



**MONTGOMERY COUNTY PLANNING BOARD**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

**MCPB No. 12-103**  
**Preliminary Plan No. 120110050**  
**Ashton Property**  
**Date of Hearing: September 13, 2012**

**NOV 12 2012**

**RESOLUTION**

WHEREAS, under Montgomery County Code Chapter 50, the Montgomery County Planning Board ("Planning Board" or "Board") is vested with the authority to review preliminary plan applications; and

WHEREAS, on November 6, 2010, Gladys B. Brigham Rev. Trust, and Jorge & Manuel Palmerio ("Applicant"), filed an application for approval of a preliminary plan of subdivision of property that would create five lots on 28.58 acres of land in the RC zone, located on the north side of Ashton Road (MD 108), approximately 3,250 feet east of the intersection with Mink Hollow Road ("Subject Property"), in the Sandy Spring – Ashton Master Plan ("Master Plan") area; and

WHEREAS, Applicant's preliminary plan application was designated Preliminary Plan No. 120110050, Ashton Property ("Preliminary Plan" or "Application"); and

WHEREAS, following review and analysis of the Application by Planning Board staff ("Staff") and other governmental agencies, Staff issued a memorandum to the Planning Board, dated August 31, 2012, setting forth its analysis, and recommendation for approval of the Application, subject to certain conditions ("Staff Report"); and

WHEREAS, on September 13, 2012, the Planning Board held a public hearing on the Application, and at the hearing the Planning Board heard testimony and received evidence submitted for the record on the Application; and

WHEREAS, on September 13, 2012, the Planning Board voted to approve the Application subject to certain conditions, on motion of Commissioner Dreyfuss, seconded by Commissioner Anderson, with a vote of 4-0; Commissioners Anderson, Carrier, Dreyfuss, and Wells-Harley voting in favor, with Commissioner Presley absent from the hearing.

NOW, THEREFORE, BE IT RESOLVED THAT, the Planning Board approves Preliminary Plan No. 120110050 to create five lots on the Subject Property, subject to the following conditions:<sup>1</sup>

<sup>1</sup> For the purpose of these conditions, the term "Applicant" shall also mean the developer, the owner or any successor(s) in interest to the terms of this approval.

Approved as to  
Legal Sufficiency:

10/17/12

8787 Georgia Avenue, Montgomery, Maryland 20910 Chairman's Office: 301.495.4605 Fax: 301.495.1320

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1. Approval under this Preliminary Plan is limited to five (5) lots.
2. The Applicant must comply with the preliminary forest conservation plan approved as part of this Preliminary Plan, subject to the following conditions:
  - a. Prior to issuance of a sediment and erosion control permit, the Applicant must secure approval of a final forest conservation plan that is consistent with the approved preliminary forest conservation plan.
  - b. The final forest conservation plan must include twenty-one (21) native canopy trees each with a minimum 3 inch diameter at breast height (DBH) (or native canopy trees with a 64-inch cumulative DBH, individual trees with a minimum size of 3 inches DBH) as mitigation for the loss of specimen trees.
  - c. The record plat(s) must reflect Category I conservation easements over all areas of forest retention and environmental buffers. With regard to Outlot A, M-NCPPC's standard Category I conservation easement document shall be modified as approved by Staff (the "Modified Category I Easement"), executed by Applicant as the grantor to be expressly subject to, and not prohibit what is permitted by, nor permit that which is prohibited by (collectively, the "Kanstoroom/Mize Agreements"):
    - i. Non-Development Easement recorded in Liber 12851 at folio 209;
    - ii. Non-Development Easement Amendment recorded in Liber 38076 at folio 001;
    - iii. Declaration of Secondary Easement for Construction Entrance recorded in Liber 12851 at folio 199;
    - iv. Irrevocable Ingress and Egress Agreement recorded in Liber 38075 at folio 488;
    - v. Temporary Permission to Use Easement Road dated September 22, 2009, to be recorded immediately prior hereto with Exhibit E referenced therein recorded at Liber 38075 at folio 509;
    - vi. Court Order entered on April 2, 2009 as docket entry 291 in the case captioned as Steven J. Kanstoroom, *et al.* v. Gladys B. Brigham, *et al.*, Consolidated Case No. 282368-V, in the Circuit Court for Montgomery County, Maryland; and
    - vii. Consent Order entered on July 20, 2009 as docket entry 374 in the case captioned as Steven J. Kanstoroom, *et al.* v. Gladys B. Brigham, *et al.*, Consolidated Case No. 282368-V, in the Circuit Court for Montgomery County, Maryland.

- Widening or improvements to the gravel driveway not otherwise permitted under the Kanstoroom/Mize Agreements must first be reviewed and approved by Staff.
- d. The record plat(s) must contain notes that reference the existing gravel driveway within Outlot A, and the right of the Grantee under the Kanstoroom/Mize Agreements to maintain the existing gravel driveway in accordance with the Kanstoroom/Mize Agreements and the Modified Category I Easement.
  - e. The Modified Category I Easement must be recorded in the Montgomery County Land Records prior to the initiation of clearing and grading and the liber and folio reference for the Modified Category I Easement must be referenced on the record plat(s).
  - f. Inspections must occur consistent with the terms of the Modified Category I Easement approved by Staff. Inspections shall only occur after reasonable notice has been provided to Applicant and Applicant is afforded the right to accompany the inspector, except in emergency situations, all as defined within the Modified Category I Easement.
  - g. The final sediment control plan's limits of disturbance must be consistent with final limits of disturbance as shown on the final forest conservation plan as approved by Staff.
  - h. The final forest conservation plan must show locations of permanent signage along a portion of the perimeter of the Modified Category I Easement in locations approved by Staff that do not conflict with the Non-Development Easement or as the Non-Development Easement Amendment described in Condition 2 c. above. The Applicant must install such signage prior to the pre-construction meeting.
3. The Planning Board has accepted the recommendations of the Montgomery County Department of Transportation ("MCDOT") in a letter dated December 22, 2010 and does hereby incorporate them as conditions of the Preliminary Plan approval. Therefore, the Applicant must comply with recommendations as set forth in the letter which may be amended by MCDOT, provided the amendment does not conflict with other conditions of the Preliminary Plan approval.
  4. The Planning Board has accepted the recommendations of the Montgomery County Department of Permitting Services ("MCDPS") Water Resources Section in a letter dated March 7, 2011 and does hereby incorporate them as conditions of the Preliminary Plan approval. Therefore, the Applicant must comply with recommendations as set forth in the letter which may be amended by MCDPS, provided the amendment does not conflict with other conditions of the Preliminary Plan approval.

5. The Planning Board has accepted the recommendations of the Montgomery County Department of Permitting Services ("MCDPS") Well and Septic Section in a letter dated August 21, 2012 and does hereby incorporate them as conditions of the Preliminary Plan approval. Therefore, the Applicant must comply with recommendations as set forth in the letter which may be amended by MCDPS, provided the amendment does not conflict with other conditions of the Preliminary Plan approval.
6. The Planning Board has accepted the recommendations of the Maryland State Highway Administration ("MDSHA") in a letter dated February 12, 2007 and does hereby incorporate them as conditions of the Preliminary Plan approval. Therefore, the Applicant must comply with recommendations as set forth in the letter which may be amended by MDSHA, provided the amendment does not conflict with other conditions of the Preliminary Plan approval.
7. Prior to issuance of MDSHA access permits, the Applicant must comply with the provisions for access and improvements required by MDSHA.
8. The Planning Board has accepted the recommendations of the Montgomery County Department of Fire and Rescue Services ("MCFRS") in a letter dated December 5, 2011 and does hereby incorporate them as conditions of the Preliminary Plan approval. Therefore, the Applicant must comply with recommendations as set forth in the letter which may be amended by MCFRS, provided the amendment does not conflict with other conditions of the Preliminary Plan approval.
9. The Applicant must dedicate the road right-of-way in accordance with the Sandy Spring – Ashton Master Plan and as shown on the certified Preliminary Plan. The dedicated area must be shown on the record plat(s).
10. Prior to recordation of the initial record plat(s), the Applicant must make a pro rata contribution towards the MCDOT CIP Project No. 507596, Annual Bikeway Program for the recommended 8 foot wide shared use path along the Subject Property frontage with Ashton Road.
11. The record plat(s) must show a common ingress/egress/utility easement for the shared driveway.
12. The record plat(s) must identify any area that is under Homeowners Association ownership.
13. The record plat(s) must reflect the easement area required for the MCFRS water storage cistern.
14. The record plat(s) must contain the following note: "The land contained herein is within an approved cluster development and further subdivision or resubdivision is not permitted after the Property is developed."
15. The following note must be shown on the certified Preliminary Plan: "Unless specifically noted on this plan drawing or as a condition of the Preliminary Plan approval, the building footprints and driveways shown on

this plan drawing are illustrative. The final location of these features will be determined at the time of building permit.”

16. The Adequate Public Facilities Review for this preliminary plan will remain valid for eighty-five (85) months from the date of mailing of the Planning Board Resolution.
17. The record plat(s) must reference all other necessary easements, including the Kanstoroom/Mize Agreements.

BE IT FURTHER RESOLVED, that, having considered the recommendations and findings of its Staff as presented at the hearing and as set forth in the Staff Report, which the Board hereby adopts and incorporates by reference (except as modified herein), and upon consideration of the entire record, the Planning Board FINDS, with the conditions of approval, that:

1. *The Preliminary Plan substantially conforms to the Master Plan.*

The Subject Property is located in the Rural/Open Space Area as defined by the Master Plan which recommends a “low-density land use pattern to protect farmland and other rural open space.” The Master Plan acknowledges that this area is not within the critical mass of farm land, such as that found in the Olney area. The Master Plan envisions the continuation of small farms with some residential development. The Master Plan also does not recommend that public sewer be extended into the Rural/Open Space Area and does not recommend that the density be any lower than one unit per five acres. Further, the Master Plan recognizes that the use of the clustering provision can provide for 60 percent of a property to remain available for farming, private recreation, or other uses allowed in the Rural Cluster zone.

The Master Plan also recommends that MD 108 maintain its rural character. Widening beyond two lanes, except to provide a third turning lane, is discouraged. An on-road, signed bike path is recommended in the Master Plan for Ashton Road, but this was superseded by the Countywide Bikeway Functional Master Plan to require a shared use, off road bike path.

The Preliminary Plan proposes a low density development of one family detached homes and preservation of open space in conformance with the RC zoning recommended by the Master Plan. The open space will be available for private recreation and will be placed in conservation easements to protect the forest resource. The Preliminary Plan also dedicates additional right-of-way (40 feet from centerline) for Ashton Road (MD 108) in conformance with the Master Plan recommendations, but does not require widening beyond the two lane cross section. As discussed below, the Planning Board, under §50-38(a)(1) of the Subdivision Regulations, granted a waiver of §50-24(b) that would have

otherwise required construction of the shared use path prescribed by the Countywide Bikeway Functional Plan.

- 2. Public facilities will be adequate to support and service the area of the approved subdivision.*

#### Roads and Transportation Facilities

The approved lots do not generate 30 or more vehicle trips during the morning or evening peak-hours, and therefore, the Application is not subject to a Local Area Transportation Review ("LATR"). The Policy Area Mobility Requirement ("PAMR") guidelines for the Patuxent policy area where the Subject Property is located, do not require mitigation of any new peak hour trips. The Application satisfies LATR and PAMR requirements.

The existing driveway access point and the shared driveway as indicated on the Preliminary Plan have both been analyzed for safe sight distance and meet all MDSHA requirements. The design of the driveway aprons on to Ashton Road meet MDSHA design standards.

The Applicant must dedicate 0.17 acres of land for the Ashton Road right of way in conformance with the Master Plan. The dedication will accommodate a suitable area within the right-of-way along the Subject Property frontage for the Class I shared use path (SP-37) recommended in the Countywide Bikeway Functional Master Plan.

#### Other Public Facilities and Services

The lots will be served by approved on-site well and septic. All utilities, including Verizon and BG&E have indicated that local service is available and adequate for the Preliminary Plan. MCFRS reviewed the Application and approved it for fire and emergency apparatus access. An easement will be established for a water supply cistern to be placed at the driveway entrance. Other public facilities and services, such as schools, police stations, firehouses and health services are currently operating within the standards set by the Subdivision Staging Policy in effect. The Subject Property is not within a school cluster that is in moratorium or otherwise limited and is therefore, not subject to a School Facilities Payment.

- 3. The size, width, shape, and orientation of the approved lots are appropriate for the location of the subdivision.*

The cluster development meets the Master Plan goals to provide low density residential development while protecting open space, forest and environmentally sensitive areas. Further, the lots are designed in such a way to meet all other requirements of the Subdivision Regulations, including access, frontage,



dedication for public uses, adequacy of public facilities and conformance to Master Plan recommendations.

The lots were reviewed for compliance with the dimensional requirements for the RC zone as specified in the Zoning Ordinance. The lots will meet all the dimensional requirements for area, frontage, width, and setbacks in that zone.

4. *The Application satisfies all the applicable requirements of the Forest Conservation Law, Montgomery County Code, Chapter 22A.*

A. Forest Conservation

The preliminary forest conservation plan shows clearing of 8.35 acres of the 25.49 acres of forest on the Subject Property. The remaining 17.14 acres of forest, including 1.75 acres of forested stream valley buffer, is to be protected in a Category I conservation easement, which will also include an additional 0.32 acres of land that is an unforested gravel road. The gravel road is included in order to assure it is not enlarged or relocated within the easement area without Staff or Planning Board approval. No reforestation or afforestation is required because the Application provides a credit of 10.00 acres for retention of forest above the conservation threshold. As a cluster method of development, the Application must comply with Section 22A-12(f) of the Montgomery County code which requires that 25 percent of the net tract, or 7.15 acres of forest be retained. This is being met through the 17.14 acres of forest to be protected in a Category I conservation easement.

B. Forest Conservation Variance

Section 22A-12(b)(3) of the Forest Conservation Law identifies certain individual trees as high priority for retention and protection ("Protected Trees"). Any impact to these Protected Trees, including removal or any disturbance within a Protected Tree's critical root zone ("CRZ"), requires a variance under Section 22A-12(b)(3) ("Variance"). Otherwise such resources must be left in an undisturbed condition.

This Application will require the removal of twenty-six Protected Trees and CRZ impact to six Protected Trees as identified in the Staff Report. In accordance with Section 22A-21(a), the Applicant has requested a Variance and the Board agreed that the Applicant would suffer unwarranted hardship by being denied reasonable and significant use of the Subject Property without the Variance.

The Board made the following findings necessary to grant the Variance:

1. *Granting the Variance will not confer on the Applicant a special privilege that would be denied to other applicants.*

The Subject Property is almost entirely forested and contains numerous large trees located throughout the site. These trees and their CRZs lie within the developable area of the site, and granting the Variance to allow land disturbance within the developable portion of the site is not unique to this Applicant. Removal and impacts to Protected Trees cannot be avoided for any reasonable development to occur.

- 2. The need for the Variance is not based on conditions or circumstances which are the result of the actions by the Applicant;*

The Applicant has prepared and submitted plans which meet all applicable zoning, septic, and forest conservation requirements. The Variance is based upon existing site conditions, including the number and locations of the large trees; not on conditions or circumstances which are a result of the actions by the Applicant.

- 3. The need for the Variance is not based on a condition relating to land or building use, either permitted or non-conforming, on a neighboring property*

The Variance is a result of the existing and proposed site design and layout on the Subject Property, and not as a result of land or building use on a neighboring property.

4. Granting the Variance will not violate State water quality standards or cause measurable degradation in water quality.

The Protected Trees being removed are not within a stream buffer, wetland, or a special protection area. A stormwater management concept has been approved by MCDPS and the project complies with all of the recommendations identified in the Environmental Guidelines for the Patuxent River Primary Management Area.

Mitigation for the Variance should be at a rate that approximates the form and function of the Protected Trees removed. Eighteen of the Protected Trees to be removed are located within the existing forest and their removal is accounted for in the forest clearing calculations. The eight Protected Trees proposed for removal that are located outside of the existing forest are not included in the forest clearing calculations. For the 256 caliper inches of these eight trees removed, the Board requires mitigation of twenty-one native canopy trees with a minimum size of 3" DBH to be planted on-site. No mitigation is required for Protected Trees impacted but retained.



- 5. The Application meets all applicable stormwater management requirements and will provide adequate control of stormwater runoff from the site.*

A Stormwater Management Concept was approved by MCDPS on March 7, 2011, and this finding is based on the determination by MCDPS that the Stormwater Management Concept Plan meets their standards. Stormwater management for the project includes the use of dry wells to catch all rooftop runoff. Non-rooftop disconnections have been approved for paved areas with gentle slopes, and flat bottom grass swales with gabion enhancements have been approved for more steeply sloping paved areas.

- 6. A waiver of §50-24(b) of the Subdivision Regulations pursuant to §50-38(a)(1) is appropriate.*

The Applicant submitted a subdivision waiver request pursuant to §50-38 of the Subdivision Regulations. This section authorizes the Planning Board to grant waivers of any part of the Subdivision Regulations based upon a finding that practical difficulties or unusual circumstances exist which prevent an Applicant from fully complying with the requirements of Chapter 50. The waiver must be the minimum necessary to provide relief from the requirement; not be inconsistent with the objectives of the General Plan; and not be adverse to the public interest.

The Applicant cites practical difficulties and unusual circumstances that prevent full compliance with Section 50-24(b) of the Subdivision Regulations. The construction of an eight foot wide bike path that is identified in the Countywide Bikeways Functional Master Plan (SP-37) would be required of this Applicant.

The Subject Property has approximately 400 feet of frontage on Ashton Road in which the 8 foot wide bike path would be constructed. Ashton Road is an arterial highway with high traffic speeds. The road passes through forest, fields and fenced pastures between Ashton and Howard County. The bike path is planned to eventually extend the 2.5 miles from Ashton town center to the Patuxent River. No part of the bike path has yet been constructed. A terminus of the bike path along the Subject Property frontage could not be located where users would be able to safely continue travelling on the side of the road or within the pavement of the highway. There are no other paths or sidewalks to connect to. The Planning Board agreed that an unsafe condition would be created and that the bike path should be completed as a single project, or that sections of the path should be completed so there are safe termination points to each section where public safety is not compromised. The clearing of forest along this one short section of road frontage would also have a negative impact on the rural highway roadside.

The Board approved the Applicant's proffer to contribute to the County, Annual Bikeway Program, CIP Project (No. 507596), a pro rata share of their bike path construction. The funds collected are used to construct sidewalks and bike paths in areas that have more immediate needs. The Applicant will dedicate land for the ultimate right-of-way of Ashton Road, and that area of dedication is sufficient to allow construction of the bike path in the future.

The Board finds that that there would likely be an unsafe condition created by this short section of bike path. Further, the Board finds that coupled with the proffer, the waiver is the minimum necessary to provide relief from this requirement; that it is not inconsistent with the General Plan; and that granting the waiver is not adverse to the public interest.

BE IT FURTHER RESOLVED, that this Preliminary Plan will remain valid for 60 months from its Initiation Date (as defined in Montgomery County Code Section 50-35(h), as amended) and that prior to the expiration of this validity period, a final record plat(s) for all property delineated on the approved Preliminary Plan must be recorded among the Montgomery County Land Records or a request for an extension must be filed; and

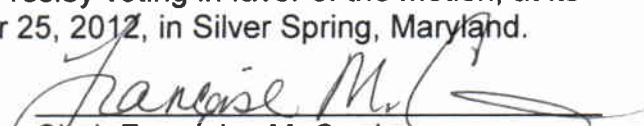
BE IT FURTHER RESOLVED, that this Resolution constitutes the written opinion of the Board in this matter, and the date of this Resolution is NOV 2 2012 (which is the date that this Resolution is mailed to all parties of record); and

BE IT FURTHER RESOLVED, that any party authorized by law to take an administrative appeal must initiate such an appeal within thirty days of the date of this Resolution, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules).

\* \* \* \* \*

**RESOLUTION**

This is to certify that the foregoing is a true and correct copy of a resolution adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission on motion of Commissioner Dreyfuss, seconded by Vice Chair Wells-Harley, with Chair Carrier, Vice Chair Wells-Harley, and Commissioners Anderson, Dreyfuss, and Presley voting in favor of the motion, at its regular meeting held on Thursday, October 25, 2012, in Silver Spring, Maryland.

  
Chair Françoise M. Carrier  
Montgomery County Planning Board