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

## APPLICANT'S RESPONSE TO PETITION FOR RECONSIDERATION

### I. Introduction.

On September 3, 2015 following a public hearing and the receipt of written and oral testimony the Planning Board voted to approve the above referenced Final Record Plats. The hearing was scheduled and conducted over the objection of the Applicant and the Applicant restates that the hearing was a nullity because the Planning Board had failed to act on the Plat applications within thirty days of submission and acceptance as required by the Subdivision Regulations and therefore on the day of the public hearing the Plats were already approved by operation of law.

This response to the pending Petition for Reconsideration is submitted without prejudice to Applicants contention as stated above.

The Petition for Reconsideration claims that Petitioner EPIC (Equestrian Partners in Conservation) is entitled to a property interest, right to construct, maintain, and repair the trail, the right of enforcement, and the right to become the grantee of an easement. Petitioners' claim is baseless and contrary to the express terms of Condition Number 3 in the Planning Board's Resolution approving Preliminary Plan No. 120090110 (MCPB No. 10-29). The approval Resolution expressly establishes that "Should the designated Grantee as specified herein (EPIC) **decline to accept** the PUTE, **the record plat may be recorded without the reference [to an easement granted to EPIC]." (Emphasis added).** Accordingly, the plats approved by the Planning Board without reference to an easement granted to EPIC meet the express terms of the Condition.

### II. The essential elements of Reconsideration.

The authority to reconsider a final action must be judiciously applied and should never be exercised in the absence of a clearly articulated request for reconsideration based on mistake, inadvertence, surprise, fraud, or other good cause that enumerates with precise particularity

errors of fact or law that render the decision reviewable and reversible. In the absence of such clearly articulated reasons, a reversal of the original decision following reconsideration would, under Maryland law, be considered an "impermissible change of mind" by an administrative agency. (See Planning Board's Rules of Procedure Section 4.12.1.)

## III. The Petition

A. Petitioners initially assert that "neither the Original Covenant nor the Amended Covenant comply with the conditions of the 2010 PP (*sic*) Resolution." (Petition page 2.) Petitioners have not yet seen the Amended Covenant that they allege to be non-conforming.

Petitioners continue to ignore the **fact** that Condition Number 3 in the Board's Preliminary Plan approval Resolution expressly negated any obligation to record a Public Use Trail Easement ("PUTE") by providing that "should the designated Grantee (Petitioner EPIC) as specified herein decline to accept the PUTE, the record plat may be recorded **without** the reference." (Emphasis added). As clearly evident from the exhibits attached to the Petition for Reconsideration, EPIC on more than one occasion declined to accept the PUTE "approved by **the Commission's** Office of the General Counsel." (Emphasis added.) Clearly EPIC's president objected to the Board's approved trail location and wanted it relocated with the addition of a parking lot for horse trailers, as depicted on one of Petitioner's Exhibits in the area of actively cultivated prime agricultural soil.

Petitioners appear to assert that the Planning Board divested the Planning Department of its jurisdiction over the determination of compliance with the approved preliminary plan and vested that determination in "Parks." The first inkling of this erroneous and factually unsupported allegation is the comment on page 2 of the Reconsideration Petition that one of the submitted easements naming EPIC as the grantee was "not a version that passed muster with **Parks**..."

There is no language in Condition Number 3 or elsewhere in the Approval Resolution that would support Petitioners' position. The fact is that the Condition expressly gave exclusive authority to the Commission's Office of the General Counsel to approve a PUTE - and it did. - The Board itself established the location of the trail without a parking lot for horse trailers on prime agricultural farm land. EPIC rejected both the PUTE and the Board-approved trail location thereby expressly eliminating any obligation whatsoever to identify EPIC as a grantee of an easement, or to file an easement in the land records separate from what is on the plats.

B. Petitioners next contend that Condition Number 3 was included 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 *(sic)* Resolution because they were placated by that seemingly express condition in the 2010 PP *(sic)* Resolution."

Suffice it to say that there is not a shred of evidence in the Preliminary Plan record that would support Petitioners' assertion. The idea that the Planning Board would ignore Supreme Court mandates to "induce forbearance" by Petitioners of their right to judicial review by

requiring an applicant to grant an uncompensated conveyance of an easement to a third party is absurd.

The PUTE that is depicted on the Plats, identified in the recorded Declaration of Covenant and depicted on the recorded Equestrian Trail Plan was a voluntary good will gesture by the Applicant to make a trail **available** for use by the general public under the cloak of protection guaranteed to such property owners by State law in exchange for making their land available for public recreational use.

Absent Applicants voluntary good will gesture, no trail could have been required as a condition of subdivision approval. The applicable master plan, the AROS Master Plan, does not include a site specific recommendation for a trail on this property and no nexus exists between the requirement of a trail and either the 24 lot subdivision or the ongoing agricultural operations. If anything, the existence of the trail is a detriment to both– not a legitimate requirement of plan approval.

C. The Petitioners next assert that the Applicant failed to comply with the "requirement that the PUTE be an easement."

Here the Petitioners ignore long-standing Maryland appellate decisions that unequivocally hold that the depiction and identification of the "Equestrian Trail" on the plats already establishes an express public easement. No written declaration or covenant is required to establish the trail as an express easement, but recorded documentation is most certainly permitted under Maryland law and in circumstances such as these it should be encouraged to establish the terms and conditions under which the easement area is available for access by the general public.

D. The Petitioners next assert that "although the easement to be created (pursuant to the 2010 PP *(sic)* 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'."

Suffice it to say that the Planning Board never required that a trail be "constructed" and in keeping with Section 5-1101 of the Natural Resources Article of the Maryland Annotated Code, Condition Number 3 did not obligate the Property owner or anyone else to construct anything. Instead, consistent with State law, Condition Number 3 expressly provided that while there was a right to construct, maintain and repair the trail, there "is **no obligation** by either Grantee or the Grantor to do so." (Emphasis added).

E. Petitioners argue that the "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 (*sic.*) resolution." (Emphasis added.)

The only "documents" that the Board was called upon to "approve" on September 3, 2015 were the submitted Final Record Plats that the Board's professional staff recommended for approval. The Declaration of Covenant was previously approved by the Commission's Office of the General Counsel pursuant to the Board's express delegation in Condition Number 3.

> "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."

Petitioners' accompanying assertion, repeated frequently in the Reconsideration Petition, that "the Applicant is really just requesting untimely reconsideration of (and *de facto* amendment to) the express requirements set forth in the 2010 PP (*sic)* Resolution" has no merit. Petitioners may differ with the Board, The Planning Department, the Office of the General Counsel and the Applicant as to the meaning of Condition Number 3 but that differing interpretation does not self-elevate or morph into the Applicant seeking an "untimely request for reconsideration" when no such request was in fact made by the Applicant. Petitioners' differing interpretation of what the Board meant by Condition Number 3 is not a basis for the Board to recast the pending applications for plat approval that have been found by the Planning Department to conform to the approved Preliminary Plan.

F. Petitioners also argue that the "Board's 9/3/15 decision was founded upon mistakes of fact." In support, Petitioners suggest that "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." (Parenthetical phrase in original.) According to Petitioners, "the Board was clearly under the mistaken impression that the subject trail, **in toto** and passable for its beneficiaries, already exists." (Petition for Reconsideration page 7.)(Emphasis added.)

Petitioners inconsistently concede on page 7 of the Petition for Reconsideration that "the trail does exist" while simultaneously asserting that "some parts of it do not and... indeed are inaccessible." As a matter of law the easement for the trail exists by virtue of the recorded Declaration of Covenant that established the trail that becomes effective upon recordation of the approved Plats. As the condition of the trail was not before the Board whether or not parts of the trail are or are not accessible is irrelevant; thus even if anyone misspoke this cannot constitute a mistake of an essential fact.

We note that Petitioners who were granted the right to present testimony (over the Applicant's objection) did not enter into the record of the September 3, 2015 public hearting any factual evidence of what they now belatedly assert as a mistake of fact. Based on the Planning Department's Report, the Applicant's submission and oral argument, there is no basis for a claim that the action taken on September 3rd was based on a mistake of fact. The trail easement was created and is clearly depicted on the plats and the Recorded Trail exhibit.

G. Petitioners contend that Condition Number 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." (Petition for Reconsideration page 7.)

However, Petitioner has omitted the express language of Condition Number 3 that EPIC will not be a grantee if it declines the Office of the General Counsel approved easement as it did here.[1] Thus, Petitioners conveniently ignore that as a result of EPIC's own actions, these so-called express conditions were nullified once EPIC rejected both the PUTE approved by the Office of the General Counsel and the trail location approved by the Planning Board.

In an attempt to boot-strap its argument, Petitioners contend that the General Counsel erred by approving the Declaration of Covenant rather than an easement. Again, Petitioners ignore the fact that the Office of the General Counsel approved at least two easements, both of which EPIC declined, thereby nullifying any requirement to record an easement separate from the one established by the plats, Petitioners argue that there are "important differences" between an easement and a covenant. Petitioners cite no legal authority for their position and again ignore the settled law in Maryland that the inclusion of the trail on the plats establishes an easement.

It appears that Petitioners' are actually complaining about the fact that EPIC was not granted an easement, not that an easement does not exist by virtue of the recorded Declaration of Covenant and the to be recorded plats. But this is what Condition Number 3 instructs: if EPIC declined, it forfeits any right whatsoever to have anything to do with the Trail. In any event, the Board does not have the authority to order a private property owner to grant an easement or property interest of any kind whatsoever to a private party. See Chapter 50-30(b).

We need not repeat that the absence of any nexus between the trail and the subdivision or the ongoing agricultural operations prohibits the Board from exacting as trail as a condition of subdivision approval.

Petitioners assert that allowing the property owner to establish the terms and conditions under which the general public can access the trail is a "role reversal." (Petition page 10.) According to the Petition for Reconsideration:

> "By requiring the creation of an easement rather than a covenant, the 9/28/10 PP *(sic)* 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)."

[1] Petitioners' footnote 10 attempts to explain why this integrated provision in Condition Number 3 should be ignored based on the factually inaccurate contention that the Parks Department was granted authority to approve an easement rather than the Office of the General Counsel. The Condition does not mention the Parks Department, and given that EPIC's President and Treasurer was and is the Parks Department's Trails Coordinator, any such involvement would clearly appear to be a conflict of interest.

In order to accept Petitioners "role reversal" argument the Board must embrace that every grant of an easement is an unlimited unrestricted grant and that the grantor is obligated to an "all or nothing" grant. Nothing in Contrition Number 3 or Maryland law supports such an "all or nothing" obligation. When an easement is granted, the grantor establishes the terms and reserves all rights not granted. That **is** the law.

Petitioners also contend that the notice of the September 3, 2015 hearing was insufficient. According to Petitioner:

> "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)".

Petitioners' argument here, as well as elsewhere in its Petition, assumes, without factual justification, that the Board's determination that Applicant complied with the Condition and its approval of the plats, somehow constitutes a material amendment to the approved Preliminary Plan. When the Board acted on September 3rd it implemented Condition Number 3 as it found the Board's previous approval intended. and neither Clearly, the Board did not and had no reason to, amend the prior Preliminary Plan approval . Unlike Petitioner, neither the Board not its staff "cherry picked" phrases out of context to support a preconceived conclusion. The Board and its staff read Condition Number 3 in its entirety as an integrated condition and, as required by Maryland law, applied the commonly acceptable meaning of the entire condition in reaching its decision.

Petitioners repeat, albeit in a footnote on page 12 the erroneous supposition that Condition Number 3 divested the Planning Department of its delegated authority to review record plats for compliance with an approved preliminary plan and vested that authority in the Parks Department. Petitioner assert in footnote 10 that:

> "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."

What is untenable is the proposition that the Applicant was required by Condition Number 3 to submit anything to any Commission department other than the Commissions Office of the General Counsel. What is equally untenable is that the Planning Board intended for the Applicant to negotiate with the Parks Department when that department's Trails Coordinator was also the president and Treasurer of EPIC.

**IV. Conclusion**

Accordingly, the Farm Owner Applicant hereby moves that the Planning Board **DENY** the Petition for Reconsideration of the action taken on September 3, 2015 to approve Subdivision Record Plat Applications 220120040, 220120060 and 220120510 for the Greentree Farm Subdivision.

Respectfully Submitted,

Miles & Stockbridge, P.C.

By: _____
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**Certification:**

I hereby certify that a copy of the foregoing Memorandum was mailed first class mail to EPIC's attorneys at the addresses below and delivered by electronic means to each.

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