



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Planning Board Hearing Date: March 17, 2005
Reconsideration Request
8787 Georgia Avenue • Silver Spring, Maryland 20910-3760

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March 11, 2005

REQUEST FOR RECONSIDERATION

MEMORANDUM

TO: Montgomery County Planning Board
VIA: Michele Rosenfeld, Associate General Counsel *NR*
301.495.4646
FROM: Debra Yerg Daniel, Associate General Counsel *DYD*
301.495.4646
RE: Reconsideration Requests For Portico, 1203 Fidler Lane
Project Plan No. 9-04003A
Preliminary Plan No. 1-04040A

I. BACKGROUND

Parties Seeking Reconsideration:

The Downtown Development Committee of the Cameron Hill Homeowners Association and the homeowners of Cameron Hill townhouse community in Silver Spring, Maryland.¹

Actions Sought To Be Reconsidered:

Project Plan No. 9-04003A and Preliminary Plan No. 1-04040A

Date of Opinions: both were mailed out February 22, 2005.²

¹ The letter requesting reconsideration is signed by Dirk P. Melton, Paul Rockett, PhD, Brian J. Turner, PhD, and Charles Segerman, PE. All four of these individuals testified in opposition of the Project and Preliminary Plans at the Planning Board hearing on September 23, 2004. Mr. Melton indicated on his sign-up sheet that he represented the Cameron Hill Homeowners Association. The letter also contained a signature line for Robert Middleton, Esquire, but indicated that he was unavailable to sign the letter. Although Mr. Middleton did sign up to speak at the September 23, 2004 hearing, he never actually testified at the hearing. Mr. Middleton's sign-up sheet indicates that he represents the Silver Spring Urban District Advisory Board.

public services for parking.”⁵ In addition, the Neighbors claim that “both the record of the September 23rd hearing and the February [22], 2005 Opinions from that meeting have substantial errors of fact and law and omit material information.”⁶

Specifically, they argue that the Planning Board incorrectly applied the provision in the Zoning Ordinance that requires the finding that the proposed development is “compatible with” the development in the general neighborhood. They argue that the Planning Board “confused the concept of ‘compatibility’ with ‘consistency with the code and the master plan.’”⁷ The Neighbors also include an extensive comparison of the proposed project with the Lenox Park high-rise development. At the Planning Board hearing, in response to a question by the Planning Board, Staff mentioned the Lenox Park project as another example of a high-rise development adjacent to townhouses in an urban setting. The Neighbors argue that an analysis of the Lenox Park project does not support the Planning Board’s approval of these Plans. The Planning Board’s Project Plan Opinion does not discuss the Lenox Park project. The Opinion states that “[t]he Board also finds persuasive the testimony of Staff that high-rise development adjacent to townhouses is not atypical in Silver Spring and that it is appropriate to locate high-rise residential buildings adjacent to townhouses in urban environments.

With respect to the parking issue, the Neighbors argue that the Planning Board “confuses the issue of consistency with zoning requirements” with “the issue of meeting the standard of undue burden.”⁸ In support of their argument, the Neighbors analyze the evidence that was before the Planning Board as well as offer additional statistics that were not before the Board at the hearing.

The Applicant⁹ submitted a letter dated March 9, 2005, responding to the Neighbors’ request for reconsideration.¹⁰ The Applicant’s letter states that the Neighbors’ request “simply rehashes the arguments presented in written and oral testimony before the Board at the Public Hearing on the Project Plan.”¹¹ The Applicant goes on to detail its position that the Planning

⁵ Attachment Three, p. 1 of the February 21, 2005 letter (emphasis in original).

⁶ Id.

⁷ Attachment Three, p. 3 of attachment (entitled Request for Reconsideration) to February 21, 2005 letter.

⁸ Id., p. 11.

⁹ The Applicant is 1204 Fidler Lane, LLC and the contract purchaser, Centex Homes.

¹⁰ Attachment Four, Letter from Stephen Z. Kaufman, Esquire, and Scott C. Wallace, Esquire, to the Honorable Derick P. Berlage, Chairman, and Members of the Montgomery County Planning Board dated March 9, 2005.

¹¹ Attachment Four, pp. 1-2. The Applicant’s letter in footnote 1 asserts that the Neighbors only raise issue as to findings related to the Project Plan and, therefore, since there is no alleged error with the Board’s finding with respect to the Preliminary Plan, the Preliminary Plan may not be reconsidered. While the Applicant is technically correct that the Neighbors have only raised issues regarding the Project Plan findings, if the Planning Board decides to reconsider the Project Plan, the Preliminary Plan would also need to be reconsidered by the Planning Board since the Preliminary Plan approval is based on the approval of the Project Plan.

Board did not err in finding 1) compatibility and no detrimental impact to existing or potential development in the general neighborhood and 2) that the project does not overburden public facilities. The Applicant goes on to offer an critique of the new shadow study submitted by the Neighbors and states that the study "does not change the conclusion of the BZC Study"¹² that the shadows cast by the building proposed in the Project will not have a detrimental impact on the Cameron Hill community."¹³ The Applicant's letter concludes by saying that the "Board's approval of the Project Plan was based on the overwhelming weight of evidence in the record and is in accord with all applicable requirements of the Zoning Ordinance"¹⁴ and that the Neighbors' request should be denied.

In response to the Applicant's March 9, 2005 letter, Mr. Rockett submitted a letter dated March 10, 2005,¹⁵ and Mr. Turner submitted a letter also dated March, 10, 2005.¹⁶ In the letters, Mr. Rockett and Mr. Turner rebut the arguments and conclusions reached by the Applicant in its March 9, 2005 letter. In addition, Legal Staff received an e-mail from Robert R. Middleton on March 11, 2005, setting forth his comments on the Planning Board's public hearing and Opinion.¹⁷

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

¹² The "BZC Study" is the shadow study submitted by the Applicant at the Planning Board hearing.

¹³ Attachment Four, p. 4.

¹⁴ Attachment Four, p. 5.

¹⁵ Attachment Five, Letter from Paul D. Rockett, PhD, to the Honorable Derick P. Berlage, Chairman, and Members of the Montgomery County Planning Board dated March 10, 2005.

¹⁶ Attachment Six, Letter signed by Brian J. Turner, PhD, to the Honorable Derick P. Berlage, Chairman, and Members of the Montgomery County Planning Board dated March 10, 2005.

¹⁷ Attachment Seven, e-mail from Robert R. Middleton to Debra Daniel dated March 11, 2005. This e-mail was received around the time that this Memorandum was being finalized. Since this Memorandum had not yet been finalized or distributed, it appears that Mr. Middleton's reference to my "decision to recommend affirmance of the Planning Board's September 23, 2004 decision" as well as other references to his review of my "decision" really refer to the adopted Planning Board Opinions for the Project and Preliminary Plans.

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 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. 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

In the view of Legal Staff, there is no legal deficiency in this case requiring reconsideration of the Project or Preliminary Plans. The Planning Board's procedural process