

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
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OFFICE OF
THE GENERAL COUNSEL

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Reconsideration Request
Board Date: January 3, 2004

MEMORANDUM

TO: Montgomery County Planning Board
FR: Michele Rosenfeld, Associate General Counsel *MR*
RE: Reconsideration Request For Kakar Subdivision – Site Plan No. 8-04031

I. BACKGROUND

Party Seeking Reconsideration:

Devinder and Arvinder Kakar, property owners (“Applicant”).

Action Sought To Be Reconsidered:

Site Plan No. 8-04031

Date of Opinion: Not yet released

Action Taken: Plan brought before Planning Board on July 29, 2004; site plan approved with requirement that applicant purchase two TDRs; preliminary plan required one TDR.

Planning Board Vote:

Motion to: Approve Site Plan No. 8-04031, subject to conditions.

Commissioners voting in favor of the motion: Five.

Commissioners voting against the motion: None.

Summary of Proponent’s Grounds For Reconsideration: The original Plan included 3 proposed lots, located across two previously-existing parcels (Attachment One). The base zone, RE-2, required 87,000 square feet per lot. In accordance with the Master Plan, however, the Applicant chose to develop under the R2-TDR2 zone, which allows development to occur under the

R-200 standards (20,000 square-foot minimum lot size).

As stated in the Zoning Ordinance, if the Master Plan recommends a "TDR Density per Acre" of 2, then the Applicant can develop under the RE-2 standards (87,000 minimum square feet/lot requirement). The only way to develop a total of three homes on this property is under the R-200 standards, available through the TDR optional method.

All three lots were approved at preliminary plan, and at the time of preliminary plan approval the Board conditioned its approval on the purchase of one TDR for one of the new lots. At site plan, staff advised the Board that the Zoning Ordinance required the purchase of two TDRs, not one, and the Board approved the site plan with a condition that required the purchase of two TDRs. The applicant has requested that the Board grant reconsideration of the site plan in order to reduce the required number of TDRs from two to one.

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 Board member 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.

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 for which it is scheduled for Board 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.

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. STAFF RECOMMENDATION

This reconsideration request is grounded in a legal (not factual) challenge to the Board's decision, and the legal grounds are clearly articulated in the reconsideration letter submitted by Mr. Orens, Esquire, counsel to the Applicant.

Contrary to the position taken by the Applicant in its letter, in the opinion of legal staff the Board acted properly in its decision on the site plan. First, the plain language of the Zoning Ordinance indicates that the Applicant can achieve a density of three lots only by using the TDR optional method provided for under Section 59-C-1.394. The underlying RE-2 zone would allow only one dwelling unit on the site (which currently is developed with one residential home, and for which no TDR is required). Consequently, consistent with Montgomery County law, the Applicant is required to purchase one TDR for each of the two additional dwelling units.

The Board made a mistake in its application of the law during the preliminary plan review process, which under Maryland law it can correct in a subsequent proceeding.

IV. ATTACHMENTS

1. Preliminary Plan.
2. Letter seeking reconsideration.

LOTS 1, 2, & 3
KAKAR PROPERTY
PRELIMINARY PLAN

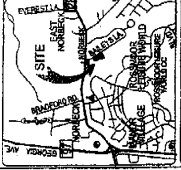


WHEATON ELECTION DISTRICT NO. 13
MONTGOMERY COUNTY, MARYLAND
15550 BAILEY'S LANE
KAKAR PROPERTY
LOTS 1, 2, & 3
PRELIMINARY PLAN

Table with columns: NO., REVISION, DATE BY

PATTON HARRIS RUSSELL & ASSOCIATES, P.C.
Engineers, Surveyors, Planners, Landscape Architects
KAKAR PROPERTY
15550 BAILEY'S LANE
WHEATON, MD 20852
FAC. (301) 466-2022
T (410) 977-8800 F (410) 977-9323

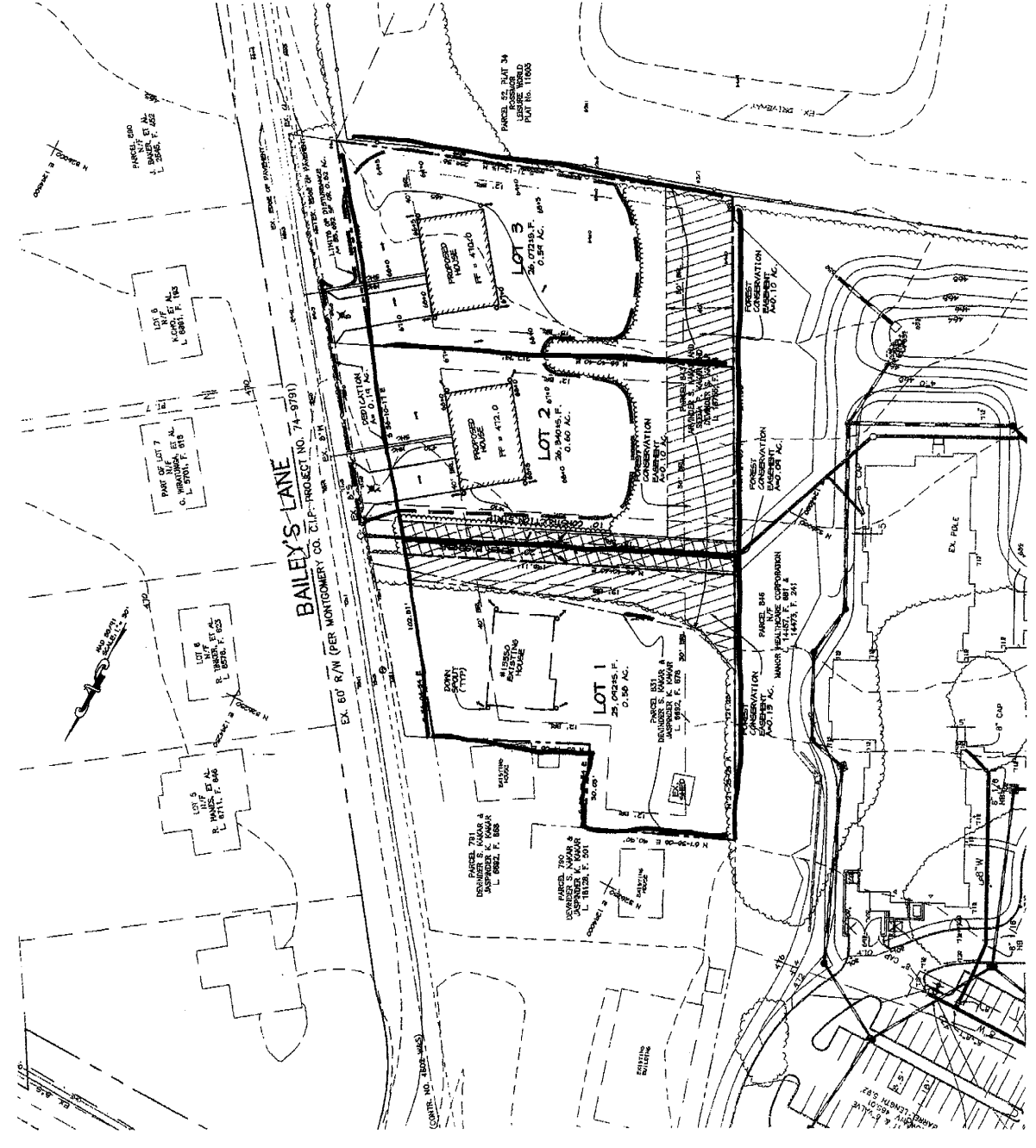
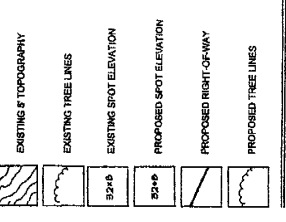
VICINITY MAP
SCALE: 1"=2000'



GENERAL NOTES:

- 1. ZONING: RES-3720B-2 (USE R-300)
2. PROPERTY BOUNDS ON ADJ. TYP. MONTGOMERY COUNTY MAP 19, GRID 8P-1.
3. PROPERTY BOUNDS ON ADJ. TYP. MONTGOMERY COUNTY MAP 19, GRID 8P-1.
4. PROPERTY BOUNDS ON ADJ. TYP. MONTGOMERY COUNTY MAP 19, GRID 8P-1.
5. SITE IS LOCATED IN THE NORTHEAST BRANCH WATERSHED.
6. LOCAL UTILITIES INCLUDE: WATER & SEWER, WASHINGTON SUBURBAN BARRIERY COFFINATION, TELEPHONE, VERIZON.
7. STORMWATER MANAGEMENT CONCEPT SHOWN HEREON IS BASED ON PRELIMINARY DESIGN AND ARE SUBJECT TO APPROVAL.
8. EXISTING FOREST COVER 07,680 S.F. or 1.72 A.

LEGEND



October 11, 2004

The Honorable Derek Berlage, Chairman
Montgomery County Planning Board
The Maryland-National Capital Park and Planning Commission
8787 Georgia Ave.
Silver Spring, MD 20910

Re: Kakar Subdivision Request for Reconsideration
of Site Plan Review Application No. 8-04031

Dear Chairman Berlage:

On behalf of our clients, Devinder Kakar and Arvinder Kakar, the owners of the property that is known as the Kakar Subdivision and the applicants for approval of the above referenced Site Plan Application, we hereby request reconsideration of one of the conditions imposed by the Planning Board when it approved Site Plan Review Application Number 8-04031. Specifically, we request that the Planning Board reconsider the condition requiring the purchase of two (2) Transferable Development Rights ("TDRs"), because that condition is in conflict with the Planning Board's prior action to require only one (1) TDR when it approved Preliminary Plan 1-03071 for the same property.

The Planning Board's determination to require two (2) TDRs for the development of the Subject three (3) lot subdivision is incorrect under both the Master Plan and the County Code. In addition, the Planning Board's action to contradict its previous action on the same property during the approval process for Preliminary Plan 1-03071 is impermissible under the Maryland Court of Appeals decision in *Permanent Fin. Corp v. Montgomery Cty.*, 306 Md. 239 (1986).

Prior to the adoption of the Aspen Hill Master Plan in 1994, many of the Baileys Lane properties were rezoned to the R-200 Zone by local map amendments. The 1994 Master Plan recommended the RE-2/TDR Zone for remaining properties that were either vacant or subject to further subdivision in order to maintain a land use pattern that was consistent with the R-200, ½ acre pattern that had developed between 1970 and 1994.

The Subject Property is part of one of the seven parcels containing a total of 16 acres in what the Master Plan identified as "Area Site No. 5." Area Site No. 5 was master-planned to develop with a total of 32 units using twenty-four TDRs. The Master Plan intended that this 16 acre area develop with 32 new homes instead of the 8 new homes that would be allowed under the underlying RE-2 Zone. That is why the Master Plan set a maximum of 24 TDRs as the limit for the entire area. (32-8=24)

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The Subject Property is too small to accommodate more than two new houses, one of which is permitted without TDRs (one of the 8), and the other is one of the 24 additional TDR units allowed by the Master Plan. The existing house on the Subject Property is not one of the 32 total new houses proposed by the Master Plan for the entire 16-acre Area 5.

The TDR density per acre shown in the Master Plan for Area 5 is two (2). The Zoning Ordinance requires that the R-200 Zone standards apply to development when 2 TDRs are recommended. (See Zoning Ordinance §59-C-1.395 "Special provisions for TDR developments") Under the R-200 standards, the side yard setback required for the two side yards of the existing house separating it from the adjacent lots is a total of 25 feet. In order to establish a functional side yard beyond the Category I Forest Conservation Easement area, a 13 foot side yard setback was established adjacent to the new lot and a 12 foot setback was established along the other side yard, complying with the R-200 setback standards that apply to TDR developments. However, even if the side yard setbacks were reversed and there was no Category I easement, the resulting physical limits on the additional density for the Kakar Subdivision would remain the same, one existing house and two new homes. In fact, the additional development of that part of the Subject Property that is currently vacant would remain the same even if the parcel on which the existing house is located were excluded from the subdivision.

Once the side yard setbacks were set for the existing house, only 52,498 square feet of land area remained for further development of the entire Subject Property in accordance with the Master Plan. In order for the new lots to comply with the R-200 lot size standards, a minimum lot size of 20,000 square feet each was required. Accordingly, only two new homes can be built on the remaining 52,498 square feet of land area of the Subject Property in conformance with the R-200 standards. One of those two new homes is one of the 8 "of right" houses that the master plan contemplated for the 16 acre Area 5, the other is one of the 24 additional TDR units. Therefore, the Master Plan recommendation translates into using one, not two of the maximum 24 TDRs recommended for Area 5 to develop two instead of one new home on the Subject Property.

The initial decision made by the Planning Board when it approved the Preliminary Plan of Subdivision was a reasonable decision and one that complied with both the Master Plan and the Montgomery County Zoning Ordinance. The Zoning Ordinance contemplates that that decision be made as part of the preliminary plan process and when it was made, it was procedurally in accordance with the Ordinance. Section 59-C-1.393 of the Zoning Ordinance, entitled "Development Approval Procedures Under the Optional Method of Development," provides in part as follows:

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“A request to utilize development rights on a property under the optional method must be in the form of a preliminary subdivision plan submitted in accordance with the subdivision regulations contained in chapter 50 of the County Code.”

Even if we were to assume that the Planning Board’s second decision as part of the Site Plan Review Process was also arguable under some other provision of law, the Planning Board may not, in that subsequent action, ignore its prior decision to require only one TDR for this Subdivision. The Maryland Court of Appeals held in its 1986 decision in *Permanent Fin. Corp v. Montgomery Cty.*, that when a statute is subject to two reasonable interpretations, and an agency acts on its first reasonable and debatable interpretation and the property owner then relies on that interpretation, it would be inequitable to allow the county to now require something under a new interpretation that it did not originally require.

As to this approved TDR Subdivision, first the Development Review Division Staff of the Department of Park and Planning and then the Planning Board itself made a reasonable and fairly debatable interpretation of the County Zoning Ordinance and County Code requirements for calculating the number of TDRs required for development of the Kakar subdivision. *See* Planning Board Minutes, 7/9/03 (A. Malcolm Shaneman amending conditions to reflect that only one TDR was required). Then, in furtherance of that interpretation, the Planning Board took positive action to give full force and effect to that determination by approving the Preliminary Plan of Subdivision application. The Planning Board specifically stated, both on the record at the hearing and again in the written Opinion that the development of this three lot subdivision required only one TDR.

Between the date of the Planning Board’s approval of the Preliminary Plan on August 5, 2003 and its subsequent action to require an additional TDR by its approval of the Site Plan on July 29, 2004 the price of a TDR increased one hundred percent from \$15,000 to \$30,000 for each TDR. When the Kakar family filed the Site Plan application they relied on the final and unappealable August 5, 2003 decision of the Planning Board requiring a single TDR for development foregoing other options, including the development of one new home on P.843, which was allowable by right under Section 59-B-5.1 of the Zoning Ordinance. As a result of that reliance and the Planning Board’s subsequent change of mind, the cost of development of the Kakar Subdivision, in terms of acquiring TDRs has increased 400% over what that cost was when the Planning Board approved a one TDR Preliminary Plan of Subdivision. The net result of the Planning Board’s change of mind is to increase the TDR cost (assuming a stagnant market) by 300%.

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Clearly, the Kakar family proceeded in good faith and expended additional funds to prepare and submit an application for site plan approval in reliance on the Planning Board's prior approval and determination that only one TDR was required.

The doctrine of "equitable estoppel" applies to the Planning Board in this case as does the "impermissible change of mind" rule, which has been followed by the Maryland Courts of Appeal in numerous decisions spanning more than thirty years. An administrative agency may not disregard its prior ruling, especially when acting on a subsequent application filed by the same applicants for the same property. It is well-settled in Maryland that "a mere change of mind is not an adequate or valid reason for reversing a previous finding. On the contrary, there must be evidence of fraud, surprise, mistake, inadvertence or some change in fact or in law in order to justify the reversal." *Gaywood Community Ass'n v Metropolitan Transit Authority* 246 Md. 93, 99 (1967).

The facts of this case, the Master Plan recommendations and established Maryland law constitute compelling reasons why reconsideration should be granted and time consuming litigation avoided. We thank the Planning Board for considering our request, and urge that it be taken up as soon as possible to minimize further delay.

Should you require anything additional it will be promptly provided upon request.

Very truly yours,

DUFOUR & ORENS, CHTD.

By: 

Stephen J. Orens

Cc: Michele Rosenfeld, Esq., Assistant General Counsel
Mr. and Mrs. Kakar
Sonny Kakar
Kinley R. Dumas, Esq.

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