



June 8, 2007

MEMORANDUM

TO: Montgomery County Planning Board

FROM: Debra Yerg Daniel, Associate General Counsel *DYD*
301.495.4646

RE: Form of Rural Open Space Covenant and Easement

I. INTRODUCTION

Section 59-C-9.574(h)(4) of the Montgomery County Zoning Ordinance currently requires that “[a]ll publicly held or privately held land in the rural open space area must be preserved in perpetuity as rural open space by application of an easement or covenant in a recordable form approved by the Planning Board.”¹ In accordance with that provision, legal staff recommends that the Planning Board approve the Form Rural Open Space Easement (“Easement”) for private rural open space and the Form Declaration of Rural Open Space Covenant (“Covenant”) for public rural open space that is attached hereto, respectively, as Attachments Two and Three.

II. RURAL OPEN SPACE RESTRICTIONS

The restrictions on the use of rural open space (“ROS”) in the Rural Neighborhood Cluster zone (“RNC Zone”) may be found in § 59-C-9.572² and restrictions on the management and maintenance of the ROS may be found in Subsections 59-C-9.574(h)(3) and (h)(4).³ All of these restrictions are addressed in the

¹ Attachment One, p. 7 (emphasis added).

² Attachment One, pp. 1-2.

³ Attachment One, p. 6-7.

draft Easement and Covenant.⁴ The only difference between the restrictions in the draft Easement and Covenant is that the Covenant is more restrictive in that it does not allow for certain residential uses that are allowed in ROS under the Zoning Ordinance.⁵ This is in recognition that the Covenant will be placed over parkland dedicated to the Commission, which will not be used for any residential uses not specifically authorized in accordance with the related development plan as required by § 59-C-9.574(h)(4).⁶

III. CONCLUSION

In order to facilitate the post-approval process of optional method development plans involving rural open space in the RNC zone, legal staff recommends that the Planning Board approve the form of the attached Easement and Covenant.

IV. ATTACHMENTS

Attachment One: § 59-C-9.571 through § 59-C-9.574

Attachment Two: Form Rural Open Space Easement

Attachment Three: Form Declaration of Rural Open Space Covenant

⁴ See Attachment Two, pp. 2-3; and Attachment Three, pp. 2-3.

⁵ See Attachment Two, p. 2, Paragraph 5 (the uses listed in Paragraph 5 as allowed in ROS is not similarly permitted in the Covenant, Attachment Three).

⁶ Attachment One, p. 7 (restrictions “prohibit any development or subdivision within the rural open space area not expressly authorized.”)

Chapter 59

Zoning [Note]

Article 59-A. In General. * [Note]

Division 59-A-1. Purpose and Applicability

59-C-9.57. Special regulations for development in the Rural Neighborhood Cluster zone.

59-C-9.571. Purpose.

The cluster method of development is intended to preserve large areas of contiguous rural open space, consistent with the recommendations and guidelines of the applicable master or sector plan. Cluster development is required under both the standard and optional methods of development. Cluster development requires the setting aside of rural open space. Under the optional method of development the maximum development unit density allowed may be increased to accommodate the construction of Moderately Priced Dwelling Units in accordance with Chapter 25A.

59-C-9.572. Rural Open Space

Rural open space is land that is managed, as described in Section 59-C-9.574(g)(3), or is unmanaged, which means that it is returning to its natural state without human intervention. Contiguous rural open space shares an extended boundary with a residential cluster neighborhood. The open space may preserve sensitive natural resources, other sensitive areas and associated habitat.

Recreational facilities in the rural open space are limited to trails and related amenities or other facilities recommended in the master plan. The following classes of uses are not permitted in the rural open space area. The exceptions noted in subsections (d) and (f) are not excluded from this area; they are permitted by right or special exception, as stated in section 59-C-9.3:

- (a) Agricultural-industrial;
- (b) Agricultural-commercial;
- (c) Resource production and extraction;
- (d) Residential, with the following exceptions:
 - a one-family detached dwelling located on a lot, 10 acres or greater in size, that contributes to the overall total of rural open space, and is a logical extension of the existing open space area;
 - accessory apartment that is part of a one-family detached dwelling located on a lot, 10 acres or greater in size, that contributes to the overall total of rural open space;
 - a farm tenant dwelling in existence prior to application of the Rural Neighborhood Cluster zone, or a structure converted to a farm tenant dwelling included as part of a historic site designated in the Historic Master Plan;
 - a one family semidetached dwelling and townhouse as part of a moderately-priced dwelling unit development;
- (e) Commercial; and
- (f) Services, except a home occupation associated with an otherwise permitted residential use.

59-C-9.573. Standard method of development.

(a) The density under the standard method of development must not exceed one dwelling per 5 acres of gross tract area.

(b) In the Rural Neighborhood Cluster zone, rural open space is defined as land contiguous to the periphery of the residential portion of a rural neighborhood which is subject to an instrument assuring its preservation as permanent open space.

(c) The following guidelines are in addition to those provided in section 50-39 of the subdivision regulations and apply to all cluster development in this zone:

(1) The development must be clustered so as to maximize that portion of the tract appropriate for open space, farming or other permissible uses listed in section 59-C-9.52, above.

(2) The cluster development must be designed so as to remain as harmonious as possible with the natural environment, minimizing as much as possible the clearing of trees, grading of earth, disturbing of streams, and other similar dislocations of the natural environment.

(3) Rural open space: A minimum of 60 percent of the property must be reserved for contiguous rural open space, consistent with the recommendations and guidelines set forth in the applicable master or sector plan. All land in the rural open space area must be preserved in perpetuity, either by dedication as parkland or by application of an easement or covenant in a recordable form approved by the Planning Board. The rural open space may be recorded as either:

(A) A parcel for common open space;

(B) An outlot; or

(C) An open space easement on a residential lot, provided that the area is clearly delineated and its reservation as open space is clearly stated on the record plat in the land records of Montgomery County.

(4) No development under the standard method is to be served by public sewer and water unless recommended in the relevant master plan.

59-C-9.574. Optional method of development.

The density of development, including the provision of Moderately Dwelling Units in accordance with Chapter 25A, must not exceed 1.22 dwelling units per gross acre. The density must conform to the recommendations and guidelines of the applicable master or sector plan. In such cases, the following development standards apply:

(a) Minimum area of development: 10 acres, except that the Planning Board may waive this requirement where the property abuts an existing property

developed under the provisions of this section, and the resulting development is a logical extension of the existing development.

(b) **Diversity of Lot Sizes:** Under the optional method, a diversity of lot sizes is required for developments. The Planning Board must evaluate the range of lot sizes provided and insure that a proposed development is compatible with existing development on adjoining properties and consistent with the purpose and intent of the zone.

(c) **Diversity of House Sizes:** The Planning Board should encourage diversity of house sizes where such diversity would be consistent with neighboring communities.

(d) **Development standards:** The standard method requirements of section 59-C-9.4 do not apply:

(i) **Minimum lot area—**4,000 sq.ft. for one-family detached units; 3,500 sq.ft. for one-family semi-detached units.

(ii) **Minimum setback from the street—**15 feet.

(iii) **Yard requirements (in feet).** A side yard, if provided, must be at least 8 feet. For a side or rear yard that abuts a lot that is not developed under the optional method of this section, the setback must be at least equal to that required for the abutting lot, provided that no rear yard is less than 30 feet.

(iv) **Minimum lot width for a one family detached dwelling unit at the existing or proposed street line—**25 feet.

(v) **Maximum building height—**35 feet.

(vi) **Maximum lot coverage for a one family detached dwelling unit—**35 percent.

(vii) **The rear and side yard setbacks for accessory structures must be consistent with the requirements in the R-60 Zone, 5 feet for rear and side yard setbacks and 60 feet from the street.**

(e) **Common open space:** Common open space within the residential neighborhood is required for all development of 10 dwellings or more. Such open space, if provided, must not be applied towards the rural open space

requirement. If provided, common open space should be configured with the following guidelines:

- Common open space is intended for common use by the residents of the neighborhood and may be either located in a central position in the neighborhood bordered by streets and/or building lots; or configured as an open space bordered by streets on all sides and generally intended for a smaller neighborhood. The common open space may contain surface features such as storm water management facilities or limited parking areas.

(f) Lots fronting on private streets. Within the Rural Neighborhood Cluster zone lots may front on a private street if the Planning Board finds, as part of the cluster subdivision plan approval, that the private street:

- (1) provides safe and adequate access;
- (2) has sufficient width to accommodate the dwelling units proposed;
- (3) will better advance the goal of preserving rural open space and the rural character than would a public road;
- (4) has proper drainage.

Each private road must comply with the requirements of subsection 59-C-7.234 of the zoning ordinance and section 50-25(h) of the subdivision regulations pertaining to private roads.

(g) Lots developed under the optional method must be connected to a community water and sewerage system, unless it can be demonstrated at the time of subdivision that a limited number of lots on a private well and septic facility within the cluster will provide a more beneficial subdivision design because of environmental or compatibility reasons.

(h) Rural open space design guidelines.

(1) Rural open space should be a contiguous area and be located and designed to:

(A) Protect rural features and other sensitive areas identified in the applicable master or sector plan;

(B) Maximize common boundaries with rural open space on adjacent tracts where recommended in the applicable master or sector plan, or as otherwise required by the Planning Board.

(2) Rural open space must comprise a sizeable contiguous area must be within a range of 65 percent to 85 percent of the tract area and must be consistent with the recommendations and guidelines of the applicable master plan. When a property includes rights-of-way for roads classified as major highways or freeways, rural open space is calculated on the net tract area by deducting those rights-of-way from the gross area of the property. The Planning Board may approve a minor variation in the master plan-recommended rural open space if the Board finds that the variation would retain both the quality and character of the open space as set forth in the guidelines of the master plan.

(3) Rural open space may be managed and maintained but may be modified to improve its appearance, function or overall condition by using the following techniques:

- (A) Reforestation
- (B) Woodland management
- (C) Meadow management
- (D) Stream bank protection
- (E) Non-structural stormwater best management practices as defined by the most recent edition of the Maryland Stormwater Design Manual adopted for use by Montgomery County.

- The Planning Board may, at its discretion, allow structural stormwater management facilities in the rural open space if the location and appearance of any facility is consistent with the general intent of the RNC zone, and with the policy and guidance of the relevant master plan for use of the open space.

- (F) Wetlands management
- (G) Agricultural management

(4) All publicly held or privately held land in the rural open space area must be preserved in perpetuity as rural open space by application of an easement or covenant in a recordable form approved by the Planning Board. The easement or covenant must restrict uses in the rural open space area to those uses allowed under 59-C-9.572, provide for the management of any natural or agricultural features in accordance with the approved site plan, and prohibit any development or subdivision within the rural open space area not expressly authorized.

A developed lot intended to provide any portion of the rural open space requirement must be a minimum of 10 acres, and a substantial majority of the lot must be encumbered by the instrument regulating the rural open space.

FORM

RURAL OPEN SPACE EASEMENT

THIS RURAL OPEN SPACE EASEMENT (the "Easement") is made this _____ day of _____, 2007, by _____ (the "Grantor") with offices located at _____ to The Maryland-National Capital Park and Planning Commission, a body corporate and politic (the "Grantee" or "M-NCPPC") with offices located at _____.

RECITALS

1. The Grantor owns in fee simple ____ acres, more or less, of certain real property situate, lying and being in the _____ Election District of Montgomery County, Maryland zoned Rural Neighborhood Cluster ("RNC") (the "Property").
2. The Property is shown on the following plats of subdivision to be recorded among the Land Records of Montgomery County, attached hereto and incorporated herein by reference as Exhibit "1" (the "Record Plats"):
3. The Grantor filed and received approval from the Montgomery County Planning Board of the M-NCPPC of Preliminary Plan No. _____ and Site Plan No. _____ (the "Plans") for development of ____ dwelling units on a larger tract of land that includes the Property.
4. The Grantor is obligated pursuant to Section 59-C-9.573 of the Montgomery County Zoning Ordinance 2004, as amended (the "Zoning Ordinance") to burden the Property through granting of a perpetual easement, the terms and conditions of which are provided herein. The specific areas to be encumbered with the Easement are identified on the Record Plats as "Rural Open Space" and shall be referred to in this Easement as the "Easement Areas".

NOW, THEREFORE, in consideration of the mutual covenants, terms, conditions and restrictions set forth in this Easement, and other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Grantor irrevocably grants in perpetuity, this Easement to the Grantee according to the terms and conditions set forth herein.

1. The above Recitals are incorporated into this Easement.
2. This Easement, and any and all covenants contained herein, shall be perpetual and shall touch, concern and run with the land and shall be binding on the Grantor and its successors, assigns and transferees.
3. The grant of this Easement is subject to those uses and improvements located, or to be located, on the Property as shown on the Plans

4. Any and all uses in the Easement Areas must be in compliance with the Plans, and the provisions of the RNC Zone relating to permitted uses in the Rural Open Space under Section 59-C-9.572 of the Zoning Ordinance in effect on the date this Easement is recorded in the Land Records, a copy of which is attached hereto and incorporated by reference as Exhibit “2”. In accordance with Section 59-C-9.572, the following classes of uses are not permitted in the Easement Areas:
 - 4.1. Agricultural – industrial;
 - 4.2. Agricultural – commercial;
 - 4.3. Resource production and extraction;
 - 4.4. Residential;
 - 4.5. Commercial Uses; and
 - 4.6. Services.
5. Notwithstanding the limitations on uses listed in Paragraph 4 above, the following uses are permitted in the Easement Areas in accordance with Section 59-C-9.572 of the Zoning Ordinance:
 - 5.1 A one-family detached dwelling located on a lot, 10 acres or greater in size, that contributes to the overall total of rural open space, and is a logical extension of the existing open space area;
 - 5.2 Accessory apartment that is part of a one-family detached dwelling located on a lot 10 acres or greater in size, that contributes to the overall total of rural open space;
 - 5.3 A farm tenant dwelling in existence prior to application of the RNC zone, or a structure converted to a farm tenant dwelling included as part of a historic site designated in the Historic Master Plan;
 - 5.4 A one-family semidetached dwelling and townhouse as part of a moderately-priced dwelling unit development;
 - 5.5 A home occupation associated with an otherwise permitted residential use.
6. In accordance with Section 59-C-9.574(h)(4) of the Zoning Ordinance attached hereto and incorporated by reference as Exhibit “3”, any natural or agricultural features on the Easement Areas must be managed in accordance with the Plans and any development or subdivision not expressly authorized therein is prohibited.
7. The Property shall be managed in accordance with the requirements of Section 59-C-9.574(h)(3) of the Zoning Ordinance in effect on the date this Easement is recorded in the Land Records, a copy of which is attached hereto and incorporated by reference as

Exhibit “4”. In accordance with Section 59-C-9.574(h)(3), rural open space may be managed and maintained but may be modified to improve its appearance, function or overall condition by using the following techniques:

- 7.1 Reforestation;
 - 7.2 Woodland management;
 - 7.3 Meadow management;
 - 7.4 Stream bank protection;
 - 7.5 Non-structural storm water best management practices as defined by the most recent edition of the Maryland Stormwater Design Manual adopted for use by Montgomery County, Maryland;
 - 7.6 Wetlands management;
 - 7.7 Agricultural management.
8. The terms and provisions of this Easement are severable and in the event that any term or provision of this Easement is deemed invalid or unenforceable for any reason, the remaining terms and provisions hereof shall remain in full force and effect.
 9. The granting of this Easement does not convey to the public the right to enter the Property for any purposes.
 10. This Easement shall be construed and enforced in accordance with the laws of the State of Maryland, and shall be effective upon recordation among the Land Records of Montgomery County, Maryland.

IN WITNESS WHEREOF, the Grantor has set its hand and seal as of the day and year written below its signature.

[SIGNATURE PAGES FOLLOW]

GRANTOR:

By: _____

STATE OF MARYLAND

*

*

to wit:

*

COUNTY OF

I HEREBY CERTIFY that on this ____ day of _____, 2007, before me, a Notary Public in and for the State and County aforesaid, personally appeared _____, known to me (or satisfactorily proven) to be the person whose name is subscribed to the foregoing and annexed instrument and acknowledged that said individual executed the same for the purposes therein contained.

Notary Public

My Commission Expires: _____

[NOTARIAL SEAL]

INFORMATION FOR RECORDING PURPOSES ONLY:

Tax ID Numbers:

No title insurance issued.

After recordation, please return to:

Office of the General Counsel
M-NCPPC
8787 Georgia Avenue
Silver Spring, Maryland 20910

EXHIBIT "1"

RECORD PLATS

EXHIBIT "2"

SECTION 59-C-9.572 OF THE ZONING ORDINANCE

EXHIBIT “3”

SECTION 59-C-9.574(h)(4) OF THE ZONING ORDINANCE

EXHIBIT "4"

SECTION 59-C-9.574(h)(3) OF THE ZONING ORDINANCE

FORM

DECLARATION OF RURAL OPEN SPACE COVENANT

THIS DECLARATION OF RURAL OPEN SPACE CONSERVATION COVENANT (“Covenant”) is made by The Maryland-National Capital Park and Planning Commission, a body corporate and politic (the “Declarant”) on _____, 2007.

RECITALS

1. The Declarant owns approximately ___ acres, more or less, of certain real property situate, lying and being in the _____ Election District of Montgomery County, Maryland, and more particularly described on Exhibit “1”, attached hereto and incorporated herein by reference (the “Property”).
2. The Property is shown on the following plats of subdivision recorded among the Land Records of Montgomery County, attached hereto and incorporated herein by reference as Exhibit “2” (the “Record Plats”):
3. The Property is designated as Rural Open Space located in a Rural Neighborhood Cluster Zone (“RNC Zone”). The intent of the RNC Zone is to, among other things, preserve environmentally sensitive natural resources to the maximum extent possible.
4. Declarant acquired the Property by dedication in accordance with the requirements of the RNC Zone and as a condition of approval of Preliminary Plan No. _____ and Site Plan No. _____ (collectively the “Plans”) for a residential development located adjacent to the Property.
5. The Plans identify the Property as “Rural Open Space” in accordance with the intent and requirements of Section 59-C-9.23.1, Section 59-C-9.572, and Section 59-C-9.574(h) of the Montgomery County Zoning Ordinance (the “Zoning Ordinance”) in effect on the date this Conservation Covenant is recorded in the Land Records.

NOW, THEREFORE, in consideration of the covenants, terms, conditions and restrictions set forth in this Covenant, and other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Declarant irrevocably makes this Covenant according to the terms and conditions set forth herein.

1. The above Recitals are incorporated into this Covenant.
2. This Covenant, and any and all covenants contained herein, shall be perpetual and shall touch, concern and run with the land and shall be binding on the Declarant and its successors, assigns and transferees.

3. The placement of this Covenant is subject to those uses and improvements on the Property as shown on the Plans.
4. Any and all uses on the Property must be in compliance with the Plans, and the uses permitted in the RNC Zone relating to the Rural Open Space under Section 59-C-9.572 of the Zoning Ordinance in effect on the date this Covenant is recorded in the Land Records, a copy of which is attached hereto and incorporated by reference as Exhibit "3". This Covenant imposes limitations and restrictions on the use of the Property. In accordance with Section 59-C-9.572, the following classes of uses are not permitted on the Property:
 - 4.1. Agricultural – industrial;
 - 4.2. Agricultural – commercial;
 - 4.3. Resource production and extraction;
 - 4.4. Residential;
 - 4.5. Commercial Uses; and
 - 4.6 Services.
5. In accordance with Section 59-C-5.72 of the Zoning Ordinance, recreational facilities on the Property are limited to trails and related amenities or other facilities recommended in the applicable master plan.
6. The Property shall be managed in accordance with the requirements of Section 59-C-9.574(h)(3) of the Zoning Ordinance in effect on the date this Covenant is recorded in the Land Records, a copy of which is attached hereto and incorporated by reference as Exhibit "4". In accordance with Section 59-C-9.574(h)(3), rural open space may be managed and maintained but may be modified to improve its appearance, function or overall condition by using the following techniques:
 - 6.1 Reforestation;
 - 6.2 Woodland management;
 - 6.3 Meadow management;
 - 6.4 Stream bank protection;
 - 6.5 Non-structural storm water best management practices as defined by the most recent edition of the Maryland Stormwater Design Manual adopted for use by Montgomery County, Maryland;
 - 6.6 Wetlands management;

6.7 Agricultural management.

7. In accordance with Section 59-C-9.574(h)(4) of the Zoning Ordinance attached hereto and incorporated by reference as Exhibit "5", any natural or agricultural features on the Property must be managed in accordance with the Plans and any development or subdivision not expressly authorized is prohibited.
8. This Covenant shall not be construed to grant any real property interest to any private person or entity, and any rights realized under this Covenant shall be deemed to be contractual.
9. This Covenant may be enforced by any person or entity granted standing, as determined by a court of competent jurisdiction.
10. The terms and provisions of this Covenant are severable and in the event that any term or provision of this Covenant is deemed invalid or unenforceable for any reason, the remaining terms and provisions hereof shall remain in full force and effect.
11. This Covenant shall be construed and enforced in accordance with the laws of the State of Maryland, and shall be effective upon recordation among the Land Records of Montgomery County, Maryland.

IN WITNESS WHEREOF, the Declarant has set its hand and seal as of the day and year written below its signature.

[SIGNATURE PAGES FOLLOW]

DECLARANT:

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Secretary - Treasurer

Executive Director

STATE OF MARYLAND *
 * to wit:
COUNTY OF *

I HEREBY CERTIFY that on this ____ day of _____, 2007, before me, a Notary Public in and for the State and County aforesaid, personally appeared _____, known to me (or satisfactorily proven) to be the person whose name is subscribed to the foregoing and annexed instrument and acknowledged that said individual executed the same for the purposes therein contained.

Notary Public

My Commission Expires: _____

[NOTARIAL SEAL]

INFORMATION FOR RECORDING PURPOSES ONLY:

Tax ID Numbers:

No title insurance issued.

After recordation, please return to:

Office of the General Counsel
M-NCPPC
8787 Georgia Avenue
Silver Spring, Maryland 20910

EXHIBIT "1"

PROPERTY DESCRIPTION

EXHIBIT "2"

RECORD PLATS

EXHIBIT “3”

SECTION 59-C-9.572 OF THE ZONING ORDINANCE

EXHIBIT "4"

SECTION 59-C-9.574(h)(3) OF THE ZONING ORDINANCE

EXHIBIT "5"

SECTION 59-C-9.574(h)(4) OF THE ZONING ORDINANCE