

1 you read the two paragraphs together, you can use sand  
2 mounds, but that's not to override what is a clear  
3 limitation on going to maximum development. It says develop  
4 a comprehensive public policy, it's a little late for that,  
5 because we've got the proposal before us, so then we have to  
6 decide whether this particular application is consistent  
7 with not going to maximum development district, development  
8 density in the RDT.

9 COMMISSIONER WELLINGTON: Well I think John, the point was

10 CHAIRMAN BERLAGE: All right. Go ahead and make your  
11 point. But then, this side of the dais has been very quiet,  
12 and I think they're entitled to their

13 COMMISSIONER ROBINSON: I just raised that issue because  
14 I'd like to hear, I'm not quite sure where I come out. I  
15 think there's the interpretation issue, and then there is  
16 the application issue. And the Chairman is correct, there's  
17 some clear indication in this plan that there is some  
18 absolute limit on total development in the zone.

19 COMMISSIONER WELLINGTON: Yeah, and I think that we  
20 haven't got a comprehensive public policy regarding this.  
21 It's not something that you do on a case-by-case basis. It's  
22 something that, either we need to address through amendment,  
23 or the council has to address through the master plan  
24 process. But not for us to all of a sudden announce well

1 now, here we do have this comprehensive public policy, so we  
2 can use an alternate technology, which will then be used  
3 time and time again. The point being the drops of water in  
4 the teapot.

5 CHAIRMAN BERLAGE: It's not a slippery slope, this is a  
6 flood gate.

7 COMMISSIONER WELLINGTON: Yeah.

8 COMMISSIONER ROBINSON: Rather, it's threshold issue  
9 about, in a sense what Commissioner Wellington is raising  
10 and I think [inaudible] is raising, and I think it's a very  
11 fair point, whether that language about the comprehensive  
12 policy is something that we can develop in some sense on a  
13 case-by-case basing saying this is equivalent to 1 to 50, 1  
14 house to 50 acre zoning, you look all around the area,  
15 there's lots of areas to preserve Ag Reserve by 1 to 50 acre  
16 zoning. What are we going to do, say that it is 1 house for  
17 every 75 acres, when nobody else in the metropolitan area  
18 has done that? So, you get into those

19 CHAIRMAN BERLAGE: NO, it's 1 house for every septic  
20 system.

21 COMMISSIONER ROBINSON: I'm not being cavalier about this  
22 issue.

23 CHAIRMAN BERLAGE: I did say that I will give Mr. Bob  
24 Harris a chance to answer my question too, so go ahead, and

1 then I want, I will invite Commissioner Perdue or  
2 Commissioner Bryant to join in if they're ready.

3 MR. HARRIS: I think I can explain this. The master plan,  
4 if you read it, is largely a discussion as opposed to most  
5 of the master plans we have. It's a rationale for the  
6 downzoning to 1 to 25, and this box references the fact not  
7 that 1 to 25 would have to be cut, but rather that the then-  
8 existing one unit per 5 acres, would support a zoned  
9 density, but that the practical holding capacity in that  
10 area would be less than 1 to 25. So they wanted to reduce  
11 it, and they in fact did reduce it to 1 to 25. And what this  
12 says is that ah, percolation certainly limited policy and it  
13 said it's imperative to develop a land use recommendation  
14 for this, but also a comprehensive public policy regarding  
15 private use, etc. They didn't do that for several years,  
16 they did that in 1994 at the request of the farmers. This is  
17 a comprehensive policy. It was voted on by the County  
18 Council, and it established the policy that said, the Health  
19 Department realizes that in the agricultural zones in the  
20 County, many property owners are not able to develop their  
21 land as permitted by current zoning, because of the soils  
22 range from marginal to unsuitable for on site individual  
23 water treatment systems. In view of the forgoing, the Health  
24 Department's proposed amendments for on site systems, which

1 include mound systems.

2 COMMISSIONER ROBINSON: Well, Mr. Harris, you don't have  
3 three votes for that argument because basically it's  
4 circular, it says whatever is permitted by the zoning, this  
5 is helping you to do what's permitted by the zoning.

6 MR. HARRIS: No, I didn't say that.

7 COMMISSIONER ROBINSON: That's what it says.

8 MR. HARRIS: No, and we're not seeking what's permitted by  
9 the zone 1 to 25, we're seeking 1 to 47, and what we're  
10 doing, and this policy intended to better serve the farmers  
11 by allowing them to subdivide their land, using sand mound  
12 systems.

13 COMMISSIONER ROBINSON: But, then you're not even done  
14 for the bulk of this development and I would agree with the  
15 protesting parties, you're not within the protected class.

16 MR. HARRIS: Owners of farm land, not farmers themselves.

17 CHAIRMAN BERLAGE: No you're right, it was the farmers who  
18 were the genesis behind this. Now, it wasn't written in a  
19 way specifically to define farming or farmers.

20 MR. HARRIS: Then all the cases you've decided on this, I  
21 guess were wrongly decided.

22 COMMISSIONER ROBINSON: That may have been the case and  
23 it's standard practice of administrative law, and about a  
24 thorough, thorough debate and analysis of an issue, we can

1 change our minds

2 CHAIRMAN BERLAGE: All right, Commissioner Perdue.

3 VICE CHAIR PERDUE: Well, I take as the the starting  
4 question whether the master plan in essence prohibits the  
5 use of sand mounds and if it does, then you guys have a  
6 problem. Because you're proposing to use them. And we've  
7 heard a lot of testimony that said, the master plan is  
8 absolutely beyond a doubt clear and so the only question is  
9 whether you're going to throw the master plan in the trash,  
10 or you're going to follow it. I don't intend to throw the  
11 master plan in the trash, but I actually don't find it so  
12 absolutely clear. The language about where, the do's and  
13 don'ts language, says that

14 CHAIRMAN BERLAGE: Page 62.

15 COMMISSIONER PERDUE: Yeah, it's deny private use of  
16 alternative systems. I mean that's alternative individual  
17 and community systems. Don't use alternative systems, that's  
18 what it says. Now the question is, is this an alternative  
19 system? Under current law, it, I mean, alternative system  
20 has an explicit definition under current law. It's not a  
21 kind of general category, there is a definition, and this,  
22 under current law, is not an alternative system. So, so  
23 you've got a master plan that uses wording that refers to a  
24 specific kind, I mean at least now, has a specific technical

1 meaning. It didn't say, whatever it said, it didn't say, it  
2 uses a phrase that has a specific technical meaning, and  
3 sand mounds are clearly currently within that specific  
4 meaning. They may not have been within this specific meaning  
5 back when the master plan was, or back in 1980. What it  
6 says, you don't use alternative systems, what it doesn't say  
7 is as we define them now, no matter how that phrase, that  
8 technical term may change in the future, it doesn't say  
9 that. But it also doesn't say whether it contemplates a,  
10 that the things that are in that category could change. I'm  
11 sorry, I think I said the last time, although I will admit  
12 that I did not, couldn't bring myself to, listen to the tape  
13 again. I, for me, that creates a statutory ambiguity, as to  
14 what it's not, it occurs in all kinds of areas where there's  
15 reference to something that changes, and does the, does the,  
16 what does the master plan contemplate.

17 Well, so how do I figure that out? Intervening practice  
18 is for me relevant in trying to figure out the meaning of  
19 something that could, I think, plausibly be interpreted  
20 different ways. We have intervening practice, which is we  
21 have approved sand mounds. The County Council action is  
22 relevant as well. I mean it's part of what precipitates the  
23 change, but I, it's relevant. So at the end of the day,  
24 what, my bottom line is, I do not read the master plan, I do

1 not read the master plan as prohibiting the use of sand  
2 mounds. It says deny alternative systems, it doesn't say,  
3 um, that's what it says, and I interpret that not to mean--  
4 well I won't use double negatives--under my interpretation  
5 of the master plan, sand mounds are today permitted,  
6 provided that other things, other goals of the master plan  
7 would be accomplished. It's not because I, ah, that's my  
8 reading of the master plan, I'm not saying I think the  
9 master plan has been changed. The master plan chose a  
10 technical term whose definition has changed. All right, so  
11 that's, that's where I'm on that. It's clear the master plan  
12 has a goal of preserving farmland, and although I heard a  
13 lot of passionate testimony about how devastating this is to  
14 farmlands, and it may be on some of the, on some very good  
15 soils. It is also preserving a lot of land. It's not  
16 preserving it all. I'm clear on that. It is not preserving  
17 it all. But it is preserving a lot. It's not at 1 per 50,  
18 it's 1 per whatever, 47.

19 COMMISSIONER ROBINSON: 47.

20 COMMISSIONER PERDUE: That's getting close to what we've  
21 said we would want to do if we were buying it, and we're not  
22 buying it. There's been a lot of talk about clustering, that  
23 this is a cluster development, it is not a cluster  
24 development. Cluster development, like alternative system,

1 has a technical meaning. A cluster development means that  
2 you're allowed to put things on smaller sized lots than  
3 would otherwise be the case. This is not a cluster  
4 development. It is true they have grouped the lots together.  
5 I view that as a strength of the plan, not a weakness. We  
6 could ask them to dot those houses out, and make sure you  
7 really wipe out the other 300 acres by putting them um, and  
8 truly eliminate the possibility of large-scale farming. I  
9 don't view that as an improvement. In the areas where they  
10 are grouped, there may not be a lot of agriculture, but, but  
11 the trade off for that is significant spaces. So on balance,  
12 is this consistent with goals of preserving agricultural  
13 land? I think it is. It doesn't preserve it all, there's a,  
14 there's a, I'm clear on that. I understand that. But  
15 agriculture is defined extremely broadly in the code, as I  
16 understand it. It is not, it is way beyond people out there  
17 with the tractors, it includes all sorts of other uses that  
18 I think can take place on the land as it's been, as it's  
19 within this subdivision as it's proposed. So, I will support  
20 the staff recommendation because I think that the master  
21 plan as written, not as, I don't know what people thought  
22 about at the time, but I know what is written. I heard  
23 people say what was thought about is that there was never  
24 going to be anything other than farm houses. And that's not



1 what the zone says. The zone is very clear that other things  
2 are permitted. So, that, I have to take what's, operate off  
3 the document as written, I think sand mounds, ah, as a  
4 result, I conclude sand mounds are permitted and I think  
5 that the development is consistent with overall objectives  
6 for the Agricultural Preserve.

7 CHAIRMAN BERLAGE: Mr. Bryant?

8 COMMISSIONER ALLISON BRYANT: I'm going to be quick. I  
9 started to say, I have a simple mind, but then again I  
10 thought Mr. Robinson might agree too heartily on that. But  
11 the reality

12 COMMISSIONER ROBINSON: Yeah, maybe you could just start  
13 that your mind was clear and less convoluted and could get  
14 more to the point more readily than mine.

15 COMMISSIONER BRYANT: Well, I am starting from the  
16 premise that my colleague Ms. Wellington said, and that is  
17 that the document is like a Bible, and that you can go find  
18 whatever it is that supports you. But there are aspects of  
19 the master plan that are unlike the Bible in that the master  
20 plan was not developed to be the final word. Now, we seldom  
21 talk about that, from my perspective, but the master plan  
22 was designed, yes, to be a plan to guide us and to, and to  
23 shape a particular zone that we might be working in, or a  
24 sector plan, or whatever the case may be. But it is, in and

1 of itself, it was understood that there can in fact be a  
2 degree of fallibility in the master plan. That's why, and  
3 this is where I might be in conflict with some of the things  
4 that I have said. That's why the County Council in fact can  
5 come up with regulations. So that you don't have to go back  
6 and go through the whole master plan process or go through a  
7 change to the master plan process in order to correct some  
8 things that were not perceived or contemplated. And with  
9 that idea in mind, I'm going back to the, the regulation  
10 2893A that you talked about that the County Council  
11 essentially adopted and that is a health initiative more so  
12 than anything else. Well, let me, in terms of that  
13 particular regulation, it talks in terms of the purpose  
14 being to control the construction, operation, you read, you  
15 know that. And this is within the framework established by  
16 the regulation, the County Council encourages the Department  
17 of Health to exercise flexibility. And that was done on the  
18 22<sup>nd</sup> of February in '94. On March 24<sup>th</sup>, because the County  
19 Council passed the regulation, you then saw the Executive  
20 coming up with a regulation to implement what the County  
21 Council said. And in doing that implementation of what the  
22 County Council said, that regulation talked in terms of  
23 procedure for the mounds. You do not establish by regulation  
24 a procedure for mounds, if in fact this is seen as being

1 experimental. But by virtue of the fact that you use the  
2 expression to the procedure for, that means that you in fact  
3 are establishing standards for in fact a procedure or  
4 process that has been found to be acceptable.

5 Associated with that, however, and I think someone had  
6 already spoke to the ratio of 1 to 5 versus 1 to 25, there  
7 also was a significant thing that it occurred in that  
8 particular period of time. And that thing was the fact that  
9 they discovered that in downzoning the farmland an egregious  
10 disservice was being done to the farmers. And the way they  
11 got around that, as you realized, was to develop the TDR  
12 process, and I remember when I first came on board as a  
13 Board member, one of the County Council persons for the  
14 upper County area indicated to me that if there is anything  
15 that I can do, I should work to protect the TDRs and the TDR  
16 process. And in fact I align myself Mr. Hussmann, who at the  
17 time also felt very, very strongly about that. And I see  
18 this as a continuation of that alignment, because the more I  
19 understand it, the more I recognize how powerful this is,  
20 and you can't get the number of TDRs that this site is going  
21 to allow by saying let's deny this, and let's keep it as it  
22 is, because what you've done, you've punished the people who  
23 believed because County Council said let us downzone it, and  
24 we will protect you. What you are doing if we don't support

1 this, as far as I'm concerned, it has other merits, but in  
2 addition to that, I'm talking about just the TDR aspect,  
3 what we're doing is violating a trust because in fact  
4 farmers did believe that they were engaging in a contract  
5 with the County Council, when they downzoned their land. And  
6 in reading the plan, the master plan, the master plan was  
7 written just like we write our master plans today. Twenty-  
8 five years from now, we understand that things are not going  
9 to be the same, and what we try to do with staff, we  
10 encourage staff, and we've done it several times within the  
11 few master plans that we've worked on most recently, when  
12 they put language in that is so absolute that it doesn't  
13 anticipate that there is a future, we ask them to try to  
14 modify the language to accommodate the fact that there are  
15 possibilities of some changes that can occur. And I'm  
16 suggesting that in terms of this master plan, that new  
17 technology was contemplated even though it talked in terms  
18 of the septic system. It did not exclude the consideration  
19 of what might occur in the future. And when you look at how  
20 we currently develop our master plans, we make sure that  
21 there is the possibility of considering future variables so  
22 that you don't have to go redo a whole master plan. And a  
23 25-year-old master plan, in spite of how great it might be,  
24 we have to acknowledge that in fact there are some

1 shortcomings, because there has been an eon of change, not  
2 only in terms of technology as it relates to farming and  
3 sewage disposal. But there's been an eon change in terms of  
4 how to use the land, and to use it in a more friendly  
5 manner. And the cap for me in terms of why I'm supporting  
6 this, is because and this is a complement, although it may  
7 not sound like it. I see the staff who put this report  
8 together as being, I call them in my own mind executionist,  
9 meaning they are so serious and so precise, that when they  
10 do something, I listen, because I know how seriously  
11 committed they are, and how competent they are in terms of  
12 how they will make sure that in terms of the reports that  
13 they're doing that the content of those reports will  
14 withstand all kinds of scrutinization. And when I can be on  
15 their side, that also reassures me that I must be going in  
16 the right direction in terms of my understanding. So, I will  
17 be supporting this, and supporting the staff recommendation.

18 COMMISSIONER WELLINGTON: Well, I would like to make a  
19 motion to not support the staff recommendation, and in doing  
20 so I would say that I think it is important to construe the  
21 master plan as being internally consistent with itself. And  
22 I think to construe the part that says deny private use of  
23 alternative individual community systems as opening the door  
24 to anything that is now not considered an alternative

1 individual system is not consistent, because it started off  
2 saying support of a rural sanitation policy that did not,  
3 does not encourage development within the critical mass of  
4 active farmland. And then as we've discussed in detail on  
5 page 17 and 18, limits the perk policy to the septic system.  
6 It makes that quite clear. And then it says deny all the  
7 others. And that has not been changed in the 25 years, and  
8 if it is changed, as we've learned, we're not talking about  
9 minor changes here, we can't be relying on the couple of  
10 times we approved 2 or 3 houses on sand mound, when we see  
11 what we could have had the last time in opening the door to  
12 a much, much greater density to 1 to 25. In order, if we  
13 want to keep the same number of houses as suggested by this  
14 plan, in order to get to a density we have to, in using sand  
15 mounds because they, they allow so many more units, we'll  
16 have to go closer to 1 to 50 and we don't have that now. So  
17 this will open up the door to the, the end of the Ag  
18 Reserve, as we know it. So, I would move that we do not  
19 approve the staff recommendation.

20 CHAIRMAN BERLAGE: Well, as I said earlier I view this as  
21 not a slippery slope, but a floodgate. This is not a matter  
22 of detail, or a matter of technicality. But I have enormous  
23 respect for the opinions of my colleagues, which apparently  
24 differ in the interpretation of the master plan. I do not

1 think that this is a road we want to go down, because it  
2 really threatens the core of what the agricultural reserve  
3 is, is meant to be, and is meant to preserve. I'll second  
4 the motion. If there is no further discussion, the motion is  
5 to deny the preliminary plan. All in favor say aye.

6 COMMISSIONER ROBINSON: I'd like to speak to the motion.

7 CHAIRMAN BERLAGE: You'd like to speak to the motion,  
8 okay.

9 COMMISSIONER ROBINSON: Yes. I agree with neither of the  
10 two sides that we've heard from so far. And I agree with, I  
11 don't agree with them completely and I don't agree with  
12 them, disagree with them completely. This is beginning to  
13 sound like a current Supreme Court opinion, where you have  
14 concurring opinions, dissenting opinions, and, all right,  
15 where do I start?

16 CHAIRMAN BERLAGE: You need a decision before we can have  
17 an opinion.

18 COMMISSIONER ROBINSON: Where do I start? Okay, first of  
19 all let's just, I want to clarify for the record what can be  
20 done in this zone? Well residential you've got, you know 1,  
21 2, 3, 4, 5, 6, 7, 8, 9, at least 9 different types of  
22 residential uses that don't have anything to do with  
23 farming, or they're incidental to farming. So, we're doing a  
24 lot of things in the Ag Reserve that aren't just houses for

1 farmers. I mean that's just absolutely clear. Then on page  
2 30, we say significantly the significance of open space as a  
3 result of large-lot residential cluster development cannot  
4 be underestimated. These open space areas are vital to  
5 buffering the agricultural preservation areas and it can  
6 also provide lease-back arrangements for interested farmers.  
7 I've had a discussion with Mr. Harris on that point before.  
8 Lease-back areas for interested farmers. That's Thompson  
9 farm, I know that there are people in room that are  
10 appealing it, but it's pretty clear that the master plan  
11 contemplates that you can have big lots and small lots, and  
12 you can put smaller lots together so that you can have more  
13 big lots, or intermediate lots that are more suitable for  
14 farming. So, there's not much doubt that that's what this  
15 plan does. And it preserves a lot of forest as well.

16 COMMISSIONER BRYANT: I can't say the suspense, please.

17 COMMISSIONER ROBINSON: Well, since you mildly insulted me  
18 before, maybe I'll string this one out. All right, now we  
19 have the language that says back on page 59 through 62, deny  
20 the use of private alternative community sewage systems in  
21 all areas designated for dah, dah, dah, dah, dah, but  
22 study the possibility of alternative and individual  
23 community systems. So it says on one hand, deny it. On the  
24 other hand it says study it. So, there is not an absolute



1 prohibition of alternative systems, because the master plan  
2 in two juxtaposing sentences contemplates we're denying  
3 it, and then we're going to study it. Well, we've studied  
4 it, and the real issue for me is going back to box 17, it  
5 says yeah you're going to get these alternative systems out  
6 here, that's because you're going to develop a  
7 comprehensive public policy regarding the private use of  
8 alternative individual or community sewage systems outside  
9 the sewer envelope. Unfortunately, we've never developed the  
10 comprehensive public policy, but I'm not quite in the  
11 position as a Commissioner to uphold, to hold up this  
12 application because we haven't developed the comprehensive  
13 public policy. Now, this proposal goes one house for every  
14 47 acres. That's twice, almost one-half, you've cut it in  
15 half in terms of what's allowed under the zone, you've put a  
16 lot of land in the reservation-type of situation that we've  
17 discussed. And for me it's a matter of the Board's judgment.  
18 We're not going to, I will never give you carte blanche to  
19 come in here with septic system, non-traditional septic  
20 systems, in the lay sense, not the legal sense that  
21 Commissioner Perdue. If you come in here with sand mounds as  
22 your last proposal, if you come in here with sand mounds for  
23 Thompson Farm, I'm not going to vote for it, because I think  
24 that uses the sand mound technology in a way that doesn't

1 carry out the proposal of not getting to the maximum density  
2 of the zone, and doesn't adequately address the agricultural  
3 purposes of the zone. I'm prepared to use the sand mound  
4 technology where it's clearly carrying out the broader  
5 purposes of the zone. This proposal carries out the broader  
6 purposes of the zone. I know that there are people who like  
7 to have no development in the Ag Reserve, they'd like to  
8 have it all agriculture, they'd like to have it non-  
9 residential. Or only residential where it's 25 acres and a  
10 couple of horses. But that's not what the zone is about. I  
11 do not agree with the staff reasoning on the interpretation  
12 of the sand mound technology, I think it's dead wrong, and  
13 with all due respect to Commissioner Perdue, I think her  
14 interpretation is wrong, history is very important,  
15 particularly when you've got what the plan contemplates. But  
16 the plan did contemplate this technology was going to come  
17 along. What the plan clearly also contemplates is that it's  
18 not carte blanche to go out and develop 1 house for every 25  
19 acres in this area west of Seneca Creek, which is entitled  
20 to a higher level of protection. The plan clearly  
21 contemplates that. So, I can accept the plan for the result,  
22 with reluctance, and I'll come back to that point in a  
23 moment. I can't get accept the staff's reasoning. Sorry  
24 about that. Did I hear some references to politics? Not that

1 the Chairman would not, wouldn't know anything about that.

2 COMMISSIONER BRYANT: No, that was calling the question.

3 COMMISSIONER ROBINSON: Anyway, that's my position, I  
4 accept the plan as presented. I don't, do not accept the  
5 reasoning of my two colleagues who apparently support the  
6 plan. Also I don't accept the staff reasoning. I accept the  
7 results with reluctance. But I'm not prepared to stand here  
8 and just say no, because I don't think we can do that as a  
9 matter of the structure of the master plan, or as a matter  
10 of constitutional law. I prepare, prefer a flexible strategy  
11 based on defensive depth and counter attack as opposed to  
12 sitting in the trenches the way two of my colleagues want  
13 to, so, the plan from my point of view, the plan for its  
14 substance would be approved.

15 COMMISSIONER WELLINGTON: Well, this was not a lightning  
16 attack though.

17 COMMISSIONER ROBINSON: No, but Mr. Harris unfortunately  
18 has the initiative and I don't.

19 CHAIRMAN BERLAGE: We're voting on Commissioner  
20 Wellington's motion to deny the preliminary plan. All in  
21 favor say aye.

22 CHAIRMAN BERLAGE AND COMMISSIONER WELLINGTON: AYE.

23 CHAIRMAN BERLAGE: Opposed.

24 VICE CHAIR PERDUE AND COMMISSIONERS BRYANT AND ROBINSON:

1 NAY.

2 CHAIRMAN BERLAGE: Motion fails.

3 COMMISSIONER BRYANT: Mr. Chair, I move approval of the  
4 staff recommendation.

5 VICE CHAIR PERDUE: Second.

6 COMMISSIONER ROBINSON: I will second that with

7 CHAIRMAN BERLAGE: Commissioner Perdue already seconded  
8 it.

9 COMMISSIONER ROBINSON: All right, I, there will not be  
10 support for that motion as it stands because I'm not  
11 accepting the staff reasoning, I will accept the motion that  
12 says the, that the

13 COMMISSIONER BRYANT: Why don't you make a motion?

14 COMMISSIONER ROBINSON: Mr. Chairman, I move that  
15 \_\_\_\_\_.

16 CHAIRMAN BERLAGE: Are you withdrawing your motion, Mr.  
17 Bryant?

18 COMMISSIONER BRYANT: I withdraw my motion.

19 CHAIRMAN BERLAGE: Secunder agrees? All right, no motion  
20 on the table.

21 COMMISSIONER ROBINSON: I move that we approve, that we  
22 approve the subdivision plan, preliminary plan, excuse me,  
23 as submitted, subject to the conditions recommended by the  
24 staff, and proffered by the applicant, including that

1 relating to, as they have explained, preserving 300 acres  
2 through an agricultural preservation of some kind.

3 CHAIRMAN BERLAGE: Is there a second?

4 COMMISSIONER BRYANT: Second.

5 CHAIRMAN BERLAGE: There is a second. Any discussion? All  
6 in favor please say Aye.

7 VICE CHAIR PERDUE AND COMMISSIONERS BRYANT AND ROBINSON:  
8 AYE.

9 CHAIRMAN BERLAGE: Opposed?

10 CHAIRMAN BERLAGE AND COMMISSIONER WELLINGTON: NAY.

11 CHAIRMAN BERLAGE: By vote of 3 to 2, that motion carries,  
12 and the preliminary plan is approved.

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14 CERTIFICATION

15  
16 This is to certify that the attached proceedings before the  
17 Maryland-National Capital Park and Planning Commission,  
18 Montgomery County Planning Board, in the matter of  
19 Preliminary Plan No. 1-05029 - Stoney Springs, held in the  
20 auditorium at 8787 Georgia Avenue, Silver Spring, Maryland,  
21 on Thursday, March 17, 2005, were held as herein appears,  
22 and that this is a transcript from the audiotape.

23  
24  
  
Ellyn Dye  
Technical Writer

January 17, 2006

Derick Berlage, Esq.  
Chairman  
Montgomery County Planning Board  
8787 Georgia Avenue  
Silver Spring, MD 20910

Re: Stoney Springs (Preliminary Plan No. 1-05029) - Request for Reconsideration

Dear Chairman Berlage:

We represent Winchester Homes, the Applicant in this proceeding. The purpose of this letter is to respond to a Request for Reconsideration Memorandum submitted December 28, 2005 by Montgomery Countryside Alliance, F.A.R.M., Theresa Cummings, David Hoerauf, Larry Schaudies and Sheila Cochran. The subject of the Request for Reconsideration is the Planning Board's decision, mailed December 20, 2005, approving this Preliminary Plan for 14 lots and 1 outlot on the 724 acre tract that was the subject of this Application.

### ARGUMENTS IN RESPONSE TO REQUEST FOR RECONSIDERATION

The Planning Board's Rules of Procedure provide very limited circumstances for reconsideration of Board decisions. The Board may only review a request to reconsider on the following grounds:

- (1) a clear showing that the action of the Board did not conform to relevant law or its rules of procedures; 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 held two hearings on this matter (December 9, 2004 and March 17, 2005). The arguments raised in the Request for Reconsideration are the same arguments advanced by opposition witnesses at both of those hearings. In approving the Application, the Planning Board rejected those arguments and found that the Application meets the requirements of the Subdivision Regulations. Having failed to show previously that such an action "did not conform to relevant law or its rules of procedure" the Petitioners have necessarily failed now in making a "clear showing" to the contrary based on the even

higher burden of proof required for reconsideration. Similarly, they have not alleged any "pertinent and significant information relevant to the Board's decision" that was not presented at the public hearings and, in fact, have not made an allegation that there is any such new information. What remains is the Petitioners' continuing objection to development in the RDT zone using sand mound septic systems even where the development is substantially below the density of 1 unit per 25 acres allowed in the zone. As such, there is no "appropriate compelling basis" to reconsider and reverse the decision.

1. The Functional Master Plan for the Preservation of Agriculture and Rural Open Space in Montgomery County Does Allow This Land Use

Petitioners begin their specific grounds for reconsideration by discussing differences they perceive under the Agriculture and Rural Open Space ("AROS") Master Plan between the Agricultural Reserve and Rural Open Space areas. Although their observation is correct that both areas are included in the AROS Master Plan, their interpretation that single family residential uses are not permitted in the Agricultural Reserve area is wrong. The Agricultural Reserve area under the AROS Plan generally is zoned Rural Density Transfer (RDT); the Rural Open Space areas are generally zoned Rural Cluster (RC). That being said, however, nothing in the RDT zone or the AROS Master Plan prevents property in the Agricultural Reserve, zoned RDT, from being used for single family residential purposes. To the contrary, page 43 of the AROS Master Plan notes that "the TDR program is an optional, voluntary program; a landowner can still develop under the Rural Density Transfer Zone (RDT) if he so chooses. The base density of this zone is one dwelling per 25 acres." The RDT zone, in turn, expressly allows all types of residential uses including "dwelling, one-family detached" up to this density. The RDT zone, and indirectly the AROS Master Plan that provided for its mapping, thus clearly allow the uses and density approved in this Application.

Petitioners argue as well that the Planning Board approved residential uses in the RDT zone and Agricultural Reserve that are not used in conjunction with agriculture, asserting the two must somehow be connected. Nothing in the Zoning Ordinance or the AROS Master Plan requires residential uses in the Agricultural Reserve or the RDT zone to be tied to agricultural uses. Were this the case, hundreds, and perhaps thousands of people living in the Agricultural Reserve, would be doing so in violation of the Zoning Ordinance. This is not the case

2. The Preliminary Plan Does Not Impermissibly Cluster Residential Lots

Again, Petitioners embark on a distinction between the RC and RDT zones in an effort to imply that "clustering" lots in the RDT zone is not allowed. The RC zone does expressly reference clustering in the name of the zone and, under Section 59-C-9.5, allows an optional development program rather than the 5 acre minimum lots size normally required in the RC zone. That, however, does not preclude "clustering" lots in the RDT zone. To the contrary, the RDT zone, expressly states in its development standards section that the minimum lot size is 40,000 square feet. Even though the maximum density in the RDT zone is 1 unit per 25 acres, lots can be as small as 40,000 square feet so long as the maximum density is not exceeded. Although this is not Optional Method "clustering" as under the RC zone, it clearly is permitted and is a practice that has been followed since the RDT zone was first established. The subject Application has a variety of lot sizes with the smallest being 3.5 acres. As such, it clearly conforms with the development standards of the RDT zone.

3. Sand Mounds Are Permitted Septic Systems

The real crux of the Petitioners' objection concerns the use of sand mound septic systems. They made this clear at the first hearing, at the second hearing, and in subsequent efforts to have the County change its septic regulations and sewer policies.<sup>1</sup> The record in this case is replete, however, with testimony from County agencies and the Park and Planning Commission's own Staff regarding the County's standing policy and practice to allow sand mounds and Applicant provided copies of regulations, resolutions and formal County policies documenting this practice. In this case, as well as others, the Planning Board has correctly approved lots in the RDT zone based on sand mound septic systems.<sup>2</sup>

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4. The Planning Board Did Not Impermissibly Delegate Its Authority Regarding the Rustic Roads Functional Master Plan

Several years ago, the County adopted a Rustic Roads Functional Master Plan that provides general guidance for development along rustic roads. Like all master plans, it is a guideline, not a strict regulatory document. Given its extremely broad and generic wording, it is, perhaps, one of the most flexible master plans. In this case, the Board concluded that the approved development complies with the broad guidelines of that Master Plan. As an additional condition, the Planning Board did require the Applicant to submit a house location and landscaping plan to Staff for review and approval prior to issuance of the building permits, a customary practice in development approvals. This is not an impermissible delegation of authority.

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<sup>1</sup> See, Expedited Bill 38-05, Sewage Disposal – Septic Systems – Temporary Prohibition, introduced November 8, 2005.

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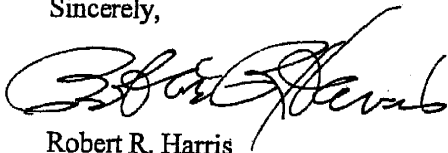
5. The Opinion Was Prepared Properly

Petitioners "have concerns" over the manner in which the Opinion was drafted but do not assert that this is a basis for reconsideration. Although the Planning Board has now changed its procedures regarding the preparation of Opinions, it has been the practice for many years for parties to prepare draft Opinions for review by Planning Staff and the General Counsel's office and adoption by the Planning Board. In this case, we did prepare a draft which the Associate General Counsel then used as the basis for her preparation of a proposed Opinion for the Board in order to provide additional reliability with respect to the Opinion, the Associate General Counsel then circulated her draft Opinion and sought comment on it from all parties of record, as well as many other individuals who were not parties of record. It is our understanding that no such comments were received and her draft Opinion was then adopted by the Planning Board on December 15, 2005.

CONCLUSION

As reflected in the Board's Opinion, the approval of this project represents a publicly desirable balance between competing objectives. Although the RDT zone allows residential development at a density of one unit for each 25 acres, this Application was approved at approximately half that density. By doing so, the Applicant has been able to preserve a substantial portion of the property that is forested or along stream valleys as Legacy Open Space without the County having to purchase those lands. It also has resulted in the preservation of substantial farmland and has provided the Applicant with the basis to transfer all remaining TDRs from the property ensuring protection of the land for the future. The Board was correct in its decision approving the Application.

Sincerely,



Robert R. Harris

cc: Michelle Rosenfeld, Esq.  
Michael Conley  
Sylke Knuppel

# Holland Knight

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**FROM:**  
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TOTAL PAGES (Including Cover Sheet) 8

**FOR THE RECORD:**  
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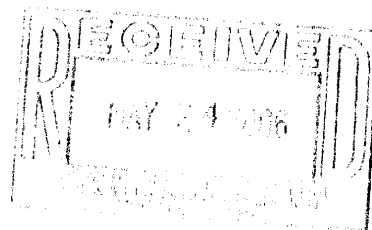
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**MESSAGE:**



May 24, 2006

VIA FACSIMILE AND FIRST CLASS MAIL

Derick Berlage, Esq.  
Chairman  
Montgomery County Planning Board  
8787 Georgia Avenue  
Silver Spring, MD 20910

Re: Stoney Springs (Preliminary Plan No. 1-05029) – Request for Reconsideration

Dear Chairman Berlage:

We represent Winchester Homes, Inc., the Applicant in this proceeding. The Planning Board approved this Plan on March 17, 2005 and mailed the written decision on December 20, 2005. On December 28, 2005, various parties in opposition filed a Request for Reconsideration with the Montgomery County Planning Board. On January 17, 2006, we responded to that Request but the Planning Board has not acted to grant or deny the Request for Reconsideration. This matter now will be brought to the Planning Board on June 1, 2006 and we want to supplement our opposition to the requested reconsideration.

As reflected in the enclosed copy of our January 17, 2006 opposition, the Request does not meet the requirements for reconsideration under the Planning Board's Rules of Procedure or under universal standards for reconsidering administrative agency actions. The arguments presented in the Request for Reconsideration are recitations of the same arguments presented to the Planning Board at both prior hearings. The majority of the Planning Board rejected those arguments then and we believe that vote should be sustained now through the denial of the Request for Reconsideration. This is particularly true now that more than one year has passed since the Planning Board's vote in March, 2005 and it has been nearly six months since release of the written decision. During that time, the opposition parties have submitted a Petition for Review in the Circuit Court of Montgomery County and we are prepared to defend the Planning Board's decision in that forum.

In addition to the reasons recited in our January 17, 2006 opposition, subsequent actions by the Montgomery County Circuit Court, the Montgomery County Council and the Planning Board have all served to reaffirm the propriety of the Planning Board's decision approving this subdivision. More specifically, the Circuit Court recently affirmed the Planning Board's approval of another RDT Zone subdivision known as the Thompson Farm (Preliminary Plan No.

1-97098), thereby allowing 17 houses in the Agricultural Reserve on lots ranging from 4 to 77 acres. As such, it rejected some of the RDT subdivision arguments raised by the opposition in the present case. That case thus follows a variety of other subdivision approvals in the Agricultural Reserve in which lots varying in size from 1 acre to 100 acres or more have been approved.

Additionally, in conjunction with legislation initially considered last fall by the Montgomery County Council (Bill 38-05-Sewage Disposal), the County has confirmed that subdivision plans have been approved on multiple occasions in the Agricultural Reserve where the lots have septic systems using sand mounds. More specifically, the Montgomery County Department of Permitting Services reaffirmed the propriety of using sand mounds in Montgomery County, including in the Agricultural Reserve, in a report presented to the County Council in March. The report indicates that prior to the subject Application, there have been 14 subdivision applications approved with sand mounds in portions of the Agricultural Reserve zoned RDT. Such applications have been approved regularly for more than 10 years when the Council affirmed the use of sand mounds.

Additionally, during the County Council's review of the proposed legislation, the County Council was informed that as recently as March, 2000, the Montgomery County Planning Board called for even more flexibility in septic regulations in the Agricultural Reserve and concluded that sand mound systems should be considered the septic system of first choice in the RDT area because they "would be extremely helpful in allowing for more creatively designed subdivisions which could be far more protective of both rural open spaces and our most fertile farmlands." These recommendations followed comments by then Planning Board Chairman Hussmann to then Council President Leggett endorsing flexibility in septic regulations in the Agricultural Reserve, including the use of sand mounds. As a result of this testimony and other comments made to the County Council during the hearing and worksessions on Bill 38-05, the County Council has not proceeded with Bill 38-05, effectively reaffirming its determination in 1994 that sand mounds are permissible septic systems in the Agricultural Reserve.

Finally, Winchester Homes has taken actions following the Preliminary Plan approval and in reliance on it. Winchester Homes signed a contract to purchase this property in January, 2003 providing for a three year period to obtain all of the necessary approvals before they would have to complete the purchase. The approval process took much longer than expected including a wait of nine months to receive the written opinion. During that time, they had to post a large, non-refundable deposit and invest significant funds to obtain the various approvals needed to develop the property. In order to avoid losing more than a million dollars that it had invested already, Winchester had to proceed to settlement on the property on January 9, 2006. The purchase price it had to pay, together with the pursuit costs, totals more than 7 million dollars. Since then, Winchester also has proceeded to dedicate easements on the property as required by the subdivision approval and has proceeded to preserve an historic structure on the property, again as required by the subdivision approval. In every respect, Winchester Homes has proceeded in good faith reliance on the Planning Board's approval. We understand that the Montgomery County Circuit Court, in theory, could overturn the Planning Board's approval but we believe the record in this case is solid with respect to the Planning Board's findings and we are confident that

Derek Berlage, Esq.  
May 24, 2006  
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the Circuit Court will affirm that approval. Winchester Homes should not be deprived of its justifiable reliance on the earlier approval by approval of a request for reconsideration that itself restates the same arguments made to the Planning Board previously and rejected not only in this proceeding but in others before it.

Cordially yours,

*Robert R. Harris / DRJ*

Robert R. Harris

Enclosure

cc: With enclosure  
Tariq El-Baba, Esq  
David Fischer, Esq.  
Mike Conley  
Sylke Knuppel

# 3805170\_v1

# Holland+Knight

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Robert R. Harris  
301 215 6607  
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January 17, 2006

Derick Berlage, Esq.  
Chairman  
Montgomery County Planning Board  
8787 Georgia Avenue  
Silver Spring, MD 20910

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Chairman Berlage

January 17, 2006

Page 2

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Chairman Berlage  
January 17, 2006  
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Chairman Berlage  
January 17, 2006  
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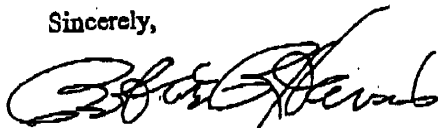
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CONCLUSION

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Sincerely,



Robert R. Harris

cc: Michelle Rosenfeld, Esq.  
Michael Conley  
Sylke Knuppel

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PETITION OF LARRY SCHAUDIES, ET. AL. )  
FOR JUDICIAL REVIEW OF )  
THE DECISION OF THE )  
MONTGOMERY COUNTY PLANNING )  
BOARD OF MARYLAND-NATIONAL )  
CAPITAL PARK AND PLANNING COMMISSION )  
IN THE CASE OF PRELIMINARY PLAN )  
NO: 1-05029, STONEY SPRINGS )  
\*\*\*\*\* )

Case No. 268477-V

*Amended* ORDER

Upon consideration of Petitioners' and Respondent's Joint Motion to Remand and Stay Noticing and Filing Schedule, and Intervenor Winchester Homes, Inc.'s Opposition, thereto, and oral argument on May 5, 2006, it is on this 5<sup>th</sup> day of May, 2006, by the Circuit Court of Montgomery County

ORDERED, that this matter will be STAYED until June 2, 2006; and it is further

ORDERED, that this Court shall retain jurisdiction over this Petition and that the Petition be REMANDED to the Montgomery County Planning Board for the limited purpose of considering and taking action on Petitioners' request for reconsideration of the Board's approval of Preliminary Plan No. 1-05029, Stoney Springs ("Reconsideration Request"); and it is further

ORDERED, that prior to June 2, 2006, the Planning Board shall decide whether to grant or deny the Reconsideration Request and, if the Board grants the request, to set a hearing date for the reconsideration of Preliminary Plan No. 1-05029 ("Preliminary Plan"); and it is further

**ENTERED**

MAY 16 2006

Clerk of the Circuit Court  
Montgomery County, Md.

**ATTACHMENT SEVEN**

ORDERED, that this matter is set for a scheduling and status conference at 9:30 a.m. on  
June 2, 2006.

  
JUDGE MICHAEL D. MASON

# 3786735\_v1

**ENTERED**  
MAY 16 2006  
Clerk of the Circuit Court  
Montgomery County, Md.