



MONTGOMERY COUNTY PLANNING DEPARTMENT
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION


MCPB
Item # 3
9-3-2015

SUPPLEMENTAL MEMORANDUM

DATE: August 28, 2015

TO: Montgomery County Planning Board

VIA: Catherine Conlon, Supervisor
D.A.R.C. Division
(301) 495-4542

FROM: Stephen Smith, Senior Planner 
D.A.R.C. Division
(301) 495-4522

SUBJECT: Correspondence associated with Greentree Farm, Plat No. 220120040 – 220120060, 220120510. Item #3 on the Planning Board Agenda of September 3, 2015 (Continued from July 30, 2015 Item #1B)

Included herein is correspondence received to date, and subsequent to the Planning Board meeting on July 30, 2015, for the subject item.

Attorney Correspondence:

Letter from Mr. Stephen Orens of Miles & Stockbridge, P.C., dated August 7, 2015
Letter from Mr. Allan Noble or Budow and Noble, P.C., dated August 12, 2015
Written Testimony from Mr. Orens submitted August 25, 2015
Letter from Mr. Noble (w/ attachment) dated August 27, 2015

Consultant Correspondence:

Email (w/ letter) from David W. McKee of Benning & Associates, Inc

Citizen Correspondence via email from the following:

Naomi Manders (w/attachments)
Sheila O'Donnell
Frederica Wheeler Johnson
Holly Harrington
Alison Farrin
David Stang

 **MILES &
STOCKBRIDGE** P.C.
Stephen J. Orens
301-517-4828
sorens@milesstockbridge.com

August 7, 2015

VIA ELECTRONIC MAIL
VIA REGULAR MAIL

RECEIVED
0724
AUG 10 2015

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

The Honorable Casey Anderson, Chair
Montgomery County Planning Board
The Maryland-National Capital Park & Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Request for Rebuttal - Greentree Farms Final Subdivision Plats

Dear Mr. Chair:

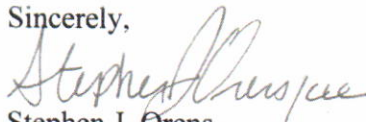
On behalf of the Farm Owner Applicant for approval of the above referenced Record Plats we hereby request the right to present rebuttal argument pursuant to Section 4.6 of Chapter 4 of the Planning Board's Rules of Procedure (the "Rules of Procedure").

Under the sequence guidelines for public hearings found in Section 4.7.2 of the Rules of Procedure, Applicant's counsel would typically present the Applicant's position before the opposition's oral argument. However, in this instance the Applicant is entitled to the opportunity to respond to Opposition's argument disputing the Planning Department's recommendations of approval. We submit that the denial of the opportunity to rebut the Opposition's argument would have significant and adverse procedural due process implications.

Accordingly, we request permission to adopt the Staff's presentation and report as the Applicant's "case in chief" and reserve all of the time allotted to the Applicant for rebuttal.

We appreciate your consideration of this request.

Sincerely,


Stephen J. Orens

cc: Gwen Wright, Planning Director
Rose Krasnow, Deputy Planning Director
Carol S. Rubin, Esq., Principle Counsel
Allan Noble, Esquire
Farm Owner Applicant

Client Documents 4842-6997-4054v1|19383-000004|8/7/2015

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PRACTICING IN MARYLAND
AND THE DISTRICT OF COLUMBIA

*ALSO ADMITTED IN VIRGINIA

August 12, 2015

VIA E-MAIL AND REGULAR MAIL

Casey Anderson, Chair
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910

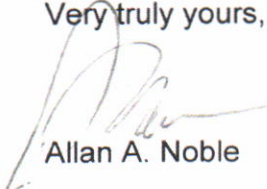
Re: Greentree Farm formerly known as Barnesville Oak Farm Plat and Public
Use Trail Easement
Preliminary Plan No. 120090110
Public Hearing - September 3, 2015

Dear Chair Anderson:

I have a copy of Mr. Orens' letter of August 7, 2015 on behalf of the applicant requesting rebuttal argument at the forthcoming Public Hearing currently scheduled for September 3, 2015. On behalf of EPIC, we object to the Applicant's procedural approach in this case. In essence, the applicant seeks to have the opposition put on its' case first and then put on their case. Such a procedure is wrong and does not make any sense.

It is the Applicant that has the burden of demonstrating that the Plat and the so-called Declaration of Covenants is in compliance with the Planning Board's Resolution No. 10-129 of September 28, 2010. It is clear that the Plat and Declaration do not comply. Therefore, it is the burden of the Applicant to demonstrate why it believes it complies. This, they should do in their initial presentation. For these reasons we urge you to adhere to the Commission's Standard of Procedures in this matter and have the Applicant put on its' case first.

Very truly yours,



Allan A. Noble

RECEIVED
0724
AUG 14 2015

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

AAN/clis

cc: Steven J. Orens, Esq., Attorney for Applicant (via email only)
Gwen Wright, Director, M-NCPPC (via email only)
Carol S. Rubin, Associate General Counsel, M-NCPPC (via email only)
Stephen J. Smith, Senior Planner (via email only)

**BEFORE
THE MONTGOMERY COUNTY PLANNING BOARD
OF
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION**

IN THE MATTER OF:

**The Application of Balsamah Corporation, N. V.
For Approval of Subdivision Record Plat
Applications 220120040, 220120060 and
220120510 Greentree Farm Subdivision**

Balsamah Corporation, N.V., the Farm Owner Applicant (hereafter the “Farm Owner” or “Applicant”) for approval of the above referenced Record Plat Applications hereby submits the following in support of the Planning Department’s recommendation of **approval** of the aforesaid final, record subdivision plats for Greentree Farm (the “Greentree Record Plats”).

Requested Action:

Approve the Greentree Record Plats as submitted and as recommended for approval by the Planning Department’s professional staff.

Background:

The Applications for Final Plat approval were filed on August 1, 2011 following the Circuit Court’s dismissal of a cross-appeal filed by Montgomery Countryside Alliance and others challenging the approval of the Preliminary Plan. The scheduling of the Planning Board’s consideration of the Greentree Record Plats was unreasonably delayed for a number of reasons, including, on information and belief, interference by EPIC’s president and treasurer who was then, and continues to be, an employee of the Maryland-National Capital Park and Planning Commission (the “Commission”) in the Department of Parks. This employee is the Parks Department’s “Trails Coordinator.” This same Commission employee was then, and continues to be, affiliated with the Montgomery Countryside Alliance, the organization that unsuccessfully challenged the Planning Board’s approval of the Preliminary Plan. The unwarranted delay is unconscionable and has caused the Farm Owner significant economic hardship.

When the public hearing is convened on September 3, 2015, the Greentree Record Plats will have been pending Planning Board action for four years, one month and two days or 1,492 days (1,857 days since Preliminary Plan approval).

On July 17, 2015 the Planning Department’s professional staff recommended that the Planning Board approve the Greentree Record Plats. Planning Board action was initially scheduled on the Board’s consent agenda for July 30, 2015. Over the Farm Owner Applicant’s continuing objection, the Planning Board severed the Greentree Record Plats from its consent agenda, the usual process, and scheduled a public hearing for September 3, 2015. Without waiving its objections to that public hearing, the Applicant submits the following in support of Planning Board approval of the Greentree Record Plats.

Planning Board Chair Anderson, by letter dated August 10, 2015, established the “parameters” for the September 3 public hearing as follows:

“the parameters of that hearing will be limited to the issues asserted as the reason for the requested hearing; that the plats do not comply with Condition No. 3 of the Preliminary Plan. That condition provides for a Public Use Trail Easement to be created on the Property as shown on the Preliminary Plan. The Subdivision Regulations are very specific about the requirements for approval of a record plat. Other than the technical requirements as set forth in §50-36, of which there are no specific objections, §50-37(b) provides that the plat must comply with the preliminary plan as approved by the Board; except, that the Board may allow for minor modifications in the plan which, in its opinion, do not alter the intent of its previous approval.”

Question presented:

Do the Greentree Record Plats comply with Condition Number 3 of the “Approval Resolution”¹ requiring a Public Use Trail Easement to be created “as shown on the Preliminary Plan”?

Question Answered:

Yes, for the reasons hereinafter set forth.

Condition Number 3:

A Public Use Trail Easement ("PUTE") must be created on the Property as shown on the preliminary plan. The PUTE will name Equestrian Partners in Conservation ("EPIC"), a 501c3 non-profit corporation, its successors or assigns, or another suitable entity identified by MNCPPC staff, as the Grantee and must include, at a minimum: (i) the conditions and restrictions governing uses that are within the definition of "Recreational Purpose" as defined in the MD Ann. Code, Natural Resources Article, §5-1101; (ii) the right of Grantee to construct, maintain and repair the trail, with no obligation by either Grantee or the Grantor to do so; and (iii) rights of enforcement by both the Grantor and the Grantee, with no obligation on either to do so. The PUTE must be approved by the Commission's Office of the General Counsel which approval may not be delayed beyond 120 days following adoption of the MCPB Resolution of approval of the Preliminary Plan but no less than 90 days after submission of a reasonable draft for review. Prior to recordation of the initial plat, the applicant must record the PUTE in the land records and the plat must include a reference to the Liber and Folio of the recorded PUTE. Should the designated Grantee as specified herein decline to accept the PUTE, the record plat may be recorded without the reference.

Chronological Background:

The Planning Board approved Preliminary Plan 120090110 on July 22, 2010. Shortly thereafter, on August 2, 2010 an email sent from the official e-mail address of the Parks Department’s

¹ Planning Board Resolution No. MCPB 10-129, (the “Approval Resolution”) approved Preliminary Plan No. 120090110 subject to 15 conditions.

Trails Coordinator was received by the Applicant's representative. The following is an excerpt from that e-mail:

"We also want to recommend some modifications: 1. Addition of a loop (see bright green on pic on south portion), 2. Re-route of trail along Peach Tree, instead of riding south west along Peach Tree and northwest at edge of cluster (in blue) we propose (see bright green) north east along Peach Tree then on edge of crop field along tree line, south west toward existing 2 Sister driveway and continuing southwest to easement. 3. If this trail is to be used by general public it requires a trail head."

What at first glance appeared to be after the fact (*i.e.* after Planning Board approval) Parks Department comments were in fact not the Parks Department's official position, but were objections to the approved trail location and physical characteristics from the president and treasurer of EPIC (who was also a member of the opposition organization, the Montgomery Countryside Alliance that subsequently sought judicial review of the Preliminary Plan approval in a cross-appeal to the Circuit Court). This Commission employee appears to have been improperly acting in the dual role of Trails Coordinator and EPIC's advocate.

Following the Circuit Court's rejection of the Montgomery Countryside Alliance cross-appeal on March 22, 2011 the Applicant prepared and submitted a Public Use Trail Easement ("PUTE") to the Commission's Associate General Counsel then assigned to the Parks Department, naming EPIC as the grantee. The following chronology of actions and inactions that followed is instructive:

May 16, 2011	Draft PUTE provided to M-NCPPC naming Equestrian Partners in Conservation/EPIC as assignee grantee
June 7, 2011	Inquiry as to the status of the review of the PUTE emailed to Associate General Counsel Derrick Rogers.
June 22, 2011	Second inquiry sent requesting the status of Mr. Rogers' review of the PUTE.
June 28, 2011	Associate General Counsel Rogers' comments received and a revised PUTE submitted comporting with the requested revisions.
June 29, 2011	Mr. Rogers responded that he was not authorized to sign the PUTE on behalf of the General Counsel's Office and that he was leaving for JAG training, but would copy Sean Dixon on the correspondence and that Mr. Dixon would handle the Parks legal matters.
July 5, 2011	Email inquiry sent to Associate General Counsel Dixon.
July 6, 2011	Mr. Dixon responded asking to be sent a copy of the PUTE since he was not certain whether his client has reviewed it.

- July 22, 2011 Miles & Stockbridge letter to Associate General Counsel Dixon regarding activities of Mr. David Tobin, a Parks Department employee who had requested permission to bring horseback riders on to Property on behalf of EPIC.
- August 1, 2011 Record Plat application No.220120060, *et. seq.* submitted to the Planning Department.
- August 22, 2011 The Farm Owner Applicant's attorneys met with Associate General Counsel Sean Dixon, William Gries representing the Parks Department and Associate General Counsel Carol Rubin to again discuss the previously submitted draft PUTE.
- August 29, 2011 In response to comments made at the August 22nd meeting, a revised draft PUTE was forwarded to the Associate General Counsel assigned to the Parks Department.
- October 11, 2011 Applicant's counsel finally received a response to the revised PUTE submitted to Associate General Counsel Sean Dixon, the Associate General Counsel assigned to the Parks Department.
- October 17, 2011 Applicant's counsel responded to the comments received from Mr. Dixon on October 11, 2011.
- November 16, 2011 Mr. Dixon responded:
 "My client wants to explore having a party named as an assignee at the signing of the easement. Apparently there are multiple groups working on this internally and I have only been working with one. I will work on that piece so this stops dragging on. We still owe you a response to your comments. Since some of your responses touches on the planning component I will consult with them. Once I can get a point guard to work with I think things will go smoother."

From December 2011 through January 2012 Applicant's counsel continued to try to communicate with the Associate General Counsel assigned to the Parks Department seeking information regarding the status of the Parks Department review. Having received no response, Applicant's counsel informed M-NCPPC General Counsel Adrian Gardner, Esquire that the "120 day" time limit for review and approval established by the Planning Board in Condition Number 3 had expired and that further delay of approval of the record plats was an unwarranted financial hardship on the Farm Owner Applicant.

At some point between March 9, 2012 and July 9, 2012 the Commission's Office of the General Counsel acknowledged its approval of the revised PUTE naming EPIC as the grantee and forwarded the PUTE to EPIC.

On July 9, 2012 EPIC's attorney, Allan Noble, Esquire wrote to then Planning Board Chair Françoise Carrier objecting to the terms of the PUTE and to the Planning Board's approved trail location, thereby rejecting the PUTE approved by the Office of the General Counsel. Mr. Noble informed Chair Carrier that:

"I have been asked by Equestrian Partners in Conservation ("EPIC") to act on EPIC's behalf to finalize a public use trail easement ("PUTE") on the Barnesville Oak Farm subdivision..."

"We believe some of the language contained in the proposed easement is unreasonable and needs to be revised. Moreover, some of the route proposed is unworkable and will not make a proper equestrian trail. I have carefully studied the proposed route and believe that it would be in the best interests of both the developer and EPIC to make certain modifications."

Rejection of the terms of the PUTE by EPIC notwithstanding, the Farm Owner Applicant continued to work with the Planning Board's Principal Counsel, Carol Rubin, Esquire and during 2013 and 2014 in spite of the fact that in April 2013 a potential purchaser of the subdivision lots backed out because the Farm Owner was unable to produce a recorded plat or warrant that there were no potential impediments to record.

Throughout 2013 and into 2014, the Parks Department continued to thwart the efforts of the Planning Department to bring closure to the process and delayed the Plat approval process contending that the Parks Department, not the Planning Department had the sole authority to approve the terms of the PUTE. Per the express terms of Condition 3, the Parks Department was not authorized to reject the PUTE approved by the Planning Department's assigned counsel from the Office of the General Counsel.

On January 10, 2014 the Farm Owner's attorney reluctantly wrote to Planning Director Gwen Wright detailing the activities of the Parks Department's Trails Coordinator asking that she personally intervene and requesting:

"the assistance of the Director's Office in the hope that we can avoid litigation because, despite our efforts over an extended period of time, the pending record plat applications (filed on August 11, 2011) have not yet been scheduled for Planning Board action. The reasonable draft PUTE submitted in 2011 vested our clients' right to record the final plats, and as previously stated, the PUTE was rejected by EPIC. Therefore, pursuant to the express governing language in Condition No. 3 we respectfully request, that the Planning Department be directed to process the pending final plat applications upon our submission of revised plats deleting the reference to a PUTE Liber and folio. We further request that the pending final plat applications be scheduled for Planning Board action with all deliberate speed."

On January 23, 2014, the Farm Owner's attorney wrote to Principal Counsel Carol Rubin, Esquire confirming the Planning Director's determination that the "Special Note" affixed to the pending final plats complied with Condition Number 3 of MCPB Resolution Number 10-129, approving Preliminary Plan No. 120090110-Barnesville Oak Subdivision.

On March 6, 2014 the Planning Board's Principal Counsel sent an e-mail to EPIC's attorney, Allan Noble, Esquire informing him that the Office of the General Counsel had:

"reached a conclusion on terms of an Easement that we find to be reasonable in light of both the property owner's concerns related to access by the general public onto its property for **equestrian** activities, and the interests of the general public to be able to use and enjoy the easement **for such purpose**." (Emphasis added.)

Ms. Rubin went on to inform Mr. Noble that:

"As indicated, the relevant condition is very clear in that the Easement is to be approved by the Office of General Counsel naming EPIC as the grantee. If EPIC declines to accept the Easement, the Commission may find another similar organization who will accept the Easement. However, in light of the extraordinary time that this has taken, the Planning Director agreed that if EPIC declines to accept the Easement as we are presenting to you, we will put forth a note on the plat (also attached) as opposed to going through this same exercise with another organization in order to allow the property owner to move forward in a timely manner with its development plans as approved."

Ms. Rubin, gratuitously, in our opinion, gave EPIC yet another opportunity to accept the easement that the Office of the General Counsel approved by directing Mr. Noble to

"please provide me with EPIC'S decision in writing by close of business on March 21, 2014. Otherwise, I will deem the Easement to be rejected by EPIC and move forward with the plat note."

EPIC again "decline[d] to accept the PUTE" and the Planning Director and The Board's Principal Counsel informed Staff and Applicant's counsel that Condition Number 3 was satisfied and that the Applicant may submit the revised record plats.

Mr. Noble responded by initiating a campaign of *ex parte* communications directed to then Chair Françoise Carrier. Mr. Noble's first *ex parte* letter was dated March 19, 2014 and it included detailed substantive objections to the approved Easement, rejecting the PUTE approved by the Commission's Office of the General Counsel. By Mr. Noble's letter, EPIC again declined to accept the PUTE approved by the Office of the General Counsel. EPIC's rejection appears to have been based on the mistaken and legally erroneous conclusion that the Planning Board had conveyed to EPIC a property interest in the Farm Owner's property and gave EPIC the right to dictate the terms of the PUTE, contrary to the express terms of Condition Number 3.

Mr. Noble failed to provide a copy of his March 19th letter to the Farm Owner's counsel. Subsequently, on March 25, 2014 Mr. Noble again wrote an *ex parte* letter to then Chair Françoise Carrier that was not intended to be seen by the Farm Owner's counsel who is not listed as receiving a copy. Mr. Noble did, however, list the Parks Department's Trails Coordinator who is also EPIC's president and treasurer as receiving a copy of his letter to then Chair Carrier. That letter was received by the Chair's office on March 26, 2014. The Chair's office provided copies of Mr. Noble's letter to Applicant's counsel via electronic mail.

Then Chair Carrier responded to Mr. Noble by letter on March 27, 2014. By responding on March 27th the Chair acted unilaterally to take an action intended to be taken in open session in violation of the State Open Meetings Act and by so doing effectively denied Applicant's counsel the right guaranteed by the State Administrative Procedures Act to rebut the allegations upon which the Chair relied to inform Mr. Noble that:

"I have read your submissions and discussed the matter with our chief land use counsel, Carol Rubin. In order to address your concerns in the appropriate setting, I intend to propose additional language for the note to be added to the plat that I believe will address your desire for a simple, enforceable easement without compromising the interests of the property owner. I have asked Ms. Rubin to notify you when this matter is due to come before the Planning Board. As in all regulatory matters before the Board, you are welcome to address us at that time."

Maryland's Administrative Procedure Act (the "APA") is applicable to the Commission and the APA prohibits *ex parte* communications. Under Section 10-219 of Title 10 of the State Government Article of the Maryland Annotated Code:

"a presiding officer may not communicate *ex parte* directly or indirectly regarding the merits of any issue in the case, while the case is pending, with: (i) any party to the case or the party's representative or attorney."

Mr. Noble's letters, with numerous attachments, were replete with assertions about "the merits of the issues" before the Board.

Under Section 10-219(d) of the Maryland APA the Applicant had the right to rebut the *ex parte* communication by requesting "the opportunity to rebut within 10 days after notice of the communication." Under Section 10-219(c) of the Maryland APA the former Chair was an "individual who is involved in the decision making process and who is personally aware of an *ex parte* communication" and as such should have notified Applicant's counsel of the *ex parte* communication triggering the right to request the opportunity to rebut the allegations made *ex parte*. We believe this was an unintended, inadvertent omission.

Despite Mr. Noble's failed effort to recall the March 25, 2015 email by which his letter was transmitted to the chair's office, Applicant's counsel received an unintended copy of Mr. Noble's letter at 5:37 pm on March 25, 2014, and a copy of the then Chair Carrier's response to Mr. Noble was received less than 48 hours later on March 27th. This exchange deprived Applicant's counsel of the opportunity to rebut the *ex parte* communication prior to then Chair Carrier's consideration of matters therein set forth and her written response to Mr. Noble.

Notwithstanding that the lack of notice was probably inadvertent, nonetheless lack of notice to the Applicant precluded an effective opportunity for Applicant's counsel to rebut the assertions upon which the then Chair relied when stating her intent to hold a hearing. We expressly do not waive our continuing objection to having been denied an effective opportunity to rebut the communication that gave rise to the hearing that the Board has determined to conduct, over the Applicant's continuing objection.

The revised Greentree Farm Plats, the final record plats, were re-submitted to the Department of Permitting Services for its review on December 8, 2014. The complex, multi-agency review and sign-off procedure applicable to record plat applications is time consuming at best and burdensome at worst. Informal and formal reviews by the Department of Permitting Services (“DPS”) required time consuming multiple revisions to the Greentree Farm Plat drawings.

Re-submission to the Commission’s Planning Department was delayed for a significant amount of time by DPS because of a misnomer in a deed document that incorrectly identified the Applicant, the then purchaser of the Subject Property, as “Malsama” instead of “Balsamah.” As a consequence, the Department of Permitting Services required the Applicant to secure a second opinion of title from the title company that conducted the original purchase settlement notwithstanding having been provided with a report of the title examination previously prepared by the Chicago Title Insurance Company that confirmed that title was vested in Balsamah.

DPS also required the Applicant to conduct unnecessary research into ancient deeds and public records to see if any historical document from the 19th century mentioned the width of the 1877 approved right of way width of Peach Tree Road. At issue was whether a four foot (4’) wide public improvement easement along Peach Tree Road was an “overlapping easement.”

The multiple plat revisions required by DPS were time consuming and the surveyor had to correct minor, insignificant, items identified by DPS before DPS would sign off on the plats. The Applicant’s surveyor completed the last DPS required revision and the Greentree Farm Plats were hand delivered to the Commission’s Planning Department for final review on July 1, 2015.

Statutory Basis for Approval

Section 50-37 of Chapter 50 of the Montgomery County Code 2004, as amended, (the “Subdivision Regulations”) govern the procedure and findings required for approval of final (record) subdivision plats intended to vest an approved Preliminary Plan of Subdivision.

According to subsection (a) of Section 50-37 of the Subdivision Regulations

“The subdivider or his agent shall file the subdivision final (record) plat and all required supporting data, as specified herein, with the Board, together with application for its approval.”

Also pursuant to subsection (a)(2) of Section 50-37 of the Subdivision Regulations

“The plat shall be deemed filed with the Board when it is filed with the staff of the Board; provided, that the staff shall have the authority to reject the plat within five (5) days of its receipt if it finds that it does not conform to the approved preliminary plan, except for minor modifications, or with this Chapter and the specifications and procedures adopted pursuant thereto, and further provided that his rejection is in writing and specifies the respects in which the plat is deficient.”

The final (record) plats for Greentree Farm and all supporting documents were duly resubmitted and accepted as filed on July 1, 2015 in accordance with Section 50-37 of the Subdivision Regulations.²

The Subdivision Regulations establish the single finding required of the Planning Board when approving a final (record) plat. Section 50-37(b) of the Subdivision Regulations requires that a plat submitted for Board approval “comply with (the) approved preliminary plan” unless a site plan is also required. No site plan was required for the Greentree Farm subdivision. The Commission’s Planning Department, following extensive reviews determined that the Green Tree Farm Plats complied with the approved preliminary plan for Greentree Farm (then known as Barnesville Oak and recommend to the Planning Board that the Board approve the plats for recordation.

Procedural Requirements for Plat Approval.

Section 50-37(c) of the Subdivision Regulations mandates that the Board act to:

“approve or disapprove a final (record) plat within thirty (30) days after submission thereof or after resubmission; otherwise, such plat shall be deemed approved and on demand a certificate to that effect and the original record plat signed in form for recording shall be issued by the Board; provided, that the applicant may waive this requirement and consent to an extension of such period.”

The administrative record does not contain any express waiver of the thirty day time limit and no such waiver was ever intended. In the event the Board fails to approve the Greentree Farm Plats, and as required by Maryland Appellate decisions that limit judicial review to matters raised before the administrative agency, the Applicant expressly reserves the right to seek judicial enforcement of the time limit restriction in Section 50-37(c) of the Subdivision Regulations.

Compliance with the Approved Preliminary Plan.

Preliminary Plan 120090110 was approved by the Planning Board on July 22, 2010 and the Board’s Approval Resolution, MCPB 10-129, was mailed to all parties of record on September 28, 2010. The Board’s approval was subject to 15 conditions, 14 of which have never been challenged and all 15 conditions have been addressed to the Planning Department’s satisfaction.

Condition Number 3.

The sole challenge to compliance with Condition Number 3 has been raised by the organization previously identified herein as “EPIC,” also known as “Equestrian Partners In Conservation” whose president and treasurer is also the Trails Coordinator for the Commission’s Department of Parks.

Standing.

As a matter of law, EPIC cannot establish that it, as an organization, would be aggrieved by the Board’s approval of the Greentree Record Plats. Accordingly, EPIC had no standing to request that the Planning Board conduct a public hearing before approving the Greentree Record Plats, recommended for approval by the Board’s professional staff.

² In the event of an appeal, Applicant expressly reserves the right to argue in court that the failure to comply with the time requirements with respect to the final plats submitted on August 1, 2011 unreasonably delayed Applicant for over four years.

EPIC's apparent attempts to influence the decision of the former Chair to agree *ex parte* to a public hearing and EPIC's continuing efforts to secure a public hearing appear to be nothing more than a thinly disguised strategy to manufacture "standing to appeal" plat approval to the Circuit Court, thereby continuing EPIC's strategy of subjecting the Farm Owner to financial torture and disrupting the plat approval process. (See Section 23-401 of the Land Use Article of the Maryland Code.)

EPIC has no legal or equitable interest in the Greentree Farm property and no special interest in the subdivision different from that of the general population. EPIC does not own any adjacent or nearby property. EPIC has no special interest that would be adversely affected by approval of the subdivision plats. EPIC has no greater interest than any other organization or member of the general public would have and has no greater standing to seek a public hearing than would any other organization desiring to appear before the Planning Board. EPIC is not an "interested party" within the meaning and intent of the provision in Section 50-37(d) of the Subdivision Regulations that states that "all interested parties shall be entitled to appear at any such hearing."

Furthermore, and EPIC's contentions to the contrary notwithstanding, the Planning Board's authority to require an easement and determine its use and location, does not authorize the Board to grant or convey a property interest (easement) in Applicant's property to a third, private party such as EPIC or require as a condition of project approval that the Applicant grant EPIC an easement. (See Subdivision Regulations 50-30(c)(3).)

Accordingly, for all of the reasons and facts stated above the Farm Owner Applicant objects to the participation of EPIC at the scheduled public hearing.³

Compliance with the Express Elements of Condition Number 3.

Condition Number 3 of the Planning Board's approval resolution contains the following express elements that require compliance. The following paragraphs identify each requirement and establish the factual basis for a finding of compliance.

A Public Use Trail Easement ("PUTE") must be created on the Property as shown on the preliminary plan.

A Public Use Trail Easement was created on the Property precisely as shown on the Preliminary Plan as- a "20' Public Use Equestrian Easement." (See the "Special Notes" on the Greentree Farm Record Plats, the recorded Declaration of Covenant and the Equestrian Trail Plan Exhibit A.⁴

³ In addition to the apparent conflicts of EPIC's president and treasurer who is also the Commission's Trails coordinator, EPIC's Chairman has repeatedly made offers to purchase Applicant's property.

⁴ The 840 acre property subject to the approved Preliminary Plan includes two operating farms that are "unplatted farm remainders," in addition to the twenty four platted subdivision lots. The equestrian trail traverses both the unplatted farm remainders as well as the subdivided portions of the Property containing the 24 lots depicted on the Greentree Farm Plats. The Declaration of Covenant and Equestrian Trail Plan (Exhibit A) was recorded in Liber 49221 at folio 445, *et. seq.* among the Montgomery County Land Records.

□ The PUTE will name Equestrian Partners in Conservation ("EPIC"), a 501c3 non-profit corporation, its successors or assigns, or another suitable entity identified by MNCPPC staff, as the Grantee.

EPIC was identified as the Grantee in the PUTE submitted to and approved by the Office of the General Counsel on June 28, 201 and again as revised in March 2012.

□ [The PUTE] must include, at a minimum:

(i) the conditions and restrictions governing uses that are within the definition of "Recreational Purpose" as defined in the MD Ann. Code, Natural Resources Article, §5-1101;

Each of the required conditions and restrictions governing the approved equestrian use are included in the recorded Declaration of Covenant approved by the Office of the General Counsel and are expressly referenced in the "Special Note" on the Greentree Farm Plats. The approved equestrian use is a recreational use that is clearly contemplated by the definition of "Recreational Purpose" in the Natural Resources Article of the Maryland Code.

(ii) the right of Grantee to construct, maintain and repair the trail, with no obligation by either Grantee or the Grantor to do so;

The right to construct, maintain and repair the trail, with no obligation to do so was included in both approved, but rejected PUTEs that named EPIC as the Grantee and the property owner has the legal right to construct, maintain and repair its own property including the trail, but no obligation to do so. See Maryland Natural Resources Article, Section 5-1101, *et. seq.*

(iii) rights of enforcement by both the Grantor and the Grantee, with no obligation on either to do so.

The right of enforcement was included in both approved PUTEs that named EPIC as the Grantee and in the recorded Declaration of Covenant approved by the Office of the General Counsel.

□ The PUTE must be approved by the Commission's Office of the General Counsel which approval may not be delayed beyond 120 days following adoption of the MCPB Resolution of approval of the Preliminary Plan but no less than 90 days after submission of a reasonable draft for review.

At least two drafts that the Office of the General Counsel determined to be "reasonable" naming EPIC as the grantee were submitted, re-submitted with requested revisions and ultimately approved by the Office of the General Counsel.

The Office of the General Counsel did not, however, comply with the 120 day time limit on approval of any of the ultimately approved versions of the PUTE. The Farm Owner

Applicant continues to contend that the Applicant had no obligation to submit anything after the expiration of the first 120 days following the initial submission of a PUTE to the Office of the General Counsel. The Applicant's subsequent cooperation with the Office of the General Counsel was without prejudice to its position that no further submissions were required by Condition Number 3.

□ Prior to recordation of the initial plat, the applicant must record the PUTE in the land records and the plat must include a reference to the Liber and Folio of the recorded PUTE.

The Declaration of Covenant approved by the Office of the General Counsel was recorded by the Applicant in the Land Records of Montgomery County on September 26, 2015 in Liber 49221 at folio 445, *et.seq.*

Condition Number 3 expressly and unequivocally provides that: "Should the designated Grantee as specified herein decline to accept the PUTE, the record plat may be recorded without the reference."

The designated grantee to which this language refers is EPIC. EPIC declined to accept the PUTE approved by the Commission's Office of the General Counsel on at least two occasions. On July 9, 2012 EPIC declined to accept the approved PUTE and also rejected the Planning Board approved trail location. Indeed, EPIC deemed the Board approved trail to be "unworkable" and proposed to re-route the Board approved trail in a manner that would be inconsistent with the AROS Master Plan and would be contrary to other policies and guidelines applicable to the Agricultural Zone. EPIC's proposed parking lot in the midst of high quality farmland is particularly outrageous.

Condition 3 Requires an Equestrian Easement for Equestrian Use Only

Condition 3 requires creation of a trail easement "as shown on the preliminary plan." The trail shown on the approved Preliminary Plan specifies the sole approved use of the easement as equestrian, labeling it: a "20' Public Use Equestrian Easement." (Emphasis added). See Enlargement of Approved Preliminary Trail, attached as Exhibit [A]. This is exactly what was required and exactly what was created.

Accordingly, the Special Plat Note and the Declaration of Covenant, which were approved by the Planning Director and OGC, expressly stated the equestrian easement is "solely for recreational horseback riding." (Emphasis added).

Likewise, documentary evidence in the record of this matter explicitly acknowledges that this easement is intended for equestrian use. See, for example:

- Chair Carrier letter to Allan Noble dated March 27, 2014 ("Equestrian Easement on Plat")
- Carol Rubin email to Allan Noble dated March 6, 2014 (easement "for equestrian activity")

- Allan Noble letter to Chair Anderson dated November 10, 2014 (“pending before the Board is the matter of the adoption of an equestrian easement to implement the Board’s Resolution 10-129. . .”)
- Parks Department memo dated January 26, 2009 (trail would be part of the County’s “equestrian trails system”)

EPIC’s contention that the limitation of trail use to horseback riding “thwarts the concept of a unified trail system in Montgomery County” is factually incorrect, in conflict with Condition 3, and inconsistent with adopted Commission policies and prior Commission actions on equestrian trails. See Benning and Associates letter dated August 25, 2015 (submitted separately).

The approved Preliminary Plan implements the Countywide Park Trails Plan. The Countywide Park Trails Plan established instructive criteria to determine the suitability of a specific natural surface trail for a “focused” use.” According to the criteria established in the 2004 Plan Update, bicycle use of an equestrian trail “should not be allowed where it would cause any of the following measurable effects” including by way of relevant example:

e. Danger to the safety of equestrians, bicyclists or other trail users because of a horses gait, bicycle’s speed, steep grades, steep terrain, sharp curves, slippery or unstable trail surfaces or limited visibility.

f. Significant displacement of other natural surface trail users. If significant user conflicts arise, the issue of how best to accommodate different trail user groups will have to be explored. (Countywide Park Trails Plan at page 76) (Emphasis added.)

Neither the Bikeways Functional Master Plan nor the Countywide Park Trails Plan envisions bikeways intruding inappropriately on natural surface equestrian trails. Bikeways are typically intended to be equestrian trail connectors and while there may be specific trails that can safely and responsibly accommodate both bikes and horses, that combination of use is by no means required in every instance.

The Trails Plan recognizes that safety and responsibility may require limitations on the use of trails by distinguishing between trails that are “open to hikers and equestrians” and trails that are open to “hikers and cyclists.” (Trails Plan page 75.)

EPIC’s current position that multi-use is required is inconsistent with what it has previously and consistently advocated that being the establishment of an Equestrian trail for horseback riding was required. (See, by way of example, correspondence from EPIC’s attorney dated July 9, 2012 and November 10, 2014.)

We note, finally, as to this issue that the report and recommendation to the Planning Board by the Board’s professional Staff also acknowledged that the trail shown on the now approved Preliminary Plan would be limited to equestrian use. (See Staff Report dated July 2, 1010 page 10.)

Response to EPIC's Assertion Regarding Compliance With the Natural Resources Article:

Condition Number 3 includes the following provision:

“A Public Use Trail Easement ("PUTE") must be created ... and must include, at a minimum:(i) the conditions and restrictions governing uses that **are within the definition** of "Recreational Purpose" as defined in the MD Ann. Code, Natural Resources Article, §5-1101” (Emphasis added.)

EPIC contends that the restriction of uses, limiting the trail to “equestrian uses” violates Section 5-1101(f) of the Natural Resources Article of the Maryland Code (the “Natural Resources Article”) because “Hikers and bikers are prohibited from using the trail.” Section 5-1101(f) of the Natural Resources Article defines “Recreational purpose” one of the defined terms used in Subtitle 11 of the Natural Resources Article. The term “Recreational purpose” is defined in Section 5-1101(f) to mean “**any** recreational pursuit.” (Emphasis added.)

The definition of “Recreational purpose” in the Natural Resources Article was amended several years ago to replace a previous list of recreational uses with the more general definition of “Recreational purpose” - “any recreational pursuit. Read in the context of the Natural Resources Article definition of “recreational purpose,” the only possible interpretation of the wording in Condition Number 3 is that the recreational use of the trail must be a use that falls within the common meaning of “any recreational purpose.”

EPIC apparently seeks to have the Planning Board improperly amend the use approved by the Board per the Preliminary Plan and redefine the phrase "any recreational pursuit" and substitute the word “*every*” for “*any*” in the definition. Had the General Assembly intended that all recreational uses must be allowed on every parcel of private property to which the general public is given access, the General Assembly would have said so but it did not say so. The Planning Board must presume that the General Assembly “said what it meant and that it meant what it said.” The clear intent of the current wording in Section 5-1101(f) of the Natural Resources Article is to allow for a range of permissible recreational activities, not to require that an owner of private property must allow every conceivable use that has a recreational purpose” in order to qualify for the immunity granted by the Natural Resources Article.

Obviously, public safety would be at substantial risk if all uses were allowed and, *e.g.*, hunters, campers, bicycles, dog walkers and horseback riders were all on this 20’ trail. (See the hypothetical illustration attached as Exhibit “B”.)

Furthermore, agriculture use cannot be subject to restriction on the grounds that it interferes with other uses

“Agriculture is the preferred use in the AR zone. All agricultural operations are permitted at any time, including the operation of farm machinery. An agricultural use cannot be restricted on the grounds that it interferes with other uses permitted in the zone.” (2014 Montgomery County Zoning Ordinance, Section 59-4.2.1A.2.)

The end result of allowing every conceivable recreational use on the equestrian trail would interfere with preferred agricultural use of the property and subject this AR zoned property to prohibited restrictions.

EPIC also seems to object to the posting of signs on the trail, however, Maryland law authorizes farmers to post signs on their property. (See Maryland Code, Natural Resources Article Section 5-1107 "Notice by Landowner of Private Land.")

Conclusion.

It was never the Board's intent to bestow upon EPIC the unequivocal right to be the grantee of an easement. In fact, Condition Number 3 contemplated that EPIC might not accept an easement that the Commission's Office of the General Counsel approved by expressly providing in Condition Number 3 that, in such event, the Greentree Farm Plats may be recorded without identifying a Liber/folio reference to an Easement naming EPIC as the grantee.

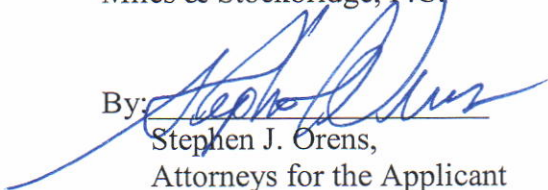
The Board's professional staff has recommended approval of the Plats as submitted and the Board's Office of the General Counsel approved the Special Plat Note and Declaration of Covenant in which the equestrian trail is exclusively and solely for recreational horseback riding, as identified on the Board approved Preliminary Plan that expressly identified the trail as an "Equestrian Easement."

Upon approval and recordation of the Greentree Farm Plats this equestrian trail that the Farm Owner is making available will be accessible for use by the general public. The economic viability of Greentree Farm, the largest agriculture operations in the County upon which the success of the County agriculture industry depends is at risk if the Plats are not approved as recommended by the Board's professional staff.

"The following record plats are recommended for APPROVAL, subject to the appropriate conditions of approval of the preliminary plan and site plan, if applicable, and conditioned on conformance with all requirements of Chapter 50 of the Montgomery County Code..." "any minor modifications reflected on the plats do not alter the intent of the Board's previous approval of the aforesaid plan." (Staff Report and Recommendation to the Planning Board dated July 17, 2015) (Emphasis Added.)

Accordingly, the Farm Owner Applicant hereby moves for APPROVAL of Subdivision Record Plat Applications 220120040, 220120060 and 220120510 Greentree Farm Subdivision.

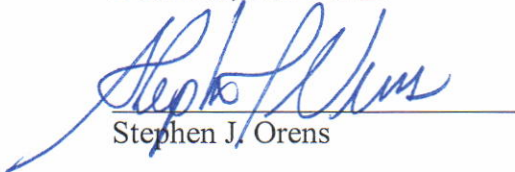
Respectfully Submitted,
Miles & Stockbridge, P.C.

By: 
Stephen J. Orens,
Attorneys for the Applicant

Certification:

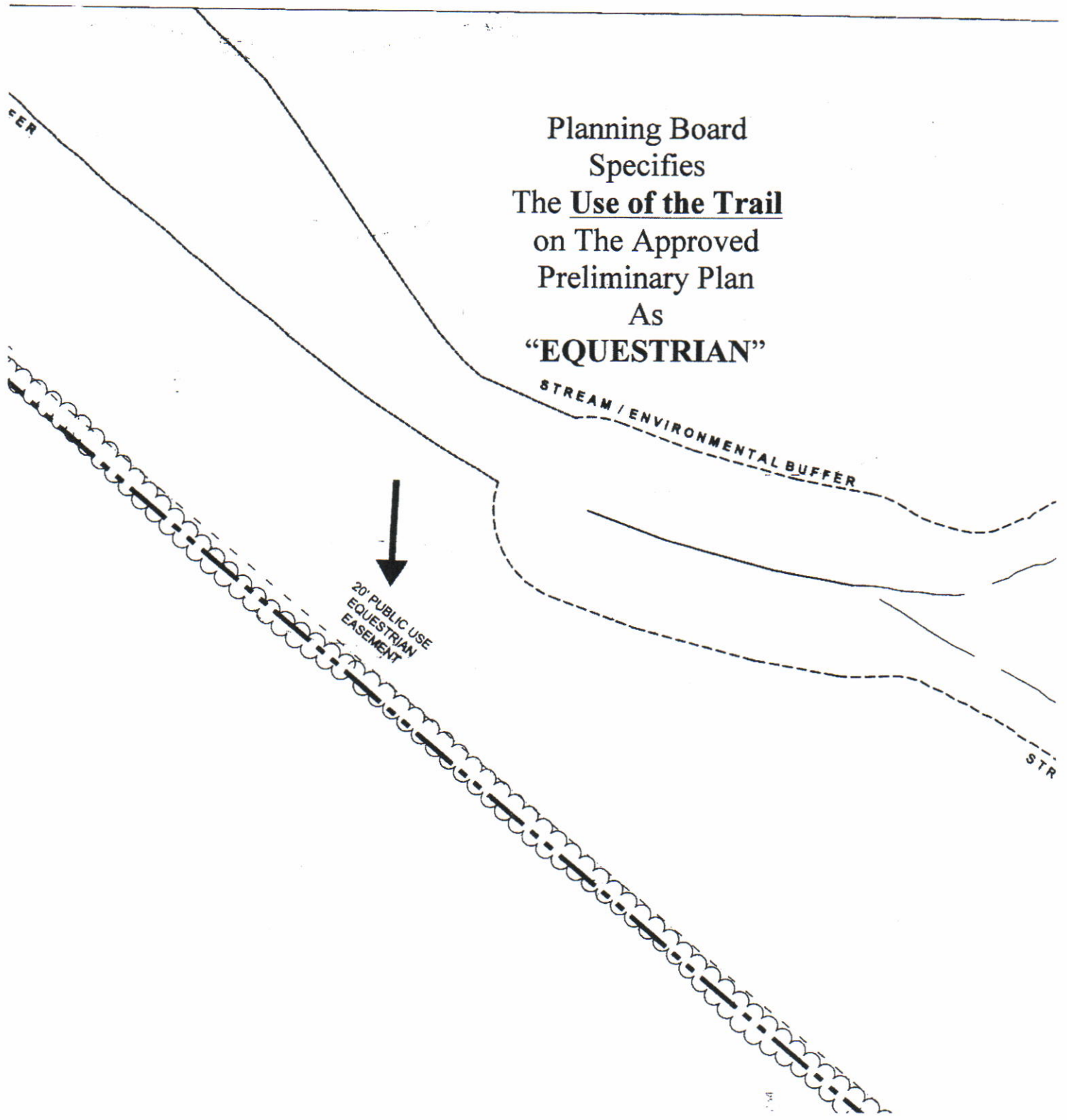
I hereby certify that a copy of the foregoing Memorandum was mailed first class mail to EPIC's attorney at the address below and delivered by electronic means to anoble@budownoble.com.

Allan A. Noble Esquire
Budow and Noble, P.C.
Air Rights Center
7315 Wisconsin Ave.
Ste. 500 West
Bethesda, MD 20814



Stephen J. Orens

Planning Board
Specifies
The Use of the Trail
on The Approved
Preliminary Plan
As
"EQUESTRIAN"





20 FT

EXHIBIT B

ALLAN A. NOBLE
MICHAEL J. BUDOW
WALTER E. GILLCRIST, JR
ANNE KELLEY HOWARD
J. CHARLES SZCZESNY
LAURA BASEM JACOBS
MELISSA D. MCNAIR
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HOWARD COUNTY OFFICE
Executive Center I
3300 North Ridge Road, Suite 245
ELLCOTT CITY, MARYLAND 21043
(410) 461-3322

PRACTICING IN MARYLAND
AND THE DISTRICT OF COLUMBIA

*ALSO ADMITTED IN VIRGINIA

August 27, 2015

VIA E-MAIL AND REGULAR MAIL

Casey Anderson, Chair
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Greentree Farm formerly known as Barnesville Oak Farm Plat and Public
Use Trail Easement
Preliminary Plan No. 120090110
Public Hearing - September 3, 2015

Dear Chair Anderson:

In preparation for the Public Hearing set for September 3, 2015, and pursuant to your letter of August 10, 2015, please accept the following submittal on behalf of EPIC concerning the issue of whether the proposed plats comply with condition three (3) of the Resolution of September 28, 2010, No. 10-129.

Preliminary Matter - Mr. Orens' Memorandum of August 25, 2015

I am in receipt of Mr. Orens' lengthy Memorandum of August 25. Rather than addressing the issue called for in your letter of August 10, 2015, Mr. Orens' Memorandum engages in personal attacks on everyone connected with EPIC, gives a long and unnecessary history which misrepresents the record, and accuses EPIC of *ex parte* communications¹. Much of this is untrue. The only purpose of this Memorandum is to confuse the record. Because the plats are in clear violation of paragraph 3, the Applicant and its' attorney desperately seek to obscure the issue before the Board by engaging in these threats and attacks. This is an obvious attempt to avoid the issue at hand and to intimidate the Board, EPIC, and the general public so that there will be no usable easement recorded on this property. Neither EPIC nor I will dignify this unfortunate

¹ The issue raised about *ex parte* communications is rather disingenuous given the manner in which the Applicant's secret recording of a "Covenant" on September 26, 2014 which attempts to avoid its obligations under the Resolution.

August 27, 2015

Page 2

Memorandum any further by responding to it. I ask that the Board ignore all of this and concentrate on the issue at hand, i.e. do the plats comply with condition 3.

The Plats Do Not Comply With Condition 3 of the Resolution

For any and all of the reasons set forth below, the plats and the language of the plats do not comply with the Resolution and should be rejected by the Board. The following represent the important reasons for rejection. All references to the Resolution are to paragraph 3 on page 3.

1. The Resolution provides that a Public Use Trail Easement (PUTE) must be created on the property as shown on the preliminary plan. The Plat does not create a PUTE as defined in the Resolution.
2. The Resolution states that it will name Equestrian Partners in Conservation (EPIC) (or another suitable entity identified by MNCPP) as a grantee. The Plat does not designate EPIC or anyone else for that matter as a grantee. There is no grantee. There is no one designated to construct, maintain and/or repair the trail. The developer has simply submitted a line on a plat - which is meaningless.
3. The Resolution requires that the conditions and restrictions governing the use be within the definition of "recreational purpose" as defined in the Natural Resources Art., Md. Code, Section 5-1101. The developers' proposal sharply limits the use of the trail to equestrian use and gives other restrictions not in accordance with Section 5-1101. Section 5-1101(f) defines recreational use as "any recreational pursuit." This includes hikers and bikers (non-motorized.) Under the developers' proposal, hikers and bikers would be prohibited from using the trail. This was not the purpose of the Resolution and it totally thwarts the concept of a unified trail system in Montgomery County. This was a contested subdivision and the Board's Resolution, in effect, determined, that a quid pro quo for granting (conditionally) the developer's request for a subdivision, was the corresponding express obligation that a recreational trail use easement be established on the property. The developer strongly opposed this. The developer is seeking to avoid its responsibilities by drafting a plat and filing a so-called covenant directly contrary to the express provisions of the Board's Resolution.
4. The Resolution provides that the grantee, i.e. EPIC, has the right to construct, maintain and repair the trail with no obligation of the grantee or the grantor to do so. This crucial provision is no where to be found in the Plat or Covenant recorded unilaterally by the developer². This important provision is crucial because trails in this environment must be constructed, maintained and repaired - otherwise they will

² Without notice to anyone, the Developer decided to record a "Covenant" on September 26, 2014 which attempts to avoid its' obligations under the Resolution. This "Covenant" is bogus and of no affect.

be unusable. EPIC has extensive experience in trail construction and maintenance (i.e. clearing of brush, fallen trees, and obstacles) and this is the only meaningful way a trail can be constructed or maintained. (For more information on EPIC and its' experience in constructing and maintaining trails, see its' website located at www.epicmontgomery.org.) This includes proper signage to instruct trail users as to the location of the trails. This is to protect every one, including the property owners, to keep trail users on the easement. Without this critical provision, there never will be a trail.

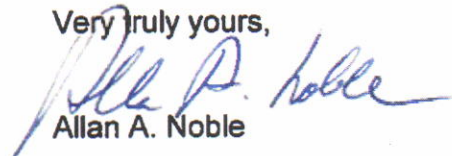
5. The Resolution gives the right to both the grantor or grantee to enforce the easement but with no obligation to do so. The Plats and Covenants are silent on the right of the grantee (there is no grantee) to enforce.

EPIC is ready, willing, and able to accept this easement in accordance with the Planning Board's Resolution. I have repeatedly urged that a simple easement be executed by the grantor, i.e. the developer, and the grantee, i.e. EPIC, and recorded in the Land Records of Montgomery County. I submitted a draft of a simple Easement, but it has been ignored. I have now re-drafted the easement to simplify it further and to make it strictly in accordance with Condition No. 3 of the Board's Resolution, and enclose a copy herewith. This is the type of easement used in the past by the County, that should be executed and recorded. As per the Board's Resolution, the applicant or developer must record the easement and the plat must include a reference to the Liber and Folio of the recorded PUTE.

In summary, we ask that the Board disapprove the current Plat or Plats before you because it is not in accordance with the Board's Resolution. We urge the Board to direct the developer to execute the easement that I am proposing with this letter, and that the Developer record it with the Land Records of Montgomery County. It is suggested that the Developer submit a revised Plat or Plats to confirm with the Board's Resolution and the easement which we have drafted.

I look forward to appearing before the Board on September 3 and answer any questions that you may have.

Very truly yours,



Allan A. Noble

AAN/clc
Enclosure

cc: Steven J. Orens, Esq., Attorney for Applicant (via email only)
Gwen Wright, Director, M-NCPPC (via email only)
Carol S. Rubin, Associate General Counsel, M-NCPPC (via email only)
Stephen J. Smith, Senior Planner (via email only)

PUBLIC USE TRAIL EASEMENT AGREEMENT

DEFINITIONS

- Grantor:** Barnesville Oak Farms, LLC, a Maryland Limited Liability Company, its successors and assigns in its capacity as agent for the Balsamah Corporation, N.V., a Netherlands Antilles Corporation, its successors and assigns, (Grantor).
- Grantee:** Equestrian Partners in Conservation, Inc., a Maryland 501(c)(3) Non-Profit Corporation, its successors and assigns ("EPIC" or "Grantee").
- Plan:** Preliminary Plan Number 120090110 as approved by the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission on September 28, 2010 under Resolution Number 10-129, a copy of which is attached and incorporated by reference herein as Exhibit A. (hereinafter referred to as "the Plan" or "Resolution")

WITNESSETH

WHEREAS, the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission ("The Planning Board") has approved Grantor's Plan conditioned upon Grantor subjecting the property ("Property") to a Public Use Trail Easement ("PUTE" or "Easement") running in favor of the Grantee and the public; and

WHEREAS, the location of the Easement is shown on the Plan (incorporated by reference into the terms of this Agreement) and further described on the applicable record plat(s) to be recorded; and

WHEREAS, the purpose of creating a PUTE is to create a trail for public recreational use in accordance with Section 5-1101, Natural Resources Art., Md. Code; and

WHEREAS, the Parties intend for conditions and covenants contained in this Agreement will run with the land in perpetuity and be binding on all subsequent owners and occupants of the Property.

NOW, THEREFORE, the Grantor has executed this Agreement for the purpose of ensuring compliance with conditions imposed by the Planning Board as a requirement of development approval. The Grantor does hereby grant and convey unto the Grantee, in perpetuity, a Public Use Trail Easement on the Property of the size and location described in the Plan, and further described on the applicable record plat(s), of the nature and character described herein. This Easement constitutes a covenant running with the land and is granted to establish a public right to use the trail easement area for all manner of public trail use as herein described. In addition, the parties agree as follows:

1. The foregoing recitals are agreed to and incorporated herein and shall be binding upon the parties
2. The provisions of the Plan, including but not limited to paragraph 3, are hereby adopted and incorporated by reference herein. If there is any conflict between the Plan and this Easement, the provisions of the Plan shall govern.
3. Grantor hereby establishes and grants a non-exclusive perpetual trail easement to the Grantee for the benefit of the public, in, on, over, across, and through the Property as described in the Plan for recreational use in accordance with Section 5-1101, Natural Resources Art., Md. Code. This shall not include motorized vehicles other than those associated with construction, management, and maintenance of the trail.
4. The Grantee and the public shall have the non-exclusive use of the easement for the purposes stated herein and shall have all of the rights and privileges reasonably necessary to exercise this easement.
5. Grantor shall not erect nor permit to be erected any structure, including but not limited to, buildings, improvements, fences and barricades of any nature whatsoever, within the easement premises, without the prior written consent of the Grantee. The Grantor shall not take any action to impede the use of the trail as a recreational trail.
6. Grantor agrees not to change the character of the topography of the easement premises without the prior written consent of the Grantee.
7. Pursuant to Section 5-1104, Natural Resources Article, Annotated Code of Maryland, the Grantor and Grantee are not: (a) extending any assurances that the easement premises are safe for any purpose, (b) conferring on any person the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assuming responsibility for or incurring liability as a result of any injury to any person or property caused by an act of omission of any person.
8. Pursuant to Section 5-1103, Natural Resources Article, Annotated Code of Maryland, the Grantor and Grantee owe no duty of care: (a) to keep the easement premises safe for entry or use by others for the recreational purposes enumerated herein, or (b) to give warning of any dangerous condition, use, structure or activity on the easement to any person who enters on the easement premises for these purposes.
9. In accordance with the Resolution, both the Grantor, and/or the Grantee, have the right to enforce the terms of this Easement, but have no obligation to do so.

10. The Grantee has the right, but is not obligated, to construct, maintain and repair the trail for recreational use and keep the premises clear of trees, shrubs and obstructions as necessary.

11. This grant is subject to existing easements of record for public roads and highways and public utilities.

12. The Grantee is not liable for any existing or future liens, mortgages, deeds of trust, or other encumbrances created voluntarily or involuntarily by the Grantor on the easement premises.

13. Grantor warrants that Grantor has good and indefeasible fee simple title to the easement premises and has the right and authority to execute this Agreement without the consent of any other person or legal entity.

14. Grantor covenants that it will warrant specially this easement and will execute such further assurances as may be requisite.

15. This Agreement and all rights and privileges granted herein shall run with the land and be binding upon and inure to the benefit of the Grantor and Grantee and their successors, assigns and legal representatives.

16. This Agreement shall be construed in accordance with the laws of the State of Maryland and enforced in a court of competent jurisdiction in Montgomery County, Maryland.

17. This Agreement shall be recorded among the land records of Montgomery County, Maryland at the expense of the Grantor.

18. Any written notices to the Grantee required by this Public Use Trail Easement Agreement shall be sent to the Director and/or President, Equestrian Partners in Conservation, P.O. Box 69, Boyds, Maryland 20841.

19. This Easement Agreement is intended to and does supercede the Covenant dated September 11, 2014 recorded by the Grantor in Liber 49221 Folio 445 among the Land Records for Montgomery County, Maryland.

TO HAVE AND TO HOLD unto the Grantee, Its successors and assigns forever, this grant shall be binding upon the heirs, successors and assigns of the Grantor in perpetuity and shall constitute a covenant real running with the land.

IN WITNESS THEREOF, the parties hereto have executed this Public Use Trail Easement on this _____ day of _____, 2015.

GRANTOR:

BARNESVILLE OAK FARMS, LLC

By: _____

(Title)

GRANTEE:

EQUESTRIAN PARTNERS IN CONSERVATION, INC.

By: _____

(Title)

STATE OF MARYLAND :
COUNTY OF MONTGOMERY : TO WIT:

On this ____ day of _____, 2015, before me, the undersigned Notary Public personally appeared _____ on behalf of **BARNESVILLE OAK FARMS, LLC**, and proved to me through satisfactory evidence of identification, which consisted of _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

Notary Public

STATE OF MARYLAND :
COUNTY OF MONTGOMERY : TO WIT:

On this ____ day of _____, 2015, before me, the undersigned Notary Public personally appeared _____ on behalf of **EQUESTRIAN PARTNERS IN CONSERVATION, INC.** and proved to me through satisfactory evidence of identification, which consisted of _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

Notary Public

CERTIFICATION

Approved for legal sufficiency by the Office of General Counsel for the Maryland-National Capital Park and Planning Commission on this ____ day of _____, 2015.

By: _____

(Title)

THE UNDERSIGNED, a member in good standing of the Bar of the Court of Appeals of Maryland, hereby certifies that the within instrument was prepared by him/her or under his/her immediate supervision.

RECEIVED
0765
AUG 25 2015

MCP-CTRACK

From: David McKee <dmckee@benninglandplan.com>
Sent: Tuesday, August 25, 2015 12:43 PM
To: MCP-Chair
Subject: Greentree Farm Subdivision Final (Record) Plats Nos. 220120040, 220120060, 220120510
Attachments: Letter to Chair_Greentree Farm Trail Easement _8-25-15.pdf

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

Hello - Please see attached regarding Item 3 of the Board's agenda for 9/3/15.

Thanks,
Dave

David W. McKee
Benning & Associates, Inc.
Land Planning Consultants
8933 Shady Grove Court
Gaithersburg, MD 20877
(301)948-0240
(301)948-0241 fax

Benning & Associates, Inc.

Land Planning Consultants
8933 Shady Grove Court
Gaithersburg, MD 20877
(301)948-0240
(301) 948-0241 fax

August 24, 2015

The Honorable Casey Anderson, Chair
Montgomery County Planning Board
The Maryland National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Greentree Farm Subdivision Final (Record) Plats Nos. 220120040, 220120060,
220120510 - Equestrian Trail Easement

Dear Planning Board Chair & Members of the Board,

I have been the lead land planner for the subject property and have been working on the project since the early 2000's. Furthermore, I have also been involved with many projects located in the Agricultural Reserve over the past 25+ years many of which involved trail easements on private property. I cannot recall a circumstance where the Planning Board, the County or other agency required a trail in the Agricultural Reserve for a purpose other than for equestrian uses.

We also prepared the subdivision plan for the abutting property located southwest of the Greentree Farm subject property identified as Woodstock Final Plat No. #22232, Preliminary Plan No. 120020020. Woodstock also includes a trail easement, identified as a 20' equestrian trail easement on the approved Preliminary Plan, which comes to the common boundary between the Greentree Farm and Woodstock properties. Similarly, for the subject property, my recollection is that at some point in time it was requested that a trail easement be provided as an east to west crossing through the site as part of the *equestrian trail corridors*. We subsequently provided an easement on the Preliminary Plan identified as an *equestrian easement*.

To the best of my knowledge, a trail for a use other than equestrian was never discussed nor requested while the Preliminary Plan for this project was under review.

The approved Preliminary Plan identifies the proposed trail easement as a *20' public use equestrian trail easement*.

Sincerely,

A handwritten signature in black ink, appearing to read 'David W. McKee', with a stylized flourish at the end.

David W. McKee, Principal

MCP-Chair

RECEIVED
0762
AUG 25 2015

From: naomi manders <naomimanders0@gmail.com>
Sent: Monday, August 24, 2015 2:17 PM
To: MCP-Chair
Subject: Testimony for Item #3 September 3 (Greentree Farms)
Attachments: Barnesville Oaks-Greentree Farms Testimony2 with attachments.pdf

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

Please see the attached PDF file with my testimony for the September 3 Planning Board hearing on Greentree Farms Preliminary Plan. I am signed up to speak as an individual representing EPIC (Equestrian Partners in Conservation). Thankyou for your consideration.
Sincerely, Naomi Manders (240-994-8129)

TESTIMONY
Before
Montgomery County Planning Board
September 3, 2015

Greentree Farms Preliminary Plan
Compliance with Planning Board Condition #3
Public Use Trail Easement

My name is Naomi Manders. I am a founding and current Board member of Equestrian Partners in Conservation (EPIC). For 12 years I was an employee of the Montgomery County Department of Parks as a Trail Planner and the Volunteer Coordinator for Natural Surface Trails Construction. I am here today to speak to the question of whether or not the plats and recorded covenants submitted by the applicant comply with the letter and intent of the Department of Parks and the Planning Board when it required the applicant to establish a trail easement on their property. More specifically I will speak to why the covenants in fact unequivocally DO NOT provide for a useable, safe, properly maintained, and sustainable trail as intended.

A line on a plat and descriptive language like that recorded by the applicant does not provide for a useable, safe, and properly maintained trail. First and foremost, the identification of an easement grantee willing to assume responsibility for stewardship of the trail is a necessity, not an option. Second, the trail must be mapped and downloadable maps posted on-line. It must have signposts that keep users on the trail and provide for location identification in the event of an accident requiring emergency services. Emergency personnel must be provided with these maps. Trail maintenance includes tread repair, removal of tree falls, trimming overhead branches, and erosion control. Since much of the easement under discussion follows the edges of crop fields, much of the trails needs mowing and signage warning user to stay on the edge and protect crops.

I have attached material which illustrates why EPIC, a private non-profit 501(c)3 organization, is a most suitable grantee of this easement. It has constructed and maintains two trail networks on private lands and promotes conservation practices by horse farms as illustrated in Attachments A, B, and C. EPIC employs paid and volunteer workers to maintain trails to high standard. EPIC also manages an "adopt-a-trail" program which provides charitable contributions that are directed to trail maintenance.

I hope that this testimony has provided the Board with a fuller understanding of all that is involved in establishing and maintaining a recreational trail and why the easement as submitted by EPIC should be adopted as the only fair and appropriate interpretation of the letter and intent of Planning Board condition #3.

Attachment A Breezy, Turtle and Bucklodge Loops



Attachment B Dry Seneca Trail



Attachment C EPIC Signpost/Trail Marker



MCP-CTRACK

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0768

AUG 26 2015

From: Sheila O'Donnell <scod@rcn.com>
Sent: Tuesday, August 25, 2015 10:37 PM
To: MCP-Chair
Subject: Reject Greentree Farm developer's "covenant"

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

Please see below.
Sorry for the forward. I had incorrectly input recipient email address.

Sheila O'Donnell

----- Original message -----

From: Sheila O'Donnell
Date: 08/25/2015 9:51 PM (GMT-05:00)
To: chair@mncppc-mc.org
Subject: Reject Greentree Farm developer's "covenant"

Dear Chair and Planning Board,

As a MC recreational trail user for 40 years, I request that you support easement language presented by EPIC. Please reject the Greentree Farm plat and covenant submitted by the developer.

I am an EPIC volunteer, a donor. I, as certainly you do, value EPIC's work to advance the Countrywide Trails MasterPlan by EPIC's tangible efforts to link public and private trail systems: their construction and maintenance of trails.

In closing, brick and mortar buildings and the costs associated with them are the taxpayers' burden and members' fee for use. In other words, qualifiers for some--- but not all. In large numbers, MC citizens are taking to free green space. It seems that to uphold EPIC's quality effects on trails, herein Greentree Farms, is to support trail users, young and old, their families and friends and their wishes to keep MC the place to live, work, learn, and recreate.

Thank you for reading.
I look forward to your positive consideration of EPIC's invaluable work and the valuable need for "easement," - not covenant.

Sincerely,
Sheila O'Donnell

Sheila O'Donnell

MCP-CTRACK

RECEIVED

AUG 26 2015

From: Yahoo!@alert <frederica20815@yahoo.com>
Sent: Wednesday, August 26, 2015 5:50 AM
To: MCP-Chair
Cc: Epicmontgomery Info
Subject: Fw: Boyds easement

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

----- Forwarded Message -----

From: "Yahoo!@alert" <frederica20815@yahoo.com>
To: "mcp-chair@mncpp-mc.org" <mcp-chair@mncpp-mc.org>
Cc: "info@epicmontgomery.org" <info@epicmontgomery.org>
Sent: Wednesday, August 26, 2015 11:45 AM
Subject: Boyds easement

Dear sir/madam:

I am submitting this email in support of the equestrian easement hearing on September 3, 2015. I am a horseback rider who greatly appreciates the opportunity to ride on the equestrian trails in Montgomery County. I am also a board member of the pbhta, a group, like epic, who support, clear and advocate for equestrian trails in Montgomery County.

I understand that an equestrian easement in Boyds is in danger of being nullified by a developer. This would be a great tragedy to riders and a terrible precedent if allowed. Please do not approve the developer's language which would effectively disallow the equestrian easement across the property and epic to maintain it. Thank you for your consideration of this important issue for Montgomery County horseback riders.

Sincerely, frederica wheeler johnson

Sent from Yahoo Mail on Android

MCP-CTRACK

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AUG 26 2015

From: hollymharrington@aol.com
Sent: Wednesday, August 26, 2015 11:12 AM
To: MCP-Chair
Subject: Preservation of Boyds' Trail

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

Dear Chair:

Please consider this a request that you ensure the three mile riding trail in Boyds remains open and accessible for use by rejecting the plat and covenant submitted by the developer and instead use the EPIC easement language. Having open riding trails throughout the magnificent Agricultural Reserve is vitally important for those of us who ride, and for the overall health and well-being of this special place.

Thank you for your attention in this matter.

Holly Harrington
415 Little Quarry Road
Gaithersburg, MD 20878

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0770
AUG 27 2015

MCP-CTRACK

From: David Stang <zipcodezoo.com@gmail.com>
Sent: Thursday, August 27, 2015 9:58 AM
To: MCP-Chair
Subject: Please support the easement language presented by EPIC for Greentree Farm.

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

The Countywide Trails Master Plan is a fabulous idea.

Connecting segments through Greentree Farm will add value to the two existing segments with this connection.

Horses and riders will benefit. Disjointed trail segments force riders to load horses into trailers to go from one segment to another, find parking spaces, unload... This is so time-consuming that it is usually not done at all. Short trail segments don't have the value that longer segments have. But once things are connected, this will be a WONDERFUL trail!

Longer trails provide more opportunity for wildlife, which also use the EPIC trails as corridors. With longer trails available, wildlife populations are less isolated, and likely healthier genetically. Longer trails also offer wildlife a means of travel that is less likely to require dangerous road crossing.

Longer trails benefit hikers, picnickers, bird watchers, mountain bikers, and others interested in the outdoors. EPIC trails are open to the public, and the public benefits from them.

EPIC has done a fabulous job maintaining the trails it is responsible for. They are safe, groomed, well-marked. Home owners along the trails are happy with the trails and the responsible riders they attract. I hope you will urge the Planning Board to accept the EPIC recommendations.

--

David J. Stang, Ph.D.
(240) 477-8817

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AUG 27 2015

MCP-CTRACK

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

From: Alison Farrin <alison@ipsd.com>
Sent: Wednesday, August 26, 2015 7:45 PM
To: MCP-Chair
Subject: FW: 3+ mile equestrian trail in Boyds - Support Letter for EPIC easement

For the record, I literally live on the other side of the country, but feel that this is important enough to let you know that the trail decisions you make ultimately affect me in my backyard as well. Numerous studies show the importance of getting people outside where they can maintain their health by actively walking, biking and riding in their local area. Also, connecting trails to our neighborhoods is extremely important from economic, environmental and physical standpoints as well. The Planning board correctly set this up for success by connecting two areas with this trail, providing for maintenance and providing that recorded easements would preserve the trails. Please reject the Applicant's Record Plat as submitted on July 30th and require them to resubmit with the Planning Board's requirements as noted below:

Planning Board requirement:

Record Plat to reflect a Public Use Trail Easement ("PUTE") through the property as shown on the preliminary plan. The PUTE will name Equestrian Partners in Conservation ("EPIC"), a 501c3 non-profit corporation, its successors or assigns as the Grantee and must include, at a minimum: (i) the conditions and restrictions governing uses that are within the definition of "Recreational Purpose" as defined in the MD Ann Code, Natural Resources Article, '§5-1101; (ii) the right of Grantee to construct, maintain and repair the trail, with no obligation by either Grantee or the Grantor to do so; and (iii) rights of enforcement by both the Grantor and the Grantee, with no obligation on either to do so.

—From Montgomery County Planning Board Resolution August 2010 conditionally approving Barnesville Oak Farm subdivision, Condition #3

I support the easement language presented by EPIC. Preservation of this historic trail is important to all trail users in Montgomery County. It provides an important link between public and private trails and horse parks. It deserves to be protected and well-maintained for the safety and the enjoyment of trail users. The future of equestrian trails rests in private, not public, land in the form of easements on private land. This is particularly true when it comes to the creation of trail connections that link existing trails to one another. Proposed residential housing developments provide opportunities to either save existing trails or establish new ones by requiring developers to establish trail easements on the property being developed. Every time this process is compromised, we as a nationwide community take a step back in the ability to create or preserve community trails. Worse, this becomes ammunition for any developer who does not have the foresight or community spirit to include good trails and pathways in his development.

Alison A. Farrin
Director
Ramona Trails Organization
Mobile: (858) 248-1849
Direct Line: (858) 218-3457