



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Agenda Date: 3/10/05
Reconsideration Request

OFFICE OF
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REQUEST FOR RECONSIDERATION

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Michele Rosenfeld, Associate General Counsel *MR*

FROM: ^{*TAB*} Tariq El-Baba, Associate General Counsel
(301) 495-4646

RE: Reconsideration Request for Deer Park
Preliminary Plan No. 1-01064R

I. BACKGROUND

A. Individuals or Entities Seeking Reconsideration:

Thomas K. Liu, Esquire, for Mr. Kuo-Piu Ni and Ms. Theresa Ni

B. Action Sought To Be Reconsidered:

Preliminary Plan Extension No. 1-01064R
Date of Final Decision: March 2, 2005 (opinion mailing date)
Action Taken: Approval subject to conditions

C. Planning Board Vote:

- Motion to approve site plan with conditions: Motion made by Commissioner Bryant, seconded by Commissioner Robinson.
- Commissioners voting in favor of the motion: Commissioners Berlage,

- Perdue, Bryant, and Robinson
- Commissioner Wellington voting against the motion
 - **Commissioners eligible to move to reconsider the application:
Commissioners Berlage, Perdue, Bryant, and Robinson**

D. Background

On June 2, 2003, Southwind Properties, LLC ("Applicant") filed a revised preliminary plan application seeking resubdivision of approximately 4.5 acres of property located in the R-90 Zone ("Subject Property") to create 14 lots. On July 22, 2004, the Preliminary Plan was brought before the Planning Board in a public hearing ("July Hearing"). The Applicant requested a deferral of the Board's consideration and action on the application in order to consider the Board's concerns. Applicant revised its proposal and, on October 21, 2004, the revised plan, which proposed 12 lots ("Revised Plan"), was brought before the Planning Board for a public hearing ("October Hearing"). After hearing testimony and receiving evidence at the October Hearing, the Planning Board voted to approve the application. On February 24, 2005, the Planning Board voted to adopt an opinion; and, on March 2, 2005, the Board mailed its written opinion approving the Preliminary Plan subject to certain conditions. (Attachment One.)

On November 2, 2004, the Office of the Chairman received a request for reconsideration, dated November 1, 2004, submitted by Thomas K. Liu, Esquire, on behalf of Mr. and Ms. Ni, owners of property ("Ni Property") that confronts the Subject Property ("Reconsideration Request"). (Attachment Two.)

E. Summary of Proponents' Grounds For Reconsideration:

The Reconsideration Request sets forth in considerable detail the Nis' proposed grounds for reconsideration, which include:

1. The Planning Board's decision contravenes relevant laws because (a) the construction of Penny Lane will create a nuisance to existing property owners, will create a risk to life and property of existing owners, and constitutes a taking, and (b) the proposal contravenes the Fairland Master Plan;
2. Pertinent and significant information relevant to the Board's decision was not presented at the public hearing before the Board or otherwise contained in the record. Specifically, the Nis allege that (a) the Staff Report ("Attachment Three") failed to accurately report the guidelines set forth in the Fairland Master Plan, (b) the Staff Report's analysis used

biased information, and (c) the conclusion in the Staff Report was inaccurate and biased;

3. "Other compelling reasons," including the contention that the Applicant made material misrepresentations to the Planning Board concerning the planting of a vegetative screen on affected neighbors' property; the Applicant has refused to exert a bona fide effort to contact existing property owners concerning such screening; and the Board "has taken no action to ensure that the rights of existing property owners are not infringed and their property devalued by the Applicant's actions."

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 must receive the request within ten days of the mailing date for the Opinion reflecting the action at issue. The Planning Board may, however, waive the period for filing a reconsideration request if it determines that just cause exists to do so.

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. 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.

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 issue(s) that were the subject of the reconsideration request.

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

For the reasons set forth below, Legal Staff recommends that the Planning Board DECLINE the request for reconsideration submitted by the Nis.

First, in legal staff's opinion, the Applicant has not demonstrated that the Board's action does not conform to relevant laws. Applicant contends that the construction of a road with access off Marlow Road will create a nuisance for the residents of 2908 Marlow Road because car headlights will shine on the residence and that "[n]o action was taken to prevent the creation of this

nuisance.” The question as to the potential existence of a future “nuisance” is a consideration that is not within the authority of the Board to determine as a part of its review of preliminary plan applications for the subdivision of property. The Board made the necessary findings, pursuant to its authority as the administrator of Montgomery County Code Chapter 50, that the application conforms to the Subdivision Regulations. However, the Board should note that the Applicant proffered to mitigate the potential impact of headlight glare on the Ni Property and agreed to condition of approval no. 19, which requires the Applicant to coordinate with the owners of the Ni Property and to provide “such landscaping on [the Ni Property] as is reasonably required to mitigate the impact of headlights from vehicles exiting Penny Lane.” The Nis have not cited any legal authority that would prohibit the construction of Penny Lane on the basis that the potential exists for a vehicle exiting that street to fail to stop and enter onto the Ni Property. Additionally, although the Nis contend that the construction of Penny Lane would constitute a “taking” of the Ni Property, they cite to no legal authority to support the proposition that the construction of an off-site road, opposite a property constitutes a taking of that property. Legal Staff is aware of no such authority. Finally, with respect to the Nis’ assertion that the application does not substantially conform to the master plan, the Reconsideration Request acknowledges that the Fairland Master Plan “[does] not provide any specific guidelines regarding the [Subject Property]” The Nis have requested that the Board apply master plan recommendations for a separate property to the Subject Property; this is not agency practice in the interpretation and application of master plan recommendations.

Second, Legal Staff is of the opinion that the Reconsideration Request fails to meet the second ground for reconsideration because the Nis do not explain why they had not timely entered into the record, by writing or through the testimony of their counsel at the hearing, the information that the Reconsideration Request describes as “[p]ertinent and significant information relevant to the Board's decision” The Nis contend that the Staff Report did not accurately report the guidelines set forth by the master plan. However, the Reconsideration Request fails to include—as is required by the Rules of Procedure—“a statement detailing why such information was not timely presented.” The Reconsideration Request also states that the resubdivision analysis in the Staff Report was based on an improper and “biased” neighborhood delineation. The Nis do not state why either of these arguments were not made, and any supporting information provided, at or before either the July Hearing or October Hearing. As the Board expressly found in its Opinion, consistent with Maryland law arguments not raised prior to the closing of the record in an administrative proceeding are deemed waived. Opinion p.18.

Third, in the opinion of Legal Staff the Reconsideration Request does not establish "other compelling reasons" to grant the Nis' request. The Nis contend that the Applicant made material misrepresentations to the Planning Board concerning an agreement to mitigate headlight glare. The record clearly establishes that: prior to the July Hearing, the Applicant had approached the property owner that would have been impacted by the original proposal; the Applicant acknowledged at the July Hearing that no agreement had been reached with that neighbor; and, at both the July and October Hearings, the Applicant expressed a willingness to mitigate the impact of such headlight glare on the impacted property. As noted above, the Planning Board did include as a condition of its approval a requirement that the Applicant provide reasonable mitigation, in the form of landscaping, if the Nis indicate a desire for such mitigation.

For the reasons stated above, it is Legal Staff's opinion that the Nis have failed to establish sufficient grounds to support the instant request for reconsideration. As such, Legal Staff recommends that the Planning Board DECLINE the request for reconsideration.

ATTACHMENTS

- ONE: Planning Board opinion for Preliminary Plan No. 1-01064R, dated March 2, 2005.
- TWO: Reconsideration Request, dated November 1, 2004.
- THREE: Staff Report