary and required current and valid organization/business certificate, license or any other document required by the West Virginia Secretary of State to conduct business in the State of West Virginia. The Declarant shall be in default of this agreement if at any time during the term of this agreement the organization/business is dissolved, suspended or revoked by the West Virginia Secretary of State or by the Department of Revenue and its good standing is allowed to lapse; and
- (b) Not be delinquent on the real property taxes applicable to the subject property by more than 30 calendar days from the first payment due date set by law. The Declarant shall be in default of this agreement if at any time during the term of this agreement, the real property taxes on this property are delinquent more than 30 calendar days.

The Declarant shall provide the Planning Commission, on the annual anniversary date of this agreement, documentation evidencing that the Declarant has maintained, during the preceding year, good standing with the State of West Virginia and Berkeley County.

(6) Default

- (a) The failure of the Declarant to observe or perform any of the covenants, conditions or obligations of this Declaration shall constitute a default under this Declaration. If Declarant fails to cure any default within thirty (30) days after the issuance of a notice by the Planning Commission, specifying the nature of the default, the Planning Commission may exercise any rights and remedies it may have hereunder or pursuant to applicable law, and may record the merger deed in the land records of the County Clerk of Berkeley County. Notwithstanding the foregoing, Declarant shall not be entitled to any notice of a violation of the covenant not to sell or transfer any Lot under Section 4(b) of this Declaration.
- (b) The Planning Commission shall have the right to bring proceedings at law or in equity against the Declarant for violating or attempting to violate or defaulting upon any provisions contained in this Declaration and Agreement, and to recover actual damages for any such violation or default. Such proceeding shall include the right to restrain by injunction any violation or threatened violation by the Declarant or any other person of any of the terms, covenants or conditions of this Declaration, or to obtain a judicial order to compel performance of any such terms, covenants or conditions. All of the remedies permitted or available to the Planning Commission under this Declaration or at law or in equity shall be cumulative and not alternative, and the invocation of any such right or remedy shall not constitute a waiver or election of remedies with respect to any other permitted or available right or remedy. In any action brought by the Planning Commission pursuant to these provisions, the Planning Commission shall be entitled to costs, including but not limited to attorney's fees. In addition, the Planning Commission shall have the right to draw on the Site Stability Surety and apply the proceeds thereof in accordance with the Bonding Policy and applicable law and regulation.
- (c) The maximum length of time for tolling the bond shall be four (4) years, except the applicant may apply for a one-time extension not to exceed four additional years. At the time of executing this agreement, the Declarant shall execute a merger deed that merges the lots back into the parent track as though the approved plan of subdivision had never occurred. . The merger deed shall be held by the Planning Commission. If the Declarant fails to post a New Infrastructure Bond or other surety within four years of the date of this or an agreement, the Planning Commission may record the merger deed and revoke all project approvals; and the \$10,000 surety for site stability shall be forfeited to the Planning Commission. The merger deed may not be recorded by the Planning Commission if the Declarant posts the New Infrastructure Bond or similar surety prior to the expiration

of the four year tolling period. In such case, the merger deed shall be returned by the Planning Commission to the Declarant. In the event of recordation of the merger deed, the parent tract and residue parcel shall retain all development rights under the land development ordinances in effect at the time any future application for land development is presented to the County.

(7) Waiver. No waiver by the Planning Commission of any default under this Declaration shall be effective or binding unless made in writing by the Planning Commission and no such waiver shall be implied from any failure of the Planning Commission to take any action with respect to any default or violation.

(8) Binding Effect. The terms of this Declaration shall constitute covenants running with the land and shall bind the Land described herein and inure to the benefit of and be binding upon the Declarant and all parties having any right, title or interest in the Land (or any part thereof), their heirs, successors, successors-in-title and assigns. This Declaration is not intended to supersede, modify, amend or otherwise change the provisions of any instrument affecting the land burden hereby.

(9) Amendment of Declaration. This Declaration may not be amended except by a written agreement executed by the Declarant and the Planning Commission and recorded in the Office of the Clerk of the County Council of Berkeley County, West Virginia.

(10) Declaration Shall Continue Notwithstanding Breach. It is expressly agreed that no breach of this Declaration shall entitle the Declarant to cancel, rescind, or otherwise terminate this Declaration.

(11) Term of this Declaration. This Declaration shall be effective as of the date first above written and shall continue in full force and effect until the Declarant satisfies the conditions set forth in Section 2(b) (ii) above. Upon the termination of this Declaration, all rights and privileges derived from and all duties and obligations created and imposed by the provisions of this Declaration, except for the provisions of Section 2(b) (ii) above, shall be subordinated to the provisions of law and regulation then applicable to the subject land herein.

(12) Recordation. This agreement shall be recorded in the Office of the Clerk of the Berkeley County Council in both the name of the developer and the project name. It shall be the Declarant's responsibility to record the agreement and provide the Planning Department with confirmation of such recordation in the form of the deed book and page number reference.

Subdivision Name

Berkeley County Planning Commission File No. _____

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
(Applicant/Developer Name)

By: _____ Date: ____/____/____

Print Name: _____ Title: _____

(Notary Certification Shall Be On The Same Page As The Signatures Being Notarized)

STATE OF _____, COUNTY OF _____, to
wit:

I _____, a Notary Public in and for the state
and County aforesaid, do certify that _____
and _____, as _____
and _____, respectively of the _____,
whose names are signed to the foregoing, this day personally appeared before me in
my State and County aforesaid and acknowledged their signatures above (and
Corporate Seal as the genuine Seal of the said corporation).

Given under my hand this ____ day of _____, 20 ____.

My Commission Expires: _____

COUNTY COUNCIL OF BERKELEY COUNTY, WEST VIRGINIA

By: _____ Date: _____

Print Name: _____

(Notary Certification Shall Be On The Same Page As The Signatures Being Notarized)

STATE OF _____, COUNTY OF _____, to
wit:

I _____, a Notary Public in and for the state
and County aforesaid, do certify that _____
and _____, as _____
and _____, respectively of the _____,
whose names are signed to the foregoing, this day personally appeared before me in
my State and County aforesaid and acknowledged their signatures above (and
Corporate Seal as the genuine Seal of the said corporation).

Given under my hand this ____ day of _____, 20 ____.

My Commission Expires: _____

ATTEST: _____
John Small
Clerk, County Council of Berkeley County, WV