



Agenda Date: September 23, 2004
Reconsideration Request

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF
THE GENERAL COUNSEL

(301) 495-4646
FAX (301) 495-2173

REQUEST FOR RECONSIDERATION

September 17, 2004

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Michele Rosenfeld, Associate General Counsel
301-495-4646 *MR*

FROM: Tariq El-Baba, Associate General Counsel *TAB*
301-495-4646

RE: Reconsideration Request for Kingsview Village
Site Plan Nos. 8-97007A and 8-94031C

I. BACKGROUND

A. Party Seeking Reconsideration:

Pleasants Investments Limited Partnership ("Pleasants").

B. Action Sought To Be Reconsidered:

Site Plan Nos. 8-97007A and 8-94031C
Date of Public Hearing: November 13, 2003
Action Taken: Disapproval.

C. Planning Board Vote:

- Motion to disapprove site plan amendments: Motion made by Commissioner Robinson, seconded by Commissioner Perdue.

- Commissioners voting in favor of the motion: Commissioners Perdue, Wellington, and Robinson.
- Commissioners Berlage and Bryant were necessarily absent.¹

D. Background of Applications and Public Hearing:

On April 17, 2003, Pleasants filed an application to amend a 1997 Planning Board site plan approval. The requested amendment focused solely on the multi-family portion of the Kingsview Village Project, and sought to increase the original approval of 123 multi-family units to 195 multi-family units, including 64 MPDUs and 53 TDRs on 10.44 acres. (Staff Report attached as Attachment One). On November 13, 2003, the application was brought before the Planning Board for consideration in public hearing ("Public Hearing"). Staff recommended approval of the application, subject to certain conditions.

Discussion at the Public Hearing centered on: (1) environmental concerns related to forest removal and levels of imperviousness; and (2) a condition proposed by Elm Street Development ("Elm Street") that would withhold the issuance of building permits for the proposed development until such time as Pleasants has paid to Elm Street an amount, which Elm Street claims it is owed by Pleasants for participation in the construction of that segment of Richter Farm Road between Route 118 and Great Seneca Highway ("Disputed Road").² A summary of the discussion of the above-stated issues is presented below.

1. Environmental Issues

In response to Planning Board questions, Staff advised the Planning Board that certain information related to environmental issues had not been supplied by Pleasants in advance of the Public Hearing. A

¹ Commissioner Bryant was present for a substantial portion of the hearing but was not present for the vote.

² An additional issue that was discussed at length at the Public Hearing was Staff's recommendation that Pleasants construct a new sidewalk along MD Route 118. Citing safety concerns, Staff recommended that Pleasants relocate the sidewalk that presently abuts the curb of MD Route 118. Recommended Condition 1.a. addressed this concern by requiring that Pleasants "construct [a] new walk a minimum of 8 feet from the curb . . ." Although Pleasants initially expressed its objection to this condition, toward the end of the Public Hearing, following much discussion on the issue, Steven Orens, Esquire, counsel to Pleasants, advised the Board that Pleasants would withdraw its request that Condition 1.a. be revised and he further informed the Board that Pleasants accepted the Staff Report as written.

representative from the Environmental Planning Division ("EPD") was not present at the Public Hearing and Staff noted that it did not have available a memorandum from the EPD that could clarify the concerns. Staff referred the Board to proposed Conditions 2.e. and 2.f., which, respectively required: that Pleasants submit a comparison of forest removal, and that the development not propose more impervious surfaces within the stream valley buffer than was previously approved. Mr. Orens advised the Board that, in his view, the record was adequate on these issues. Planning Board members, however, expressed concern that Staff appeared to be lacking some basic information; and, as a result, the Board did not have sufficient information before it to make a decision regarding the environmental issues.

2. Roadway Participation

On November 12, 2003, the Chairman's office received a letter from David D. Flanagan, President, Elm Street Development ("Elm Street") (Attachment Two). That letter proposed a condition that would result in the withholding of building permits for the current applications until such time as Pleasants paid a certain sum to Elm Street, which sum Elm Street claimed Pleasants is required to pay pursuant to a 1995 preliminary plan condition. Specifically, in Mr. Flanagan's view, that condition required participation by Pleasants in the construction of that segment of Richter Farm Road between Route 118 and Great Seneca Highway ("Disputed Road"). Mr. Flanagan testified at the Public Hearing and provided the Board with his understanding of the events that gave rise to the current issue.

Mr. Orens and Mr. Don Pleasants, speaking on behalf of the applicant, rebutted Mr. Flanagan's testimony, arguing that Pleasants was under no obligation to participate in the construction of the Disputed Road, given the circumstances of the development of another section of Kingsview Village. Pleasants cited the language of the 1995 condition of approval of the underlying preliminary plan in support of its position. Mr. Orens noted that because the proposed condition by Elm Street was raised at the eleventh hour, certain historical documents in the possession of Pleasants and the Commission, related to the issue and which he believed could respond to Board queries, were not available at the Public Hearing.

One Planning Board member expressed concern that the roadway participation issue was brought to the Board's attention very late in the

process; and, further, that there was not sufficient documentation available to adequately inform the Board on this matter.

In addition to the above-stated concerns regarding a lack of information on the roadway participation issue, the Planning Board stated that it did not have an adequate record before it, with specific reference to the environmental issues (Pleasants having removed its objection to the condition requiring sidewalk construction), to render a decision on the application. In response to a question by a Board Member, Legal Staff advised the Board that the available options were: (1) for the Planning Board to act on a motion to approve or disapprove the application, or (2) the applicant could request deferral to give Staff an opportunity to return to the Board responsive with additional information responsive to the Board's comments at the Public Hearing. Pleasants declined to request a deferral, suggesting that it could not agree with Elm Street on the roadway participation issue.

Those Planning Board Members present voted unanimously to disapprove the application on the grounds that the record was inadequate; and, furthermore, that, putting aside the roadway participation issue, there were details of the application, discussed above, that the Board wanted resolved by Staff before the Board could approve the plan.

E. Reconsideration Request

By letter dated November 26, 2003, Pleasants requested reconsideration of the Planning Board's decision to deny the subject site plan ("Reconsideration Request") (Attachment Three).

Pleasants suggests in the Reconsideration Request that certain additional details concerning environmental matters, which Board members had requested prior to disapproving the application, were available for the Board's consideration at the Public Hearing; and, moreover, that Pleasants and Staff could have clarified the forest conservation and imperviousness issues at the Public Hearing.

Additionally, Pleasants states as a ground for granting reconsideration, that it was unable, at the Public Hearing, to make available for the Board's consideration relevant documents concerning the roadway participation issue because "Elm Street's request for payment . . . was not provided to [Pleasants] until moments before the [Public H]earing began." Pleasants further comments that the granting of its request for reconsideration would provide an opportunity "for an up front, fair airing of issue known in advance"

II. RULES APPLICABLE TO RECONSIDERATION REQUESTS

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 agenda routinely reserves time to allow the Board to consider any reconsideration requests that may have been transmitted to the Board. The Rules do not provide for notice of a reconsideration hearing, nor is it advertised on the agenda. Staff does attempt to advise the party requesting reconsideration of the date for which it is scheduled for Board consideration.

No party of record (including the party seeking reconsideration) may present testimony regarding the reconsideration request, however, Board members may seek clarification from staff or other persons present to aid in her/his consideration. 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.

When the Chairman calls the item, 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 for 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 project application.

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

1. the Board's action did not conform to relevant laws or its rules of procedure;
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. STAFF RECOMMENDATION

Legal Staff recommends that the Planning Board grant the instant reconsideration request for the following reasons:

1. Environmental Issues

EPD Staff has informed Legal Staff that, subsequent to the Public Hearing, engineers retained by Pleasants have met with EPD Staff and have provided information related to the environmental conditions cited by the Planning Board as a basis for its decision to disapprove the application. This information includes a comparison of forest removal between the previously approved plan and the instant application. Other information supplied by Pleasants has established that the proposed development does, in fact, increase the impervious surface within the stream valley buffer.³

EPD Staff has advised Legal Staff that, if the Board grants this request for reconsideration, it will require Pleasants to submit a revised Forest Conservation Plan in advance of any future Public Hearing, which Plan will reflect the mitigation measures required by Staff to address the increased forest removal and increased level of imperviousness. As such, recommended Conditions 2.e. and 2.f. will no longer be necessary because the pertinent information has been received and will have been analyzed by staff prior to a future public hearing. If ultimately approved, the plan will be conditioned on compliance with the revised Forest Conservation Plan.

³ Pleasants asserted during the Public Hearing and in the Reconsideration Request that the record before the Planning Board was adequate, with respect to the environmental issues, to render a decision. In Legal Staff's view, the new information concerning the increased impervious area validates the Board's position that such details properly be provided prior to Board action.

The Board, at its discretion, may consider the submission of the above information, which was not available to Staff or the Board before or at the Public Hearing, to be a compelling reason to grant the request for reconsideration, as such information has provided Staff with the ability to properly analyze the outstanding environmental issues and to condition any recommendation of approval on specific mitigation measures.

2. Documentation Submitted Concerning Roadway Participation Issue

Pleasants has asserted, both at the Public Hearing and in the Reconsideration Request, that its inability to produce documents supporting its position with respect to the roadway participation issue was a result of it not having been alerted to the existence of that issue until the day of the hearing. Legal Staff is of the opinion that, notwithstanding the fact that Board's disapproval of this application was not based on the roadway participation issue, the Board can consider Pleasants' inability to provide roadway participation-related documentation for the Board's consideration, as a legitimate ground for reconsideration because it meets the criteria of the second ground listed in Section II, above. First, the Board was not timely provided pertinent and significant information relevant to the Board's ability to determine whether the condition proposed by Elm Street is reasonable. Second, the Reconsideration Request does include a statement explaining why the information was not provided at the time of the public hearing.

The Board should note that, as promised in the Reconsideration Request, Pleasants has submitted to Staff documentation that it believes supports its position that it is not responsible for participation in the Disputed Roadway. Should the Board grant this request for reconsideration, such documentation will be made available to the Board in advance of the future hearing, along with any submitted opposition thereto and a Staff analysis and recommendation.

For the above reasons, Legal Staff recommends that the Planning Board GRANT Pleasants' request for reconsideration of the Board's November 13, 2003, action disapproving Kingsview Village (Site Plan Nos. 8-97007A and 8-94031C).

ATTACHMENTS

- One: Staff Report, dated November 7, 2003
- Two: Letter from Elm Street to the Chairman, dated November 12, 2003
- Three: Reconsideration Request Letter, dated November 26, 2003