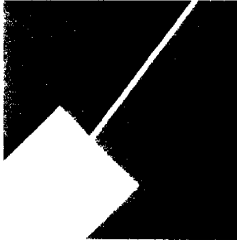


M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppc.org

Agenda Date: June 1, 2006
Reconsideration Request

**OFFICE OF
THE GENERAL COUNSEL**

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

May 26, 2006

REQUEST FOR RECONSIDERATION

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Debra Yerg Daniel, Associate General Counsel
301.495.4646
DYD (TAD)

FROM: Tariq El-Baba, Associate General Counsel
301.495.4646
TAB

RE: Reconsideration Request For Stoney Springs
Preliminary Plan No. 1-05029

I. BACKGROUND

Parties Seeking Reconsideration:

Montgomery Countryside Alliance, For A Rural Montgomery (F.A.R.M.), Teresa Cummings and David Hoerauf, Larry Schaudies, and Sheila Cochran (collectively referred to hereinafter as the "Requesters")

Action Sought To Be Reconsidered:

Preliminary Plan No. 1-05029

Date of Hearing: March 17, 2005

Action Taken: Approval of Preliminary Plan

Planning Board Vote:

Motion to approve Preliminary Plan made by Commissioner Robinson, seconded by Commissioner Bryant.

Commissioners Perdue, Bryant, and Robinson voting in favor of the motion. Commissioners Berlage and Wellington voting against the motion.

Procedural Background

The Preliminary Plan involved a proposal by the applicant, Winchester Homes, Inc., ("Applicant") to create fourteen lots and one outlot on 704 acres of RDT-zoned property on the north and south sides of West Offutt Road, east of its intersection with Mount Nebo Road ("Subject Property").

This Preliminary Plan was heard by the Planning Board on December 9, 2004¹ and March 17, 2005 ("2005 Hearing"). At the 2005 Hearing, the Planning Board approved the Preliminary Plan with conditions. On December 20, 2005, the Planning Board mailed a written opinion, memorializing its March 17 action. (Attachment Three.) The Board received a timely request for reconsideration from the Applicant on December 28, 2006 ("Reconsideration Request") (Attachment One). On January 19, 2006, an appeal of the Board's decision was noted in Montgomery County Circuit Court by Larry Schaudies, Teresa Cummings, David Hoerauf, Sheila Cochran, Andrea Arnold, and Dolores Milmoie (collectively, "Petitioners"); the Circuit Court has assigned case number 268477-V to the petition for judicial review. The Planning Board and Petitioners petitioned the Court to remand the action to the Board in order that the Board consider the reconsideration request. Following oral argument on May 5, 2006, the Court, on May 16, 2006, entered an Order remanding the case to the Planning Board for its consideration of the reconsideration request. (Attachment Seven.) Attached to the memorandum are copies of the public hearing Staff Report for the Preliminary Plan (Attachment Two) and a transcript of the March Hearing on the application (Attachment Four).

Request For Reconsideration and Opposition Thereto

By letter dated December 27, 2005, the Requesters have asked that the Planning Board reconsider its approval of the Preliminary Plan. As grounds for the request, the Requesters generally contend that the Board should have disapproved the Preliminary Plan because it fails to comply with the Functional Master Plan for the Preservation of Agriculture and Rural Open Space in Montgomery County ("AROS Plan") and the Rustic Roads Functional Master Plan ("Rustic Roads Plan").

In relevant part, the Requesters contend that:

1. The Planning Board has misconstrued the distinction in the AROS Plan between the Agricultural Reserve and the Rural Open Space Areas. Requesters argue, among other things, that language in the Planning Board Opinion provides "a wholly inaccurate and distorted interpretation of the AROS Plan." Quoting a passage from page 13 of the Opinion, Requesters contend that the Board replaced the broader

¹ At the 2004 Hearing, Applicant requested that the Board's action be deferred.

term "Agricultural Preservation Study Area" with the "Agricultural Reserve"; and, furthermore, that the Board erroneously attributes the phrase "variety of land uses" to page 35 of the AROS Plan.

2. The Preliminary Plan impermissibly clusters residential lots. Requesters argue that the Board "effectively amended both the Zoning Ordinance and the AROS . . . Plan by inserting 'clustering' where it was never intended."
3. The Preliminary Plan impermissibly relies on sand mound systems to overcome the soil's natural ability to pass a percolation test. Requesters attach "Declaration of Covenant for Experimental Septic System," purportedly to support their position that that the Montgomery County Department of Permitting Services views sand mound systems as alternative and experimental systems.
4. The Planning Board impermissibly delegated its authority to Staff by approving a condition requiring that, prior to issuance of building permits for each lot, the Applicant must submit "a house location and landscaping plan . . . to M-NCPPC Legacy Open Space staff for review and approval."

The applicant, Winchester Homes, Inc. ("Applicant"), submitted a written response to the request for reconsideration on January 17, 2006 (Attachment Five). Applicant generally contends that the arguments presented in the Reconsideration Request were previously raised to the Board by opponents to the Preliminary Plan at both hearings and in writing and that the Requesters have failed to put forward adequate grounds to merit reconsideration. Applicant responds in kind to each argument raised by the Requesters:

1. Applicant acknowledges that the Agricultural Preservation Study Area is comprised of both the Agricultural Reserve and Rural Open Space areas. Applicant contends, however, that the AROS Plan and the RDT zone permit development of RDT-zoned property for single-family residential purposes and that neither the zone nor the master plan require residential used to be associated with agricultural uses.
2. Applicant argues that there is no prohibition in either the AROS Plan or the RDT zone against "clustering" lots in the Agricultural Reserve.
3. Applicant observes that the Requesters make the same arguments against the use of sand mound septic systems in the Agricultural Reserve that they made before the Planning Board during the two public hearings. Applicant also avers that it has confirmed with the Assistant County Attorney assigned to DPS that the covenant attached to the

Reconsideration Request is not, in fact required for sand mounds because they are not considered experimental systems.

4. Commenting that the language of the Rustic Roads Functional Master Plan is broad, Applicant argues that the Board properly concluded that the Preliminary Plan complies with its broad guidelines; and, additionally, that the Board was within its rights to delegate authority to staff for review and approval of house locations.

Applicant submitted a supplemental response and opposition to the Reconsideration Request on May 24, 2006 (Attachment Six). Through that correspondence, Applicant seeks to inform the Board of a recent Circuit Court decision affirming a Planning Board decision approving a residential subdivision of 17 houses in the Agricultural Reserve. In the context of Bill 38-05 (Sewage Disposal), Applicant also references a March 2006 DPS report presented to the Council that, Applicant contends, reaffirms the propriety of using sand mounds in the Agricultural Reserve and reports that the Board has approved 14 subdivision applications that utilize sand mounds prior to the instant application in the Agricultural Reserve. Applicant also opines that fact that the Council has not proceeded with Bill 38-05 reaffirms its 1994 position that sand mound septic systems are permitted in the Agricultural Reserve. Finally, Applicant informs the Board that it has expended great sums in reliance on the Board's decision.

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 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 the issues will be limited to the contents of the written request and any staff consideration of those issues.

No notice need be sent of the Board's consideration of a reconsideration request. Staff does attempt to advise the party requesting reconsideration of the date the request is scheduled to go before the Board for consideration.

When the item is called by the Chairman, staff presents the reconsideration request to the Board and any Board member may pose questions about points raised in the request. 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. A clear showing that the action of the Board did not conform to relevant law or its rules of procedure; or
2. Evidence indicating that certain 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, together with a statement detailing why such information was not timely presented; or
3. Such other appropriate compelling basis as determined by the Board.

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. RECOMMENDATION

In legal staff's opinion, there is no legal deficiency in the Planning Board's action that requires reconsideration of the Board's prior action. If, however, the Board decides to grant reconsideration based on any of the grounds listed above, the Board should be advised that Judge Mason has expressed a desire that any such reconsideration occur in an expedited manner and has ordered that the Board set a hearing date for the reconsideration of the Preliminary Plan. The Court has further ordered that the parties attend a scheduling conference on June 2, 2006, and report to the Court the Board's decision on whether to grant reconsideration of this matter. As such, if the Board grants

reconsideration, the Board must set a date certain for the new hearing following consultation with Development Review Staff at the reconsideration hearing.

IV. ATTACHMENTS

- Attachment One: Reconsideration Request dated December 27, 2005
- Attachment Two: Staff Report for March 17, 2005 public hearing
- Attachment Three: Planning Board Opinion, dated December 20, 2005
- Attachment Four: Transcript of March 17, 2005 public hearing
- Attachment Five: Applicant Response Letter, dated January 17, 2006
- Attachment Six: Supplementary Applicant Response Letter, dated May 24, 2006
- Attachment Seven: Order of Circuit Court granting remand for consideration of the Reconsideration Request, dated May 16, 2006.

Request for Reconsideration Memorandum

To: Chairman Derick Berlage, Montgomery County Planning Board
Michele Rosenfeld, Associate General Counsel

From: Montgomery Countryside Alliance
F.A.R.M. (For A Rural Montgomery)
Teresa Cummings and David Hoerauf¹
Larry Schaudies²
Shiela Cochran³

Re: Request for Reconsideration of the Board's Approval of Preliminary Plan
No. 1-05029, Stoney Springs

Date: December 27, 2005

RECEIVED
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OFFICE OF THE CHAIRMAN
THE MONTGOMERY NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Executive Summary

Pursuant to Section 11 of *The Rules of Procedure for the Montgomery County Planning Board* ("Rules of Procedure"), Montgomery Countryside Alliance, For A Rural Montgomery, Teresa Cummings, David Hoerauf, Larry Schaudies, and Shiela Cochran ("Petitioners") request the Montgomery County Planning Board to reconsider its approval of Preliminary Plan 1-05029 for the Stoney Springs development ("Preliminary Plan"). The Board should have soundly rejected the Preliminary Plan on March 17, 2005 because it fails to comply with the Montgomery County Subdivision Regulations. Specifically, the Preliminary Plan fails to "substantially conform" to the Agricultural and Rural Open Space ("AROS") Master Plan and the Rustic Roads Functional Master Plan.

In approving the Preliminary Plan, the Planning Board completely misconstrued the significant distinction between the Agricultural Reserve and Rural Open Space Areas as defined in the AROS Master Plan, and impermissibly delegated its authority to staff to ensure that the Preliminary Plan substantially conforms to the Rustic Roads Functional Master Plan. Further, the Preliminary Plan impermissibly clusters residential lots and relies on sand mounds to overcome the soil's natural inability to pass a percolation test.

¹ They reside at 15200 Mt. Nebo Road, Poolsville, Md. 20837.

² His farm would be surrounded by the Stoney Springs development.

³ She owns the property at 15200 Mt. Nebo Road, Poolsville, Md. 20837.

Specific Grounds for Reconsideration

- I. **The Preliminary Plan Fails to Substantially Conform to the Agricultural and Rural Open Space Master Plan (AROS Master Plan) in Violation of Subdivision Regulation § 50-35 (l).**
 - A. **The Planning Board Completely Misconstrued the Significant Distinction Between the Agricultural Reserve and Rural Open Space Areas as Defined in the AROS Master Plan.**

The Agricultural and Rural Open Space Master Plan (“AROS”) Master Plan defines the Agricultural Preservation Study Area as consisting of the Agricultural Reserve, Rural Open Space Areas, and Growth Centers.⁴ Thus the term, “Agricultural Preservation Study Area” is not synonymous with the term “Agricultural Reserve.” The Agricultural Reserve “includes the majority of the remaining working farms.... It represents the County’s critical mass of farms and is the focus of the Plan’s farmland preservation policies.” AROS Master Plan at 38. (emphasis added). Rural Open Space Areas are distinctly different from the Agricultural Reserve because they are generally located close to developing areas. “The farms that remain are interspersed with rural subdivisions. **Policies for the Rural Open Space Areas encourage a carefully planned mix of residential and farming uses.**” *Id.* (emphasis added).

The AROS Master Plan recommends the Rural Density Transfer (“RDT”) zone to protect the productive farmland within the Agricultural Reserve. This contrasts sharply with the Rural Clustering Zone which is recommended for Rural Open Space Areas “where subdivision activity has already eroded parts of the critical mass of farmland. Rural clustering retains open space by allowing residences to be grouped on a portion of the site....” *Id.* at 40. (emphasis in original).

The Board’s Opinion, memorializing its March 17, 2005 decision approving the Preliminary Plan, completely eviscerates the clear distinction between the *Agricultural Reserve* and *Rural Open Space Areas*. In an effort to support its approval of the Preliminary Plan, the Board referenced page 35 of the AROS Master Plan. According to the Board, “even the Master Plan recognizes that it would be unrealistic to expect all farmland and open space in the *Agricultural Reserve* to be preserved, and solely for farming, and allows a ‘variety of land uses.’” Opinion at 13. (emphasis added). This is a wholly inaccurate and distorted interpretation of the AROS Master Plan.

The expression “variety of land uses” is not found on page 35. Furthermore, the Board replaced the broader term “Agricultural Preservation Study Area” with “Agricultural Reserve.” **These terms are not synonymous.** As noted above, the Agricultural Preservation Study Area included the Agricultural Reserve and Rural Space

⁴ Growth Centers “are areas designated for development in conformance with the General Plan. The extent and intensity of development will be or already has been identified in area master plans.” AROS Master Plan at 38.

Open Areas. By interchanging one term for the other, the Board minimized the importance of the Agricultural Reserve in preserving agricultural land and agriculture in Montgomery County. The AROS Master Plan does recognize that not every farm should be preserved. But the example illustrating this point on page 35 is applicable to farmland in Rural Open Space Areas “where subdivision activity has already eroded parts of the critical mass of farmland.” not the Agricultural Reserve. AROS Master Plan at 40. (emphasis in original).

A farmland preservation program should be selective. Preserving a small farm which is surrounded by residential development, for example, or one which lies on the edge of an urban area, may prevent orderly development and result in a leap frog expansion pattern. *Id.* at 35.

The important text on page 35 that is *not* included in the Board’s Opinion makes clear that the Preliminary Plan does not substantially conform to the AROS Master Plan. “The [Master] Plan... recognizes that some residential development will occur even in productive areas. Therefore, residential options are available in farming areas but only on a limited basis and in a manner that is consistent with preservation policies. That is why the Master Plan proposes two rural land use categories; one emphasizes agriculture, the other open space.” (emphasis in original). As described below, the Stoney Springs development is not consistent with these preservation policies.

B. The Preliminary Plan Impermissibly Clusters Residential Lots.

The Preliminary Plan consists of 14 lots and 1 outlot, ranging in size from as small as 3.5 acres to 309.1 acres. Eight of the lots are clustered in groups of four lots. In addition, lot 6 is fragmented by a lengthy, serpentine driveway that services one of the clusters. The total acreage removed from agriculture is not 42 acres as stated in the Opinion, but over 100 acres. This much larger acreage represents more than 25% of the currently available farmland, and nearly all of the prime agricultural land as noted in public testimony during the two hearings. The remaining lots are dispersed throughout the property.

In its Opinion, the Board embraced clustering as an important tool to preserve large contiguous farm fields in the Agricultural Reserve. “[T]he clustering of smaller lots in two areas on the Property is a strength of the preliminary plan because it allows more contiguous area of agricultural land as recommended in the Agricultural Master Plan.” Opinion at 16. Without clustering, “larger lots, dotted across the Subject Property... would further fragment this property and undermine the purpose of the zone.” *Id.* at 12. The Board’s endorsement of clustering is not rationally supported by the express language of both the AROS Master Plan and Zoning Ordinance.

The Transfer of Development Rights (TDR) program was created to help preserve farmland and farming in the Agricultural Reserve. “TDR is like cluster zoning in that development is shifted from the Agricultural Reserve to another area in order to preserve

farmland. ... By clustering residential uses away from farmland, TDR preserves a critical and irreplaceable natural resource while still allowing for needed housing.” *Id.* at 41. (emphasis in original). The language of the AROS Master Plan anticipates Mont. Co. Code § 59-C-9.23. “The intent of this [RDT] zone is to promote agriculture as the primary land use.... This is to be accomplished by providing large areas of generally contiguous properties suitable for agricultural and related uses and permitting the transfer of development rights from properties in this zone....” Thus, neither the AROS Master Plan nor Mont. Co. Code § 59-C-9.23 states that the way to achieve contiguous farm fields is by grouping or clustering lots in the Agricultural Reserve. The Board effectively amended both the Zoning Ordinance and AROS Master Plan by inserting “clustering” where it was never intended.

Although not memorialized in the Board’s Opinion, during the March 17th hearing, Commissioner Robinson cited language in the AROS Master Plan in support of clustering in the Agricultural Reserve. As can be readily seen, however, this language is applicable to Rural Open Space Areas, not the Agricultural Reserve.

Similarly, the significance of open space, as a result of large lot residential clustered development, cannot be underestimated. **These open space areas are vital to the buffering of the agricultural preservation areas** and can also provide leaseback arrangements for interested farmers. AROS Master Plan at 30. (emphasis added).

Even if clustering of lots were permissible, the two clusters in the Preliminary Plan are located on the property’s most desirable agricultural land.⁵ Thus the Board’s conclusion “that the layout of the site clearly meets the goal of the Agricultural Master Plan by protecting vast acreage for farming use” is not supported by the facts. Opinion at 12. The Board also failed to provide substantial support for its assertion that “the Agricultural Master Plan and the RDT Zone both allow residential uses as a matter of right...even if those residential uses are not used in conjunction with or to support traditional agricultural uses.” *Id.* In fact, the AROS Master Plan and the Zoning Ordinance support the very opposite assertion.

The Board’s analysis is also fraught with striking inconsistencies. The Board states that clustered lots are better than larger lots because these larger lots “dotted across the Subject Property... would further fragment this property and undermine the purpose of the zone.” *Id.* Yet, the Preliminary Plan the Board approved consists, in part, of “dispersed larger lots.” Opinion at 3. The Board is also convinced that “agricultural uses were likely to occur, even on the smaller [clustered] lots,” but it failed to explain why agriculture is compatible with smaller lots but not larger lots. *Id.* at 12.

⁵ The United States Department of Agriculture’s *Soil Survey of Montgomery County, Maryland* confirms that the two proposed clusters are on prime farmland. In fact, the soil type is identical to that found on the farm operated by Larry Schaudies.

C. The Preliminary Plan Impermissibly Relies on Sand Mound Systems to Overcome the Soil's Natural Inability to Pass a Percolation Test.

The Planning Board asserts that the Preliminary Plan's complete reliance on sand mound systems "substantially complies with the Agricultural Master Plan." Opinion at 15. The Board proffers four bases to support its conclusion:

1. The AROS Master Plan does not explicitly limit "alternative individual and community systems" to the 1980 definition of "alternative." Since sand mound systems are no longer considered alternative systems, they are permitted in the Agricultural Reserve for residential development;
2. Sand mound systems are not defined under current law as an alternative system;
3. The Board has previously approved sand mound systems to support residential development in the RDT zone; and
4. Executive Regulation 28-93AM, On-Site Water and On-Site Sewage Disposal Systems, reflects a policy goal to allow alternative septic technologies to be used to support zoned densities as long as RDT zone requirements and Master Plan goals are satisfied.

None of these bases provide the legal grounds to satisfy Subdivision Regulation § 50-35(1). First, the inability of the soil to pass a percolation ("perc") test for traditional septic systems is an important tool among several to limit development within the Agricultural Reserve. AROS Master Plan at iv, 17, 25, 34, and 62. But this tool is rendered ineffective if alternative (non-traditional) systems designed to circumvent the soil's natural inability to pass a perc test are permitted in the Agricultural Reserve. That is why the AROS Master Plan specifically recommends, "Deny private use of alternative individual and community systems in all areas designated for the Rural Density Transfer Zone (RDT)." AROS Master Plan at 62. Since sand mound systems were considered an alternative system in 1980, their use in the RDT zone should be denied. To state otherwise would eviscerate the plain language of the AROS Master Plan.

Under the Board's misinterpretation of the AROS Master Plan, the definition of alternative systems evolves over time; alternative systems are eventually viewed as traditional systems based on usage. The inevitable result will be increased development within the Agricultural Reserve and the continued depletion of farmland. The only way to avoid this irrational outcome is by limiting the definition of alternative systems to its definition as of 1980.

In addition, the Board misconstrued the language of the AROS Master Plan to support the use of sand mound systems in the Agricultural Reserve. The Board notes that "While the Plan (at page 62) recommends sewerage guidelines including the recommended denial of private 'alternative individual and community systems' in the RDT Zone, **the Plan also recommends in the same paragraph that a study of the**

possible application of private alternative individual and community systems in rural open space areas be undertaken." Opinion at 14. (emphasis added). Petitioners fail to understand the relevance of this highlighted text. Evidently the Board was trying to demonstrate an internal inconsistency of the AROS Master Plan – on the one hand recommending denial of alternative systems, while the other hand, recommending a study of such alternative systems. During the March 17th hearing, Commissioner Robinson seized upon this apparent inconsistency in supporting the Preliminary Plan.

Upon further examination of this language, no inconsistency exists. As noted previously, the AROS Master Plan draws a clear distinction between the Agricultural Reserve and Rural Open Space Areas. The Agricultural Reserve "includes the majority of the remaining working farms.... **It represents the County's critical mass of farms and is the focus of the Plan's farmland preservation policies.**" AROS Master Plan at 38. (emphasis added). **Policies for the Rural Open Space Areas encourage a carefully planned mix of residential and farming uses.**" *Id.* (emphasis added). It is entirely consistent for the AROS Master Plan to both deny alternative systems in the *Agricultural Reserve* where residential development is to be strictly limited, while at the same time recommending a study of alternative systems in *Rural Open Space Areas* where development is already occurring.

Second, it is irrelevant whether sand mound systems are **currently** defined by some state or local entity as alternative systems.⁶ The limiting factor is whether or not sand mounds were considered an alternative system in 1980. They were, as the Board itself acknowledges, "The Board further notes that... in 1980, sand mounds were considered 'alternative' systems...." Opinion at 14.

Third, it is also irrelevant whether the Board has previously approved sand mounds in the RDT zone, particularly when the Board itself recognized at the December 9th hearing that it had not actually discussed the sand mound issue when approving previous plans.

Fourth, the County Council's resolution on Executive Regulation 28-93AM did not amend the AROS Master Plan. The intent of the regulation was to protect the public health and ground water, not to undo one of the most significant development limiting tools in the Agricultural Reserve. Therefore, the Executive Regulation can not be relied upon as supporting the Board's decision to approve the Preliminary Plan.

Finally, Commissioner Robinson supported the use of sand mounds for reasons different from other members of the Board. According to his remarks that preceded his motion to approve the Preliminary Plan, the AROS Master Plan permits sand mound systems in the Agricultural Reserve: (1) "as long as you don't go to maximum density"

⁶ Evidently, the Montgomery County Department of Permitting Services still views sand mound systems as alternative and experimental systems, as shown in the Department's Declaration of Covenant for Experimental Septic System. Attachment A. It is Petitioners' understanding that sand mound systems are in fact the alternative and experimental septic systems referred to in this declaration.

and (2) "where it is clearly carrying out the broader purposes of the [RDT] zone." Commissioner Robinson's two part rationale has no basis in the explicit language of the AROS Master Plan. The clustering of sand mounds systems on prime farmland is clearly not "carrying out the broader purposes of the [RDT] zone."

II. The Planning Board Impermissibly Delegated Its Authority to Staff to Ensure that the Preliminary Plan Substantially Conforms to the Rustic Roads Functional Master Plan.

Montgomery County Subdivision Regulation § 50-35 (1) requires the Planning Board to ensure that a preliminary plan substantially conforms to all applicable master plans. Petitioners do not dispute the important role Planning Board staff play in assisting the Board in making this determination. Importantly, conditions of approval must include explicit criteria by which staff can ensure compliance; vaguely written conditions rest impermissible authority in the hands of staff. In this regard, Condition (3) in the Opinion impermissibly delegates Planning Board authority to the staff. "As explained in the Staff Report, Staff conditioned its recommendation for approval of this preliminary plan upon the Applicant submitting a house location and landscaping plan to Legacy Open Space Staff for review and approval prior to issuance of building permits. The Board finds that this condition adequately ensures that the houses will be situated on the Property in a manner that satisfies the Rustic Roads Master Plan." Opinion at 16. The Board's finding begs the question, **how does this condition ensure that houses will be situated in a manner that substantially conforms to the applicable master plan?** Absolutely no criteria or standard is delineated in the condition. Furthermore, Petitioners question whether it is feasible to place houses in a manner that will not impede the scenic vistas from Mount Nebo Road, particularly when this cluster of lots is located "at the end of a shared driveway that rises in elevation from the road." Opinion at 4.

Finally, Petitioners continue to have concerns over the manner in which the Opinion was drafted. The drafting of any Board Opinion is the sole function of Planning Board staff working in concert with the Planning Board. Unfortunately, Planning Board staff sought input on the draft Stoney Springs Opinion from Mr. Harris, the lawyer for Winchester Homes, the developer of Stoney Springs. Staff attempted to remedy this infraction by seeking input on the draft Opinion from all parties of record. Petitioners urge the Planning Board not to permit the drafting of any Board Opinion to devolve onto parties of record.

Conclusion

For the forgoing reasons, Petitioners respectfully request the Montgomery County Planning Board to reconsider its approval of Stoney Springs - Preliminary Plan No. 1-05029.

ATTACHMENT A

DECLARATION OF COVENANT FOR EXPERIMENTAL SEPTIC SYSTEM

Montgomery County, Maryland (hereinafter the "County"), by and through its lawful agent, the Montgomery County Department of Permitting Services (hereinafter the "Department") and [REDACTED] (hereinafter the "Owners") do hereby consent and agree to the following stipulation of facts and resolution of issues regarding the issuance of an on-site sewage disposal (septic) system permit for the property at [REDACTED] Damascus, MD 20872 (hereinafter the "Property").

A. STIPULATION OF FACTS

1) The Property contains 23,914 square feet of land identified as Lot [REDACTED] found at tax map coordinates [REDACTED] and is further identified by the deed found at Liber [REDACTED] in the land records for Montgomery County; and

2) The Property is currently improved with a 3 bedroom, single family residence served by an on-site septic system which is currently failing; and

3) Investigations made by the Department have revealed that a sewage disposal system meeting all the current standards cannot be constructed on this property. A proposal for an alternate system has been made by the property owner and/ or a consultant retained by the property owner.

4) The County is willing to issue a permit to construct the alternative system, but this will create a restriction on this property that may limit or preclude future expansion of the property. In addition, the useful life span or performance of the sewage disposal system may be reduced from the typical life span or performance of a sewage disposal system. The nature of the restrictions may be discussed with the Department during normal business hours.

B. RESOLUTION OF ISSUES

The Well and Septic Section will issue the septic construction permit for the proposed system when the conditions below have been agreed to by the Owners and completed to the satisfaction of the Department:

1) The Owners agree to install, operate, and maintain the proposed system in accordance with the conditions of the permit and in compliance with County laws and regulations governing sewage disposal systems.

2) The Owners agree that this Consent agreement shall be recorded among the land records of Montgomery County and that the covenants and restrictions contained herein shall run with and bind the land described.

3) The Owners agree to allow the Department access to the property at reasonable times to insure compliance with this agreement. The Owners agree that this agreement will be binding on current and future owners of the property. The Owners and the Department agree that this agreement will become null and void if and when the property is served by a public sewer system.

4) The Owners, for themselves, their heirs, legal representatives, successors and assigns, release Montgomery County, Maryland, its agencies and officers, agents and employees, from any and all claims for liability or loss from injury or property damage they may now have or that might subsequently arise out of or be connected with the terms of this consent agreement or the approval of the septic permit described herein for the property. This release includes, but is not limited to, a release and covenant not to sue the aforementioned persons in any administrative forum, State or Federal court upon any claims, liabilities, losses, or damages arising out of or connected with the terms of this consent agreement or the approval of the septic permit described herein for the Property.

In WITNESS WHEREOF, this CONSENT AGEEMENT is executed upon signature of all parties:

Owner's Signature

Owner's Printed Name

Date: _____

Eugene L. von Gunten
Permitting Services Specialist

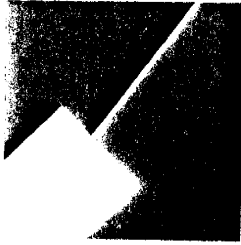
Dept. Permitting Services

Date: _____

Approved as to form and legality
By: _____

Malcolm F. Spicer, Jr.
Assisstant County Attorney

Date: _____



MCPB
ITEM #8
3/17/05



MEMORANDUM

DATE: March 10, 2005

TO: Montgomery County Planning Board

VIA: Rose Krasnow, Chief *RK*
Development Review Division

FROM: Catherine Conlon, Acting Subdivision Supervisor (301) 495-4542
Development Review Division *CC*

REVIEW TYPE: Preliminary Plan of Subdivision

APPLYING FOR: Preliminary Plan approval of fourteen (14) lots and one (1) outlot; fifteen (15) one family detached dwelling units

PROJECT NAME: Stoney Springs (Casey Property)
CASE NO. 1-05029

REVIEW BASIS: Pursuant to Chapter 50, the Subdivision Regulations and Chapter 59, the Zoning Ordinance

ZONE: RDT

LOCATION: Located on the south side of Offutt Road and west side of Mount Nebo Road at the intersection of West Offutt Road and Mount Nebo Road

MASTER PLAN: Agricultural and Rural Open Space

APPLICANT: Winchester Homes
ENGINEER: Benning & Associates, Inc.
ATTORNEY: Holland and Knight, LLP

HEARING DATE: March 17, 2005

Staff Recommendation: Approval subject to the following conditions:

- 1) Approval under this preliminary plan is limited to 14 lots and 1 outlot.
- 2) Compliance with the conditions of approval for the preliminary forest conservation plan including requirements that reforestation occur during the first planting season after issuance of the first sediment control permit and that applicant construct a permanent, split rail fence on lots 6 and 9 to protect and delineate the forest conservation easement area. The applicant must satisfy all conditions prior to recording of plat(s) or MCDPS issuance of sediment and erosion control permits.
- 3) Prior to issuance of building permits for each lot, a house location and landscaping plan shall be submitted to MNCPPC Legacy Open Space staff for review and approval.
- 4) Future contract of sale for proposed lot 2 shall include notification to potential buyers that the lot contains a historic resource included on the Historic Preservation Locational Atlas (Resource #17/32, Log Cabin - Offutt Road).
- 5) Future contracts of sale for all houses shall include notification to potential buyers of the shooting range operated on the adjacent Izaak Walton League property.
- 6) Prior to recordation of plats, applicant shall conduct necessary stabilization measures for the existing historic structure in coordination with Historic Preservation staff.
- 7) All road rights-of-way shown on the approved preliminary plan shall be dedicated by the applicant to the full width mandated by the Rustic Road Master Plan, unless otherwise designated on the preliminary plan.
- 8) Dedicate five (5) additional feet of right-of-way for a total of 35 feet from the centerline of Mount Nebo Road, as required for rustic road R-27.
- 9) Compliance with the conditions of approval of the MCDPS stormwater management approval dated October 29, 2004.
- 10) Compliance with conditions of MCDPS (Health Dept.) septic approval.
- 11) Applicant to establish 25' Public Use Trail Easements in the following locations:
 - a. From Edwards Ferry Road to the eastern boundary of the subject property to promote access to Broad Run Stream Valley Park. Alignment to be sufficiently set back from West Offutt Road to allow a useable trail to be aligned therein that adequately protects users from road traffic, but extending no further than 35 feet from the proposed road right of way unless otherwise agreed to by Applicant and M-NCPPC staff.
 - b. South from West Offutt Road along the entire eastern border of proposed Lot 3;
 - c. South from West Offutt Road along the approximate Mount Nebo Road alignment to the southern boundary of the property sufficiently set back from Mount Nebo Road to allow a useable trail to be aligned therein that adequately protects users from road traffic but extending no further than 35 feet from the proposed road right of way, unless otherwise agreed to by Applicant and M-NCPPC staff; and
 - d. South from West Offutt Road through the eastern portion of the subject property to the southern property boundary, to be located east of proposed Lots 14, 12, 11 and 10, and west of the Potomac River tributary that runs from north to south through the property.

Exact alignment of said easements to be field located by Applicant and M-NCPPC staff and established by Applicant on the record plat. Easement and trail to be adequately identified by the applicant with appropriate signage.

- 12) Compliance with conditions of MCDPWT letter dated November 12, 2004, unless otherwise amended.
- 13) Record plat to reflect a Category I easement over all areas of stream valley buffers and forest conservation, including the proposed forest conservation bank area on Lot 15.
- 14) Record plat to reflect common ingress/egress and utility easements over all shared driveways.
- 15) Provide an affidavit to verify the availability of a TDR for each existing and proposed dwelling unit shown on the approved preliminary plan. Include a note referencing the affidavit on record plat.
- 16) Other necessary easements.

SITE DESCRIPTION and SURROUNDING AREA:

The Stoney Springs property is a 704-acre site on the north and south sides of West Offutt Road east of its intersection with Edwards Ferry Road, and on the south side of West Offutt Road east of its intersection with Mount Nebo Road (see Attachment A). The property is zoned RDT and includes an existing farmhouse and outbuildings. The property is currently fallow fields, but has been actively farmed. The property includes numerous streams, wetlands, floodplains, and 304 acres of forest. Edwards Ferry Road is designated as "exceptional and rustic" in the Rustic Roads Functional Master Plan, and West Offutt and Mount Nebo Roads are designated "rustic". The surrounding properties contain agricultural uses or forest with the exception of a cluster of residential lots abutting the property on the west side of Edwards Ferry Road. A conservation property owned by the Izaak Walton League abuts the southeast corner of this property. A shooting range is currently operated on this property.

PREVIOUS PLAN HISTORY

A pre-preliminary plan application (Pre-preliminary Plan No. 7-03023) which included 28 potential residential lots was submitted in January, 2003 for this property for staff review and septic testing purposes. This pre-preliminary plan was followed in August, 2004 by a preliminary plan application for 13 lots and 8 outlots (Attachment B). The proposed lots and outlots ranged in size from a lot of 3.5 acres to an outlot of 301 acres. Most of the proposed lots averaged 9 acres, with two very large lots of 62 acres and 70 acres. The smallest proposed outlot was 8.6 acres with most of them being greater than 15 acres. All the lots were proposed to be served by private "sand mound" septic systems and wells.

The preliminary plan was presented to the Planning Board on December 9, 2004 with a staff recommendation of approval, with conditions. Staff based the approval recommendation on the fact that the proposed lots complied with the dimensional requirements for Rural Density Transfer (RDT) zoned property found in Chapter 59, the Zoning Ordinance, and the belief that the subdivision met the intent of the zone.

The RDT Zone allows single-family residential uses by right at a density of one dwelling per twenty-five acres, with a minimum net lot area is 40,000 square feet. The intent in allowing this flexible lot size was to allow property owners to carve off smaller lots while retaining the bulk of their land in contiguous fields for agricultural purposes. The intent of the zone in the Ordinance states: “*agriculture is the preferred use*”, and “*this is to be accomplished by providing large areas of generally contiguous properties suitable for agricultural and related uses.*”. The support for the preliminary plan in the staff report reflected a belief that the subdivision would provide large contiguous field areas on the larger lots which could continue to support traditional farming uses (i.e., crops).

Prior to and during the Planning Board hearing, concerns were raised by citizens and environmental groups regarding the proposed density on the property and the size of the proposed lots. Additional concern was raised regarding the use of sand mound septic systems in the RDT zone as the means of achieving the proposed density. The Planning Board discussed these concerns and the merits of the proposed plans and concluded that the proposed preliminary plan was not in keeping with the intent of the RDT zone as contained in the Agricultural and Rural Open Space (AROS) Master Plan. In response to the Board’s discussion, the applicant requested deferral of the plan.

CURRENT PROJECT DESCRIPTION

The revised preliminary plan proposes to create fourteen (14) lots and one (1) outlot on the 704-acre subject property (Attachment C). The applicant proposes to remove all remaining development rights from the property, so no additional lots will be created. This will reduce the overall density on the property to one dwelling per 50 acres; or one dwelling per 47 acres if the outlot is ever converted to a building lot.

The proposed building lots range in size from 3.5 acres to 309.1 acres. The two smallest lots are 3.5 and 3.6 acres in size. Nine of the fifteen lots are greater than 20 acres in size, and eight out of nine of these lots are greater than 30 acres in size. The proposed lot layout consists of two areas where smaller lots are clustered, and several widely dispersed larger lots. The first lot cluster is located in the southwest portion of the site and consists of 4 lots clustered at the end of an extremely long driveway. Existing forest and tree cover provides visual buffering between houses on these lots and the road frontages. The second lot cluster consists of 4 lots on the east side of Mount Nebo Road at the end of a shared driveway that rises in elevation from the road frontage. Houses on these lots and a fifth lot in the same proximity would be in view from the road frontage.

A total of six lots are less than or equal to eight acres in size. These lots are large enough to support private horse stables, but they will not provide for the more significant types of agricultural uses envisioned by the AROS plan. However, the clustering of these smaller lots does provide large areas of generally contiguous property which are suitable for agricultural and related uses. Factoring out the area encompassed by the smaller lots (35 acres), non-farmable portions of mostly wooded lots (7 acres), and the portions of the overall property which will remain forested (309 acres), a total of 353 acres of the currently existing 395 acres of available agricultural land will remain available for agricultural uses. When combined with the 309 acres

of forest protection and planting, approximately 662 acres of the total property will be preserved for agriculture and agricultural open space. Overall proposed density on the property is now approximately one dwelling unit per forty-seven acres.

CONFORMANCE TO THE MASTER PLAN

RDT Zoning

The proposed reconfigured preliminary plan meets the requirements for the RDT Zone, and more fully complies with the intent of the zone stated in 59-C-9.23. The zone allows single-family dwellings as a permitted use in the zone, and the current proposal has a density significantly lower than the allowed density of one dwelling per twenty-five acres.

Further, the proposed configuration creates more contiguous open space that could be used for agriculture. As stated in the Master Plan (page 30), *“The open space qualities of farmland preservation are significant. It provides productive, privately maintained agricultural open space with environmental benefits that include rural aesthetics and air and water quality. The significance of open space, as a result of large lot residential clustered development, cannot be underestimated. These open space areas are vital to the buffering of the agricultural preservation areas and can also provide leaseback arrangements for interested farmers.”*

Sand Mound Septic Systems

Chapter VI of the AROS plan includes recommended Water and Sewer Guidelines to be applied in areas designated for agricultural preservation. On page 62 the guidelines state: *“Deny private use of alternative individual and community systems in all areas designated for the Rural Density Transfer Zone (RDT)”*. A number of individuals testifying during the original preliminary plan hearing stated the belief that the proposed use of sand mound septic systems on the subject property violated this guideline.

The Montgomery County Code, Chapter 27A describes innovative and alternative on-site sewage disposal systems as, *“an experimental system and/or innovative technology not currently described in these Regulations but described in State of Maryland Regulations or policy letters.”* Mound systems are described in the county regulations and are routinely approved. According to staff’s research, a total of 35 lots in the RDT zone have received approval for sand mound septic systems since 1999. In the State of Maryland Regulations, *“mound systems”* are included in the definition of *“conventional on-site sewage disposal systems”*, and *“non-conventional on-site sewage disposal systems”* are separately defined (see Attachment D).

Concern has also been raised regarding the adequacy of sand mound septic systems for water quality protection. The Montgomery County Department of Permitting Services (MCDPS) is the lead agency that reviews and approves applications for all on-site sewage disposal systems in the county. MCDPS Well and Septic staff present at the previous hearing stated that sand mounds are comparable, and in some ways superior to, typical septic trench systems. As is the case with a trench septic system, a mound system must meet percolation standards and have

back-up mounds approved in case of failure. Cost for repairs and replacement of a mound system are borne by the property owner.

MCDPS Well and Septic staff have reviewed and approved the proposed sand mounds for the 14 lots being created as part of this subdivision. Conversion of the proposed outlot to a lot through the minor subdivision process will be contingent on further MCDPS approval. In accord with the MDPS recommendation, staff finds that the proposed well and septic is adequate.

Despite this conformance with County regulations, this subdivision proposal has raised a question regarding the intent of the Master Plan in regard to septic disposal systems vs. the current state of technology for septic disposal. The truly provocative question is whether the state of septic technology in 1980 should govern density – imposing “defacto” density standards far more restrictive than what the zoning permits. Establishing an answer to that question is a deeply divisive policy interpretation that is very debatable.

Zoning law sets certain development standards that define the limits of property rights. But in certain instances, those limits are further restricted by subsequent decisions that further limit development potential. This has happened in many areas where new environmental regulations have curtailed development potential; or where a property is outside the sewer envelope and therefore cannot develop at the full zoning potential.

This situation is somewhat different. In 1980 septic technologies like “sand mounds” were new and considered “alternative”; and the Master Plan determined that using these systems would undermine the intent of the Plan. But the Plan had already established that it was the County agency (DEP at the time, DPS now) that defined what was “alternative.”

The Master Plan discusses the population holding capacity of the Agricultural study area (page 17), and states that the projected holding capacity under the existing Rural Zone with its 5 acre density (35,000 dwelling units) is significantly higher than the holding capacity based on septic system suitability (20,000 dwelling units). This study establishes the reason for creating a public policy regarding the private use of “alternative individual or community sewerage systems outside the sewer envelope”, and the much lower density Rural Density Transfer Zone that is proposed later in the Plan. That discussion also notes that septic systems are regulated by the Montgomery County Department of Environmental Protection; and emphasizes that this “perc” policy is one of the most significant factors in limiting residential development in the agricultural study area. The implication of the Study is that residential development density should be lower than one dwelling per five acres; but septic policy – regulated by the MCDEP – is an insufficient means to keep the otherwise allowed density restricted; therefore a much lower density zone is needed.

Later, in its description of the state of the Agricultural Community (page 25) the Plan states that farming is under stress, and the five-acre density of the Rural Zone is not effective in curbing residential conversion and limiting future development. The plan states this is due to “recent advances in small scale community sewerage system technology, [as] these systems can overcome the most severe of soil conditions” (from footnote 24). The Plan further notes that the lack of public water and/or sewer do not deter development activity, so new land use policies and

a new zone must be developed that will address future development with an emphasis on farmland preservation.

To address the stated concern, the Plan proposes the new RDT Zone and water and sewerage guidelines (page 59-60). The Plan specifically supports denying the private use of *“alternative individual and community systems in all areas designated for the Rural Density Transfer Zone.”* This phrase is at the core of the policy question today. Who is authorized to determine or define what is an “alternative individual system”? According to the Master Plan (page 17) the regulatory agency is the Department of Environmental Protection (now regulated by the Department of Permitting Services). If they are the defining regulatory agency, and they determine that sand mound systems are no longer “alternative”, then these systems should be found acceptable.

If this interpretation is within the legal authority of the Planning Board, then they can decide that the underlying intent of denying sand mounds as a means to reduce density below that allowed in the zone is sufficient to deny any subdivision that uses sand mounds. The staff sees several problems with relying too heavily on this approach:

First, the Planning Board has already approved a number of subdivisions using sand mounds, so it would not be consistent with past practice.

Second, the Plan itself states that septic disposal is regulated by the County, which implies that they have the authority to determine what an “alternative” system is.

Third, the intent in the Plan’s “Holding Capacity Study” was to show why a 25-acre density zone was needed, instead of the existing 5 acre density zone; since septic systems did not stop development at 5 acre density.

Finally, the staff believes that using an artificial construct of septic viability as a means to restrict density otherwise allowed in the zone is not a particularly honest approach. If lower densities overall are desired for the RDT Zone, that should be openly debated and decided.

But there are other reasons and stronger authority for pushing developers to propose more creative subdivision designs that better achieve the goal of preserving open farmland – which may often result in lower density as a byproduct. The staff believes that getting a better subdivision design that better preserves large contiguous areas that could potentially be farmed is a stronger basis for reviewing subdivisions in the RDT Zone.

The Planning Board was correct in pushing this developer to reconfigure this subdivision to better achieve the intent of the zone, and for that reason it is in better conformance with the Master Plan. But septic methods are evolving swiftly, and soon there will be septic treatments that will work on virtually any soils, and will be far more protective of groundwater – and ultimately our drinking water and the Chesapeake Bay – than any systems currently used. The staff would find it difficult to recommend denying the use of those systems, because the 1980 Master Plan would have considered them to be “alternative.” The staff believes that using the

1980 argument against the use of the Rural Zone, as the basis for denying development in the RDT Zone that was designed to “cure” the problem, is not sustainable, and perhaps not fair.

ENVIRONMENTAL

The property includes numerous streams, wetlands, floodplains, and 304 acres of forest. Most of these environmentally sensitive areas, some of which are very high quality, will be protected and preserved as part of the proposed plan. Long-term protection will be provided by placing these areas in Category I conservation easements.

Forest Conservation

There are 304-acres of existing forest on the property. This development is occurring in an agricultural resource area and therefore must comply with Section 22A-12(f) of the Montgomery County Code, Forest Conservation Law. This section requires retention and/or planting of a certain percentage of the net tract area as forest. For this particular plan, the appropriate percentage is equal to the “afforestation threshold” for the property, or twenty percent.

The applicant has requested an agricultural exemption from forest conservation for proposed Lot 15. This lot is 309 acres in size and includes 144 acres of existing forest. The forest is both within stream buffers and upland. All forest is high priority and includes good diversity in canopy and understory trees. This forest will be placed in a Category I conservation easement and protected as part of the plan. In the future, the applicant will be permitted to use or sell “credits” from this forest bank area to meet the offsite reforestation requirements of other development projects. This bank will not inhibit the remainder of the site being used for agricultural purposes. The net tract area to which forest conservation requirements apply has been reduced to reflect the exemption of proposed Lot 15, however, if the lot is not used for agriculture the forest conservation plan will be required to be revised.

The plan is proposing the removal of 4.5-acres of forest. As a result of this forest removal the forest conservation law requires the applicant to plant 9-acres of new forest. The applicant is proposing to plant along an unforested stream buffer. This planting will not result in the reforestation of all stream buffers, but it is sufficient to meet the minimum requirements of the forest conservation law.

Environmental Guidelines

The site includes stream buffers, floodplains, and wetlands. These areas will be protected by Category I forest conservation easements. Stream buffers that are not currently forested or will not be reforested will also be protected with a category I forest conservation easement. The existing farmhouse and outbuildings are partially within the stream buffer and the applicant proposes to remove these structures.

LEGACY OPEN SPACE

The Planning Board approved the addition of the property for the above-referenced plan to the Legacy Open Space (LOS) program on May 13, 2004 (known as the Casey Farm in LOS documents). The site was added to the Farmland and Rural Open Space target area and recommended for protection through agricultural easement programs or directly through the Legacy Open Space program. The site was identified as an exceptional property within the Agricultural Reserve due to the high quality of the forested wetlands on the property, the ecological connectivity that those forests provide between significant natural areas, and the large size of the agricultural fields. Staff recommended that the applicant consider agricultural conservation easements for parts of the property to reduce density and minimize impact on the environmental and rural character of this site. Legacy Open Space staff have reviewed the Preliminary Plan at several stages and have the following comments on the current plan.

Density/Lot Layout

The current plan asks for a maximum of 15 lots with all remaining development rights to be separated from the property, resulting in an overall density of one unit per 47 acres. The *Legacy Open Space Functional Master Plan* recommends that density be kept below one unit per 50 acres to keep as much viable farmland and rural open space as possible. The lot size distribution on this plan will provide a mix of smaller estate lots (six lots less than eight acres), larger estate or small farm lots (eight lots ranging from 20 to 78 acres), and one large farm outlot of 309 acres. This size distribution and density, while increasing the developed area significantly over the current land use, does almost meet the reduced density goal for Legacy Open Space and does provide several lots that have the potential for continuing agriculture use.

Forest Protection

This development plan protects most of the existing forest on the site through easements on the larger lots with fencing in critical locations to define the edge of protected forest. Legacy staff understands that the forest and stream valley buffers on the 309-acre farm (Lot 15) will be preserved in easement to meet offsite forest conservation requirements for other developments. This level of protection of the existing forest meets the Legacy Open Space goals for the property.

Rural Viewshed Protection

The *Legacy Open Space Functional Master Plan* also recommends protection of rural vistas along designated Rustic Roads. All three roads adjacent to this subdivision (Mount Nebo, West Offutt, and Edwards Ferry) are Rustic Roads. Staff recommends that care be taken as building permits are issued to fine tune landscaping and placement of houses on the lots to minimize impact to the rural viewsheds (see proposed Condition #3).

CITIZEN CONCERNS

A number of letters have been received in response to the pre-preliminary and preliminary plans, most of which express opposition. A packet containing the letters previously submitted to the Board as part of the first hearing has been placed in the Chairman's office for reference. Several selected letters which express the main concerns are attached to this staff memo along with written testimony from the first hearing and new letters. Staff has attempted to address the issues raised in these letters in this staff memo.

CONCLUSION

The plan was reviewed for consistency with Chapter 50, the Subdivision Regulations and found to comply with all applicable sections of that chapter. Staff also finds the lots comply with the dimensional requirements for Rural Density Transfer (RDT) zoned property found in Chapter 59, the Zoning Ordinance. As such, Staff recommends approval of the preliminary plan, subject to the conditions included above.

ATTACHMENTS

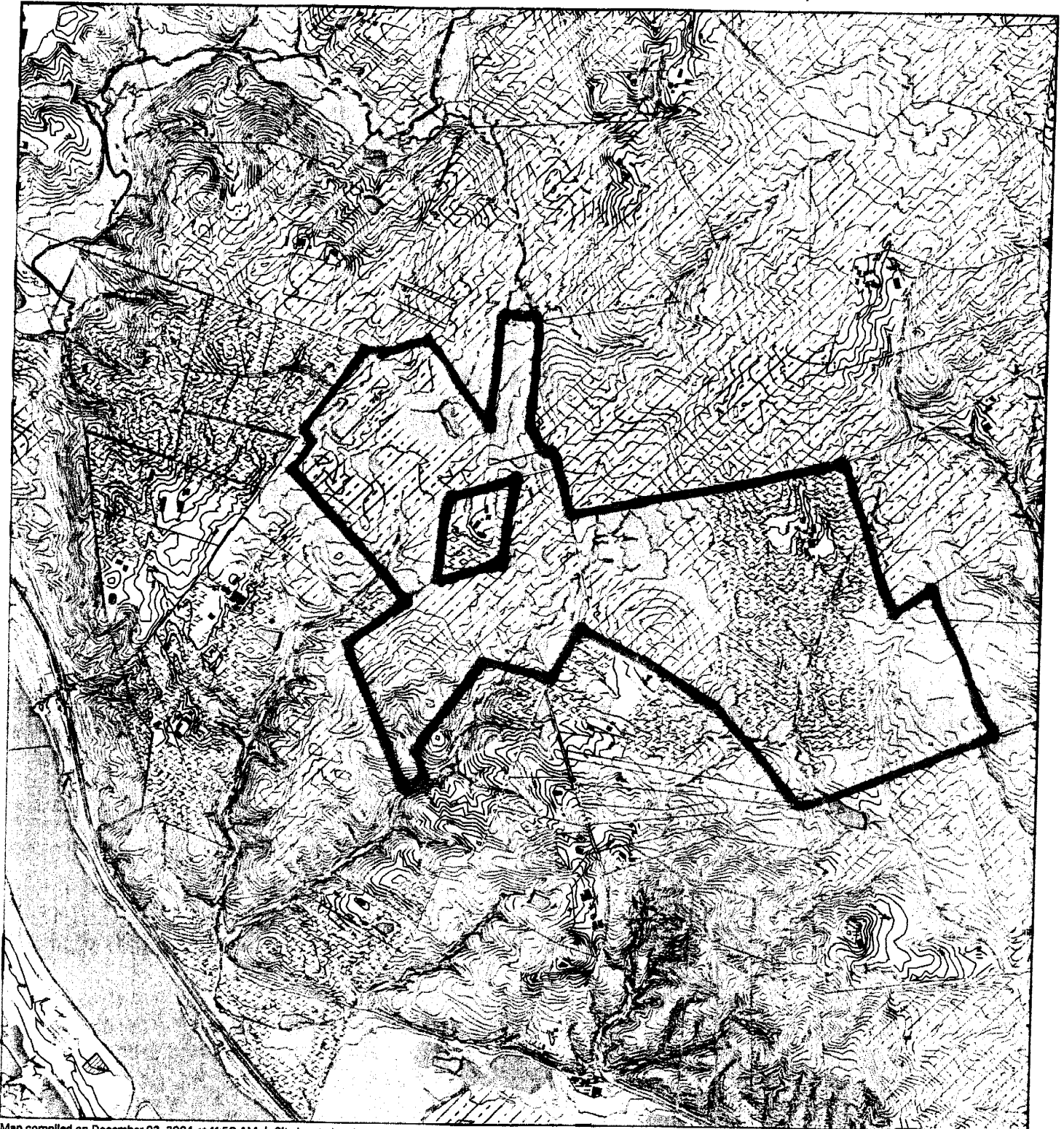
Attachment A – Vicinity Map

Attachment B – Previous Preliminary Plan

Attachment C – Revised Preliminary Plan (Current Proposal)

Attachment D – State Septic Definitions

Attachment E – Citizen Correspondence



Map compiled on December 02, 2004 at 11:58 AM | Site located on base sheet no - 221NW21

NOTICE

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Property lines are compiled by adjusting the property lines to topography created from aerial photography and should not be interpreted as actual field surveys. Planimetric features were compiled from 1:14400 scale aerial photography using stereo photogrammetric methods.

This map is created from a variety of data sources, and may not reflect the most current conditions in any one location and may not be completely accurate or up to date. All map features are approximately within five feet of their true location. This map may not be the same as a map of the same area plotted at an earlier time as the data is continuously updated. Use of this map, other than for general planning purposes is not recommended. - Copyright 1998

Key Map



N



Research & Technology Center

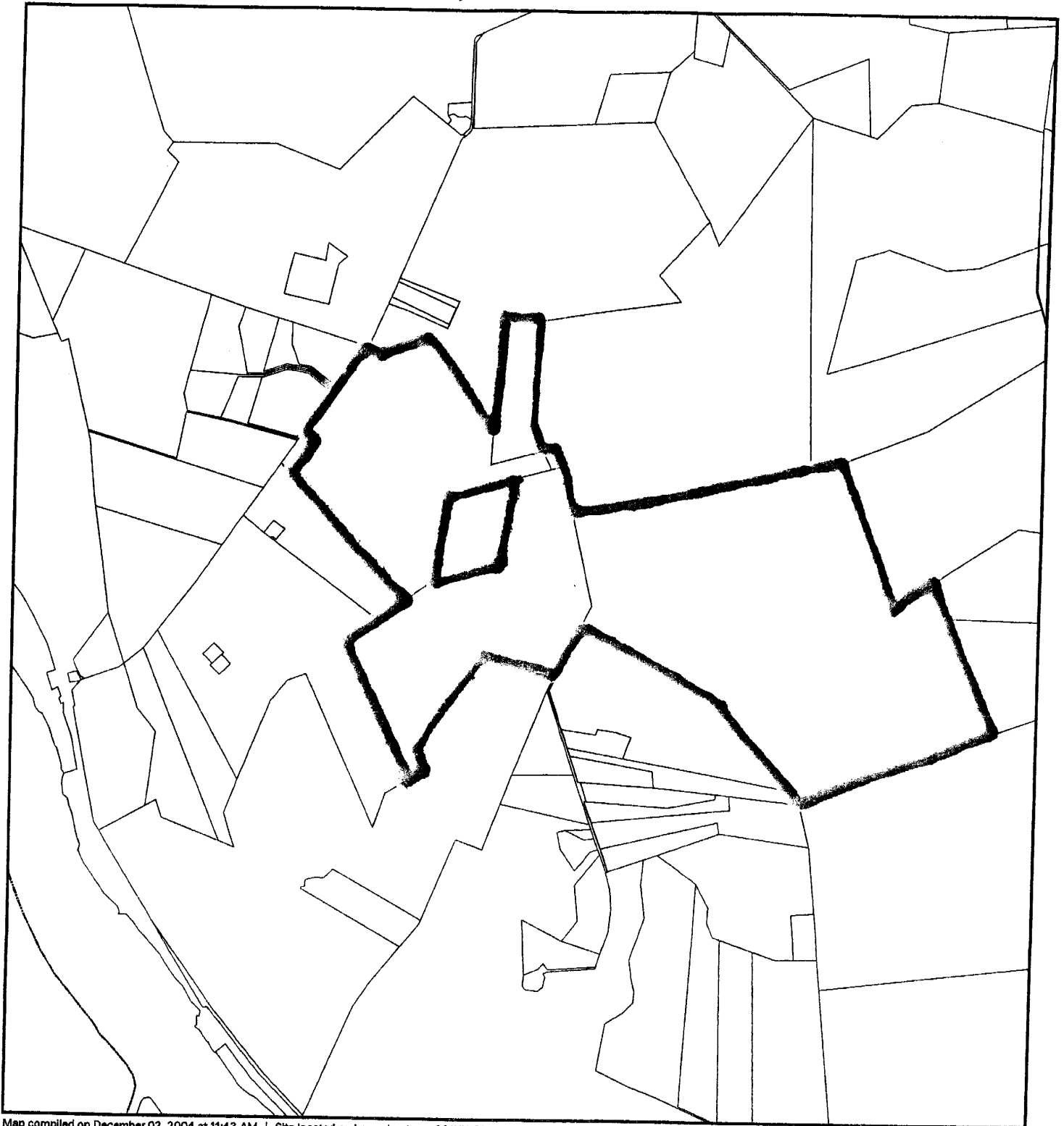


1 inch = 2000 feet
1 : 24000

MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

8787 Georgia Avenue - Silver Spring, Maryland 20910-3760

STONEY SPRINGS (1-05029)



Map compiled on December 02, 2004 at 11:43 AM | Site located on base sheet no - 221NW21

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MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

8787 Georgia Avenue - Silver Spring, Maryland 20910-3760

Key Map

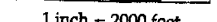


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Research & Technology Center

0 2000



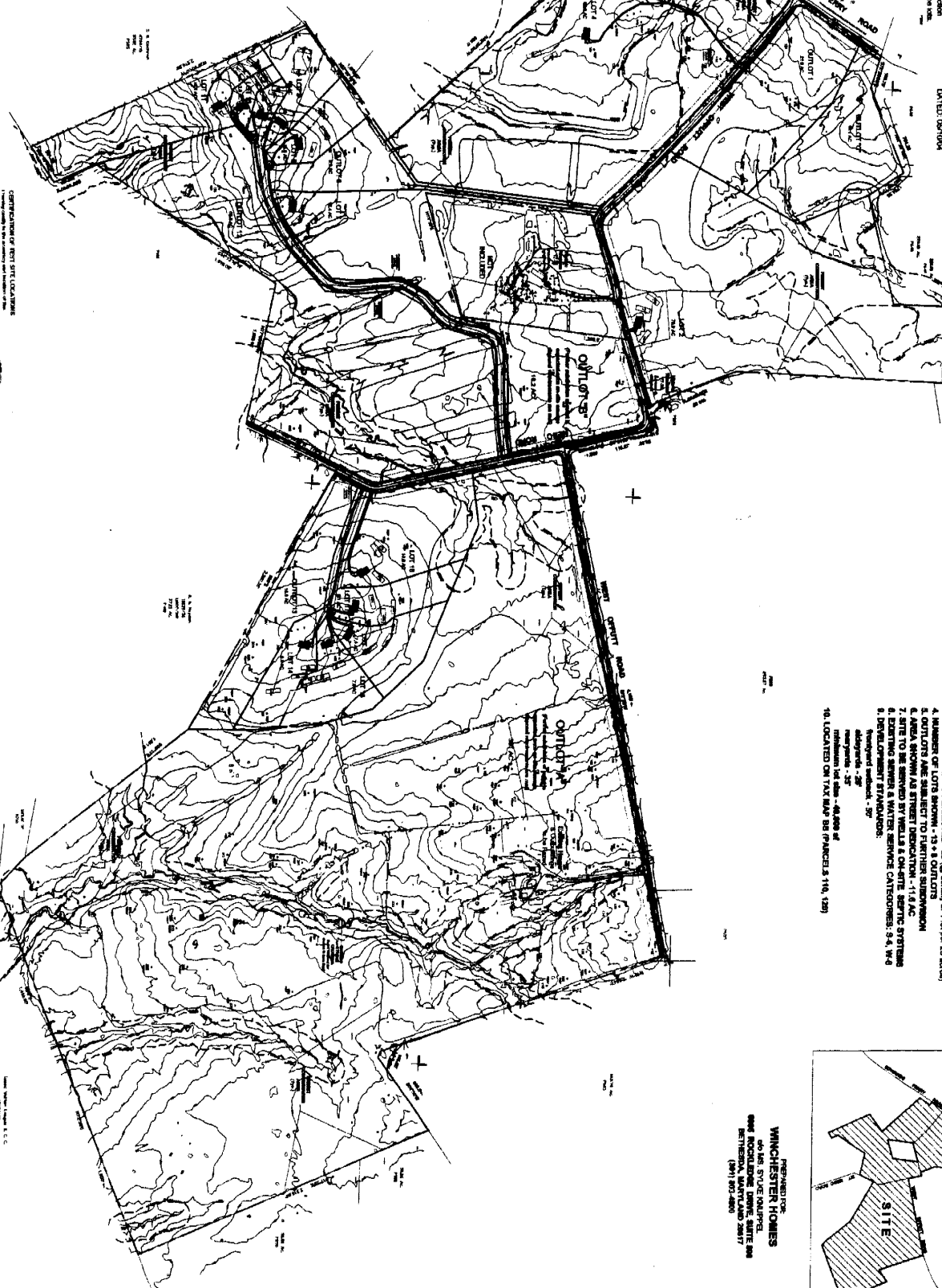
1 inch = 2000 feet

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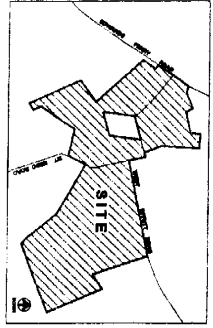
NOTE:
 All approved land tracts shall be suitably protected from grading or other disturbances through the installation of energy dissipation structures (or other approved measures) designed to prevent erosion of the stream banks. The installation of the proposed structure shall be completed by the developer and approved by the local and State Departments (MCHES) prior to approval of any final permit for the site.

SOURCE OF TOPOGRAPHY:
 WINNERS AERIAL MAPPING CO., INC.
 10000 WOODBURN
 P.O. BOX 10000
 GREENBELT, MARYLAND 20770-2122
 410-255-2253
 DATED: 05/10/04

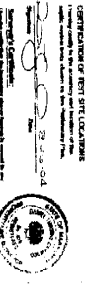
- Legend:**
- Homestead
 - Soil Type Divide
 - Forest / Tree Cover
 - Well Sites
 - Septic Field
 - Driveway



- NOTES:**
1. AREA OF PROJECT - 74.46 AC
 2. EXISTING ZONING - RT
 3. NUMBER OF LOTS PROPOSED - 28 (8) (each of 1.00 acre)
 4. NUMBER OF LOTS PROPOSED TO FURTHER SUBDIVISION - 11 (4) (each of 1.00 acre)
 5. OUTLOTS ARE SUBJECT TO FURTHER SUBDIVISION
 6. AREA SHOWN AS STREET DEDICATION - 11.4 AC
 7. SITE TO BE SERVED BY WELLS & ON-SITE SEPTIC SYSTEMS
 8. EXISTING SEWER & WATER SERVICE CATEGORIES: S, 4, W, 4
 9. DEVELOPMENT STANDARDS:
 - lot area - 35'
 - lot width - 35'
 - lot depth - 35'
 - minimum lot area - 48,000 sq ft
 10. LOCATED ON TAX MAP 28 (PAGES 3, 114, 123)



PREPARED FOR:
WINCHESTER HOMES
 c/o MR. SYDNEY HOLLIFER
 6990 ROCKLEDGE DRIVE, SUITE 200
 GREENBELT, MARYLAND 20770
 (301) 903-4800



NOTE:
 Sheet 2 of 3
 Sheet 3 of 3

ORIGINAL
PRELIMINARY PLAN
STONEY SPRINGS
 Montgomery County, Maryland

B&A Berling & Associates, Inc.
 Land Planning Consultants
 8015 Ridge Clays Court
 Odenssboro, MD 20677
 (301) 964-6200

date: AUGUST 2004
 scale: 1" = 300'



Sheet 1 of 3

(9) "Contamination" means the introduction into water of any substance, which may transfer infectious agents or other foreign substances (organic, inorganic, radiological, or biological), in concentrations which may constitute a health hazard or impair the usefulness of the water.

(10) "Controlled hazardous substance" means a substance identified as a hazardous substance by the Department of the Environment pursuant to Environment Article, Title 7, Subtitle 2 (COMAR 26.13.01.03B(26)).

(11) "Conventional on-site sewage disposal systems" are those systems in use which meet current regulations and consist of a septic tank or aerobic treatment with standard trench or deep trench subsurface irrigation or seepage pit on-site disposal or sand mound system.

(12) "County water and sewer plan" means a comprehensive plan and all amendments and revisions of it as required by Environment Article, Title 9, Subtitle 5, Annotated Code of Maryland, for the provision of adequate water supply systems, on-site sewerage and solid waste disposal systems, and solid waste acceptance facilities, throughout the county, whether publicly or privately owned, to include all towns, municipal corporations, and sanitary districts in the county.

(13) "Deep trench" means a trench having perforated or open-jointed pipe or tile trench in which the trench side wall and bottom area is used to calculate the absorptive area in the system design. At least 2 inches of gravel/stone covers the pipe and extends throughout the depth of absorptive side wall to the trench bottom.

(14) "Domestic sewerage" means the liquid or water carried wastes derived from dwellings, including floating homes, business buildings, institutions, and the like, exclusive of wastes derived from industrial processes.

(15) "Floating home" means any vessel, whether self-propelled or not, which is:

(a) Used, designated, or occupied as a permanent dwelling unit, place of business, or for any private or social club, including a structure constructed upon a barge primarily immobile and out of navigation or any structure which functions substantially as a land structure while the same is moored or docked within Maryland; and

(b) Which has a volume coefficient greater than 3,000 square feet based upon the ratio of the habitable space of a vessel measured in cubic feet and the draft of a vessel measured in feet of depth.

(16) "Fall line" means the contact between the unconsolidated sediments of the coastal plain physiographic province and the crystalline rocks of the Maryland Piedmont physiographic province (see the map of "Maryland Physiographic Provinces and Their Divisions" in this chapter), and is approximated by the line connecting the numerous waterfalls and rapids in adjacent streams.

(17) "Flood plain soils" are those soils that are listed in the soil survey as either having a flood hazard or being susceptible to flooding.

(18) "Grease interceptor" means a receptacle designed to collect and retain grease and fatty substances normally found in kitchen or similar wastes.

(19) "Ground water" means underground water in a zone of saturation.

(20) "Hazardous substance" means any matter:

(a) That conveys toxic, lethal, or sublethal effects to plant, aquatic, or animal life, or which may be injurious to human health, or persists in the environment; or

(b) Which causes sublethal alterations to aquatic, plant, animal, or human systems through their cumulative or immediate reactions.

(21) "Holding tank" means a watertight receptacle which is used, or intended to be used, for the collection of sewage.

(22) "Liquid waste hauler" means a person engaged in the business of cleaning and emptying septic tanks, holding tanks, seepage pits, privies, or any other on-site disposal facility.

(23) "Mobile home" means a structure that can be used with or without a permanent foundation, is transportable in one or more sections, built on a permanent chassis, and is designed to be used as a dwelling when connected to the required utilities.

(24) "**Mound** system" means an on-site sewage disposal system utilizing a raised bed of sand fill with a distribution system constructed so as to distribute sewage equally over the ground surface located under the base of the **mound**.

(25) "Non-conventional on-site sewage disposal systems" are experimental systems and innovative technologies not currently described in these regulations, that are undergoing evaluation by the Department of the Environment and the Approving Authority.

(26) "On-site disposal" means the disposal of sewage effluent beneath the soil surface.

(27) "On-site sewage disposal system" means a sewage treatment unit, collection system, disposal area, and related appurtenances.

(28) "Percolation test" means a procedure used to determine the percolation rate.

(29) "Permeability" means the capability of a rock, aquifer, or confining bed to transmit waters or air.

(30) "Person" means an individual, partnership, firm, corporation, cooperative enterprise, or a governmental agency.

(31) "Pollution" means any contamination or other alteration of the physical,

Citizen Correspondence



March 11, 2005

Montgomery County Planning Board
Maryland-National Capital Park & Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Stoney Springs (Casey Property), Winchester

Preliminary Subdivision.

Dear Commissioners,

I ask on behalf of the Board of Directors of Historic Medley District, Inc. (19923 Fisher Avenue, Poolesville, MD) that you **deny** the Stoney Springs preliminary plan. Since our nonprofit corporation was organized in 1974, we have supported the conservation of historic open space as well as the preservation of historic structures.

We do not expect you to bring back the Native American hunting deer in the forests or the colonial farmer growing wheat to ship to the Indies. We do ask that the Planning Board continue to protect the historic uses of the land as farmland, hunting grounds, undeveloped open spaces and woodland that were recognized in 1980 with the passage of the Preservation of Agriculture & Rural Open Space Functional Master Plan. The Plan itself developed "a zoning map and land-use plan that recognizes farmland as permanent land-use and not simply a "holding land-use" to be utilized for future development." (P.7, Preservation of Agriculture & Rural Open Space Functional Master Plan, 1980.)

Please understand that the Rural Density Transfer area in the Agricultural Reserve as an industrial zone. The industry is farming, an enterprise that has served the county well for centuries. It is an industry that requires substantial contiguous land mass in order to be viable. In the Ag Reserve that viability still exists as long as projects such as Stoney Springs are denied. Although the subject property has been temporarily taken out of farming by the developer in anticipation of permission being given to change the zoning from farming to housing, the land continues to be an important component of the future of the industry. To convert the land to housing would be to downgrade the RDT land from its preferred use as farmland. It would be in direct contravention to the "Permanence Syndrome" in farming that the Ag Reserve was created to support.

For the Planning Board to support the proposed use of sand mounds is counter to the Ag Plan, which recommends, "Support of a rural sanitation policy that does not encourage development within the critical mass of active farmland."

Attached is a letter to the Gazette that was published after the December 9, 2004 consideration of the Stoney Springs development plan. We ask that the Planning Board put the welfare of the county's people ahead of the financial objectives of the housing industry. The Ag Reserve was a

visionary and sagacious gift which the Planning Board and the County Council made to the people of the county. We ask that this board support the wisdom of that action.

Thank you.

Sincerely,

Elizabeth Perry Kapsch
Vice President

In the article, "When you can't afford to live near where you work" (Nov. 17), Rich Parsons, CEO and president of the Montgomery County Chamber of Commerce, said that 47 percent of the land area (of the county) is locked away from development.

The Agricultural Reserve is not locked away from development. It is not land waiting to be used. It is, in fact, already fully and actively developed as farmland. There is no room in the Ag Reserve for suburban expansion. The land has been entirely committed to a beneficial industrial use, farming, that is compatible with the welfare of all the people in the county, no matter their income level.

Farming has prevailed as an industry for several thousand years. It is able to continue on the same piece of ground for decades - for eons. Unlike the housing industry, it does not require more and more land be consumed in order for the business to be viable.

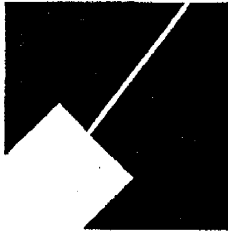
What wears out in farming is the farmer. As he or she grows old and wants to retire, the need for a replacement farmer - if there is no one in the family to take over - creates an interval when the land could go out of farming. It is completely appropriate that the county has recognized the need to protect the land while the transition takes place so the county can continue to have farms.

Take heed that the housing industry does not care about keeping farms and open space in the county. When it has consumed all the land in the county it can get its hands on, it will move on to other counties and continue building there. It will not look back at Montgomery County and worry about the quality of life of the county's people. It will not worry that it left no open space, no farmland, no night sky, no country roads, and the huge pile of problems that come with overbuilding.

It is up to the people who live here to have the discipline to keep a balance of open spaces, suburban housing, and urban centers. It is up to the people to elect county leaders who have the vision and fortitude to protect the county, no matter how seductive the siren song of the developers and their easy money.

Perry Kapsch

M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-493-4500, www.mncppc.org

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OFFICE OF THE CHAIRMAN
THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

February 9, 2005

Montgomery County Planning Board
Silver Spring, Maryland 20910

At our meeting on January 31, the LOS Advisory Committee expressed its concern that allowing sand mounds for sewage disposal in order to subdivide the Casey/Winchester (Stoney Creek) property into residential lots is inconsistent with the Mater Plan of Agricultural Preservation and Open Space. We understand from LOS staff that they feel opposition to the subdivision may exceed their mandate under the Legacy Open Space Master Plan because the proposed subdivision exceeds minimum acreage requirements of the RDT zone and a substantial portion of forest land on the tract is to remain undeveloped. We believe this approach focuses on the mote and ignores the beam in the eye of the Plan.

The *purpose* of the Agricultural Reserve is to protect the land for agricultural and forestry uses—not to provide passive open space. The LOS plan is consistent with that purpose. Consequently, it must be read as complementary and as a means of implementing the Master Plan through acquisition of the fee or an easement on critical parcels of land where appropriate, or through other means, such as the subdivision process, where feasible. A subdivision that is in violation of the Master Plan with regard to its means of sewage treatment, and especially one that impairs the express primary purpose of both the Plan and the Zone can hardly be viewed as consistent with the purpose of LOS. As a property identified in LOS for conservation by means other than acquisition in fee, we have no doubt that an appropriate plan of subdivision *consistent with the Master Plan* would warrant acceptance. One that is premised and entirely dependent on technologies the Master Plan recommends AGAINST does not commend itself to us, and we trust the Board will reject such a plan, as it must under the subdivision regulations.

Sincerely,

Royce Hanson

by Dominic Quattrocchi per direction

Members of the Legacy Open Space Advisory Group:

Royce Hanson, Barbara Medina, Charles Pritchard, Aleen Starkweather, Delores Milmoie, Ginny Barnes, Helen Wilkes, Jim Benton, and John Chritea



Izaak Walton League of America

BETHESDA-CHEVY CHASE CHAPTER

Defenders of Soil, Air, Woods, Waters and Wildlife

June 25, 2004

Derick Berlage, Chairman
Planning Board
MNCPPC
8787 Georgia Ave.
Silver Spring, MD 20910

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OFFICE OF THE CHAIRMAN
THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Dear Sir;

I am the President of the Bethesda-Chevy Chase Chapter of the Izaak Walton League of America, Poolesville, MD. I am writing this letter because there are two building developments under consideration bordering our property. One property is to the North, Casey Property, and one property is to the East, Polo Grounds.

As you know our chapter operates outdoor shooting ranges on our property that are regularly attended throughout the year. At times we hold special shooting events that involve numerous participants.

I am writing this letter to request that the MNCPPC Planning Board require an "acknowledgement clause" in each lot deed issued to the home purchasers in these developments. The clause should state that purchaser acknowledges that the BCC-IWLA operates shooting ranges on the adjacent property and that the chapter regularly sponsors events that are attended by numerous participants.

Sincerely,

Ray Klecker
President
Bethesda-Chevy Chase Chapter
Izaak Walton League of America

P.O. Box ⁵⁴²~~851~~ Poolesville, MD 20837



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AUG 10 2004

Maryland Division
The Izaak Walton League of America
707 Conservation Lane
Gaithersburg, Maryland 20878-2983
301-926-8713

OFFICE OF THE CHAIRMAN
THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Dr. Roger C. Sears
17240 Edwards Ferry Road
Poolesville, MD 20837
301-972-8942
rogercsears@aol.com

August 4, 2004

Mr. Derick Berlage, Chairman
Planning Board
MNCPPC
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Mr. Berlage,

As president of the Maryland Division of the Izaak Walton League I wish to express my alarm at proposals being put forward to introduce large scale residential development in the Agricultural Reserve, in particular, and especially, the proposed cluster housing development for the Casey Property located near Poolesville. In addition to compromising the integrity of the Ag Reserve by the conversion of a working farm to a non farm, developments such as this would introduce a large urbanized population into the area having little or no appreciation for the realities of country life. Needless to say, this could create difficulties for the people who wish to continue to hunt, fish and farm in this area,

The Maryland Division of the IWLA is composed of 4000 conservation minded sportsmen and women, of which two-thirds (2700) reside in Montgomery County. One thousand members belong to the Bethesda-Chevy Chase Chapter, whose 500 acre property is contiguous to that of the Casey Property, and lies down stream from it on the Horsepen Creek. We hear that the developer plans to construct 35 individual sand mound septic systems on the property, which, being individual systems, would not be subject to State licensing and oversight. We also hear that sand mound systems are safe and reliable if they are properly constructed and properly maintained. However, this is a big "if", and we have seen an article in a professional journal about a local contractor who does a substantial business in correcting other contractors' mistakes. This is not encouraging.

Thanking you for your attention to this matter, I remain

Sincerely yours,

Roger C. Sears

Roger C. Sears
President
Maryland State Division IWLA

December 8, 2004

Chairman Berlage and Montgomery County Planning Board
MNCPPC
8787 Georgia Avenue
Silver Spring, MD 20910

RE: Proposed Stoney Springs Development (Case No. 1-05029)

Dear Chairman Berlage and Planning Board Members:

I am writing to express the Potomac Conservancy's concerns regarding the proposed Stoney Springs Development and the preliminary plan of subdivision that is being considered by the Montgomery County Planning Board. The Potomac Conservancy holds a conservation easement on the nearby West Woods tract owned by the Bethesda-Chevy Chase Chapter of the Izaak Walton League of America. We have two major concerns regarding the proposed development:

1. **Water Quality:** The developer is proposing to use sand mound septic systems for a significant residential development. For a development of this size in an environmentally sensitive area with highly permeable soils, the use of sand mound septic systems is inadequate. This property is located very close to the Potomac River and McKee-Beshers Wildlife Management Area, and a rare red triassic shale barren is known to occur in this region. If the land itself does not support normal septic systems, then it seems logical that such a scale and density of the proposed development should not be permitted because of the threat to water quality and public health. If the developer cannot propose septic systems that are appropriate for the sensitive resources on and surrounding this property, then the proposed development should not be permitted.
2. **Character of the Agricultural Reserve:** Montgomery County's Agricultural Reserve is very rich with one of the region's most prized and critical resources – productive farmland. Certainly, farming is not much of a profit-making business due to the current economic conditions, however, farmland is integral to Montgomery County's heritage and quality of life. Montgomery County's leadership in creating the Agricultural Reserve and the Legacy Open Space Program has allowed many farms to remain active and both are touted around the State of Maryland as being strong models for preservation of rural areas. Montgomery County has set a high standard for quality of life, protection of productive agricultural lands, and preservation of open space. We urge the