



June 10, 2004
Reconsideration Request
Item No. 10

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF
THE GENERAL COUNSEL

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June 4, 2003

REQUEST FOR RECONSIDERATION

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Michele Rosenfeld, Associate General Counsel *MR*
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FROM: Debra Yerg Daniel, Associate General Counsel *DYD*
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RE: Reconsideration Request For Thompson Farm
Preliminary Plan No. 1-97098

I. BACKGROUND

Parties Seeking Reconsideration:

Jamison 427 Land Company, Applicant, through its attorney, Stanley D. Abrams,
Esquire

Action Sought To Be Reconsidered:

Preliminary Plan No. 1-97098.

Date of Hearing: December 11, 2003.

Action Taken: Denial of Preliminary Plan.

Planning Board Vote:

Motion to deny Preliminary Plan:

Motion made by Commissioner Wellington, seconded by Commissioner
Robinson.

Commissioners voting in favor of the motion:
Chairman Berlage, Commissioners Wellington and Robinson.

Commissioners voting against the motion: Commissioners Bryant and Perdue.

Procedural Background

The Preliminary Plan involves Applicant's proposal to develop property consisting of a total of 434.73 acres in the RDT zone located within the Ten Mile Creek Area of the Clarksburg Master Plan ("Subject Property"). The Subject Property is bordered by Slidell Road on the North and Shiloh Church Road to the South, and is intersected by Old Baltimore Road. The Applicant proposes to subdivide the Subject Property into 17 lots ranging in size from approximately 3 acres to approximately 61 acres.

This Preliminary Plan was originally heard by the Planning Board on June 27, 2002. At that hearing, the Planning Board approved the Preliminary Plan with conditions. The Planning Board's opinion was issued on December 3, 2002. Thereafter, the Board received a timely request for reconsideration from the Audubon Naturalist Society and other neighbors (collectively "Neighbors"). The Neighbors' reconsideration request was granted on May 1, 2003.

On December 11, 2003, the Planning Board held a new hearing on the Preliminary Plan. At that hearing, the Planning Board voted to deny the Preliminary Plan and the Applicant has made a timely request for reconsideration of that decision.¹

Summary of Request For Reconsideration:

By letter dated March 10, 2004, the Applicant requests reconsideration of the Planning Board's denial of the Preliminary Plan. (See Attachment One.) This request was supplemented by letter dated April 14, 2004. (See Attachment Two.) In its request, the Applicant raises the following issues as bases for reconsideration:

First, the Applicant argues that the Planning Board's denial amounts to a revocation of the Board's prior approval and, as such, the Board must abide by § 50-35(i) of the Subdivision Regulations² governing the procedure for revoking a prior preliminary plan approval.

¹ In this case, the Planning Board's opinion has not yet issued. As such, this request for reconsideration is considered timely since, under the Planning Board's Rules of Procedure, the Applicant has until 10 days after the issuance of the Board's opinion to request reconsideration.

² Section 50-35(i) of the Subdivision Regulations reads, in full, as follows:

Revocation of approval. Approval of a preliminary plan may be revoked by resolution of the Board at any time prior to the approval of the final record plat covering the proposed subdivision, upon a finding by the Board that any conditions attached to the approval of such preliminary plan have become

Second, the Applicant argues that, under Maryland law, the Planning Board cannot reverse its prior position (that the preliminary plan was approvable) unless there is "substantial change of conditions or it is shown that the decision was a product of fraud, mistake, or inadvertence." (See Attachment One, p. 4.) The Applicant further states that "[t]he mere fact that the written opinion drafted by staff erroneously described the property as located east of Ten Mile Creek does not support a change of mind by the Board. This is patently clear by the evidence, that the Board knew exactly where the property was located and why it voted the way it did when it approved the subdivision." (*Id.*)

In addition, the Applicant notes that the Planning Board's vote appears to implement "a new Board policy with respect to subdivision approvals of RDT Zoned land. The desire to have all lots have a minimum of 25 acres is contrary to the Zoning Ordinance and amounts to a re-write of the Zoning Ordinance." (*Id.*, at 6.)

In its supplemental letter, the Applicant points out that there was a different Chairman at the time of the first hearing by the Planning Board than the second hearing. The Applicant asserts that, under Maryland law, changes in the composition of the Planning Board between the two hearings is insufficient, in and of itself, to permit contrary rulings by the Planning Board on the same plan. (See Attachment Two.)

II. RULES APPLICABLE TO RECONSIDERATION REQUEST

In accordance with the approved and adopted rules and procedures for the Montgomery County Planning Board, any party of record may, in writing, request the Planning Board to reconsider its determination on an action taken by the Board. The Planning Board must receive the request within ten days of the mailing date for the Opinion reflecting the action at issue.

The written request alone shall be the basis upon which the Board will consider whether reconsideration is warranted, although a Boardmember may seek clarifications from staff or other persons present to aid in her/his consideration. No party of record (including the party seeking reconsideration) may present testimony regarding the reconsideration request, unless called upon by a Board member to respond to a question. A party seeking reconsideration is encouraged to be thorough in drafting a written request, because the Board's consideration of the issues will be limited to the contents of the written request and any staff consideration of those issues.

inapplicable or that the plan itself has been rendered impractical by reason of an amendment or addition to the general plan or any portion thereof, or by a proposed public improvement which conflicts with such plan or other conditions or circumstances which involve injury or damage to the public health, safety or welfare. The Board shall afford a landowner or subdivider an opportunity to be heard prior to taking any action to revoke approval of a preliminary plan by sending such owner or subdivider a notice by certified mail not less than five (5) days prior to the date of the proposed action and giving the time and place thereof. The notice shall state the reasons for the proposed revocation.

The Planning Board agenda routinely reserves time to allow the Board to consider any reconsideration requests that may have been transmitted to the Board. No notice need be sent of the Board's consideration of a reconsideration request, nor is any particular reference required to be made on the printed agenda of a particular request. Staff does attempt to advise the party requesting reconsideration of the date the request is scheduled to go before the Board for consideration.

Staff will forward to the Board a reconsideration request shortly after its receipt by the Commission. Ordinarily, staff does not make a recommendation to the Board relative to whether the Board should or should not support a reconsideration request, except in those cases where a legal flaw occurred (for instance a party entitled to notice did not receive notice of the public hearing). When the item is called by the Chairman, any Board member may pose questions about points raised in the letter. Thereafter, only a Board member that voted in favor of the motion (action) for which reconsideration is being requested may make a motion to reconsider. If a motion is made to reconsider, any Board member may second the motion. As always, to succeed, the motion carries if supported by a majority of Board members then present and voting.

If no motion is made or a motion fails either for lack of a second or insufficient votes, the prior action stands unaltered in all respects, including time for administrative appeals.

If a motion to reconsider carries, no further action or consideration will occur at that time. Rather, the prior action is extinguished and staff will schedule the matter for public hearing, upon due notice, at a later date. The Board, at that time, will conduct a *de novo* hearing on the issue(s) that were the subject of the reconsideration request. This may be an entire project application, or may be narrowed in scope to specific issues.

Basis for Reconsideration

Grounds for reconsideration, as specified in the rules, are as follows:

1. The Board's action did not conform to relevant laws or procedures;
2. The Board was not timely provided pertinent and significant information relevant to the Board's ability to take the action at issue, and the request must include a statement explaining why the information was not provided at the time of the public hearing;
3. Other compelling reasons.

The Planning Board in its sole discretion is responsible for determining if the grounds stated in support of the reconsideration request are sufficient to merit reconsideration.

Any and all materials submitted as part of the reconsideration request are excluded from the public hearing administrative record, unless submitted in the record prior to its closing.

III. ANALYSIS

As a general rule, Legal Staff does not provide a recommendation on reconsideration requests unless it implicates a legal deficiency. In this case, given the split in reasoning for the denial of the Preliminary Plan, Legal Staff recommends that the Planning Board reconsider its decision to review and clarify its application of the current development standards to the proposed Preliminary Plan

IV. ATTACHMENTS

Attachment One: Applicant's letter requesting reconsideration dated March 10, 2004

Attachment Two: Applicant's supplemental letter dated April 14, 2004

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