

MAR 10 2004

KENNETH R. WEST
STANLEY D. ABRAMS
HARRY C. STORM
CATHY C. BORTEN
JAMES L. PARSONS, JR.

PRACTICING IN MARYLAND AND
THE DISTRICT OF COLUMBIA

ATTORNEYS AT LAW
SUITE 760N
4550 MONTGOMERY AVENUE
BETHESDA, MARYLAND 20814-3304
(301) 951-1550
FAX: (301) 951-1543

M. GREGG DIAMOND
OF COUNSEL

WRITER'S DIRECT DIAL NUMBER
(301) 951-1540
EMAIL "sabrams@awsdlaw.com"

March 10, 2004

Mr. Derrick Berlage, Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

**RE: Request for Reconsideration and Rehearing
Thompson Farm Subdivision
Preliminary Plan #1-97098**

Dear Chairman Berlage:

The undersigned along with James Clifford, Esq. represent Jamison 427 Land Company, the owner/applicant for the 434.73 acre parcel ("Subject Property") involved in the above referenced preliminary plan application. By voice vote at a public hearing on December 11, 2003, the Planning Board denied the subject application, reversing through reconsideration, the prior approval of this plan by written decision dated December 3, 2002. The preliminary plan sought approval of 17 Lots with lots ranging in size from 3.0 acres to 72 acres in a modified grouping or cluster arrangement located in the Ten Mile Creek Area of the Clarksburg Master Plan. Specifically, the property is located between Slidell Road on the west, Shilo Church Road to the east and is bisected by West Old Baltimore Road, west of Ten Mile Creek.

Most of the property is zoned in the Rural Density Transfer (RDT) Zone which requires a minimum net lot area of 40,000 square feet (§59-C-9.42 of the Zoning Ordinance) provided only one, one-family dwelling unit is permitted per 25 acres. This was recognized by the Planning Board in its December 3, 2002 opinion originally approving this plan.

"It is important to note that the minimum lot size need not be 25 acres; simply that the overall number of units not exceed the numerical equivalent of one unit per 25 acres." (f.n. 1, p.2)

Notwithstanding the provisions of the Zoning Ordinance and the Board's clear recognition on its prior opinion that the minimum lot size in the RDT Zone is 40,000 square feet, the

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most recent action of the Planning Board has left open to question (and confusion) whether the Board has established a policy of requiring each lot zoned RDT to have a minimum of 25 acres. The implementation and application of such a policy to the subject application amounts to a re-writing of the RDT Zoning Ordinance provisions, an act beyond the powers of the Planning Board. Equally egregious, as will be explained below, was the Board's reliance on a drafting error in the original opinion, characterizing the location of the property as east of Ten Mile Creek and then applying the master plan in a different manner to this property than at the original public hearing, discussion, voice note and decision on this application in 2002.

The applicant must and does hereby request reconsideration of your oral decision of December 11, 2003 because of various procedural and substantive errors and misapplication and erroneous construction of relevant law as detailed below.

(1) Procedurally, you have violated your own subdivision regulations. Your most recent decision is a product of the reconsideration resulting from a remand from the Circuit Court for Montgomery County, MD of an administrative appeal of your original approval by certain opponents.

Your most recent action constitutes a revocation of the preliminary plan approval of December 3, 2002. The procedure and grounds for revocation are contained in §50-35(i) of the Subdivision Regulations. Procedurally before the Board may revoke a preliminary plan approval you must give the owner or subdivider notice by certified mail not less than five (5) days prior to the proposed action to revoke, affording the owner a public hearing and notice of the time and place of the public hearing. In the subject case the notice required was that the Board was proposing to revoke the prior approval of the plan. This notice has not occurred. Further, in view of the prior Board action of approval, the planning staffs continued support of the plan, what applicant believed to be the limited scope of the remand and error in the description of the location of the property in relation to Ten Mile Creek and the lack of any material changed conditions in the evidence since the prior approval, it cannot even be inferred that the Board was contemplating a revocation of the prior plan approval. Thus, the type of proceeding and notice required is of material importance to the owner to prepare for the hearing.

Further, the required findings in §50-35(i) for revocation are absent from your most recent voice vote to deny as per the type of that public hearing and vote.

The tapes of the December 11, 2003 public hearing discussion of Board members when considering the vote on this matter reflect clearly that the evidence of record did not support a decision to revoke the prior preliminary plan approval. One commissioner questioned whether the layout was inconsistent with agricultural use and staff (Judy Daniel) responded:

"Not any more than any subdivision I have seen approved

within the last twenty years. It's not inconsistent with agricultural uses. It depends upon the type of agriculture you are doing. Twenty Five acre lot is the, 25 acres is the minimum, that was set up in the Ag. Master Plan for viable agriculture but we have some forms of viable agriculture on smaller lots that are working intensive types of agricultural uses.....”

Another rationale expressed by a commissioner during the Board's discussion was whether the preliminary plan complied with the master plan and its goals. The response by staff was:

“..... we rarely see any subdivision that fully meets all the goals. It is not realistic that everything can meet all of the goals completely and perhaps the phrasing should have been that while we cannot completely meet all of those goals, it could meet it better if we have this ability to do this more design oriented review which as we said we don't have now and therefore this does meet the current regulations.”

The Planning Board's staff recommendation dated December 5, 2003 specifically noted that:

“The proposed development of the subject property will provide open space for the benefit of the public at large and a substantial buffer for the very productive farm land of Western Montgomery County”(p.6 of Staff report). One of the historical land use concepts is that buffers can become a transitional use between two different and potentially discordant uses.

The Board must focus upon the fact that this property is not in the agricultural preservation area of *The Functional Master Plan for the Preservation of Agricultural and Rural Open Space* and its purposes and plan objectives -- but within the Clarksburg Master Plan area which viewed the area west of Ten Mile Creek as a “critical transition area” between I-270 and the Agricultural Preservation Area to the west of the Clarksburg Planning Area (p.87 of Clarksburg Master Plan). Even if the Board desired to establish a policy of applying a 25 acre minimum lot size in the Agricultural Preservation Master plan area, we are focusing upon a “Transition Area” which has elements of both the agricultural preservation areas to the west and more intensive residential development to the east. This is an important recognition of existing facts when the Clarksburg Master Plan was adopted and there had to be such recognition, as discussed at the public hearing on the preliminary plan, that lots and parcels existed along Slidell Road and West Old Baltimore Road of 2-3 acre sizes and even one R-200 subdivision. The down zoning of this area, coupled with the 40,000 square foot minimum lots in the RDT zone, ensured a transitional concept of the master plan by allowing grouping or clustering of lots and retention of open areas, either for farming or open space. If the County Council intended this area to be treated the same as the area within the Master Plan for Agricultural Open Space, they would have placed it within

that master plan area and not discussed this area as a transition. One potential transition use was discussed at the public hearing by the applicant as its intended use of the property for an equine community. Here all of the lots exceed the minimum 2 acres to keep horses. This type of use is particularly suitable in this area due to poor soils and topography for raising crops. The Board's prior opinion approving this subdivision in 2002 clearly recognized and found (p. 8 of opinion) that:

“Moreover, the Board finds that the poor soil quality and steep topography of the subject property call for residential rather than strictly agricultural use, and the Preliminary Plan maintains and enhances the character of the surrounding area through dedication of public land, establishment of public use trails and forest conservation.”¹

Another and even more compelling reason to reconsider your most recent vote is established in Maryland case law. Case law clearly establishes that an unreversed final decision of an agency is binding absent substantial change of conditions or it is shown that the decision was a product of fraud, mistake, or inadvertence. Bd. of County Commissioners' of Cecil County v. Racine, 24 Md. App. 435, 332 A2d 306, 314 (1975). This concept known as the “impermissible change of mind rule” is analogous to the doctrine of res judicata and estoppel and applied to administrative agencies exercising, as here, quasi judicial powers. Sugarload v. Waste Disposal, 323, Md 641, 658, 659 (note 3), 594 A2d 1115, 1123-1124 (1991), White v. Prince George's County, 282 Md. 641, 658-659, 387 A2d 260, 270 (1978).

It cannot be contested that no conditions relating to this property, the surrounding area, the Master Plan, etc. changed between the Board's first decision on December 3, 2002 and it's oral voice vote on reconsideration December 11, 2003. Thus, was the Board's latest voice vote supported by fraud, mistake or inadvertence in its prior decision. Clearly it wasn't. The 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. This conclusion is obvious:

- (1) The Planning Board's vote and participation in the adoption of the Clarksburg Master Plan in 1994 charges the Board with knowledge of what they adopted. By virtue of down zoning of property, including this property, from R-200 to

¹It should also be noted that the tapes of the Board discussion of the December, 2003 hearing also erroneously supported its decision by referencing the Rustic Roads Master Plan. None of the adjacent roads were listed as “Rustic Roads” on that document.

RDT, the Board had to know the location of the property was west of Ten Mile Creek because all property west of Ten Mile Creek in the Clarksburg Plan was zoned RDT.

- (2) The Planning Board opinion of December 3, 2002 specifically relates:
- * That the preliminary plan complies with purposes and requirements of the subdivision regulations (p.1). That would include §50-35(1) involving conformance with the Master Plan.
 - * The opinion describes the property as north of Shiloh Church Road and Slidell Road, which is west of Ten Mile Creek (p.2). Also the map reference in the Clarksburg Master Plan and staff report shows the location of the property and its relative location to Ten Mile Creek.
 - * The immediate area is described as largely agricultural with most properties zoned RDT (p.2). Again, only properties west of Ten Mile Creek in this portion of the Clarksburg Plan were recommended for this zoning.
 - * The Board made findings that the preliminary plan was in accord with the Clarksburg Master Plan (p. 7, 8, of Bd. Op.) and meets the requirements of §59-C-9.23 of the Zoning Ordinance (i.e.: meets the purposes and requirements of the RDT Zone).
 - * The Boards findings that the poor quality soils and steep topography call for residential rather than strictly agricultural use (p. 8 of Bd. Op.).
- (3) The planning staff report refers to the recommended land use pattern west of Ten Mile Creek in a separate section in the Master Plan (p.5 of Staff report) and extensively discusses the Clarksburg Master Plan and how this property complies with this planning document (p.6 of Staff report).
- (4) The Board had before it at the June 27, 2002 public hearing prior to approving this preliminary plan various maps showing the location of this property and its locational direction from Ten Mile Creek.

For the Board to claim it was surprised as to the location of this property vis-a-vie Ten Mile Creek or that it was mistaken as to what the Master Plan recommendations for the area were, is shocking. I submit that a Court reviewing the Board's recent action on appeal would have a similar reaction.

Equally shocking and more disturbing is what appears to be confusion as to whether

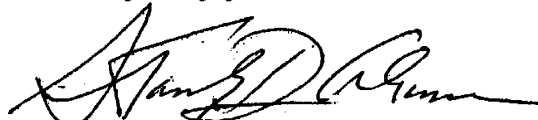
the Board is implementing a new Board policy with respect to subdivision approvals of RDT Zoned land. The desire to have all lots have a minimum of 25 acres is contrary to the Zoning Ordinance and amounts to a re-write of the Zoning Ordinance. Clearly a power beyond the power of the Board. Further, this action is not protected or required as claimed by the opponents under the case of Coffey v. Maryland National Capital Park & Planning Commission, 293 Md. 24, 441 A2d 1041 (1982) (holding that the planning commission may deny a subdivision plan where the density in the plan did not conform to the proposed density in the master plan even though it conformed to county zoning requirements). Here, unlike the Master Plan covering the Riverdale Road area in Prince George's County considered in Coffey supra, the Clarksburg Master Plan did not specify any express density restrictions or require any specific minimum lot size for RDT zoned land for this property contrary to what zoning would allow. Simply if the Board wants the power to implement this new policy for this property it must seek and receive County Council approval to either amend the RDT Zone, the Subdivision Regulations or in this case the Clarksburg Master Plan.

Finally, the Board's most recent vote amounts to a renunciation of the grouping or clustering of homes concept and its benefits in countering sprawl and its failure to recognize that the same amount of agricultural/open space is preserved whether a subdivision contains some lots over 25 acres in size and some under 25 acres in size. Why else would the County Council (and this Board) allow as part of the implementation of the planning to preserve agricultural and open spaces, place in the Zoning Ordinance a minimum lot size significantly below a 25 acre minimum?

For the reasons expressed above we request that the Board reconsider its prior voice vote of December 11, 2003 and/or reinstate (with technical amendment in its opinion as to the property location description) its prior approval of December 3, 2002.

Thank you for your consideration of this request.

Very truly yours,



Stanley D. Abrams

SDA:dw
Enclosure

cc: Frank & William Jamison
James Clifford, Esq.
Deborah Daniel, Esq.
Malcolm Shaneman

ABRAMS, WEST & STORM, P.C.

KENNETH R. WEST
STANLEY D. ABRAMS
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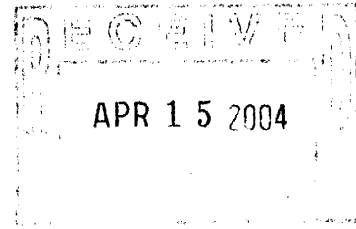
ATTORNEYS AT LAW
SUITE 760N
4550 MONTGOMERY AVENUE
BETHESDA, MARYLAND 20814-3304
(301) 951-1550
FAX: (301) 951-1543

M. GREGG DIAMOND
OF COUNSEL

WRITER'S DIRECT DIAL NUMBER
(301) 951-1540
EMAIL "sabrams@awsdlaw.com"

April 14, 2004

Mr. Derrick Berlage, Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910



**RE: Supplement to Request for Reconsideration and
Rehearing - Thompson Farm Subdivision
(Preliminary Plan No. 1-97098)**

Dear Chairman Berlage:

By prior letter dated March 10, 2004, I requested on behalf of the applicant, Jamison 427 Land Company, reconsideration of the December 11, 2003 voice vote to deny the subject preliminary plan for 17 lots in the Ten Mile Creek Area of the Clarksburg Master Plan. As you may recall, this last vote revoked prior approval of this preliminary plan rendered December 3, 2002.

Among other basis for our recent request we referred to the case law referencing the "impermissible change of mind" Rule which we believe is at the heart of this reversal of planning board position. To further place our position in context of the history behind this application, when this plan was first approved the then chairman voted to approve, but you as the new chairman voted to disapprove. This is a situation strikingly similar to Kay Construction Co. v. County Council for Montgomery County, 227 Md 479, 177 A.2d 694 (1962) where a new County Council granted reconsideration of a previously adopted rezoning and denied the zoning based upon a different County Council makeup. The Court of Appeals reversed the denial and stated:

"It is sufficient to conclude, as we do, that mere 'change of mind' by substitution for one councilman of another who holds contrary views from those of his predecessor, does not amount to good cause shown"

(177 A.2d 700)

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Mr. Derrick Berlage
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This is clearly what happened here. The original 3-2 vote to approve was changed to a 3-2 vote to deny by the substitution of the new chairmans vote for the prior chairmans vote and we submit would not meet with any different result should it be necessary to appeal the board's decision.

Thank you for considering this additional material to supplement our prior and still pending request.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stanley D. Abrams", written in a cursive style.

Stanley D. Abrams

SDA:dw

cc: Frank & William Jamison
James Clifford, Esq.
Deborah Daniel, Esq.