BEFORE THE MARYLAND-NATIONAL CAPITAL
PARK & PLANNING COMMISSION, SITTING AS THE
MONTGOMERY COUNTY PLANNING BOARD (THE "**BOARD**")

IN RE:

Greentree Farm Subdivision;
Application of Balsamah
Corporation, N.V. ("**Applicant**")
for approval of subdivision
record plat applications 220120040,
220120060 and 220120510.

PETITION FOR RECONSIDERATION

Equestrian Partners in Conservation ("**EPIC**"), a 501(c)(3) entity with standing to sue, and Michael D. Rubin ("**Rubin**"; EPIC and Rubin referred to herein as "**Petitioners**"), a neighboring property owner who testified at the September 3, 2015 Board hearing (the "**9/3/15 Hearing**"), by their undersigned counsel and pursuant to Rule 4.12.1 of the Montgomery County Planning Board's Rules of Procedure, hereby file this petition for reconsideration. This Petition respectfully moves the Board to reconsider its conditional approval (at its recent 9/3/15 Hearing) of the Applicant's recorded covenant (and proposed amended covenant) as supposedly sufficient to satisfy the recorded easement condition in the Board's expressly conditioned 2010 Preliminary Plan approval (hereinafter, the "**2010 PP Resolution**"). In short, the Board committed one or more reversible errors, both in law in fact, in deciding to accept the Applicant's Amended Plat and Amended Covenant (together, the "**Non-Conforming Documents**"), both over the objections of these Petitioners and in clear contravention of the Board's own earlier-required express conditions in the 2010 PP Resolution (per Applicant's Preliminary Plan Application No. 120090110). Of course, the Applicant failed to appeal the 2010 PP Resolution and subsequently ratified the Board's express easement condition by initially proffering a would-be easement

following the 2010 PP Resolution – *albeit* not a version that passed muster with Parks, because it also failed to include the express rights and strictures spelled out in the 2010 PP Resolution. *See* **Exhibit 1** attached hereto.

For the reasons that follow, and as may be further supported by a supplemental memorandum of law prior to or at any hearing on this matter (which hearing EPIC hereby respectfully requests), the Applicant's Non-Conforming Documents should be rejected (as written and recently approved by the Board), and the Applicant should instead be required to proffer (and accede to) conforming documents that satisfy the clear requirements of Condition No. 3 of the Board's 2010 PP Resolution,[1] or have its requested subdivision finally denied for its failure to satisfy that express condition.

I. Background And Summary Of Requested Relief

EPIC files this petition for reconsideration to address certain serious errors of fact and law committed by the Board at its 9/3/15 Hearing and thereafter. As an express condition of the

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[1] By way of history, Condition No. 3 of the Board's 2010 PP Resolution provides, in pertinent part:

> A Public 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…

Id. (emphasis added). After originally submitting an easement in an effort to comply with the required terms of Condition No. 3, the Applicant instead recorded a "Covenant To Establish An Equestrian Trail For Recreational Use By The General Public" with the land records of Montgomery County at Liber 49221, Folio 445 (the "**Original Covenant**"). The Original Covenant was discussed during the 9/3/15 Hearing, and Petitioners understand that an "**Amended Covenant**" (titled "Amended Covenant To Establish A Natural Surface Trail For Use By The General Public For Equestrian And Other Specified Recreational Use") was prepared as a result of discussions which took place at and after the 9/3/15 Hearing, and is currently being considered by the Board for approval. As explained herein, neither the Original Covenant nor the Amended Covenant comply with the conditions of the 2010 PP Resolution.

Board's 2010 PP Resolution approval, and Applicant being permitted to record plat subdivision for the subject property (the "**Subject Property**"), the Board expressly required that the Applicant (**i**) create a public use trail easement ("**PUTE**") on the Subject Property and (**ii**) include in the PUTE certain provisions. *See* 2010 PP Resolution, Condition No. 3. The Board's imposition of that Condition No. 3 clearly acted to induce forbearance by the Petitioners (and apparently others, at least in regard to Condition No. 3), who did not timely appeal the 2010 PP Resolution because they were placated by that seemingly express condition in the 2010 PP Resolution. Indeed, the Petitioners elected not to appeal that (now final, and unappealable) Preliminary Plan approval because they reasonably relied upon the *bona fides* of the Applicant and the Board as expressed in the objectively clear terms contained in Condition No. 3; *viz.*, (**i**) that the PUTE was to be an easement, and (**ii**) that the PUTE would contain the terms specified in Condition No. 3.[2]

Despite the clearly stated conditions in the 2010 PP Resolution, at the Board's 9/3/15 Hearing the Board indicated – over EPIC's objections/opposition – that it would approve, as modified, the Non-Conforming Documents. In doing so, the Board:

1. Failed to include a right in the PUTE for EPIC and/or the general public to construct the subject public use trail (language specifically contained in Condition No. 3), which right is necessary in light of the fact that – contrary to **the Board's**

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[2] Indeed, as the Board will recall and the record will reflect, there was significant public opposition to approval of the Subject Project unless the subject PUTE was put in place...which opposition led to the requirements set forth in the 2010 PP Resolution. Even so, and due to the Board's recent approval of the Non-Conforming Documents, it appears the Applicant has engaged in "bait and switch" tactics … and the Board, however unwittingly, has improperly allowed the Applicant – at least for now – to improperly turn the earlier-approved Condition No. 3 into, at best, an illusory exercise in futility, destined to create more disputes and potential litigation over these **far from resolved** issues.

mistaken belief – the trail in question is not actually fully in existence (*see* e-mails and aerial photos attached hereto as **Exhibit 2**);

2. Failed to comply with the 2010 PP Resolution's requirement that the PUTE be an easement, which is necessary so as to give EPIC and/or the public in general the ability to construct or perform maintenance beyond "routine maintenance" – without the need to request permission to do so from the Applicant. Indeed, under the Non-Conforming Documents, the Applicant appears able to arbitrarily reject any such request from EPIC or the pubic with impunity – subject only to the intended beneficiaries (the public and/or EPIC) having to sue to enforce the subject express condition that was clearly pivotal to the Applicant's conditional Preliminary Plan approval in 2010); and

3. Similarly, although the easement to be created (pursuant to the 2010 PP Resolution) mandated that EPIC was to be named grantee thereof, the Amended Covenant provides instead not only that the Applicant is the only entity permitted to enforce the Amended Covenant, but also (in its "Special Notes") provides that only the Applicant has the right to construct or maintain the would-be trail beyond so-called "routine maintenance."[3]

As explained more fully *infra*, the foregoing failures by the Board are violative of both the Board's own Rules, but also EPIC's (and the public's for that matter) rights to procedural due process and fundamental fairness. To correct these serious errors, the Board should reconsider

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[3] Note that the Original Covenant recorded by Applicant did not give EPIC/the general public the right to even engage in (undefined) "routine maintenance," let alone "construct, maintain and repair" as mandated in Condition No. 3. *See* Original Covenant at p. 4 ("Unless expressly authorized by the Property owner, no entity or individual is authorized to operate, maintain or manage the equestrian trail…"). It is only in the Amended Covenant (under consideration by Staff and the Board) in which the ability of the public to even do routine maintenance on the "trail" is now even arguably included.

its actions at the 9/3/15 Hearing and either (i) require the Applicant to amend the Non-Conforming Documents to comply with and satisfy the now non-appealable Condition No. 3, or (ii) reject the Applicant's record plats as violative of the Board's earlier 2010 PP Resolution, as a matter of law.[4]

Indeed, while the Non-Conforming Documents should be made to fully conform to the terms of the 2010 PP Resolution, they should be further amended, at a minimum, (i) to allow the currently non-existent/impassible portions of the subject trail to be constructed and (ii) to remove the Applicant's self-reserved ability to prevent EPIC and/or the general public from engaging in construction and other non-"routine" activities. *See* Amended Covenant at ¶9(b) ("Unless expressly authorized by the Property Owner, other than routine maintenance by the general public, no entity or individual is authorized to operate, maintain or manage the trail…").[5]

While as part of the relief requested herein EPIC asks that the Board reconsider allowing the filing of only a covenant instead of the originally-required easement, further changes to the Amended Declaration would (at a minimum) need to be required and satisfied in order to meet any plausible, good faith definition of compliance with the 2010 PP Resolution.

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[4] As well, Petitioners note that Paragraph 8(a) of the Original Covenant, now Paragraph 10(a) of the Amended Covenant, should also be deleted or at least amended, since it purports to negate the terminate the access/use rights granted even in (*inter alia*) the event of a remand (in whole or part) of an approval by a court.

[5] Condition No. 3 of the 2010 PP Resolution should be adhered to and an easement created. Failing that, and at a minimum, the language in the Applicant's proffered Covenant (and the amendments Staff is recommending) should be further revised to require, at most, notice to the Applicant of such other activities (with no right of Applicant to unreasonably withhold its consent) and an obligation by Applicant to plead, prove and enjoin any allegedly *ultra vires* uses.

II. Argument

A. Applicant's Request For Board Approval of its Non-Conforming Documents Must Be Rejected Because They Are Nothing More Than An Untimely Motion For Reconsideration Of The 2010 PP Resolution

As a preliminary matter, EPIC notes that the Board should reconsider and overturn its decision made at the 9/3/15 Hearing in light of the real purpose behind (and effect of, regardless) the Applicant's request that the Board accept the Non-Conforming Documents. Specifically, by submitting documents which clearly do not conform to the requirements of Condition No. 3 and asking the Board to rubber stamp them as being what the Board "must have intended," the Applicant is really just requesting untimely reconsideration of (and *de facto* amendment to) the express requirements set forth in the 2010 PP Resolution.[6] However, under Rule 4.12.1 of the Board's own Rules, any such request for reconsideration was required to be filed "within ten days after the date of mailing of the [2010 PP] Resolution." Similarly, the supposedly aggrieved Applicant was required to appeal the 2010 PP Resolution within 30 days, which the Applicant did not, thereby limiting the Board's current jurisdiction to enforcement of the subject easement

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[6] That even the Applicant understood the 2010 PP Resolution's requirements is borne out by the fact that the Applicant's initial draft of the PUTE actually was an easement, naming EPIC as grantee, and not any such covenant – into which it has more recently morphed, c/o the Applicant. *See* **Exhibit 1**. Indeed, it is significant to note that by **failing to ask for reconsideration of, or appeal the Board's 2010 PP Resolution, the Applicant accepted its terms and is now estopped and precluded from challenging its terms and is bound by the same.** In short, regardless of whether the Applicant could have initially challenged Condition No. 3 on appeal, it did not. That waiver, coupled with Applicant's part performance (before it decided to renege), clearly make any attempted challenge of that decision (now the "law" of the case) legally untenable. Despite this, and apparently frustrated with having to comply with the requirements of the 2010 PP Resolution (*ala* "buyer's remorse"), the Applicant has now clearly decided to try an "end run" around its requirements...and has even convinced the Board – at first blush – to go along, EPIC's well-reasoned remonstrations notwithstanding. However, because doing so was nothing more than allowing an untimely request for reconsideration, that alone renders this untimely *de facto* amendment to the clear language of the 2010 PP Resolution reversible error, requiring reconsideration and/or reversal on appeal.

condition.[7] *See* Board Rule 4.11.3 ("[t]he Board's adoption of a Resolution embodying its decision is the final action in matters subject to these Rules"); Md. Code, Land Use §23-401 (appeals of final actions of county planning board must be filed "[w]ithin 30 days" of the action); Maryland Rule 7-203 (petition for judicial review "**shall** be filed within 30 days after the latest of [the date of the order or action, or notice of same]") (emphasis added).

Since the Applicant failed to timely contest the easement condition, its transparent attempt to conflate that express condition (*a la* "mission creep") in its latest Non-Conforming Documents, clearly should have been rejected at the 9/3/15 Hearing and should now be rectified by proper Board reconsideration. Because the Board failed to reject Applicant's attempted circumvention at the 9/3/15 Hearing (and has now improperly accepted the Applicant's clearly Non-Conforming Documents as supposedly satisfying Condition No. 3 – when they clearly do not), Petitioners respectfully petition the Board to reconsider and reverse its 9/3/15 decision regarding this issue.

B. The Board's 9/3/15 Decision Was Founded Upon Mistakes Of Fact

Even if (*arguendo*) the Applicant's untimely request for reconsideration/*de facto* amendment to the 2010 PP Resolution had been timely filed, the Board should still reconsider and reverse its 9/3/15 decision. This is because in considering the Applicant's request, the Board was clearly mistaken as to certain assumed/pivotal facts (not in evidence) that were, and remain patently false, as a matter of undeniable fact.

Specifically, during the 9/3/15 Hearing the Board was clearly under the mistaken impression that the subject trail, *in toto* and passable for its beneficiaries, already exists. While much of the trail does exist, some parts of it do not and… indeed are inaccessible and not

[7] Indeed, to hold otherwise would be to ignore and divest Maryland law and the Board's Rules of any meaning or efficacy.

useable, plain and simple. *See* aerial photographs at **Exhibit 2**. In order to establish the subject "trail," substantive clearing work in some areas has to be done. The Board's mistaken assumption in this regard clearly led it to believe that it was not necessary to include a right on EPIC's/the general public's part to "construct" the trail – one of the expressly contemplated uses spelled out in (the easement) Condition No. 3 in the 2010 PP Resolution. *See* Condition No. 3 [PUTE **must** include "(**ii**) the right of Grantee to **construct,** maintain and repair the trail…"] (emphasis added). By contrast, the Applicant's proffered documents contain no such language; rather, they purport to require the Applicant's real-time permission in order for any beneficiary to undertake such activities in regard to a trail that does not fully exist, and may – if Applicant has its way – never exist in fact.

C. Reconsideration And Reversal Is Warranted Because The Non-Conforming Documents Are, On Their Face, Not Compliant With The Requirements Of The 2010 Resolution

The Board should also reconsider its 9/3/15 decision because the Non-Conforming Documents clearly, and on their face, do not comply with the requirements set forth in the 2010 PP Resolution. The Board's error of fact/law in this regard further justifies reversal of the Board's 9/3/15 decision.

As touched on above, Condition No. 3 in the 2010 PP Resolution contained express requirements of the PUTE that was to be created. Among other things, Condition No. 3 required that the PUTE (i) name EPIC as the "Grantee" of the PUTE, (ii) give EPIC the right (but not the obligation) to "construct, maintain and repair" the subject trail, and (iii) provide EPIC the right (but not the obligation) to enforce the PUTE. None; repeat none of these express requirements are included in the Amended Covenant proffered by the Applicant as supposedly compliant with

Condition No. 3...which the Board still erroneously approved as somehow compliant.[8]

Rather than an easement (which Applicant originally proffered to resolve the public objections regarding the subject trail and which the 2010 PP Resolution expressly required), the Applicant submitted, and the Board approved, the Amended Declaration (*i.e.*, covenants).[9] Of course, the Board is well aware of the differences (exceedingly important here) between an easement and a restrictive covenant. The former grants an incorporeal use right in real property, and gives the grantee (here EPIC and the public) the right to utilize the easement area, for permissible uses, in accordance with the terms of the easement … and without the need to make a request to the grantor prior to doing so. However, here the Amended Covenant gives neither EPIC nor the general public any permission to construct the (currently only partially existent) trail. As well, the Amended Covenant does not require the Applicant to construct the trail, such that the currently non-conforming *status quo* can continue in perpetuity – turning the original intent of a useable trail completely on its head! Indeed, even under the amended covenant now being considered by Staff at the Board, the would-be easement grantees are now restricted from any activities other than (undefined) "routine maintenance" without the Applicant's permission, that (in turn) can be unreasonably withheld with impunity. *See* Amended Covenant ¶1(a) (even

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[8] While EPIC understands that Applicant has fallaciously claimed that it had the right to record the non-conforming Amended Covenant because its original and/or amended terms were supposedly "rejected" by EPIC, that "convenient" bit of sophistry is not only factually untenable but is also facially specious. Condition No. 3 required Applicant to submit the required easement to Parks and to act in good faith in satisfying that express condition. Simply put, Applicant was not permitted to submit to Parks or EPIC documents that clearly did not conform to the requirements of the 2010 PP Resolution (*e.g.*, not an easement grant; no right to create/ construct the trail; no right to take certain actions without Applicant's prior consent, etc.), and then -- when the document PUTE was justifiably rejected because of its (apparently intended) non-conformity -- rely on that supposed "rejection" as a basis for recording its facially non-conforming PUTE.

[9] *See* attached e-mail dated August 2, 2010 from Applicant (part of **Exhibit 2**), confirming that Applicant offered the easement; it was not imposed on them until Applicant agreed that the agreed easement was required to resolve the issue.

routine maintenance prohibited if it "disrupts the quiet enjoyment and privacy of residents"); ¶9(b) (plats to include language stating that "[u]nless expressly authorized by the Property Owner, other than routine maintenance by the general public, no entity or individual is authorized to operate, maintain or manage the trail..."). By requiring the creation of an easement rather than a covenant, the 9/28/10 PP Resolution clearly did not intend such a role-reversal; instead, it clearly intended that EPIC and the public be given the right (but not the obligation) to take such activities, without having to wait for the Applicant's subjective approval (which, under the PUTE as written, is not required to even be reasonably considered, let alone given by the Applicant).

Similarly, the Board was clearly under the misimpression that the Non-Conforming Documents submitted by the Applicant would allow EPIC and/or the pubic to file suit to enforce their provisions and that EPIC, given its position, would have standing to enforce those provisions. However, the Amended Declaration does not grant any express right to enforce it other than to the Declarant. *See*, *e.g.*, Amended Declaration at ¶3.

For all of these reasons, the Board's error in approving documentation that was clearly not in compliance with the 2010 PP Resolution, requires reconsideration, should be reversed and the express conditions in the 2010 PP Resolution should be enforced as a matter of law.

D. The Board Should Reconsider Its 9/3/15 Decision Because It Improperly Acted To Amend the 2010 PP Approval Condition, Which The Board Could Not Do In Deciding Whether To Approve The Plats As Supposedly Compliant and/or Without Proper Notice And A Public Hearing

Finally (but equally compelling), the Board should reconsider and reverse its 9/3/15 decision approving Applicant's Non-Conforming Documents because in approving them the Board acted to improperly amend the 2010 PP Resolution. In short, the Non-Conforming

Documents do not comply with express Condition No. 3 in the 2010 PP Resolution (as a matter of law) – and it was reversible error to accept them as supposedly compliant – or the Board committed reversible error by, *sua sponte*, purporting to amend the 2010 PP Resolution – in violation of its own Rules and without providing proper notice to the public and an opportunity to be heard.

Of course, after the 30-day appeal period passed in 2010, the Board was not permitted (either *sua sponte* or otherwise) to amend the clear and express conditions of the 2010 PP Resolution. Board Rule 4.11.3 ("[t]he Board's adoption of a Resolution embodying its decision is the final action in matters subject to these Rules"); Md. Code, Land Use §23-401 (appeals of final actions of county planning board must be filed "[w]ithin 30 days" of the action); Maryland Rule 7-203 (petition for judicial review "**shall** be filed within 30 days after the latest of [the date of the order or action, or notice of same]") (emphasis added). After that, the express Easement condition clearly had to be satisfied – as a condition of record plat approval – or the proffered record plats rejected as non-conforming. The Board also clearly cannot justify the Non-Conforming Documents' greater restrictions on the creation, use and maintenance of the currently impassable trail as supposed excused as a mere "reinterpretation" of the Board's original "intent" under Rule 4.12. In short, the Board's latitude to approve minor, non-substantive changes to the plats – as within its power to interpret its own original intent – cannot justify the wholesale revision to its expressly stated intent, such as Applicant now hopes to get away with. Monticello v. Monticello, 271 Md. 168, 173, 315 A.2d 520 (1974) (construction of final and unappealed decree governed by "objective rule," wherein plain language must be given its plain meaning, as a matter of law). In short, the conspicuous (i) deletion of any right to construct the subject trail and (ii) the Applicant's attempt to conflate who must seek prior

approval from whom in order to maintain or take other actions in regard to the trail (*e.g.*, to maintain it in a useable state) cannot be squared with the palpably greater degree of use rights and ancillary creation/maintenance rights expressly called for in the 2010 PP Resolution. *See*, *e.g.*, Calomiris v. Woods, 353 Md. 425, 436, 727 A.2d 358 (1999); In re Arnold M., 298 Md. 515, 520-1, 471 A.2d 313 (1984); Monticello v. Monticello, 271 Md. at 173 (whether in interpreting a contract, a statute, or judicial ruling, Maryland universally applies the "objective rule," applying the plain meaning of the language without tortured construction).[10]

At bottom, although the Board's 9/3/15 Hearing was noticed, the stated subject matter of the hearing gave no notice of the Board's intention to entertain a material amendment to the conditional Preliminary Plan approval after the passing of the (clearly "jurisdictional") deadline for appeal by the Applicant. Md. Code, Land Use §23-401 (appeals of final actions of county planning board must be filed "[w]ithin 30 days" of the action); Maryland Rule 7-203 (petition for

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[10] As an important aside, the Chairman's comments after EPIC had already submitted on its various objections to the Non-Conforming Documents and in opposition to approving them as supposedly compliant with Condition No. 3 – stating essentially to the effect that "we are all in agreement?" to his colleagues on the Board – was clearly not an offer to EPIC's counsel to supplement EPIC's arguments, let alone to confirm supposed "agreement" with the Board's rulings against EPIC, which EPIC was actively opposing and about which it clearly remained in opposition.

Also, any suggestion that because the Parks Department and Applicant supposedly could not agree on the terms of the required easement (*e.g.*, because Applicant's versions which began as a proffered easement morphed over time into a non-conforming covenant), somehow relieves Applicant of the condition is completely untenable. Compare supposed 120 day period for Parks and Applicant to work out the remaining terms for any such required easement, while not contradicting the overall scope ("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") (emphasis added). Clearly that supposed failure of applicant and Parks to agree cannot excuse Applicant's Non – Conforming Documents as supposedly compliant, any more than any other Applicant's attempted flouting of a clearly required Preliminary Plan and record plat condition would net any other applicant any such windfall; *viz*, like a reward for indefensible *post hoc* efforts to circumvent a condition through Staff. *Compare* Clarksburg Town Center Applicants, wherein P&P Staff had allegedly worked with an applicant to alter an earlier condition of approval. Clearly neither EPIC nor the Board are constrained or estopped by any such "behind the scenes" attempts by Applicant to circumvent the 2010 PP Resolution.

judicial review "**shall** be filed within 30 days after the latest of [the date of the order or action, or notice of same]") (emphasis added). Simply put, the 9/3/15 Hearing was not noticed as a hearing in which the Board was going to reconsider, let alone amend the requirements of the 2010 PP Resolution to improperly dispense with the earlier required easement condition. Because such a fundamental change in the approval of the Subject Project (again, *a la* "bait and switch") was already enrolled as the law of this case, but – at a minimum – required proper notice and a public hearing, reconsideration and reversal of the Board's 9/3/15 rulings are now required to redress each of these clear violations of EPIC's and Rubin's rights to procedural due process.

For the foregoing reasons, as may be supplemented prior to or at the (requested) hearing on this matter, the Board should now reconsider and reverse its decision to approve the Applicant's Non-Conforming Documents and instead require the easement called for in Condition No. 3 be granted by Applicant as a continuing condition of its requested subdivision in this matter.

Respectfully submitted,

SHULMAN, ROGERS, GANDAL,
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By: _____

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REQUEST FOR HEARING

Petitioners respectfully request that a hearing be set in on this Petition for Reconsideration for the earliest possible date.

Kevin P. Kennedy 9/28

Kevin P. Kennedy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 14, 2015, a copy of the foregoing was served via first-class U.S. Mail, postage prepaid, upon:

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