



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Agenda Date: November 10, 2005
Reconsideration Request

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REQUEST FOR RECONSIDERATION

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Michele Rosenfeld, Associate General Counsel
MR (GRS)

FROM: Tariq El-Baba, Associate General Counsel
TAB

RE: Reconsideration Request for Woodcrest
Preliminary Plan No. 1-04019
Site Plan No. 8-05009

I. BACKGROUND

A. Parties Seeking Reconsideration:

1. Daniel Goldberg
2. Mary Lynn George

B. Actions Sought To Be Reconsidered:

1. Preliminary Plan No. 1-04019
Date of public hearing: September 9, 2004
Date of Opinion: November 9, 2004
Date of Corrected Opinion: June 6, 2005

Action Taken: Approval of Preliminary Plan, with conditions.
Planning Board Vote (5-0):

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

2. Site Plan No. 8-05009

Date of public hearing: December 23, 2004

Date of Opinion: February 8, 2005

Action Taken: Approval of Site Plan, with conditions.

Planning Board Vote (5-0):

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

C. Summary of Proponents' Grounds For Reconsideration:

By letter dated October 11, 2005, Daniel Goldberg and Mary Lynn George (the "Requesters"), collectively request reconsideration of the Planning Board's decision approving the Preliminary Plan and Site Plan for Woodcrest (Attachment One). The Requesters, who reside at 13303 Dutrow Way in Clarksburg, which adjoins the subject Woodcrest development, assert that they did not receive notice of either the preliminary or site plan applications for the above-referenced cases. In addition, the Requesters allege that neither their builder, NV Homes, their community homeowners association, Clarksburg Ridge HOA, nor the Clarksburg Civic Association ("CCA") were provided notice of the subject applications.

The Requesters suggest that, had they been given notice of the applications, they would have objected to the location of proposed townhomes in proximity to their lot, the environmental impact of the construction of such townhomes, and would have raised concerns that stormwater runoff from their community will negatively impact the proposed Woodcrest development. The Requesters propose a redesign of the Woodcrest community. The reconsideration request also raises concerns about pending development of an unrelated adjoining property.

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 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.

Staff forwards 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 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. 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 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

A. Planning Board Rules of Procedure Notice Requirements

Section 2 of the Rules of Procedure for the Montgomery County Planning Board ("Rules") provides direction to applicants and Staff concerning the noticing of an application (Attachment Two). In relevant part, the Rules require that:

1. "The applicant shall obtain the names and addresses of the confronting and adjacent property owners,¹ and shall mail them a notice of application as soon as possible, but not later than 10 calendar days after the date of the application." Rules § 2.A.(1) (emphasis added).
2. At the same time the applicant mails such notice of the filing of its application, the applicant shall submit to the Planning Board Staff a list of notified property owners. See id.
3. Within 10 days of the filing of the application, Planning Board Staff shall send notices of the filing of the application "to the appropriate civic associations."² See id.

¹ A Commission document entitled "Site Plan Submission Requirements" states that the list of adjacent and confronting property owners "must be based on the latest available tax assessment ownership records, compiled no more than 30 days prior to the date the application is submitted."

² It is the practice of Staff to mail notices to all civic (including homeowner) associations included in the Commission's database of civic associations ("Associations Database") with jurisdiction over any property located within a one-mile radius of the property that is the subject of the application; and, additionally, to certain organizations that have requested notice be provided to them for each preliminary and site plan application filed with the Montgomery

4. "If an application is pending for more than one year . . . the applicant is responsible for updating the list of owners, notifying any new adjacent and confronting property owners, and providing a copy of the updated list to the Planning Department." Rules § 2.A.(1) (emphasis added).
5. "Ten (10) calendar days prior to the public hearing on the application, the Planning Board staff shall mail notices of the date and location of the hearing. This notice shall be sent to all parties previously notified, and to all additional parties of record. Parties of record shall be anyone who communicates in writing concerning the case." Rules § 2.C (emphasis added).

The foregoing represents the sum total of the applicable respective notice obligations of the Planning Board and the applicant under the Rules for the subject applications.

B. Preliminary Plan Reconsideration Request

For the below reasons, it is the recommendation of legal staff that the Board DENY the request for reconsideration as to the preliminary plan.

The applicant, Miller and Smith at Woodcrest LLC ("Applicant"), filed an application for the subject preliminary plan on September 11, 2003. A public hearing was held on the application on September 9, 2004. The mailing list for the August 27, 2004 notice for the September 9 public hearing, lists, among other adjoining and confronting property owners, Natelli Clarksburg, LLC, the developer of the Clarksburg Ridge subdivision, in which the Requesters' lot is situated. (Attachment Three). A Real Property Data search conducted by the Commission's legal department through the website of the Maryland Department of Assessments and Taxation ("MDAT") indicates that, at the time of the filing of the preliminary plan application and on the date of the public hearing, the Requesters' lot was owned not by the Requesters but by an entity named Clarksburg Ridge LLC (Attachment Four).³

County Planning Board. The onus is upon a homeowners or other civic association to register with the Commission, which would result in inclusion in the Associations Database list.

³ A Charter search conducted by the Commission's legal department on the MDAT website reveals that Clarksburg Ridge LLC listed its principal office as 806 West Diamond Avenue, Gaithersburg Maryland, and that its resident agent was Thomas A. Natelli, located at the same address. (Attachment Five) Although the mailing list supplied by the Applicant for the preliminary plan does not include the entity

As such, the facts make clear that the Requesters were not listed as the owners of 13303 Dutrow Way at the time the Applicant filed for preliminary plan review; and, therefore, the Applicant could not reasonably have mailed notice to them. Evidence in the record of the case suggests that the Applicant did, in fact, mail notice of both the filing of the application and the September 9, 2004 public hearing to the Requesters' predecessor-in-interest, Clarksburg Ridge, LLC.

The Requesters also allege that neither their community homeowners association, Clarksburg Ridge HOA, nor the CCA were provided notice of the preliminary plan application. As is stated above, Staff consults the Associations Database in compiling the list of associations to receive notice of the application. Legal Staff has confirmed with the Commission's Community Relations staff that, in fact, the Clarksburg Ridge HOA has not, to date, registered with the Commission and, therefore, is not included in the Associations Database. As such, Staff would not have discovered the Clarksburg Ridge HOA at the time it performed its one-mile radius search. Moreover, Legal Staff has confirmed in a September 26, 2005, telephone conversation with a representative of ComSource Management, the Clarksburg Ridge community's Property Manager, that the homeowners only took control of the HOA in mid-April 2005—the significance of this fact is that the developer, Clarksburg Ridge, LLC presumably controlled the HOA up until that point in time and that developer did receive notice of both the application and public hearing. The latter information is consistent with Applicant's contention in its materials submitted in response to the subject requests for reconsideration, that the Clarksburg Ridge HOA "was not formed until April 2005." (Attachment Seven). With respect to the CCA, the associations mailing list, upon which Staff based the mailing of the notice of application in 2003, includes two contacts for the CCA, Charles Faller and Steve Howie. (Attachment Eleven). As such, it appears that Staff followed the proper procedure in notifying associations of the filing of the application and the public hearing.

C. Site Plan Reconsideration Request

For the reasons stated below, it is the recommendation of legal staff that the Board DENY the request for reconsideration as to the site plan.

named Clarksburg Ridge LLC, it does include an entity by the name of Natelli Clarksburg, LLC, with addresses at 806 West Diamond Avenue, Gaithersburg. MDAT records confirm that Clarksburg Ridge, LLC and Natelli Clarksburg, LLC are the same entity, the former name being the current name. (Attachment Six).

The Applicant filed an application for the subject site plan on September 1, 2004. A public hearing was held on the application on December 23, 2004. The mailing list for the December 13, 2004 notice for the December 23 public hearing, includes, among other adjoining and confronting property owners, Natelli Clarksburg, LLC, which, as discussed above, is the old name for Clarksburg Ridge, LLC, the entity listed as the owner of 13303 Dutrow Way at the time the site plan application was filed. (Attachment Eight). In fact, MDAT records do not reflect a transfer of ownership of the Requesters' lot until September 27, 2004, approximately four weeks after the site plan application was filed—conveyance to NVR, Inc., the company that constructed the Requesters' home. (Attachment Four). The MDAT records do not reflect ownership by the Requesters in 13303 Dutrow Way until December 23, 2004, the date of the public hearing for the site plan.⁴ As such, it is the opinion of legal staff that the Applicant properly noticed the filing of the site plan application to Natelli Clarksburg, LLC (aka Clarksburg Ridge, LLC).

Evidence of record shows that, although under no obligation to do so, the Applicant did, in fact, provide Staff with an updated list of property owners on December 14, 2004, in advance of the December 23 public hearing. (Attachment Nine). Staff had requested this update because, as noted on page 11 of the Site Plan Staff Report, "[s]ince the application was received by M-NCPPC, several homes within the adjacent Clarksburg Ridge have been under construction." (Attachment Ten). It appears to have been Staff's view, expressed in the Staff Report, that no new notices would be required beyond the then-current mailing list because the list submitted by the Applicant indicated that "no new homeowners are adjacent to the shared property line" Although staff's statement is arguably accurate, in that no new "homeowner" was reflected in MDAT records on December 14, 2004, the list submitted by Applicant does reveal that NVR, Inc., a homebuilder, was the owner of 13303 Dutrow Way on that date. It does not appear, however, that Staff mailed notice to NVR, Inc. of the December 23 public hearing date. Nonetheless, as is stated above, because the application was not pending for more than one year, the Rules did not place any obligation on the Applicant to update the list of adjoining and confronting property owners prior to the public hearing.

⁴ It is legal staff's understanding that MDAT records reflect the date of deed recordation and not, necessarily the settlement date of a real property transfer. The Requesters do not provide, in their reconsideration request letter, the date that they closed on their home. The latter missing information notwithstanding, as stated above, the Board's practice has been to request Applicants consult with MDAT records to determine the names and mailing addresses of adjoining and confronting property owners.

The Applicant compiled its list of adjacent and confronting property owners using the Board-sanctioned method of consulting MDAT records. As such, even if the Rules had required updating of the adjacent/confronting list prior to mailing notice of a public hearing, the MDAT records would not have revealed the Requesters as the owners of 13303 Dutrow Way at the time notice was required to be mailed for the December 23 hearing (10 days before the hearing). Therefore, it would not be reasonable to expect that the Requesters could have been identified as record owners of their lot in advance of the public hearing. It is the view of legal staff that because the Applicant voluntarily updated the list of adjacent and confronting property owners, the fact that the Board's staff did not mail notice of the public hearing to NVR, Inc. should not be held against the developer.

The Requesters also allege that neither their community homeowners association, Clarksburg Ridge HOA, nor the Clarksburg Civic Association were provided notice of the site plan application. As is stated in the preliminary plan section, above, the Clarksburg Ridge HOA has not, to date, registered with the Commission and, therefore, is not included in the Associations Database. As such, Staff would not have discovered the Clarksburg Ridge HOA at the time it performed its one-mile radius search for notification purposes. With respect to the Clarksburg Civic Association ("CCA"), the associations mailing list, upon which Staff based the mailing of the notice of application, includes three contacts for the CCA: Krisna Becker, Paul Majewski, and Kathie Hulley. As such, it appears that Staff followed the proper procedure in notifying associations of the filing of the application and the public hearing.

IV. CONCLUSION

It is Legal Staff's opinion that the Requesters have not provided "a clear showing that the action of the Board did not conform to . . . its rules of procedure . . ." Montgomery County Planning Board Rules of Procedure § 11. If the Board concurs that notice was not defective, the Requesters cannot be considered parties of record to the applications; and, therefore, they do not have standing under the Rules to submit a request for reconsideration. Therefore, Legal Staff recommends that the Planning Board DENY the subject requests for reconsideration of the Woodcrest preliminary and site plans.

ATTACHMENTS