



# MONTGOMERY COUNTY PLANNING DEPARTMENT

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB

Item #5

12/14/06



## MEMORANDUM

**DATE:** November 29, 2006

**TO:** Montgomery County Planning Board

**VIA:** Rose Krasnow, Chief *RK*  
Development Review Division

**FROM:** Catherine Conlon, Subdivision Supervisor (301) 495-4542  
Development Review Division *CC*

**REVIEW TYPE:** Preliminary Plan Review

**APPLYING FOR:** Subdivision of Five Lots (4 Child Lots)

**PROJECT NAME:** Copenhaver Property

**CASE #:** 120050970 (formerly 1-05097)

**REVIEW BASIS:** Chapter 50, Montgomery County Subdivision Regulations

**ZONE:** RDT

**LOCATION:** Located in the northwest quadrant of the intersection of Comus Road and Peach Tree Road

**MASTER PLAN:** Agricultural and Rural Open Space (AROS)

**APPLICANT:** John Copenhaver

**ENGINEER:** Macris, Hendricks & Glascock, P.A.

**ATTORNEY:** Miles & Stockbridge P.C.

**FILING DATE:** May 16, 2005

**HEARING DATE:** December 14, 2006



## **STAFF RECOMMENDATION: Denial**

### **SITE DESCRIPTION**

The 41-acre subject property is located in the northwest quadrant of the intersection of Comus Road and Peach Tree Road near Barnesville (Attachment A). The property has frontage on these roads and on Sunridge Drive, which is a dedicated but non-maintained public street. Both Comus Road and Peach Tree Road are designated as "Rustic Roads" in the 1996 *Rustic Roads Functional Master Plan*. The property is zoned Rural Density Transfer (RDT) and is currently farm fields and pasture land with no existing dwellings or other structures. Surrounding land uses include low density residential and farms.

The site is bisected by an intermittent stream and associated floodplain that flows from south to north. The entire property is within the Little Monocacy River watershed which is designated as Use I-P waters. There is no forest on the property.

### **PROJECT DESCRIPTION:**

This is an application to subdivide the Subject Property into five (5) lots for the construction of five one-family detached residences (Attachment B). Proposed Lots 1 and 5, which are 2.5 and 2.0 acres in size, respectively, are located at the intersection of Comus Road and Peach Tree Road in the southeast corner of the site. Proposed Lots 2 and 3, which are 2.0 and 3.3 acres in size, respectively, are located in the southwest corner of the site on Comus Road and Sunridge Drive. Proposed Lot 4 includes the remaining 29.3 acres of the property which encompasses the northern half of the property, with expansion down to Comus Road. Access to the lots is via separate private driveways from Peach Tree Road (2 driveways), Comus Road (1 driveway) and Sunridge Drive (2 driveways).

All five proposed lots have been approved by MCDPS for standard septic systems and private wells. The applicant has submitted an Agricultural Declaration of Intent per Chapter 22A of the Montgomery County Code (Forest Conservation Law) which states his intent to continue commercial agricultural uses on 28.8 acres of proposed Lot 4. The applicant states that the remaining lots are intended for residential use by children of pre-1981 owners of the property. A portion of the onsite environmental buffer area will be planted in forest to meet the forest conservation requirements of the non-agricultural areas.

### **ANALYSIS AND FINDINGS**

#### **Compliance with the Subdivision Regulations and Zoning Ordinance**

This application has been reviewed for compliance with the Montgomery County Code, Chapter 50 ("Subdivision Regulations") and Chapter 59 ("Zoning Ordinance"). Access and public facilities will be adequate to support the proposed lots and uses, and the lots meet the dimensional requirements for area, frontage, width and setbacks in the RDT zone. However, in staff's opinion, the application does not satisfy the Zoning Ordinance requirements for the creation of child lots.



Per Section 59-C-9.41 of the Zoning Ordinance, residential density in the RDT zone shall not exceed one dwelling per twenty-five acres. The subject application proposes creation of five lots, for five dwellings, on this 41-acre property. Four of the lots exceed the one dwelling per 25 acre base density, but are being requested under the "child lot" provision of the Zoning Ordinance, which states:

**59-C-9.74. Exempted lots and parcels – Rural Density Transfer Zone.**

- "(b) The following lots are exempt from the area and dimensional requirements of section 59-C-9.4 but must meet the requirements of the zone applicable to them prior to their classification in the Rural Density Transfer zone.
- (4) A lot created for use for a one-family residence by a child, or the spouse of a child, of the property owner, provided that the following conditions are met:
- (i) The property owner can establish that he had legal title on or before the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone;
  - (ii) This provision applies to only one such lot for each child of the property owner; and
  - (iii) Any lots created for use for one-family residence by children of the property owner may not exceed the number of development rights for the property." (Emphasis added)

The threshold issue in this application is whether the applicant, John R. Copenhaver<sup>1</sup> ("Applicant"), is eligible to create child lots on behalf of deceased property owners. If the Board determines that John Copenhaver may apply to create such child lots, then the Board must address two secondary issues: (1) whether, and if so, how, common ownership of a property through individual interests affects an individual's eligibility to create child lots, and (2) whether child lots can be created in addition to, rather than inclusive of, the base zone density. Although staff recommends denial of the application based on the inability to satisfy the above-noted threshold issue, staff has set forth its analysis of the other issues, in the event the Board disagrees with staff's position.

Eligible Property Owners

Per section 59-C-9.74(b)(4)(i), a property owner who can establish that he/she had legal title to a property on or before the approval date of the sectional map amendment ("SMA") that initially zoned the property to RDT<sup>2</sup>, is eligible to create lots for his or her children. In this instance, there were four owners of the subject property on the date the SMA was approved. They were Hilda F. Copenhaver and her three children: Gail C. McAuliffe, William F.

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<sup>1</sup> The application is signed by John Copenhaver, but subsequent correspondence states that he is acting in his capacity as the personal representative of Hilda and William Copenhaver (see Attachments C and D)

<sup>2</sup> January 6, 1981



Copenhaver, and John R. Copenhaver.<sup>3</sup> Hilda Copenhaver and her son William F. Copenhaver passed away on March 13, 2002 and June 20, 2002, respectively. However, the four child lots being requested are for John R. Copenhaver, one of Hilda Copenhaver's children, and for the three children of William F. Copenhaver.

#### APPLICANT'S POSITION

In letters dated September 13, 2005 and October 16, 2006 (Attachments C and D), the Applicant's representative explains that the subject lots are being requested by John R. Copenhaver, acting as the Personal Representative for the estates of his mother and brother. The letters state that both estates are still open in the Orphans Court/Register of Wills for Montgomery County, Maryland, and that John Copenhaver is acting based on desires expressed by his mother and brother to create child lots. The Applicant acknowledges that neither of them expressed a desire to create child lots for their respective children as part of their last wills and testaments, but that it had been the intention of both Hilda and William to do so.

In support of the position that child lots were intended to be created by Hilda and William Copenhaver, the Applicant's representative points to the fact that the family engaged the services of a consultant in 1999 to initiate percolation testing as evidence that the development process was begun within both their lifetimes. The Applicant's representative contends that it was delays inherent in the process, and the untimely deaths of both Hilda and William Copenhaver, that prevented the lots from being created. Therefore, the Applicant's representative believes that John Copenhaver, acting as Personal Representative for both Hilda and William Copenhaver, should be permitted to create one child lot for himself, on behalf of his mother, Hilda Copenhaver, and three child lots for the children of his brother, William Copenhaver.

#### STAFF'S POSITION

In staff's opinion, the requested child lots should not be approved because the property owners who are purportedly requesting those lots were not living at the time the application was filed, and their respective last wills and testaments do not state a desire to create such lots. The Applicant's representative asserts that the Personal Representative of the estates of the eligible property owners should be able to create child lots because the property owners "intended" to create them. The Zoning Ordinance does not address whether or not the written or unwritten "intention" of a deceased owner may be relied upon to create child lots. The section simply states that lots may be created for children of "the property owner" if, among other things, the "property owner" can establish that he had legal title on or before [January 6, 1981] "Section 59-C-9.74(b)(4)(i)". Since Hilda and William Copenhaver are deceased, their shares of the property are now controlled by their estates and not the individuals.

The Zoning Ordinance states that lots may be created for children of the property owner. It is staff's position that the property owner must be alive at the time of application for a

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<sup>3</sup> According to deeds supplied by the Applicant, an undivided one-half interest in the subject property was owned by Hilda Copenhaver, and each of her children owned an undivided one-sixth interest (see Attachment E).



subdivision to create child lots – or, at minimum, that the owner's last will and testament expressly state that owner's desire to create such lots.<sup>4</sup> Section 59-C-9.74(b)(4)(i) requires that "the property owner . . . establish" his ownership on or prior to the approval date of the SMA. In staff's view, this language suggests the legislature intended that the privilege of creating child lots extends to the property owner, not the potential beneficiary. Therefore it is reasonable to require that the applicant be a living property owner, or have expressly stated his or her intent in writing. The intention to create child lots is not expressly or implicitly provided in the wills of either Hilda or William Copenhaver, and no other documents executed by them to support this finding have been submitted. The only persons expressing such an intent are the potential beneficiaries. Therefore, no eligible property owner is the applicant in this case.

While staff does not contest that a Personal Representative may be able to subdivide a property on behalf of the estate of a deceased property owner, staff does not believe that the Personal Representative should be able to create child lots absent such express written intent of the original landowner. One policy reason for supporting the foregoing staff position is to prevent potential disregard of an original landowner's possible desire, not expressly stated in a will, to maximize the potential for continuing agricultural use of the land by limiting residential development.

Staff also does not agree with the Applicant's contention that the process to create child lots was commenced during the lifetimes of the eligible property owners. An application for a pre-preliminary plan was not filed until October 25, 2002, after the deaths of both Hilda and William Copenhaver, by John Copenhaver. While certain members of the family may have consulted with a professional regarding septic testing on the property in 1999, there was no plan submitted to a reviewing agency that indicated the discussion involved child lots, and there is no indication that either Hilda or William Copenhaver sought such testing. A pre-preliminary plan application is the first step in the subdivision process for septic lots. The Department of Permitting Services, Well and Septic section generally will not initiate septic testing on proposed lots until such an application, or an application for preliminary plan, is made. In order to support an argument that their representative should be able to continue a process that they purportedly began, it is staff's position that, at a minimum, the eligible property owners should have submitted an application for pre-preliminary plan during their lifetimes. For all the reasons discussed above, staff does not support the requested child lots.

The following issues are solely provided for the Board's consideration in the event that the Board disagrees with staff's threshold position that the stated property owners' cannot avail themselves of the child lot provisions.

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<sup>4</sup> Although not binding on the Planning Board, staff notes as a point of information, that the Maryland Agricultural Land Preservation Foundation (MALPF) has encountered similar situations in its implementation of the MALPF program. A representative of the Agricultural Preservation Advisory Board in the Agricultural Services Section of the Montgomery County Department of Economic Development has informed staff that, under the MALPF program, child lots have solely been granted to the estates of eligible property owners based upon the original property owner's intent being expressly included in a last will and testament or other notarized document.



## 1. Entitlement Related to Acreage Owned

One issue raised by this application is whether shared property ownership affects eligibility to create child lots. As stated above, when this property was rezoned to RDT, ownership was shared by four property owners. According to the deed that describes this shared ownership, undivided interest in the property was bequeathed to Mrs. Hilda Copenhaver (one half), and to each of her three children (one sixth each). Therefore, based on the 41-acre total property area, Mrs. Copenhaver held interest to 20.5 acres, and her children held interest to 6.8 acres each. Three of the four child lots included in this application are intended for the children of William Copenhaver, who held interest to 6.8 acres of the total property in 1981.

Because transferable development rights ("TDRs") for a property in the RDT zone are set at a rate of one TDR per 5 acres, and the child lot provisions of Section 59-C-9.74(b)(4)(iii) state that the total number of child lots may not exceed the number of TDRs for a property, there is a question as to whether William Copenhaver, or in this case his estate, is entitled to create three child lots because his estate controls only a 1/6 undivided interest. In other words, can Gail McAuliffe, John Copenhaver or the estate of Hilda Copenhaver allocate their respective interest in TDRs and acreage to the estate of William F. Copenhaver in order to create child lots for his children?

Because John Copenhaver is serving as William's Personal Representative in this application, staff presumes his consent to such use of his present and/or future TDR and acreage interests. Gail McAuliffe has expressly consented to this proposed subdivision, in writing (Attachment F), and therefore, staff similarly presumes Gail's consent to the use of her present and/or future TDR and acreage interests.

## 2. Child Lots In Addition To Base Density

If it is determined by the Board that the requested child lots may be created by the Applicant, an additional finding regarding overall density of the property needs to be made. Specifically, the Board must decide whether the child lots can be created in addition to, rather than inclusive of, the base zone density given the zoning ordinance provisions<sup>5</sup>. Consistent with the interpretation that has been applied since the inception of the RDT zone and the accompanying zoning text amendment, staff supports creation of child lots in addition to the base zone density of one unit per twenty-five acres provided the total number of lots do not exceed the number of TDRs (one per five acres) available for the original tract. In this instance, TDRs remain available to support the creation of the five lots proposed.

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<sup>5</sup> Specifically, Sec. 59-C-9.4 which includes the provision that only one one-family dwelling unit per 25 acres is permitted (with the exception of farm tenant dwellings, farm tenant mobile homes, guest houses, and accessory apartments or accessory dwellings regulated by a special exception); and Sec. 59-C-9.74 which states that child lots "are exempt from the area and dimensional requirements of section 59-C-9.4" but is silent on base density.



### **Conformance to the Master Plan**

The Master Plan for the Preservation of Agricultural and Rural Open Space (AROS) recommends the “preservation of critical masses of farmland and rural open space” (p. iv), but is otherwise silent regarding subdivisions. The Rural Density Transfer (RDT) zone would normally allow only one lot on a parcel of this size, but the zone allows the creation of child lots.

The plan provides for one market lot of 29.3 acres which provides the only opportunity for agriculture. An intermittent stream bisects this lot, and most of the lot is unsuitable for septic fields. If the child lots are approved for this application, the choices for their location are constrained by septic requirements. The size and configuration of the four proposed child lots are generally in keeping with the goal of reducing the size of exclusively residential lots to only include the house, septic area and wells. Given the constraints of the site, staff considers this application to meet the master plan requirement to preserve a critical mass of farmland.

### **Transportation**

The proposed lots do not generate 30 or more vehicle trips during the morning or evening peak-hours. Therefore, the application is not subject to Local Area Transportation Review. The proposed right-of-way dedication and access via private driveways has been determined to be adequate to serve the proposed lots. No sidewalks are required. Proposed vehicle and pedestrian access for the subdivision will be safe and adequate.

### **Relationship to the Rustic Road Functional Master Plan**

The Copenhaver property is located on two Rustic Roads, Comus Road and Peach Tree Road. The Rustic Roads Functional Master Plan “describes the recommended rustic and exceptional rustic road and identifies significant features for each...The Rustic Roads Program preserves the rustic character of certain County roads” (pp.1-3). The road descriptions in the plan provide guidance to the Rustic Roads Advisory Committee (RRAC) on the significant rustic characteristics of each road that the program seeks to preserve. The master plan also notes that the “rustic roads designation is not intended to affect the use of adjoining land except in the design of access to subdivision” (p. 5).

For Comus Road, significant features noted in the plan include the “alignment of the road as it leads to Sugarloaf Mountain” (p. 74), and further notes that, “beginning at Peach Tree Road (a rustic road) and traveling west, Comus Road has expansive views of farms on both sides”. This refers to the Copenhaver farm, on the north side of the road. For Peach Tree Road, views are also noted: “A good view of Sugarloaf Mountain is seen just north of Comus Road” (p. 129).

The RRAC reviewed a previous 7-lot submission for this subject property, which has now been revised to 5 lots. The committee expressed concerns for the roadway views and other impacts as follows:

*Our primary issue is protection of the view shed from Peach Tree Road towards Sugarloaf Mountain at Comus Road. This outstanding view is specifically identified in*



*the Functional Master Plan of Rustic Roads. We believe that a house on the corner (proposed Lot 1) will significantly degrade this vista and recommend that this lot be eliminated or relocated north of proposed Lot 7.*

*Additionally, we have the following concerns regarding this plan:*

- The density (number of lots) appears excessive for the agricultural reserve*
- The number of driveways should be further combined if feasible*
- Sunridge Drive should remain a driveway with minimal if any upgrading*

The 5-lot preliminary plan continues to locate lots at the corner of Peach Tree and Comus Roads, and along Comus Road. Future houses on these lots would impact the views to Sugarloaf Mountain, however, there are few options for avoiding these impacts since septic locations on the property are limited. If the Board decides to support the proposed application, the applicant has proffered a house setback from the corner, and down slope, to minimize the impact of the house on the view. This is probably the extent to which the view can be protected per the functional plan given its limited authority to affect land uses adjacent to designated roads.

### **Environment**

The 41-acre site is located in the Little Monocacy River watershed and contains the headwaters of an intermittent stream. The stream bisects the property and flows from south to north. There is no forest on the property. The Montgomery County Department of Permitting Services (DPS) has approved a stormwater management concept for the proposed subdivision. The concept includes onsite water quality and recharge through the use of dry wells.

### **Environmental Guidelines**

There are 4.8 acres of environmental buffer area, including 1.34 acres of floodplain, associated with the onsite stream. Since this buffer area is located on a proposed lot which is intended for continued agricultural use, the typical requirement to place the entire buffer in a conservation easement is waived. Instead, the proposed conservation easement is limited to the area of the buffer that will be used for planting to meet forest conservation requirements, and the remaining buffer will be available for agricultural use. With the reduced buffer, the application satisfies the requirements of the Planning Boards *Environmental Guidelines* for protection of environmentally sensitive areas.

### **Forest Conservation**

The preliminary forest conservation plan (FCP) submitted for the property includes a request for agricultural exemption for 28.8 of the 41 acres. A "Declaration of Intent" to continue farming this acreage has been submitted by the applicant to support this request. The remaining 10.26 acres of the site, which contains the residential dwellings, is subject to forest conservation requirements. Section 22A-12(f)(2)(A) of the Montgomery County Code ("Forest Conservation Law") states that in an agricultural and resource area on-site forest retention or planting must



equal 25% of the net tract area. Since this property is zoned RDT, the FCP must comply with this section. To meet the requirements, the application includes forest planting on 2.05 acres of the onsite environmental buffer area. The planting area will be placed in a Category I conservation easement. The application meets the requirements of the Forest Conservation Law.

### **Citizen Correspondence and Issues**

This application predated specific requirements for meetings between the applicant and interested parties, however, written notice of the application and the public hearing date was given to adjacent and confronting property owners, and local civic and homeowners associations. As of the date of this report, three citizen letters were received (see Attachment E). The letters express opposition to the proposed plan based on several concerns. The major concern expressed in all the letters is that the application does not meet the intent of the child lot provisions. Specifically, that the proposed child lots are not being created to support continued agricultural use of the property, but will be "flipped" by the designated children for profit. A second concern is that existing views of Sugarloaf Mountain from Comus Road and Peach Tree Roads not be blocked by proposed residential dwellings. Finally, an adjacent property owner raises a concern that proposed wells on the new lots will jeopardize the productivity and safety of their existing well.

In staff's opinion, the proposed child lots should not be approved, but not for the reasons identified in the citizen letters. There is no specific language in the AROS plan which requires creation of child lots to support the farm use. Rather, staff interprets the requirement to be that the creation of child lots does not preclude continued use of major portions of the property for farming. As discussed above, the preservation of the 29.3-acre lot for agricultural use meets the requirements of the AROS plan. The views from Comus and Peach Tree Roads to Sugarloaf Mountain will be impacted by the proposed houses, but this is unavoidable given the septic constraints of the site. There may be opportunities to adjust house locations to minimize impacts if the Board decides to support creation of the proposed lots. The proposed wells and their locations have been conditionally approved by the Montgomery County Department of Permitting Services, Well and Septic Section. Protection of existing wells is typically a consideration in their review.

### **CONCLUSION**

The privilege of creating child lots extends only to the original property owner at the time the SMA was adopted; and therefore, the Board should deny this application because Hilda and William F. Copenhaver, the original owners of the subject property, now deceased, did not express any intent or desire to create child lots in their respective wills or other written documentation.

### **ATTACHMENTS:**

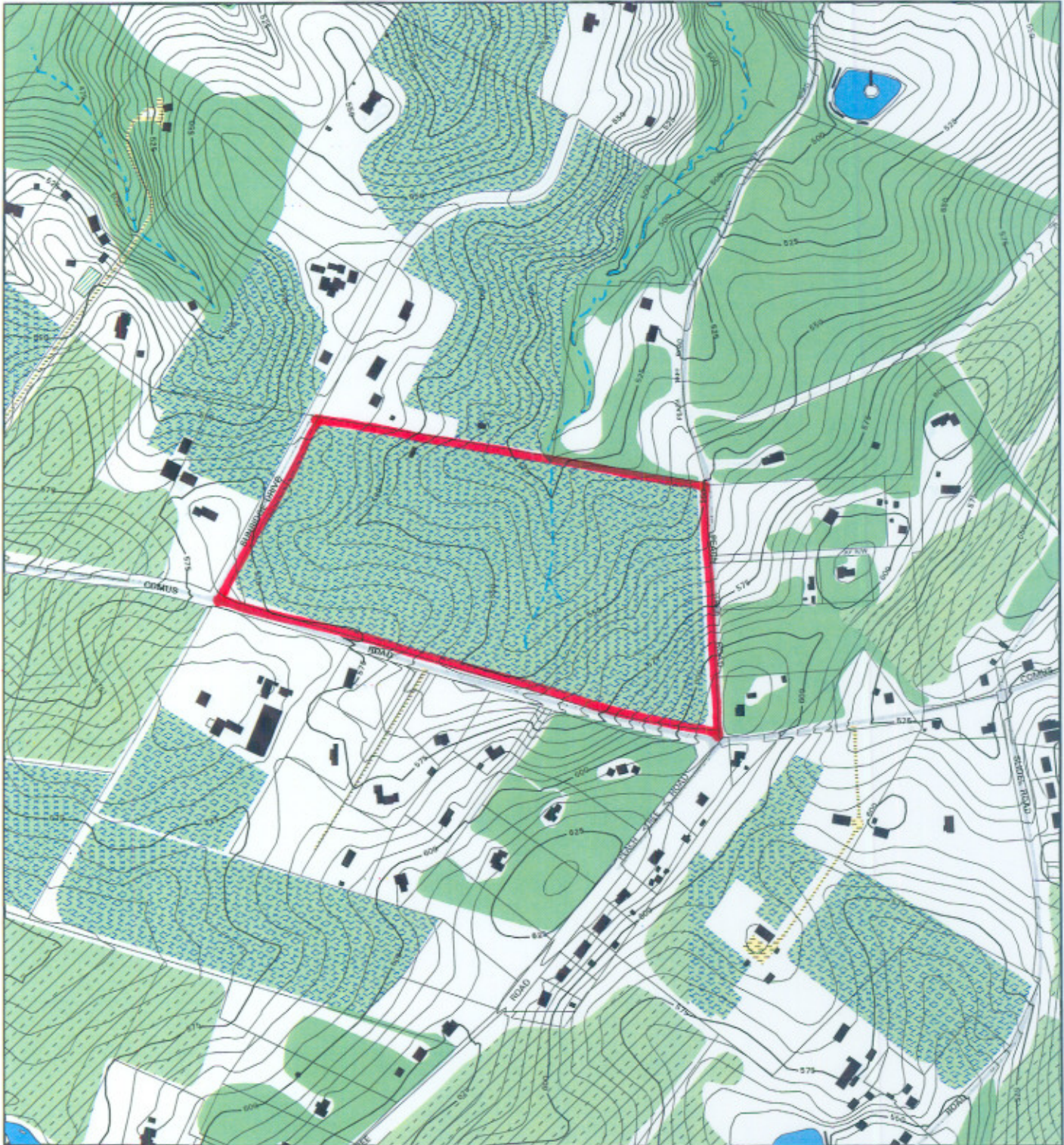
Attachment A – Vicinity Map  
Attachment B – Preliminary Plan



Attachment C – September 13, 2005 Applicant Letter  
Attachment D – October 16, 2006 Applicant Letter  
Attachment E – Deed of Ownership for the Property in 1981  
Attachment F – November 14, 2006 Letter  
Attachment G – Citizen Correspondence



## COPENHAVER PROPERTY (1-05097)



Map compiled on June 08, 2005 at 2:50 PM | Site located on base sheet no. 233NW16

## NOTICE

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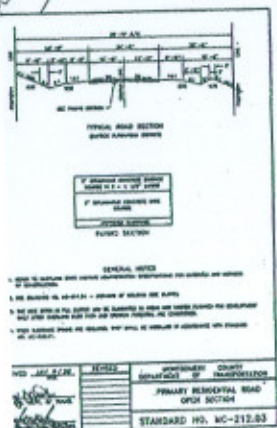
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**MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING**  
 THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION  
 8787 Georgia Avenue - Silver Spring, Maryland 20910-9760







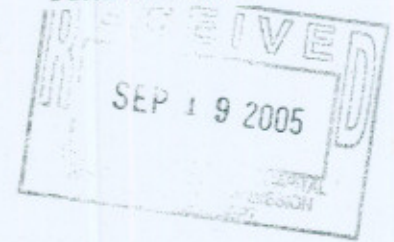


September 13, 2005

VIA FIRST CLASS MAIL & E-MAIL

Michele Rosenfeld, Esq.  
Associate General Counsel  
Maryland-National Capital Park & Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910

Attachment C



Re: Copenhaver Estate, Preliminary Plan # 1-05097

Dear Michele:

As you know, we represent the Copenhaver family and, on their behalf we submitted a letter to you on August 9, 2005 pertaining to the family's intent to create lots for themselves in accordance with Section 59-C-9.74 of the Zoning Ordinance. Following your receipt of that letter, you and Steve Orens discussed the matter and you raised a question regarding the applicability of this provision to family members who are the grandchildren of William K. Copenhaver and his wife Hilda F. Copenhaver who operated this farm property for many years but are now deceased. This letter provides additional information and responds to your concern.

In order to create a lot under Section 59-C-9.74 of the Zoning Ordinance the ownership of the property on or before the approval date of the sectional map amendment that initially zoned the property to the Rural Density Transfer Zone must first be determined. That pivotal date in this case is 1981, the year that the Sectional Map Amendment classifying the Subject Property to the RDT Zone was approved.

The owners of the Subject Property<sup>1</sup> in and prior to 1981 were Hilda F. Copenhaver, William F. Copenhaver, Gail C. McAuliffe and John R. Copenhaver. All of whom have owned the Subject Property since September 29, 1978.<sup>2</sup> Their ownership interests are as follows: Hilda Copenhaver owns an undivided 1/2 interest in the Subject Property and William F. Copenhaver, Gail C. McAuliffe and John R. Copenhaver (collectively referred to as the "Children of William K. and Hilda Copenhaver") each own an undivided 1/6 interest.

Hilda F. Copenhaver passed away in March 2002. She predeceased her son, William F. Copenhaver, who passed away in June 2002. At the present time, both of their estates are still open in the Orphans Court/Register of Wills for Montgomery County, Maryland and.

<sup>1</sup> William K. Copenhaver and Hilda Copenhaver originally acquired the Subject Property in September 1963, as tenancy by the entireties, however William K. Copenhaver passed away in October 1975.

<sup>2</sup> See the enclosed deed dated September 29, 1978 recorded in the Land Records for Montgomery County in Liber 5219 at Folio 564



Michele Rosenfeld, Esq.  
September 13, 2005  
Page 2 of 5

John R. Copenhagen (son to Hilda F. Copenhagen and brother to William F. Copenhagen), the Personal Representative of both estates is acting on behalf of the decedent owners. Upon the death of Hilda F. Copenhagen, her  $\frac{1}{2}$  interest in the property passed to William F. Copenhagen, Gail C. McAuliffe and John R. Copenhagen each of whom is one of her heirs at law. Accordingly the same individuals who were owners in 1981 each increased their respective ownership interest in the Subject Property as of March 2002. As of that date, the Children of William K. Copenhagen each had an undivided  $\frac{1}{3}$  interest in the Subject Property.

William F. Copenhagen passed away in June 2002 and his  $\frac{1}{3}$  interest in the Subject Property passed to his estate under a will that bequeathed his  $\frac{1}{3}$  interest in the Subject Property in equal shares to his three children, Stacy Thane, Susan Lee Kohler and William F. Copenhagen, Jr. (collectively referred to as the "Children of William F. Copenhagen"), and to his brother, John R. Copenhagen who previously had a  $\frac{1}{3}$  interest in the Subject Property. Therefore, under the will, the Children of William F. Copenhagen will each inherit an undivided  $\frac{1}{12}$  interest in the Subject Property, and John R. Copenhagen who owns a  $\frac{1}{3}$  interest will have his interest in the Subject Property increased by an additional  $\frac{1}{12}$  interest inherited from his brother. Therefore, John R. Copenhagen will ultimately have a  $\frac{5}{12}$  interest in the Subject Property.

For your assistance we have taken the liberty of attaching a "family tree" to this letter that should be of assistance to you.

The lots that are proposed by this preliminary plan are being created for the Children of Hilda Copenhagen who, along with the estate of her then late husband, William K. Copenhagen, was the owner of the Subject Property in 1981, as well as the Children of William F. Copenhagen who was also a pre-1981 owner. The Children of William F. Copenhagen are, of course, the grandchildren of William K. Copenhagen. That however is not relevant to the creation of "child lots" because those same family members are also the children of the 1981 owner, William F. Copenhagen who is now represented by the personal representative of his estate.

You previously considered virtually the same issue in the Nash-Howard Chapel Road Preliminary Plan Review (M-NCPPC File Number 1-86013). In that case, Jim Demma, representing the Nash Family, asked your office for an opinion as to the number of lots that could be created from a tract of land by right, as well as under Section 59-C-9.74 of the Zoning Ordinance. Mr. Demma, who is an expert in real estate transaction matters, concluded in his 1989 letter to you that 11 lots could be created on the Nash-Howard Chapel Road property. He observed "it is significant to note that Section 59-C-9.74 does not specifically address circumstances, such as the present, where there are co-owners with separate children." (See Demma letter dated September 1, 1989, attached hereto.) Mr. Demma then went on to state:



"The provision simply states that lots may be created for children of 'the property owner.' However, a reasonable interpretation of the language of 59-C-9.74 would imply plurality into the term property owner."

Section 59-C-9.74(b)(4) of the Zoning Ordinance reads the same today as it did in 1989 and the interpretation that was correct then remains so today.

You agreed with Mr. Demma's interpretation in 1989, as is reflected in your response to his letter. (Mr. Demma's letter is included for your review.) In your reply, you state:

"I agree with your conclusion...The Zoning Ordinance does not define "owner" for purposes of this exemption and the child exemption may be available to each owner of the property, **regardless of the fact that several owners may come from different generations.**" (Emphasis added)

The Nash-Howard Chapel Road case is astonishingly similar to the Copenhaver case. Here, we have several property owners from different generations. Each member of the Copenhaver Family, for whom a lot will be created, meets the established criteria under the Zoning Ordinance and therefore the creation of the six (6) additional lots requested, in addition to the one lot that is permitted by right, is permissible.

Gail C. McAuliffe and John R. Copenhaver are each entitled to a lot as the children of Hilda Copenhaver who was living in 1981, was the owner of the Subject Property prior to that date and expressed an intent to establish lots for her three children, including William F. Copenhaver.

Stacy Thane, Susan Lee Kohler and William F. Copenhaver are each entitled to a lot as the children of William F. Copenhaver who was living in 1981, was the owner of the Subject Property prior to that date and expressed an intent to establish lots for his three children.

The Copenhaver family members who currently have an interest in the Subject Property as owners or legatees of an estate can establish:

- (1) That they each had legal title to the Subject Property before the approval date of the Sectional Map Amendment in 1981, which initially rezoned the Subject Property to the Rural Density Transfer Zone;

They actually had title to the Subject Property since 1963 and the Copenhaver Family ownership was reapportioned among family members in 1978 and again in 2002.



Michele Rosenfeld, Esq.  
September 13, 2005  
Page 4 of 5

- (2) That the property owners, including the deceased Hilda Copenhaver and William F Copenhaver have each expressed a continuous intent to create one lot for each of the children of the property owners; and
- (3) The lots created for use as a one-family residence by children of the property owners will not exceed the number of development rights for the property.

Pursuant to our August 9, 2005 letter, enclosing the title search for the Subject Property, we have confirmed that no Transferable Development Rights have been created or conveyed.

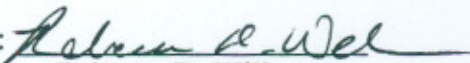
Given the foregoing, we request your concurrence that the 7 lots requested pursuant to Preliminary Plan # 1-05097 are permitted, both by right and as lots that are exempt from the area and dimensional requirements of section 59- C-9.4 of the Zoning Ordinance that meet the requirements of the Rural Zone, which is the zone applicable to them prior to their classification in the Rural Density Transfer zone under Section 59-C-9.74 of the Zoning Ordinance.

As you may also know, Steve Orens and I met with Rich Weaver on Wednesday, August 31<sup>st</sup>, to review certain technical revisions that have been made to the Preliminary Plan, as well as to finalize what additional revisions may be required prior to a Planning Board hearing being scheduled. It is our goal to have the revisions completed within the next two weeks and to request a Planning Board hearing date sometime in October.

We appreciate your continued assistance with this matter, and as always, if you have any questions, please do not hesitate to contact either Steve Orens or myself.

Sincerely,

DUFOUR & ORENS, CHTD.

By:   
Rebecca D. Willens

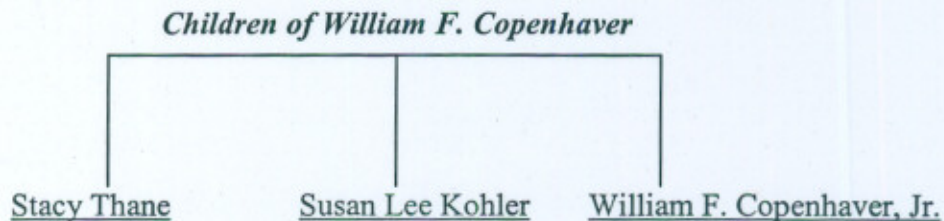
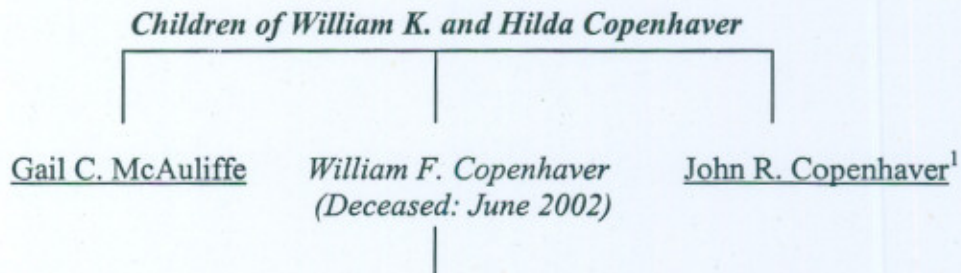
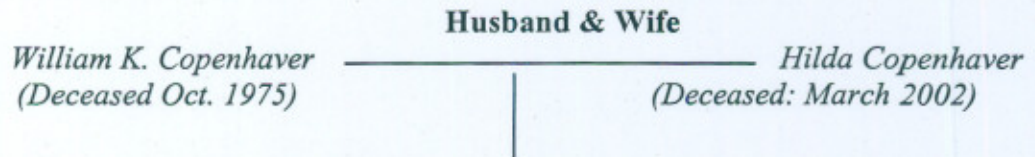
Enclosure

cc: John R. Copenhaver  
David Crowe, MHG  
Stephen J. Orens, Esq.  
Richard Weaver



## COPENHAVER FAMILY TREE

(Original Subject Property Owners- Acquired September 25, 1963)



### Key

Italicized = Currently Deceased

Underlined = Current Subject Property Owners

---

<sup>1</sup> Personal Representative for the Estates of Hilda F. Copenhaver (mother) and William F. Copenhaver (brother).



LIBER 5219 FOLIO 564

DEED

This Deed, made this 29th day of September, 1978, by and between William F. Copenhaver and James S. McAuliffe, Jr., Personal Representatives of the Estate of William F. Copenhaver, parties of the first part and Hilda F. Copenhaver, William F. Copenhaver, Gail C. McAuliffe, and John R. Copenhaver, parties of the second part.

WITNESSETH, that in consideration of and pursuant to the Last Will and Testament of William F. Copenhaver, the said parties of the first part do grant and convey as tenants in common an undivided one-half interest to Hilda F. Copenhaver, an undivided one-sixth interest to William F. Copenhaver, an undivided one-sixth interest to Gail C. McAuliffe, and an undivided one-sixth interest to John R. Copenhaver, parties of the second part their heirs and assigns in fee simple as tenants in common all that piece or parcel of land lying and being in Montgomery County, State of Maryland, described as follows:

Part of a tract of land called "WILSON'S INHERITANCE", being part of Lot numbered Four (4), in the division of the real estate of a certain David Hershey, deceased, described according to Plat of Survey prepared by R. K. Maddox, County Surveyor, in September, 1963, as follows:

BEGINNING FOR THE SAME at Stone No. 6 found in place on the East side of Ridge Road, at the beginning of 120 acres and 2 Woods of land as described in a conveyance from James E. Thompson and wife, to William L. Thompson and wife, and recorded among the Land Records for said County in Liber No. 1245, at folio 85; thence with part of said first line, South 02 degrees 47 minutes 50 seconds East, 1054.79 feet to the Northerly side of the Comus Road as shown on widening plat on file in the Montgomery County Public Works Department, and dated May, 1946 for a 50 foot wide Right of Way; thence along the Northerly side of said Road as shown, North 89 degrees 02 minutes 50 seconds West, 70.54 feet to Station P. C. 5 plus 27.85; thence, on a curve to the right having a radius of 1407.40 feet for a distance of 410.21 feet, chord bearing and distance North 80 degrees 41 minutes 50 seconds West, 408.77 feet to Station P.T. 9 plus 45.38; thence North 72 degrees 20 minutes 50 seconds West, 1660.20 feet to Station P. C. 26, plus 08.55; thence on a curve to the left having a radius of 2889.91 feet, for a distance of 50.30 feet (chord bearing and distance North 72 degrees 50 minutes 45 seconds West, 50.30 feet) to intersect the 7th line of said conveyance; thence leaving said Road with part of said line, North 28 degrees 02 minutes 55 seconds East, 859.55 feet thence with the last line of said conveyance, South 80 degrees 09 minutes East, 1673.76 feet to the place of beginning; containing 41.764 acres of land clear of Ridge Road.

STATE OF MARYLAND ) to wit  
COUNTY OF MONTGOMERY )  
Notary Public

On the 11th day of October 1978 before me, the undersigned Notary Public personally appeared William F. Copenhaver, Jr., agent for the parties hereto and made affidavit that there was NO CONSIDERATION for the transfer of this property.

My Commission Expires: 7/1/82

LAW OFFICES  
Rowan, Abell  
Quirk & Quinn  
Suite 320  
414 HUNGERFORD DR.  
ROCKVILLE, MD.  
(301) 762-4050

CLERK'S OFFICE  
MONTG. CO., MD.  
OCT 11 PM 1:30

COUNTY R/  
PER MCDP  
PLATS FO.  
50' R/W  
COMUS R

6



THIS DEED MADE THIS 1st day of April, 1949, by James E. Thompson and Elva T. Thompson, his wife, hereinafter called the Grantors to William L. Thompson and Bertha Mae Thompson, his wife, hereinafter called the Grantees.

NOW, THEREFORE, THIS DEED WITNESSETH, That for and in consideration of the sum of five dollars, (\$5.00), and other good and valuable consideration, receipt of which is hereby acknowledged, the said Grantors do hereby grant and convey unto the said Grantee, as tenants by the entireties, their heirs and assigns, in fee simple forever, all of the following described lands and premises situate in Montgomery County, Maryland, to-wit: All of that certain tract, part of a tract, piece and parcel of land situate in the 11th Election District of said County and State of Maryland, and being Lot No. 4 in the division of said land by a certain David Hershhey, deceased, described by metes and bounds as follows:

Begin at a stone for the said 1st parcel of land at a stone marked "6" at the corner of the 5th line of "Wilson's Inheritance" and running westerly along the lines of said tract with the courses and distances expressed, South 1/2 degrees East, 78 perches, South 37 1/2 degrees West, 61 perches, N. 07 1/2 degrees W. 18 paces, South 49-3/4 degrees West 14 perches, then with the line of No. 1, reversed North 71 degrees West, 111-3/4 perches North 32-3/4 degrees East, 68-3/4 perches to a stone, then North 30-3/4 degrees East, 78 1/2 perches to the end of 41 perches on the 5th line of "Wilson's Inheritance", then with said line to the place of beginning containing 120 acres and 2 rods of land, more or less.

Being all the land and premises described in a deed dated July 22nd, 1948, from John Newton Ward and Annie E. Ward, his wife, of record among the Land Records of Montgomery County, Maryland, in liber No. 1174, folio 598, et seq., to the said James E. Thompson and Elva T. Thompson, his wife.



1245 FEB 86

TO HAVE AND TO HOLD said lands and premises unto the said Grantees, as tenants by the entireties, their heirs and assigns, together with all and singular the buildings and improvements thereon, the rights, roads, ways, waters, privileges, easements, advantages and appurtenances thereto belonging or appertaining.

AND THE GRANTORS hereby covenant with the Grantees to warrant specially said property hereby conveyed and that they will at any time execute such other and further assurances as may be requisite.

WITNESS the hands and seals of the said Grantors.

Witness:

*Hazel W. Young*  
HAZEL W. YOUNG

*James E. Thompson* (SEAL)  
James E. Thompson

*Elva T. Thompson* (SEAL)  
Elva T. Thompson

STATE OF MARYLAND, MONTGOMERY COUNTY, to-wit:

I hereby certify that on this 8<sup>th</sup> day of April, A.D., 1949, before me, the subscriber, a Notary Public of the State of Maryland, in and for Montgomery County, personally appeared James E. Thompson and Elva T. Thompson, his wife, and they did each acknowledge the foregoing deed to be their respective act and deed. Witness my hand and notarial seal.

*Hazel W. Young*  
Notary Public

My com. expires: 7/2/49



Recorded April 18th  
1949 at 10:48  
A.M.





LAW OFFICES

**MILES & STOCKBRIDGE**  
22 WEST JEFFERSON STREET  
ROCKVILLE, MARYLAND 20850

TELEPHONE 301-782-1800  
TELECOPIER 301-782-0383

80 WEST PATRICK STREET  
FREDERICK, MARYLAND 21701

600 WASHINGTON AVENUE  
TOWSON, MARYLAND 21204

1701 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON, D.C. 20006

10 LIGHT STREET  
BALTIMORE, MARYLAND 21202

101 BAY STREET  
EASTON, MARYLAND 21821

11350 RANDOM HILLS ROAD  
FAIRFAX, VIRGINIA 22030

September 1, 1989

The Maryland-National Capital Park  
and Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910

Attention: Charles Loehr  
Coordinator-Subdivision Review Section

Re: Preliminary Plan  
Nash-Howard Chapel Road Property  
Liber 5249 at folio 120  
Montgomery County, Maryland

Our File No. 11982-000

Dear Mr. Loehr:

We have been asked for our opinion as to the maximum number of lots that the Nash Property can be subdivided into, and it is our opinion that such maximum number would be six (6), plus an additional five (5) lots based upon an allowed exemption. For our mutual benefit, the pertinent facts that were considered in order to reach this conclusion are as follows:

1. Janet R. Nash, Alan R. Nash, Linda S. Nash and Mary H. Nash, (now known as Mary H. Day), heirs at law of Richard H. Nash, deceased, as to a one-half (1/2) undivided interest, conveyed to Janet R. Nash, as to undivided thirty-eight percent (38%) interest, and Alan Nash, Linda Nash and Mary Nash, each as to an undivided four percent (4%) interest, by a certain deed dated the 14th day of November, 1978, and recorded the 4th day of December, 1978, in Liber 5249 at folio 120, among the Land Records for Montgomery County, Maryland, the remaining one-half (1/2) undivided interest being held by Janet R. Nash, solely.

2. The Nash Property is presently located in the Rural Density Transfer Zone (RDT). Section 59-C-9.4 of the Montgomery County Code provides that property in that RDT zone may be developed into a maximum of one (1) one-family dwelling units per twenty-five (25) acres. The Nash Property consists of a total of 166.47 acres and, therefore, the maximum number of 25-acre lots that may be created out of the 167.47 acre tract is six (6).



3. Section 59-C-9.74 provides, however, that certain lots are exempt and are not computed in the above calculation. This section provides that lots created for use for a one-family residence by a child of the owner are exempt subject to the following conditions:

(a) The property owner must establish that she had legal title on or before January 6, 1981. This condition is met because Janet R. Nash, Alan R. Nash, Linda Nash and Mary Nash took title to the property by the aforesaid deed recorded on the 4th day of December, 1978.

(b) Only one (1) lot per child of the owner is permitted under this exemption, however, the term "child" as defined by the Montgomery County Code does not include grandchildren. Here, Janet R. Nash, who has three children, may create three (3) lots and Linda Susan Nash, one of Mrs. Nash's children, who has two children, may create two (2) lots. Therefore, we believe that a total of five (5) lots may be created pursuant to this provision.

(c) The number of lots created under this exemption must not exceed the number of development rights of the property. The property comprises of 166.47 acres and at one development right per five (5) acres, the property is attributable with thirty-three (33) development rights. Assuming no more than twenty-two (22) development rights have been transferred, there are sufficient number to sustain five (5) exempted lots plus six (6) 25-acre lots.

4. The lots created under the 59-C-9.7 exemption must comprise at the least 40,000 square feet. Furthermore, in order to maintain the maximum allowable 25-acre lots, the exempted lots cannot comprise more than 16.47 acres in the aggregate ( $6 \times 25 = 150$  acres;  $166.47$  less  $150 = 16.47$  acres). Of course, if any of the "25 acre" lots exceed 25 acres, the amount of acreage attributable to the exempted lots must be reduced accordingly.

It is significant to note that Section 59-C-9.74 does not specifically address circumstances, such as the present, where there are co-owners with separate children. The provision simply states that lots may be created for children of "the property owner." However, a reasonable interpretation of the language of 59-C-9.74 would imply plurality into the term "property owner."

One consideration in order to achieve our conclusion is that the exemption is not designed to limit density but to expand it. The presumed purpose of the exemption is to allow others to provide their children with a building lot on family land



## MILES &amp; STOCKBRIDGE P.C.

Rebecca D. Willens  
301-517-4830  
rwillens@milesstockbridge.com

OCT 19 2006

October 16, 2006

Ms. Catherine Conlon  
Maryland-National Capital Park and Planning Commission  
Development Review Division  
8787 Georgia Avenue  
Silver Spring, MD 20910

Re: Copenhagen Subdivision - Preliminary Plan 120050970

Dear Ms. Conlon:

Per our discussion last week this letter serves as a summary of the preliminary plan revisions that have occurred since this plan was originally filed on April 29, 2005. As you know, this plan has been thoroughly reviewed by Staff at the Maryland-National Capital Park and Planning Commission (M-NCPPC), the Department of Public Works and Transportation (DPWT), the Rustic Roads Advisory Committee (RRAC), Department of Permitting Services (DPS), Montgomery County Fire and Rescue Services (MCFRS) and several other pertinent county agencies. As a result of these various reviews, and discussions with Staff at these various agencies since the Development Review Committee meeting on June 20, 2005, the preliminary plan has evolved to be the plan that is before you now and which we contend is ready to be brought to the Planning Board for a determination, hopefully in the beginning of November.

The property is known of record as Parcel P683, tax account identification number 11-00914781 (the Subject Property). The Subject Property is located in the Northwest Quadrant of the intersection of Comus Road and Peachtree Road and contains approximately 41.05 acres of land located in the Rural Density Transfer (RDT) Zone.

When this plan was initially filed the Applicant, John Copenhagen, sought 7 lots to be created on the 41.05 acre parcel. At the present time the plan has been revised to request a total of 5 lots. Each lot will be served by a septic system and DPS Well and Septic Division has already conducted the necessary percolation testing to approve the sites.

The initial preliminary plan submittal included additional driveways along Comus Road, which have now been eliminated. Further, the house sited on Lot 1 was located further forward from the current location shown on the revised plan. By siting the house further back on the lot from the corner of Comus Road and Peachtree Road, and in such a way as to have the house sit in a natural depression on the lot, the Applicant has taken steps to preserve the scenic vista to

Client Documents:4823-3127-8849v1|14261-000002|10/12/2006



Sugarloaf Mountain beyond that required by the Master Plan mandated 50 foot setback. The subdivision regulations do not require an Applicant to be bound by the house locations noted on a preliminary plan, however as a means of assuring compliance with the spirit and intent of the proffer, the Applicant will consent to a condition of approval that establishes a building restriction line for Lot One that requires a minimum 100 foot setback from both Comus and Peachtree Roads.

The lots being requested are as follows:

Lot Number	Lot Area	Zoning Ordinance Section Authorizing
1	2.5 acres	59-C-9.74(b)(4)
2	2.0 acres	59-C-9.74(b)(4)
3	3.3 acres	59-C-9.74(b)(4)
4	29.3 acres	59-C-9.4
5	2.0 acres	59-C-9.74(b)(4)

The pre-1981 owners of the Subject Property are Hilda F. Copenhaver, Gail C. McAuliffe, William F. Copenhaver and John R. Copenhaver, as evidenced by a Deed recorded in the Land Records for Montgomery County in Liber 5219 at folio 564.

The persons for whom child lots are proposed to be created by the Preliminary Plan are Stacey Thane, Susan Lee Kohler and William F. Copenhaver, Jr. and John Copenhaver (collectively referred to as the "Children"). Stacy, Susan and William F. Copenhaver, Jr. are children of the pre-1981 property owner William F. Copenhaver, and one lot is being requested for each. John R. Copenhaver is the child of Hilda F. Copenhaver, a pre-1981 property owner, and one lot is being requested for him.

Lot 4 is requested pursuant to the RDT Zone standard, as it contains more than 25 acres. This lot is requested of right pursuant to Section 59-C-9.4 of the Zoning Ordinance.

The child lots requested by the preliminary plan will be owned and occupied by the Children as intended by Section 59-C-9.74 of the Zoning Ordinance. The Children have agreed, although not required by the Zoning Ordinance or other applicable law, to submit signed and binding Affidavits evidencing their commitment to reside on the Subject Property for a minimum of five years from the completion of construction of the proposed residences.



The application of §59-C-9.74 to the Preliminary Plan clearly demonstrates that the Copenhaver family is entitled to the lots requested. §59-C-9.74 of the Zoning Ordinance states:

**59-C-9.74. Exempted lots and parcels-Rural Density Transfer zone.**

- (a) The number of lots created for children in accordance with the Maryland Agricultural Land Preservation Program must not exceed the development rights assigned to the property.

**This provision is inapplicable to the Copenhaver Plan, because the Property is not subject to any easement recorded pursuant to the Maryland Agricultural Land Preservation Program.**

- (b) The following lots are exempt from the area and dimensional requirements of Section 59-C-9.74 but must meet the requirements of the zone applicable to them prior to their classification in the Rural Density Transfer zone.

- (1) A recorded lot created by subdivision, if the record plat was approved for recordation by the Planning Board prior to the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone.

**This provision is not applicable because no plat was previously recorded for the Copenhaver Property.**

- (2) A lot created by deed executed on or before the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone.

**This provision is not applicable because there was no lot created by deed.**

- (3) A record lot having an area of less than 5 acres created after the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone by replatting 2 or more lots; provided that the resulting number of lots is not greater than the number which were replatted.

**This provision is not applicable as there is no previous plat for the Copenhaver Property, and accordingly, there has been no replatting.**

- (4) A lot created for use for a one-family residence by a child, or the spouse of a child, of the property owner, provided that the following conditions are met:
    - (i) The property owner can establish that he had legal title on or before the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone;



The pre-1981 owners of the Copenhaver Property are Gail C. McAuliffe, William F. Copenhaver and John R. Copenhaver, as evidenced by the Deed recorded in Liber 5219, Folio 564.

- (ii) This provision applies to only one such lot for each child of the property owner; and

The persons for whom child lots are proposed to be created by the Preliminary Plan are Stacey Thane, Susan Lee Kohler, William F. Copenhaver, Jr. and John Copenhaver. They are all children of pre-1981 property owners and one lot is being requested for each.

- (iii) Any lots created for use for one-family residence by children of the property owner must not exceed the number of development rights for the property.

We have confirmed through a title report, which has previously being provided to M-NCPPC Legal Staff, that no Transferable Development Rights have been created or conveyed from the Copenhaver Property.

Given the foregoing, we conclude that the five (5) lots requested, four (4) of which are child lots, can be validly created through the pending Preliminary Plan.

The history of the pending Preliminary Plan is important. The Copenhaver Family began the process of creating "child lots" in 1999. At that time they engaged the services of Dick Witmer of Witmer & Associates who began the process by initiating percolation testing. He also had correspondence with the Maryland-National Capital Park and Planning Commission (M-NCPPC) Staff regarding the exemption to platting requirements for a single residential lot that has not changed size or shape since June 1, 1958 per Chapter 50, Section 50-9(f) of the Montgomery County Code.

On September 6, 2002 a Pre-Preliminary Plan of Subdivision application was filed with M-NCPPC<sup>1</sup> and on October 28, 2002 a pre-application concept plan was submitted as well. The Development Review Committee (DRC) met on November 18, 2002 to review the Pre-Preliminary Plan; however a Planning Board review was not conducted.

Hilda F. Copenhaver ("Hilda") passed away in March 2002. Hilda passed away after a bout of pneumonia, although she had also been recovering from a broken hip and various other illnesses. She was 94 at the time of her death. Prior to her death she expressed a desire to create child lots for her children, if they wanted to reside on the Subject Property.

<sup>1</sup> This was plan number 7-03008.

Client Documents 4823-3127-8849v1|14261-000002|10/12/2006



William F. Copenhaver ("Bill") passed away in June 2002 after a battle with cancer. Prior to his death Bill expressed a desire to create child lots for his three children. That process was commenced during both Bill and Hilda's lifetimes. Unfortunately, due to their untimely deaths, and the delays inherent in the process, the creation of the lots did not occur during their lifetimes. John Copenhaver, as the Personal Representative for Bill is requesting the three child lots for Stacy, Susan and William F. Copenhaver, Jr. John is also the Personal Representative for his mother, Hilda, and in that capacity is requesting a lot for himself as the child of a pre-1981 property owner.

The Applicant for the Preliminary Plan is John Copenhaver. He is the authorized agent and property owner, a proper party to be the Applicant on behalf of his family. Despite John being the only named Applicant, each of the Children have agreed to be bound by the terms and conditions of the Preliminary Plan.

The final remaining question to be addressed herein relates to a point, that has been raised by civic activists, that deals with the ability of a Personal Representative of an Estate, here the Estates of William F. Copenhaver and Hilda Copenhaver, to step into the decedent's shoes to complete the process of creating "child lots" when the process for creating such lots was begun during the lifetime of the decedents and the decedents' intent is clearly established.

The Maryland Annotated Code, in the Estates and Trusts Article, Section 9-101, defines a Personal Representative as an executor or administrator. Section 1-301(a) provides "All property of a decedent shall be subject to the estates of decedents law, and upon the person's death shall pass directly to the personal representative, who shall hold the legal title for administration and distribution, without any distinction, preference, or priority as between real and personal property." The Personal Representative is charged with the responsibility of transferring all assets of the decedent, as evidenced by instrument or deed. §9-105 of the Trusts and Estates Article. The deed or other instrument that the Personal Representative executes in their authority is indexed among the land records under the name of the decedent. See §9-105(d). The fact that such a document is indexed under the name of the decedent, not under the name of the Personal Representative or other individual, is evidence of the broad powers and fiduciary duty conferred upon the Personal Representative to act on behalf of the decedent.

Here, John Copenhaver is the Personal Representative for his mother, Hilda Copenhaver, and his brother, William F. Copenhaver, and he is carrying out the decedents' intent, as evidenced throughout their lifetimes, to create the "child lots" and confer legal ownership of the family property to the Children in fee simple.

We understand that the Planning Board has expressed a hesitancy to create "child lots" that are not specifically provided for in a last will and testament. Maryland law does not require that a person execute a last will and testament and the Zoning Ordinance does not require that a last will and testament be the mechanism by which a deceased owner of RDT property express their intent to continue the process of providing lots for their children on their RDT property. The



primary purpose of a last will and testament is to express the intent of the deceased with regard to the distribution of that person's real and personal property and to appoint an individual, or group of persons, who will be responsible for carrying out the decedent's remaining legal or personal issues, including the filing of tax returns.

There is no doubt that the deceased pre-1981 owners of the Copenhaver property expressed in their last will and testaments their intent that the Children succeed to ownership of the property. That the benefits of such ownership by the children of the deceased, under the law as it existed when the individual passed away, is the right to continue the process to create a lawful lot for their residence is also clear. The Personal Representative is working to effectuate the decedents' intent. We submit that it would be an anomaly to require an explicit recitation in a last will and testament as the vehicle to implement the property owner's intent, especially if state law does not even require that there be a will. Such a statement in a will would be especially rare in such a family as the Copenhavers. The family is a tight knit group of persons who were all aware of the decedent's intent to create "child lots", as they had already commenced the process by hiring an engineering firm: Macris, Hendricks and Glascock, to prepare and pursue the subdivision on the family's behalf prior to their deaths.

Maryland law provides that a personal representative of an estate has a duty to act consistent with the terms and conditions of the will. The Personal Representative is charged with the execution of the terms of the will, as expressed through the written document, and the personal representative "should not become a party to any shift or device whereby the will of his testator is collusively avoided, or the intention of the testator is defeated or changed to effect a different disposition of his estate." *Brewer v. Brewer*, 386 Md. 183, 193, 872 A.2d 48 (2005), citing *Surratt v. Knight*, 162 Md. 14, 158 A. 1,2 (1932). Here the Personal Representative's actions in pursuing the child lot subdivision are consistent with the bequest of the property and the intentions of the decedents, as expressed during their lifetimes. The Personal Representative, having a fiduciary duty to the estate and a statutory duty to enforce the terms and conditions of the will, is acting consistent with his obligations.

Admittedly, the evidence of the decedents' intent to create "child lots" are not found in the four corners of the Last Will & Testaments. However, testimony and Affidavits from family and others who knew William F. Copenhaver and Hilda Copenhaver during their lifetimes can be presented, if necessary, to support the decedents' intent to create child lots for the Children.

Maryland courts have held that parole evidence may be used to determine the intent of a decedent, should an ambiguity exist or questions arise with regard to the decedent's intent. This was the case in *Ebert v. Ritchey*, which concerned the decedent, Charles Ebert's, intended distribution of assets. Mr. Ebert executed certain bank account documents that were potentially inconsistent with his will and the personal representative brought a suit seeking the Court's clarification as to the distribution of the estate. Mr. Ebert's brother, Anthony, claimed that it was the decedent's intent to have him solely own certain assets and not share the assets with their siblings. The siblings joined with the personal representative in asserting that their brother's true



intent was to divide any and all proceeds equally among the four siblings. In *Ebert*, the Court of Special Appeals held that such statements of relatives and heirs to the intent of the decedent were hearsay or "offered to prove the truth of an out of court statement." *Ebert v. Ritchey*, 54 Md.App. 388, 396, 458 A.2d 891 (1983). The Court went on to hold that there were certain exceptions to the hearsay rule and that the testimony of the siblings was admissible under the state of mind or true intent exception. This is consistent with the holding in *Mason v. Poulson*, 40 Md. 355 (1874) where the Court of Appeals held that "statements made by a decedent as to his testamentary interest were admissible if offered through those persons who heard them." *Id.*

There are no cases that we have been able to find that directly discuss a decedent's intent to create "child lots" and whether the testator's intent must be strictly governed by the four corners of the document itself. However, given the Maryland Court's trend toward the fulfillment of the testator's intent and reviewing evidence indicating that intent, it is unlikely that such a case would go up on appeal, especially in light of the fact that the current Zoning Ordinance does not require a will to specifically mention the creation of "child lots" for a valid subdivision to occur. The Personal Representative for William F. Copenhaver and Hilda Copenhaver that the decedents intended to create "child lots" for the Children, as did the remaining family members, and is acting consistent with the spirit and intent of the wills.

I hope that the foregoing summary proves helpful in the preparation of the Staff Report and that we can move expeditiously forward to a public hearing on this plan. Should you require further information, please do not hesitate to contact me directly at 301-517-4830.

Sincerely,



Rebecca D. Willens

cc: Stephen J. Orens  
John Copenhaver  
Stacy Thane  
Susan Kohler  
John F. Copenhaver, Jr.



LIBER 5219 FOLIO 564

D E E D

This Deed, made this 29th day of September, 1978, by and between William F. Copenhaver and James S. McAuliffe, Jr., Personal Representatives of the Estate of William K. Copenhaver, parties of the first part and Hilda F. Copenhaver, William F. Copenhaver, Gail C. McAuliffe, and John R. Copenhaver, parties of the second part.

WITNESSETH, that in consideration of and pursuant to the Last Will and Testament of William K. Copenhaver, the said parties of the first part do grant and convey as tenants in common an undivided one-half interest to Hilda F. Copenhaver, an undivided one-sixth interest to William F. Copenhaver, an undivided one-sixth interest to Gail C. McAuliffe, and an undivided one-sixth interest to John R. Copenhaver, parties of the second part their heirs and assigns in fee simple as tenants in common all that piece or parcel of land lying and being in Montgomery County, State of Maryland, described as follows:

Part of a tract of land called "WILSON'S INHERITANCE", being part of Lot numbered Four (4), in the division of the real estate of a certain David Hershey, deceased, described according to Plat of Survey prepared by R. K. Maddox, County Surveyor, in September, 1963, as follows:

BEGINNING FOR THE SAME at Stone No. 6 found in place on the East side of Ridge Road, at the beginning of 120 acres and 2 roods of land as described in a conveyance from James E. Thompson and wife, to William L. Thompson and wife, and recorded among the Land Records for said County in Liber No. 1245, at folio 85; thence with part of said first line, South 02 degrees 47 minutes 50 seconds East, 1054.79 feet to the Northerly side of the Comus Road as shown on widening plat on file in the Montgomery County Public Works Department, and dated May, 1946 for a 50 foot wide Right of Way; thence along the Northerly side of said Road as shown, North 89 degrees 02 minutes 50 seconds West, 70.54 feet to Station P. C. 5 plus 27.85; thence, on a curve to the right having a radius of 1407.40 feet for a distance of 410.21 feet, chord bearing and distance North 80 degrees 41 minutes 50 seconds West, 408.77 feet to Station P.T. 9 plus 45.38; thence North 72 degrees 20 minutes 50 seconds West, 1660.20 feet to Station P. C. 26, plus 08.55; thence on a curve to the left having a radius of 2889.91 feet, for a distance of 50.30 feet (chord bearing and distance North 72 degrees 50 minutes 45 seconds West, 50.30 feet) to intersect the 7th line of said conveyance; thence leaving said Road with part of said line, North 28 degrees 02 minutes 55 seconds East, 859.55 feet thence with the last line of said conveyance, South 80 degrees 00 minutes East, 1673.76 feet to the place of beginning; containing 41.764 acres of land clear of Ridge Road.

STATE OF MARYLAND ) to wit  
COUNTY OF MONTGOMERY )  
Notary Public

On the 11th day of October 1978 before me, undersigned Notary Public personally appeared William F. Copenhaver, Jr., agent for the parties hereto and made affidavit that there was NO CONSIDERATION for the transfer of this property.

My Commission Expires: 7/1/82

LAW OFFICES  
Rowan, Abell  
Quirk & Quinn  
Suite 320  
414 HUNGERFORD DR.  
ROCKVILLE, MD.  
(301) 762-4060

CLERK'S OFFICE  
MONTG. CO., MD.  
OCT 11 PM 1:30  
1978

18



AND the said parties of the first part covenant that they will warrant specially the property hereby conveyed; and that they will execute such further assurances of said land as may be requisite.

WITNESS our hands and seals.

WITNESS:

Therese Rhodes

William F. Copenhaver  
William F. Copenhaver, Personal  
Representative of the Estate of  
William K. Copenhaver

Therese Rhodes

James S. McAuliffe, Jr.  
James S. McAuliffe, Jr., Personal  
Representative of the Estate of  
William K. Copenhaver

STATE OF MARYLAND )  
COUNTY OF MONTGOMERY ) to wit:

On this 29th day of September, 1978, before me, the undersigned officer, personally appeared, William F. Copenhaver, Personal Representative of the Estate of William K. Copenhaver and James S. McAuliffe, Jr., Personal Representative of the Estate of William K. Copenhaver, known to me (or satisfactorily proven) to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Therese Rhodes  
Notary Public

My Commission expires: 7/1/80

THIS IS TO CERTIFY that the within instrument was prepared by or under the supervision of the undersigned, an attorney duly admitted to practice before the Court of Appeals of Maryland.

William F. Abell, Jr.  
William F. Abell, Jr.

LAW OFFICES  
Rowan, Abell  
Quirk & Quinn  
Suite 320  
414 HUNGERFORD DR.  
ROCKVILLE, MD.  
(301) 762-4050



SEP 29 1878

11-1-914781

All parties to whom the property referred to in  
 California T. & C. Co. Deed of Trust, County  
 of Santa Clara, No. 11-1-914781, of  
 the County of Santa Clara, State of  
 California, are hereby notified that the  
 same has been sold to the State of California  
 for the purpose of satisfying the  
 same for prior periods, does  
 not tax value satisfaction of outstanding

Witness my hand and seal of office  
 at the City and County of Santa Clara,  
 California, this 29th day of September, 1878.

- EXEMPT FROM MOUNTAIN TAX -

HEREBY CERTIFY THIS PROPERTY HAS BEEN DULY  
 TRANSFERRED ON THE MONTGOMERY COUNTY  
 ASSESSMENT BOOKS.

*W. H. Moore* 6870  
 TRANSFER CLERK DIVISION OF ASSESSMENTS  
 11-1-914781



November 14, 2006

Ms. Catherine Conlon, Subdivision Supervisor  
Development Review Division  
The Maryland-National Capital  
Park & Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910-3760

COPY  
*Original Filed*

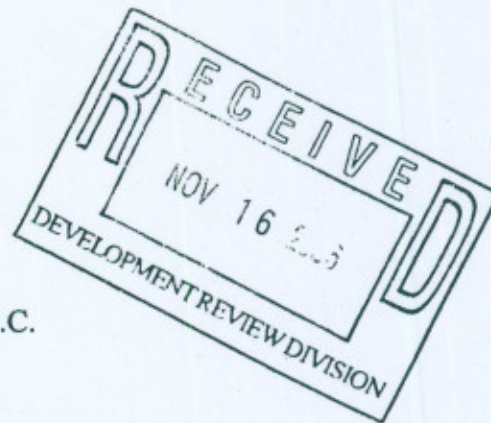
RE: Preliminary Plan #1-05097  
Copenhaver Property

Dear Ms. Conlon;

I am aware of the pending subdivision application for our property located at the corner of Comus and Peach Tree Roads. I consent to the application, as well as the five lots being requested.

Sincerely,

*Gail C. McAuliffe*  
Gail C. McAuliffe



CC: Rebecca D. Willens; Miles & Stockbridge P.C.



## Citizen Correspondence



COPY

RECEIVED  
1618  
OCT 05 2005

MCP-Chairman

OFFICE OF THE CHAIRMAN  
THE MARYLAND NATIONAL CAPITAL  
PARK AND PLANNING COMMISSION

**From:** MelaneKHoffmann@aol.com  
**Sent:** Wednesday, October 05, 2005 6:04 PM  
**To:** MCP-Chairman  
**Cc:** county.council@montgomerycountymd.gov; councilmember.knapp@montgomerycountymd.gov; Abbaticchi@aol.com; ajcinque@mindspring.com; laserveteeg@netzero.com; c.g.fecteau@att.net; calmarken@boo.net; pathancock50@yahoo.com; Rlreilly16@aol.com; Leedyko@aol.com; Leedyt@aol.com; f.a.r.m@erols.com; annedavies@intaimet.com; gordonballard@netzero.com; pearljam@earthlink.com; pearljam@erols.com; fcarey@erols.com; farnsworthhomes@starpower.net; W8BOZ@aol.com; keller6@bellatlantic.net; gowen@sugarloafnet.com; FoxfireZoe@aol.com; Windcrestii@aol.com; sharon\_libby@agilent.com

**Subject:** Abuse of Tot lots in the Ag Reserve

Derick Berlage  
 Chairman, Montgomery County Planning Board  
 MNCPPC

Dear Chairman Berlage:

I am writing to ask that the County Planning Board enforce the intent of the "tot lot" provision in the Ag Reserve zoning on the Copenhagen property at the corner of Comus and Peach Tree Roads, and for all farming properties in the future.

While the Board has approved several unethical and illegal subdivisions in recent years that are incomprehensible to many of us, that does not mean they should continue the damage this is doing to the Ag Reserve. Major mistakes have been made, but let's not continue making the same mistakes.

The owners of the Copenhagen property have created a case that is the "poster child" of tot lot abuses:

- The owners have no intention of continuing farming (and farming is the **ONLY** intended purpose of the tot lot provision), rather they intend to purely and simply sell land and/or houses on the open market as if there were no Ag Reserve. In fact, subdividing the land into eight parcels ensures that the land can no longer be farmed.
- Peach Tree and Comus Roads are designated Rural and Rustic Roads, and the clustering of new large mansions close to the roads is in direct opposition to the purpose of this designation.
- The stream that runs through the property travels downstream to several horse farms, and seven or eight septic fields disrupting that stream endangers these other farms.
- Many, many law abiding landowners with large parcels in the Ag Reserve have **NOT** tried to abuse the tot lot provision, and it is a travesty of justice to reward those who try to break the law.
- Please remind the staff of Park and Planning: This is an **AGRICULTURAL** Reserve, not a development reserve! Please stand up and do your job, by enforcing the regulations that were created by elected officials!

Please do not approve this illegal subdivision!

Please keep me informed of the status of this property. Thank you.

Melane Kinney Hoffmann  
 Hidden Ridge Farm  
 23801 Peach Tree Road  
 Clarksburg, MD 20871  
 301-972-6126 (home)  
 301-972-6430 (home office)

10/6/2005

(22)



301-928-5857 (cell)

[melanekhoffmann@aol.com](mailto:melanekhoffmann@aol.com)

cc: County Council

Council Member Mike Knapp

Peach Tree and Comus Road neighbors

10/6/2005

23



Weaver, Richard

1-05097

**From:** MelaneKHoffmann@aol.com  
**Sent:** Wednesday, October 19, 2005 4:39 PM  
**To:** Weaver, Richard; RThomasHoffmann@aol.com  
**Subject:** Re: FW: Copenhaver Property (C-track 2005-1618)

Addn  
 9/29 psc

Hi Richard: Thanks for your call, and sorry I have not gotten back to you sooner; I was out of town Monday and Tuesday.

I returned your call today but got a message that your voicemail box was full. I did receive your email; thanks for the detailed response. I am very interested to talk with you about it. Unfortunately I will be out again all day tomorrow (Thursday 10/20), but will be available all day Friday. I'll phone you early in the morning in hopes we can connect. Thanks, Melane Kinney Hoffmann

Melane Kinney Hoffmann  
 Hidden Ridge Farm  
 23801 Peach Tree Road  
 Clarksburg, MD 20871  
 301-972-6126 (house)  
 301-972-6430 (home office)  
 301-928-5857 (cell)  
 301-972-6132 (fax)  
 melanekhoffmann@aol.com

In a message dated 10/13/2005 9:02:51 AM Eastern Standard Time, Richard.Weaver@mncppc-mc.org writes:

Dear Ms. Kinney Hoffman,

I am responding to your email dated October 5, 2005 to Derick Berlage, Chairman of the Planning Board. Please understand that under the Board's ex parte rules, Board members cannot comment on plans under review by staff until they are actually brought to the Planning Board at public hearing. The Copenhaver Property remains under review by staff. At this time we do not have an anticipated Board date for the plan to be considered at public hearing.

Your email did not ask specific questions. You appeared to be concerned with previous "tot lot" approvals by the Planning Board, impact of the plan to roads and streams, and interpretation of the child lot provisions. As staff interprets the current zoning ordinance, a landowner who owned and still owns a given piece of land prior to the land being re-zoned to the RDT Zone is eligible to create lots for their children or spouses of their children, as long as they have TDR's remaining for each lot. The lots are to be created for a residence of the child or spouse of the child. There is no length of residency requirement that we can interpret from the language, nor is there a requirement that the children living in the homes on the child lots be required to work on the farm. After approval of the child lots, Park and Planning's role is to assure that the building permits that are applied for on the child lots are actually under the name of one of the children (or spouse).

The Board has approved applications in the past based on this interpretation. Any violations, of which there is at least one that I am aware of, came well after the Planning Board approval and were not due to actions of the Planning Board. I do know that the preservation of the agricultural reserve is receiving renewed interest; the Chairman and staff are actively involved in refining the land use policies in all agricultural zones. However, when the Copenhaver Property application is otherwise complete, staff is required to take it to the Planning Board for public hearing in a timely manner unless a change in

(24)

10/20/2005



policy or other guidance precludes us from doing so.

The Copenhaver Property does have a few outstanding issues which need to be resolved prior to scheduling for the Board. The Board and staff are aware of most of the concerns you raised in your letter regarding the intent of the child lot provisions. Resolution of the issues may tend to extend our review period. For now, I will be sure your name is placed on the mail-out list so you will be advised of the Planning Board hearing. Please use me as your contact for this particular plan, I can be reached at (301) 495-4544. Email is preferred however.. Should you have more general questions regarding policies in the RDT, I suggest you contact Judy Daniel, of our Community Based Planning Division at (301) 495-4595. Thank you for your input.

Richard A. Weaver  
Coordinator  
Development Review Division  
MD-National Capitol Park and Planning Commission

10/20/2005

(25)



Jeffrey G. Garrard  
23501 Peach Tree Rd.  
Clarksburg, MD 20871  
301-916-6212

COPY

June 6, 2005

M-NCPPC  
Development Review Division  
8787 Georgia Avenue  
Silver Spring, MD 20910-3760

Attention: Richard Weaver

**Re: Preliminary Plan #1-05097-Copenhaver**

The preliminary plans for the Copenhaver property have raised several concerns that not only directly affect our family's physical and financial well being, but also effect the unique rural setting of our community.

One of our primary objectives is to insist that the MNCPPC strictly enforce the rules governing "Tot Lots" in the RDT zone. It is apparent to our community that the intention of the "Tot Lot " provision is being grossly abused in the Copenhaver's proposal. They are requesting to divide their forty-one acres into seven two to three acre home sites. **Lot 1** has a septic easement on to **Lot 7** which is blatantly encouraging future density. The remaining twenty -five acres is to qualify for "Agricultural Use". This will leave the door open for future expansion of four additional home sites. We understand that the family does not have children ready to occupy these homes. The use of the Tot Lot exception is a thinly veiled attempt to "develop and flip" houses for commercial subdivision purposes. I am advised that there were several situations in recent years in which a development plan that abused the "tot lot rules" slipped through the cracks of County enforcement. I hope it is obvious that failure to enforce the law in the past is not an excuse for allowing the Copenhaver proposal to abuse the rules.

Second, we bring to your attention a significant misrepresentation of fact in the Preliminary Plan. Note #13 states "There are no existing wells or septic areas within 100' feet of the property". This statement is not true. Our Current well is 45 feet from the proposed development, specifically **Lot 1**. We are deeply concerned for the productivity and safety of our well. We live on **Tax Parcel 813**. Our well produced only 2 gallons per minute, at last testing. The county is aware of our community's fragile water supply as demonstrated by its purchase of 200 acres on Peach Tree Road under "Legacy Open Space," a purchase that was motivated by the protection of inadequate well water



supplies along Peach Tree Ridge" which follows, more or less, Peach Tree Road. Incidentally, substantial exploratory drilling occurred on our property over many years.

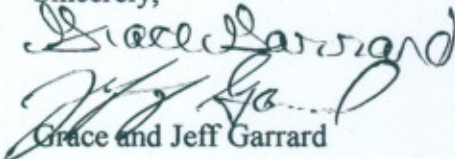
All attempts to obtain a more productive well failed. Expert testimony and test results prepared for the State of Maryland conclusively demonstrated that excess water extraction along Peach Tree Ridge had a definite, proven impact on neighboring wells. In some of the test results, the impacts occurred at distances of 600 feet and more.

Our next concern is to protect the "rural and rustic" designation of Peach Tree Road. The Preliminary Plan threatens and will destroy the unobstructed and magnificent view of Sugarloaf Mountain. It is a vista that residents and visitors of Montgomery County frequent and enjoy immensely. I know of no other place where Sugarloaf can be appreciated in this manner than at the intersection of Peach Tree and Comus road. Development of **Lot 1** with an imposing house directly on the corner would destroy this view for all but the residents of that property.

Our home is a 2,100 square foot, eighty-five year-old farmhouse on 2.25 acres. We have put all of our financial resources into it, as well as our hearts. If we were to lose our water supply, or if the County were to fail to enforce the Tot Lot rules, we would be personally devastated. The Preliminary Plan of the Copenhavers' fails to take into consideration the water supply of their neighbors and the future of the "Agricultural Reserve" and the scenic vistas it provides to Montgomery County.

Because the proposed Plan contains misstatements of critical facts, and because it violates established policies and regulations of the County, we urge you --- **DO NOT** approve plan #1-05097. Thank you for giving this matter your attention.

Sincerely,

  
Grace and Jeff Garrard

cc: Douglas M. Duncan, Michael J. Knapp, and Thomas E. Perez



MCP-Chairman

**From:** Kaja Farnsworth [farnsworthhomes@starpower.net]  
**Sent:** Wednesday, October 05, 2005 8:30 AM  
**To:** MCP-Chairman  
**Cc:** County.council@montgomerycountymd.gov  
**Subject:** Comus & Peach Tree Road

RECEIVED  
1623  
OCT 05 2005

OFFICE OF THE CHAIRMAN  
THE MARYLAND NATIONAL CAPITAL  
PARK AND PLANNING COMMISSION

Derick Berlage, Chairman  
Montgomery County Planning Board  
MNCPPC  
8787 Georgia Avenue  
Silver Spring, MD 20910

*Also  
11/29/06  
JSL*

Re: Copenhaver Property - Comus & Peach Tree Road

Dear Mr. Berlage:

We live on Peach Tree Road in the Ag Preserve and were very alarmed to hear that one of our neighboring properties could possibly be illegally subdivided. The Copenhaver property at the corner of Comus and Peach Tree Road has long provided the community with vistas of cattle or horses grazing and hay peacefully growing, not to mention the lovely groundline it affords to a majestic view of Sugarloaf Mountain.

Many of our friends and neighbors have strictly followed the "tot lot" rules in place by Montgomery County and not realized huge profits from their real estate. It would be VERY unfair and illegal to allow the Copenhaver property to do otherwise. Clarksburg is becoming known as the hot spot for violations and abuse and we would certainly hope that our planning board and county council would protect us and put an end to these unethical practices. Please take a stand for our community and as we repeatedly tell our children, follow the rules and do the right thing!

Very truly,

Minter P. Farnsworth, III and Kaja R. Farnsworth  
25101 Peach Tree Road  
Clarksburg, MD 20871  
301-601-0688

cc: Mike Knapp & Tom Perez, Montgomery County Council

10/5/2005

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