



MEMORANDUM

To: Mayor and City Council

From: Steve Dush, AICP

Date: April 8, 2013

Subject **5342 Tilly Mill Road and 2026 Womack Road:** Waiver Request from Section 16-487 to reduce the required right-of-way of Tilly Mill Road from 43' to 40' and waive the requirement of a bike lane along Tilly Mill Road and from 42' to 27' on Womack Road (which is to include an 11' travel lane, 4' bike lane, 2' curb and gutter, and 10' utility strip).

ITEM DESCRIPTION

The applicant of the proposed Berman Commons Assisted Living Facility, to be located along Womack Road, just west of its intersection with Tilly Mill Road and north of Georgia Perimeter College, has submitted to the City a plan set for final plat review. Authorization for a 90-bed assisted/independent adult living facility was initiated prior to incorporation but was never completed or final platted by DeKalb County. During the review process, staff identified, pursuant to the terms of Section 16-487, that the land owners are required to install certain improvements along the frontage of said property. The applicant is requesting that these requirements be waived or amended based upon the existing conditions of the area and in order to comply with the conditions of setbacks and landscaping required by the Special Land Use Permit issued by DeKalb County August 12, 2008.

BACKGROUND

Code Section 16-487, which compels the applicant to improve additional right of way reads, in part:

Sec. 16-487. - Street classification and right-of-way width.

All streets shall be classified according to the table in this section. Street construction standards shall be no less than as follows:

Type of Road	Travel Lanes	Bike Lanes	Paving Width	Planting Strips	Sidewalks	Utility Strips	Property ROW	Underground Utilities	Streetlights
Minor arterial	2 @ 11'	2 @ 4'	*	2 @ 6'	2 @ 5'	2 @ 15'	80	Y	Y
Collector	2 @ 11'	2 @ 4'	*	2 @ 5'	2 @ 5'	2 @ 15'	70	Y	Y

*Paving width = travel lanes + bike lanes

**Property right-of-way = paving width + curb and gutter width + utility strip + bike lanes + other (median or shoulder)



Code Section 16-488(e), which empowers the Mayor and City Council to waive these development requirements, reads, in part:

(e) The city council, after considering all related factors, may authorize deviations from this section as follows:

(1) Right-of-way dedication may be waived or modified if:

- a. Existing use of property is not to be substantially changed as a result of proposed development or construction;
- b. Existing government construction plans for the roadway indicate lesser right-of-way would be required for dedication; or
- c. The adjoining frontage is developed and the predominant existing right-of-way meets city standards.

(2) Road improvements may be waived or modified if:

- a. Existing use of property not to be substantially changed (i.e., traffic generation and ingress/egress would remain the same);
- b. Governmental construction plans for the road indicate a pavement width less than city standards (only the planned pavement width shall be required);
- c. No more than five percent of average daily traffic generation would occur between 7:00 a.m. and 9:00 a.m. and 4:00 p.m. and 6:00 p.m., on weekdays;
- d. The existing road meets current county standards; or
- e. Widening would create a hazard to traffic, pedestrians, or bicyclists along the thoroughfare.

RECOMMENDATION

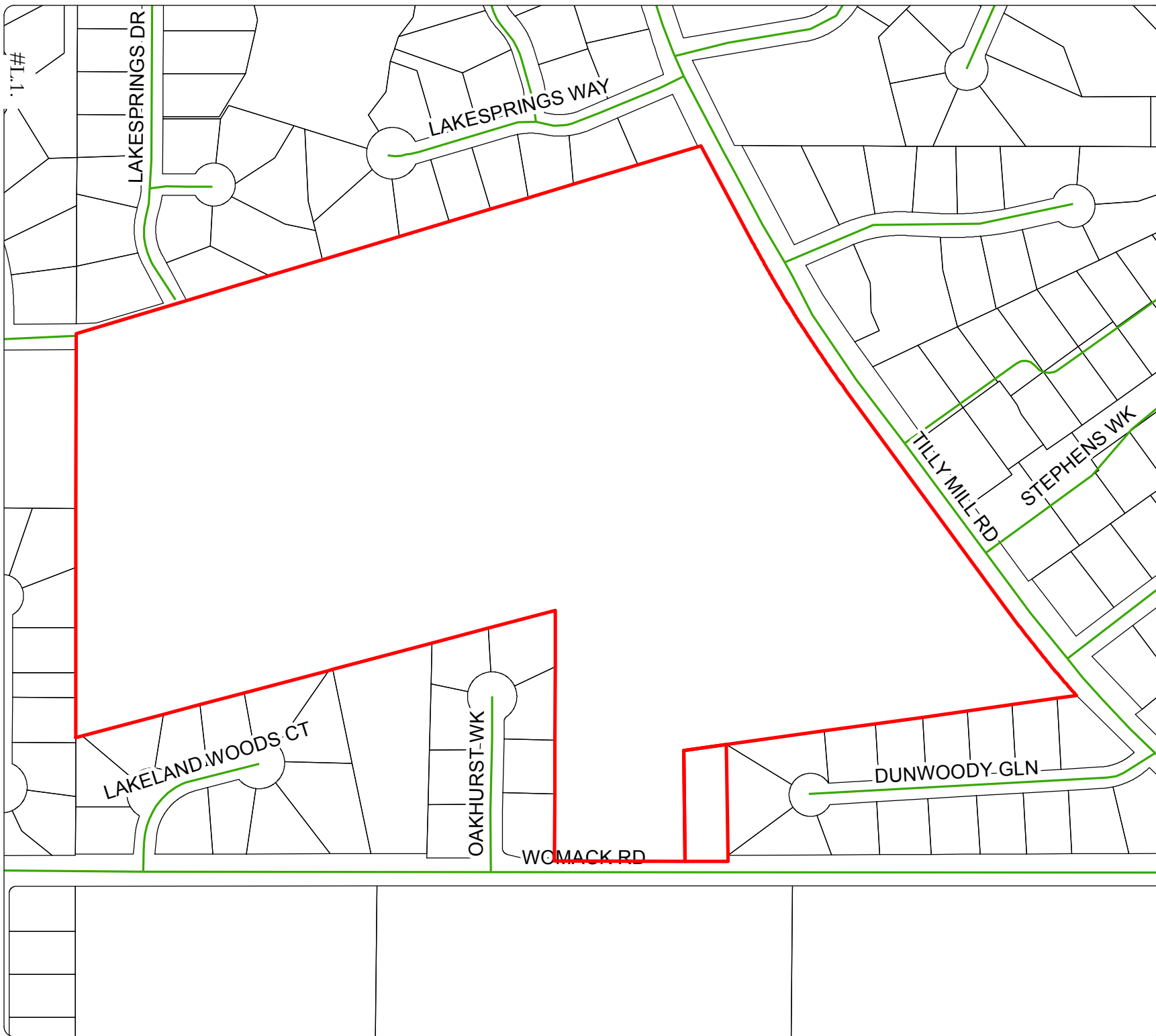
Staff recommends **approval** of the applicant's request to waive the requirement for dedication of the full 42' to be reduced to 27' to accommodate required improvements on dedicated ROW and private property **with the condition that a landscape/pedestrian access easement, as demonstrated in exhibit A, be successfully executed upon approval.** The outcome, if approved, would result in the reduction of the dedicated ROW from 42' to 27', including an 11' travel lane, 4' bike lane, 2' curb and gutter, and 10' utility strip to be installed by the applicant in the dedicated ROW. The following requirements of Section 16-487 are proposed to be constructed on private property, but would be accompanied by an access easement, rather than dedicated ROW: 5' sidewalk (located within the landscape strip), connecting to the offsite sidewalk infrastructure and the 18' landscape strip, as conditioned by the Special Land Use Permit. Requiring such improvements to be installed on dedicated ROW impedes current entitlements the property owner holds with respect to the building location and setbacks.

Staff recommends **approval** of the waiver of the applicant's additional request to waive the requirement for street improvements along Tilly Mill Road. The outcome, if approved, will require a 40' ROW dedication to the City from the centerline of Tilly Mill Road, a deferral of the remaining 3' utility easement dedication until the conclusion of the platting process, and a waiver for the construction of bike lanes along Tilly Mill Road. Pursuant to Section 16-



488, the use of this portion of the property will not be substantially changed as a function of the project, as the limits of construction and access along Tilly Mill Road are not proposed; therefore ingress and egress will remain unchanged.

In summary, staff recommends approval of the waivers for granting them provides the necessary improvements along Womack through the use of easements and the improvements along Tilly Mill can be implemented through redevelopment or when the City would install them as the ROW will be dedicated.



Dunwoody
*Smart people - Smart city
Community Development
41 Perimeter Center East | Dunwoody, Georgia
Suite 250 | 30346-1902
678-382-6800 ~ www.dunwoodyga.gov

**5342 Tilly Mill Rd.
and 2026 Womack Rd.**

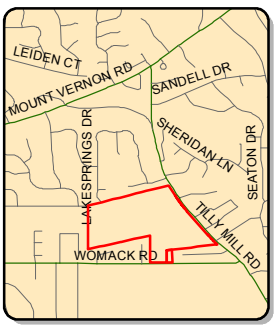
Site Location

March 2013

Legend

- Street Centerlines
- Parcels

Scale: 1"=300'
(1:3600)



ORIGINAL

Before the City Council of
The City of Dunwoody, Georgia

In Re:)	
)	
Berman Commons,)	Application No. 12-0265
)	
Applicant,)	

APPLICATION FOR WAIVERS

COMES NOW, BERMAN COMMONS, as Applicant, and requests the following waiver from the City Code of the City of Dunwoody and shows the Council as follows:

1.

That Applicant, Berman Commons, is the Lessee of 2026 Womack Road, Dunwoody, DeKalb County, Georgia.

2.

On the 12th day of August, 2008, the Lessee was approved for a 90-bed assisted/independent adult living facility on said property by the DeKalb County Board of Commissioners.

3.

That the original CUP approved by DeKalb County made certain requirements for landscaping along Womack Road.

4.

That Code Section 16-487 of the City of Dunwoody Code requires that certain improvements be made along the frontage of said property that is contiguous and abutting Womack Road.

5.

That strict compliance with said Code Section causes significant damage and loss to the Applicant and the Applicant requests a waiver from said Code Section 16-487 as follows:

- a. Reduce the required right-of-way of Womack Road from 42' to 27' as measured from the northern edge of the existing left turn lane;

received 3/14/13

- b. Said waiver request to include an 11' travel lane, a 4' bike lane, a 2' curb and gutter, and a 10' utility strip;
- c. The required 5' sidewalk will be located outside of the right-of-way within the SLUP required landscape strip except where it transitions to connect to the existing sidewalk at the east and west side of the subject property; and
- d. The sidewalk shall be located within a 5' Pedestrian Access and Landscape Easement as shown on the attached Womack Road Improvement exhibit dated March 13, 2013, which is marked Exhibit "A" and by reference and incorporated herein and made a part hereof.

6.

Additionally, a second waiver is requested as a part hereof from Code Section 16-487 relating to property located at 5342 Tilly Mill Road.

7.

Said property is owned by the Marcus Jewish Community Center of Atlanta, the Lessor of the Applicant.

8.

For that portion of said property that fronts, abuts and is adjacent to Tilly Mill Road, the following waiver is requested:

- a. That the required right-of-way of 43' be reduced to 40' from the center line of Tilly Mill Road;
- b. That an additional 3' utility easement abutting the edge of the above noted 40' right-of way and within the building set back area be dedicated by the owner at the time of the platting of the property;
- c. That the required construction of a bike lane along Tilly Mill Road be waived;
- d. That the existing right-of-way is sufficient for future construction of said bike lane by the City as part of a future road improvement program;

- e. After construction of said bike lane, the City will be responsible for restoring the property to its prior grades, as well as any landscaping and restoring or replacing any other improvements that may be damaged as a result of their construction and utilization of the 3' utility easement along Tilley Mill Rd.; and
- f. Said waiver request is shown on attached Exhibit "B", which is by reference incorporated herein and made a part hereof.

9.

The hereinafter constitutional notice is now required by Georgia law.

The portions of the City of Dunwoody Zoning Ordinance, facially and as applied to the property, which prohibit the granting of said waivers as requested by the Applicant is unconstitutional in that they would destroy the Applicant's property rights without first paying fair, adequate and just compensation for such rights, in violation of Article I, Section I, Paragraph I and Section III, Paragraph I of the Constitution of the State of Georgia of 1983, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The application of the City of Dunwoody Zoning Ordinance, facially and as applied to the property, which prohibits the granting of said waivers as requested by the Applicant is unconstitutional, illegal, null and void, constituting a taking of Applicant's property in violation of the Just Compensation Clause of the Fifth Amendment to the Constitution of the United States; Article I, Section I, Paragraph I, and Section III, Paragraph I of the Constitution of the State of Georgia of 1983; and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States denying the Applicant an economically viable use of its land while not substantially advancing legitimate state interests.

A denial of these waivers would constitute an arbitrary and capricious act by the City of Dunwoody City Council without any rational basis therefore constituting an abuse of discretion in violation of Article I, Section I, Paragraph I and Section III, Paragraph I of the Constitution of the State of Georgia of 1983, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

A refusal by City of Dunwoody City Council to grant these waivers as requested by the Applicant would be unconstitutional and discriminate in an arbitrary, capricious and unreasonable manner between the Applicant and owners of the similarly situated property in violation of Article I, Section I, Paragraph II of the Constitution of the State of Georgia of 1983

A refusal by City of Dunwoody City Council to grant these waivers as requested by the Applicant would be unconstitutional and discriminate in an arbitrary, capricious and unreasonable manner between the Applicant and owners of the similarly situated property in violation of Article I, Section I, Paragraph II of the Constitution of the State of Georgia of 1983 and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Any rezoning of the property subject to conditions which are different from these waivers requested by the Applicant, to the extent such different conditions would have the effect of further restricting Applicant's utilization of the property, would also constitute an arbitrary, capricious and discriminatory act in zoning the property to a unconstitutional classification and would likewise violate each of the provisions of the State and Federal Constitutions set forth hereinabove.


The denial of these waivers on the subject property is unconstitutional as it applies to the property. This notice is being given to comply with the provisions of O.C.G.A. § 36-11-1 to afford the City an opportunity to revise the property as requested in the waivers. If action is not taken by the City to grant these waivers within a reasonable time, a claim will be filed in the Superior Court of DeKalb County demanding just and adequate compensation under Georgia law for the taking of the property, diminution of value of the property, attorney's fees and other damages arising out of the unlawful deprivation of the Applicant's property rights.

A denial of the waivers violates the substantial burden, equal terms and discrimination provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Section 42 USC 2000 cc et seq.

WHEREAS, the Applicant requests that said waivers be granted and that the Applicant have such further and just relief as required by the circumstances.

Respectfully submitted, this 14th day of March, 2013.

BERMAN COMMONS

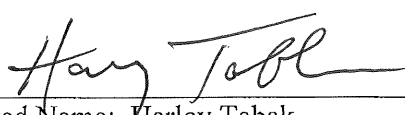
By: 
G. Douglas Dillard,
Attorney for Applicant

Weissman, Nowack, Curry & Wilco, PC
3500 Lenox Road, NE, 4th Floor
Atlanta, GA 30326

VERIFICATION

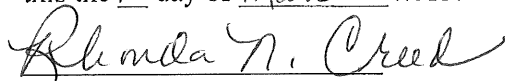
I, Harley Tabak, am the owner of Berman Commons. I have reviewed the Application of Waiver and am authorized to state, on behalf of the Berman Commons, that the facts contained in the Application for Waiver are, to the best of my knowledge and information, true and correct.

BERMAN COMMONS


Printed Name: Harley Tabak

Title: Owner

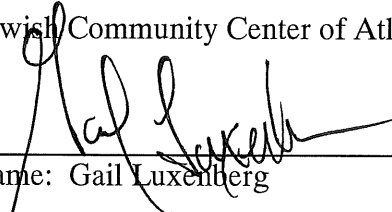
Sworn to and subscribed before me
this the 11th day of March 2013.


Notary Public

VERIFICATION

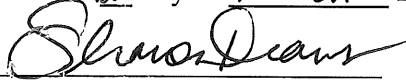
I, Gail Luxenberg, am the CEO of Marcus Jewish Community Center of Atlanta (MJCCA). I have reviewed the Application of Waiver and am authorized to state, on behalf of the Marcus Jewish Community Center of Atlanta (MJCCA), that the facts contained in the Application for Waiver are, to the best of my knowledge and information, true and correct.

Marcus Jewish Community Center of Atlanta
(MJCCA)


Printed Name: Gail Luxenberg

Title: Chief Executive officer

Sworn to and subscribed before me
this the 12th day of March 2013.


Notary Public

Sharon Deans
Notary Public
Cobb County, Georgia
Commission Expires 10/21/2016



