

Resolution No.: 2016-10

RESOLUTION OF THE JOINT LAND USE BOARD OF THE TOWNSHIP OF ELK, COUNTY OF GLOUCESTER, STATE OF NEW JERSEY, CONFIRMING A LEGAL INTERPRETATION AS TO THE EXPIRATION DATE FOR A PREVIOUSLY GRANTED GENERAL DEVELOPMENT PLAN ("GDP") TO SILVERGATE ASSOCIATES

WHEREAS, in 1996, the then-Planning Board of the Township of Elk (the "Board") had granted to Silvergate Associates ("Silvergate") Master Development Plan Approval, a/k/a Planned Unit Development ("PUD") approval, a/k/a General Development Plan approval, (hereinafter, together, the "GDP" approval), with respect to a planned development project associated with property situated in the Township of Elk; and

WHEREAS, said GDP approval was memorialized by way of the Board's adoption of an unnumbered resolution (the "Resolution") on May 16, 1996; and

WHEREAS, said memorializing resolution set forth that Silvergate's GDP approval shall continue for a period of sixteen (16) years from the date of the adoption of the Resolution (or until May 16, 2012); and

WHEREAS, over the ensuing years, many applications were filed before the Board by Silvergate for various forms of approvals and relief, including an Application for Final Major Subdivision approval for Phase I of the Silvergate GDP, which was thereafter approved by the Board's adoption of Resolution No. 2003-14 on June 17, 2004, which constituted the date upon which Silvergate received final approval of the first section of its GDP pursuant to N.J.S.A. 40:55D-45.1(b); and

WHEREAS, the Board adopted Resolution No. 2011-20, which was subsequently amended by Resolution No. 2012-16 adopted by the Board on November 14, 2012, which extended Silvergate's GDP expiration date until May 16, 2016, and revised certain conditions relating to the timing of the filing of applications for preliminary and final approvals; and

WHEREAS, Silvergate, through its counsel, and in reliance on N.J.S.A. 40:55D-45.1(b), and an unpublished Appellate Division case entitled Pagano v. Woolwich Tp. Joint Land Use Bd., 2015 WL 4661524 at *1 & *6 (App. Div. 2015), had submitted its letter to the Board of February 12, 2016 by Emily K. Givens, Esq., Maley & Associates, 931 Haddon Avenue, Collingswood, N.J. 08108, requesting a legal interpretation as to the correct expiration date for Silvergate's GDP; and

WHEREAS, counsel to the Board, Dale T. Taylor, Esquire, The Law Office of Dale T. Taylor, 51 Forage Drive, Mickleton, N.J. 08056, in response to the February 12, 2016 letter to the Board from Silvergate's counsel, submitted to the Board his letter of February 16, 2016; and

WHEREAS, Silvergate's request for a legal interpretation as to its GDP expiration date was heard by the Board during a regularly scheduled meeting and public hearing of the same, held on February 17, 2016, at which time Silvergate was represented by Emily Givens, Esquire; and

WHEREAS, as part of said meeting and public hearing, were Ms. Givens' letter of February 12, 2016, and Mr. Taylor's letter of February 16, 2016, entered into the record; and

WHEREAS, the Board considered the letters entered into the record, and based upon the same, and in reliance on the Board attorney's legal opinion given, without objection, did the Board concluded that the correct expiration date of Silvergate's GDP is June 17, 2020;

NOW, THEREFORE, BE IT RESOLVED by the Joint Land Use Board of the Township of Elk, County of Gloucester, State of New Jersey, as follows:

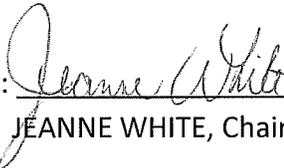
1. The expiration date of the previously approved General Development Plan for Silvergate Associates shall expire on June 17, 2020, which is 16-years from the date that the first Phase of Silvergate's GDP received final approval, as memorialized by the Board's adoption of Resolution No. 2003-14 on June 17, 2004, which is consistent with N.J.S.A. 40:55D-45.1(b).

2. Any conditions previously set forth in Resolutions 2011-20 and 2012-16, as to the timing by which applications had to be submitted for both preliminary and final approval of the remaining phases, that have not yet received such approvals, are rendered as null and void, insofar as Silvergate now has until June 17, 2020 by which applications for all preliminary approvals, not already received, must be filed, after which any such approvals, once granted, shall be subject to N.J.S.A. 40:55D-49 of the Municipal Land Use Law.

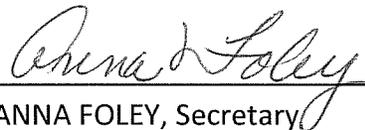
WHEREUPON a motion to confirm the above findings and, in particular, that Silvergate's GDP expires on June 17, 2020, was made by Board member White, which was seconded by Board Member Nicholson, with the following Board members voting in favor of the motion: Poisker, McCreery, Nicholson, McKeever, Hughes, White, Schmidt, Shoultz and Goss (Alternate Member # 1). There were no votes in the negative, and no abstentions or recusals. The following Board Members were absent: Barbaro and Penza (Alternate Member # 2).

THIS RESOLUTION WAS ADOPTED by the Joint Land Use Board of the Township of Elk, County of Gloucester, State of New Jersey at a meeting of the same held on March 16, 2016, at 7:30 PM, time prevailing, as a memorialization of the approval granted by the Board, as set forth above, at a meeting and public hearing on February 17, 2016.

TOWNSHIP OF ELK JOINT LAND USE BOARD

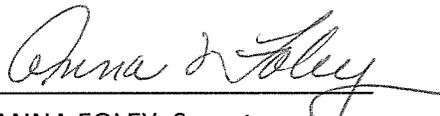
By: 
JEANNE WHITE, Chairperson

ATTEST:


ANNA FOLEY, Secretary

CERTIFICATION

I hereby certify that the above referenced resolution is a true copy of a resolution adopted by the Joint Land Use Board of the Township of Elk, County of Gloucester, State of New Jersey, at a meeting of the same held on the 16th day of March, 2016, at the Elk Township Municipal Building, 680 Whig Lane, Monroeville, New Jersey 08343, as a memorialization of the action taken by the Board at the Board's February 17, 2016 meeting and public hearing held on the matter cited hereinabove.


ANNA FOLEY, Secretary

MALEY & ASSOCIATES

A PROFESSIONAL CORPORATION

Counsellors at Law

931 Haddon Avenue

Collingswood, New Jersey 08108

M. James Maley Jr.*
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*Admitted in PA & NJ

February 12, 2015¹⁶

VIA REGULAR AND ELECTRONIC MAIL (afoley@elktownshipnj.gov)

Elk Township Planning Board
c/o Anna Foley, Planning Board Secretary
Elk Township Municipal Building
680 Whig Lane
Monroeville, NJ 08343

RE: Silvergate Associates, Elk Township, NJ
Request for Legal Interpretation - General Development Plan

Dear Chairperson White and Members of the Board,

As you may recall, this office represents the interests of Silvergate Associates relative to their General Development Plan ("GDP") approvals in Elk Township. Late last year we made a request of the Board to exercise its authority to grant an Administrative correction to a 2011 GDP extension which had been granted to Silvergate. We were advised by the then Solicitor of the Board that due to the lateness in the year of our request, the Board would not have time to review the matter.

Since that request was made, a new Board Solicitor has been appointed and we have been working with him to determine the appropriate course of action to take regarding the matter. We have, I believe, come to a meeting of the minds with regard to the appropriate course, and therefore we are submitting this Letter Brief in support of our request that the Board apply N.J.S.A. 40:55D-45.1(b) of the Municipal Land Use Law in conjunction with the recently decided case of Pagano v. Woolwich Tp. Joint Land Use Bd., 2015 WL 4661524, *1 & *6 (App. Div. 2015) to the original GDP approvals obtained by Silvergate, which would result in calculation of the original sixteen (16) year GDP approval as expiring on June 17, 2020. This legal interpretation is supported by the Pagano case, as well as a reading of the applicable statute governing when the time period for GDP approvals begins to run.

In support of our request, we offer the following legal analysis. Based upon the language set forth in the statute governing GDPs, the term of a GDP "shall not exceed 20 years from the date upon which the developer receives final approval of the first section of the planned

development pursuant to P.L.1975, c. 291 (C. 40:55D-1 et seq.)” N.J.S.A. 40:55D-45.1(b). The term “section” is not defined, but the term “final approval” is a defined term, which means “the official action of the planning board taken on a preliminarily approved major subdivision or site plan...” This indicates that the term of a GDP can be up to 20 years from the date of the first final site plan or final subdivision approval that is received.

Such an interpretation is further supported by the use of the word “section” both in N.J.S.A. 40:55D-45.1(b) and in N.J.S.A. 40:55D-45.2(k), which says that the proposed timing schedule of a planned development must consider any protections needed by the public and the residents “who occupy any section of the planned development prior to the completion of the development in its entirety.” The use of the term “section” in both places suggests that the term is meant to be synonymous with the term “phase”. Thus, where a GDP is proposed to be constructed in phases, the twenty (20) years would run from the date that the *first* final site plan or final subdivision approval is received from the Planning Board for a phase of the planned development.

In the Pagano case, an unpublished opinion, the Appellate Division agreed with this interpretation, rejecting an argument that the twenty (20) year time period for GDP approval ran from the date of the original GDP approval. In that case, the Planning Board had extended the phasing schedule so as to start from the date of an amended GDP approval rather than the date of the original GDP approval. *Id.* at *1. The Appellate Division explained that “the language is clear concerning when the twenty years begins to run...At the time the Board restarted the time allotments for the DGP phases, the statutory clock had not yet begun to run as none of the phase had reached the point of ‘final approval[.]’ ” *Id.* at *6.

With regard to the Silvergate GDP approval, Final Subdivision approval for Phase I was issued by the Planning Board via Resolution #2004-14, on June 17, 2004. Final Subdivision approval for Phase III was issued via Resolution #2004-15, on June 18, 2004. Thus, the Planning Board is authorized to provide a term for Silvergate’s GDP approval of up to twenty (20) years from the date of Final Subdivision Approval for Phase I, or June 17, 2024. Based on the original sixteen (16) year GDP approval granted to Silvergate, the GDP approval, with the requirement to have submitted plans and applications for Preliminary Approvals for all remaining phases, would run through June 17, 2020.

We respectfully request that the Planning Board place this matter on its February 17, 2016 agenda, and that the Board apply the Municipal Land Use Law, N.J.S.A. 40:55D-45.1(b), in conjunction with the Pagano court decision to the Silvergate GDP approvals and administratively correct the 2011 GDP approval to confirm that the period of protection provided to the Project through its GDP approval expires June 17, 2020.

Should you have any questions with regard to this request, please do not hesitate to contact me. I thank you in advance for your attention to this request.

Very truly yours,

MALEY & ASSOCIATES
A Professional Corporation

By: 
Emily K. Givens, Esq.

cc: Dale Taylor, Esquire (dale@daletaylorlaw.com)
Brian Duffield, Esq., Township Solicitor (Brian.Duffield@Comcast.net)
Bach Associates, Township Planner (sbach@bachdesigngroup.com)
Nick Casey, Quaker Group (ncasey@quakergroup.com)

THE LAW OFFICE OF DALE T. TAYLOR
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Mickleton, New Jersey 08056

TELEPHONE: (856) 687-5444 E-MAIL: dale@daletaylorlaw.com

Dale T. Taylor, *M.B.A., J.D., LL.M.*
Attorney At Law

FILE NO:

Member of the Bar in *New Jersey* and
Washington, D.C., and admitted to practice
Before the Supreme Court of the United States
of America

February 16, 2016

Sent via E-Mail to Anna Foley, Board Secretary

Jeanne White, Chairperson & All Board Members
Township of Elk Joint Land Use Board
680 Whig Lane
Monroeville, N.J. 08343
ATTN: Anna Foley, Board Secretary

RE: Request for Legal Interpretation as to GDP Expiration Date IMO Silvergate Associates, Block 65, Lots 4.02 & 5; Block 170, Lots 14 & 18; and Block 171, Lots 6 & 9 – Hearing Date: February 17, 2016;

Dear Chairperson White and Members of the Board:

Silvergate Associates, through its counsel, has submitted a letter brief to the Board dated February 12, 2016, in the above captioned matter. In particular, Silvergate opines that it believes that its original GDP approval granted on May 16, 1996, expires on June 17, 2020. Previously, by way of counsel to Silvergate's letter of October 8, 2015 to the Board's previous solicitor, John Eastlack, Jr., Esquire, Silvergate had opined that its GDP approval expires on June 17, 2024. By way of Mr. Eastlack's letter to the Board of October 21, 2015, and for the reasons that Mr. Eastlack had set forth in his letter, Mr. Eastlack informed the Board that he concurred with Silvergate's then-opinion that its GDP expired on June 17, 2024.

Upon being appointed by the Board as Solicitor for 2016, this matter was brought to my attention. I conducted my own research and legal analysis, and then discussed this matter with Silvergate's counsel. For the reasons set forth below, I informed Silvergate that it was my legal opinion that its GDP expires on June 17, 2020, and not June 17, 2024. By way of counsel for Silvergate's letter to the Board dated February 12, 2016, in which Silvergate asks for the Board's confirmation as to the correct expiration date for its GDP, Silvergate now concurs with my opinion.

Background.

As the Board is acutely aware, the Silvergate development project has had a long and somewhat tortuous history in the Township. The memorializing resolution (unnumbered) approving Silvergate's "Master Development Plan" (a/k/a GDP) approval, was adopted on May 16, 1996, following five (5) months of hearings before the Board. The memorializing resolution was comprehensive in nature and, more relevant to the issue at hand, contained the following provisions:

"The master development plan approval shall continue for a period of sixteen (16 years from the date this resolution is adopted), subject to compliance with the applicable provisions of the Elk Township PUD ordinance, including but not limited to, sections IV P(1) and (4). The development applications for each phase shall be filed in compliance with the time schedule set forth above. In accordance with the ordinance if applications are not made within the stated periods, the master development plan approval of the planned unit development plan shall be terminated and void unless extensions are granted through timely applications by the applicant. Each stage shall be built out within four (4) years of the date of final approval for that phase except Phase I which shall be built out within three years. If build-out is not completed in compliance with this schedule, the procedures set forth in N.J.S.A. 40:55D-45.7 shall apply". **Emphasis** added, page 3, Section 5.B. of Resolution.

As noted immediately above, the Board's May 16, 1996 resolution granting GDP approval to Silvergate set forth that such approval ran for sixteen (16) years beginning from May 16, 1996 (or until May 16, 2012). Over the following ten years after Silvergate's GDP was approved by the Board, applications for development for numerous phases were submitted by Silvergate and approved by the Board, along with changes to the various phases, Major and Minor Subdivision approvals, Major and Minor Site Plan approvals, site plans, extensions of submission deadlines with regard to various phases, amendments to the Plan extending certain approvals and deadlines, etc.

On June 17, 2004, Resolution No. 2004-14 was adopted by the Board, granting Final Major Subdivision approval to Silvergate for Phase I. (The adoption of this resolution is critical to the issue of when the 16-year tolling for Silvergate's GDP begins and ends).

On October 19, 2011, the Board adopted Resolution No. 2011-20, which extended Silvergate's GDP expiration until May 16, 2016. The Resolution cited that Silvergate had taken significant steps towards bringing its GDP to fruition, and recognized that numerous circumstances beyond Silvergate's control, including NJDEP regulations and the inability of Silvergate to obtain necessary water and sewer services. In pertinent part, the resolution points out that:

"Neither the water or sewer litigation prevented the Applicant from proceeding to design and **submit the development applications for phases 5, 6 or 7** of the GDP. The Applicant

did not meet the conditions of the GDP which required the Applicant **to obtain by a specific date, preliminary and final subdivision and Site Plan approvals for Phases 5, 6 and 7, but the Board did not seek to invalidate the GDP because of this delay.** **Emphasis added, page 4, paragraph 22 of the resolution.**

A year later, on November 14, 2012, the Board adopted Resolution No. 2012-16, which “clarified” Resolution No. 2011-20, by stating that it had granted an extension of Silvergate’s GDP until May 16, 2016, conditioned upon a requirement that:

“... **applications for both preliminary and final development approval (Subdivision and/or Site Plan approval) for each phase of development contemplated by this GDP must be prepared and filed with the Board for consideration no later than May 16, 2016**”. **Emphasis added, page 2, paragraph 4.**

Legal Analysis.

The applicable statute regarding General Development Plans (“GDP”) is found within the Municipal Land Use Law (“MLUL”), promulgated at N.J.S.A. 40:55D-1, et seq. In particular, N.J.S.A. 40:55D-45.1.b. sets forth, in pertinent part, the following:

“The term of the effect of the general development plan approval shall be determined by the planning board using the guidelines set forth in subsection c. of this section, except that the term of the effect of **the approval shall not exceed 20 years from the date upon which the developer receives final approval of the first section of the planned development**” **Emphasis added.** (For the reason set forth by counsel for Silvergate in her letter February 12, 2016, I concur that the use of the term “section” is synonymous with “phase”).

In addition, while the timing of the completion of the project (individual phases, etc., as Silvergate has requested and the Board has granted in many instances), the actual GDP cannot exceed the outer limits of approval (sixteen years in Silvergate’s case, or twenty years if a lesser time-frame was not referenced in the original approval). N.J.S.A. 40:55D-45.2.k. See also Cox and Koenig, N.J. Zoning and Land Use Admin., 2015 Ed., Sec. 24-2.3, pg. 496.

In a recent Appellate Division case (unpublished), entitled Pagano v. Woolwich Tp. Joint Land Use Bd., 2015 WL 4662524, *1 & *6, the question of GDP expirations was also raised. The Court confirmed the plain language of N.J.S.A. 40:55D-45.1.b., in that the term of the GDP approval **shall run from the time that the developer receives final approval of the first section [phase] of the planned development.** The Court also held that restarting time allotments for various phases within the GDP had no impact as to the starting of the statutory clock leading to the expiration of the GDP. Rather, the tolling

of the GDP time-frame (in Elk Township's case, 16 years) **only begins when the first phase reached a point of "final approval"**. (I believe that the term "first phase" doesn't necessarily means "Phase I" but, rather any phase that receives final approval "first").

Legal Conclusion.

1. On June 17, 2004, Resolution No. 2004-14 was adopted, granting Final Subdivision approval for Phase I. Accordingly, and consistent with N.J.S.A. 40:55D-45.1.b., the statutory clock on Silvergate's GDP expiration began to run on that date, and will expire sixteen years from June 17, 2004 (or June 17, 2020). (Silvergate's earlier interpretation that their GDP expired on June 2024 appears to be based on a misreading of the 20-year GDP limitation period referenced in N.J.S.A. 40:55D-45.1.b. The statute cites the 20-year period as an outer limit (i.e.: a GDP "... shall not *exceed* 20 years"), not that *all* GDP's expire in 20 years. If a municipality such as Elk Township sets a different outer limit period (in Elk's case – 16 years), then it is that period which prevails, not the 20 year period.

2. The date of the adoption of the GDP, or the date that applications are filed for various phases, cannot be used to begin the tolling of the statutory clock as to when a GDP expires. Only the date of the first final approval of a phase or section can be used to begin the tolling of the statutory clock as to when a GDP expires.

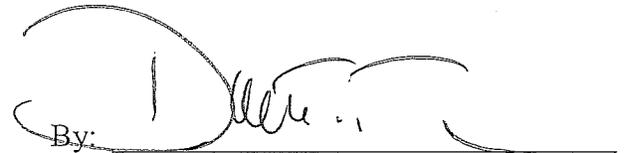
3. Prior resolutions changing or limiting Silvergate's GDP expiration, to other than June 17, 2020, are null and void.

3. Prior or future changes in the timing of the phasing schedule, amendments to plans, etc., are still valid, but they have no impact on the tolling of the GDP approval.

I will be glad to answer any questions that Board members may have in this matter at the Board's meeting on February 17, 2016.

Very truly yours,

THE LAW OFFICE OF DALE T. TAYLOR

By: 
DALE T. TAYLOR, Esquire

DTT:jr

Cc: Brian J. Duffield, Esquire, Township Solicitor