

B. Applicant's Testimony

Sylke Knuppel, Development Manager for the Applicant Winchester Homes, testified that the proposed plan was a revision to the earlier plan and that it incorporated Planning Board comments and suggestions that encouraged the Applicant to reduce the number of lots proposed for the Property and to create larger agricultural parcels. She reminded the Board that during its consideration of the earlier plan the Board had concluded: (1) that sand mound septic systems would be appropriate on the Property; and (2) that use of sand mound systems did not conflict with the Agricultural Master Plan or County regulations. She described the current preliminary plan as reflecting the Board's suggested revisions and noted that the current plan provided for a density of only one-half of the density allowed in the RDT Zone.

Robert Harris, legal counsel for the Applicant, submitted into the record copies of State regulations,<sup>8</sup> a County resolution,<sup>9</sup> and County regulations and reports,<sup>10</sup> that all confirm that under County policy, sand mound septic systems are not considered "alternative or innovative septic systems" and are expressly allowed in the Agricultural Reserve. He stated that the County regulations were adopted specifically to afford landowners in the RDT Zone a reasonable opportunity to develop their properties in the RDT Zone at the zoned density.<sup>11</sup> He explained that the County Resolution, and the related Executive Regulations, were adopted in response to farmers' concerns that there was no clear County policy on the use of sand mound septic systems in the RDT Zone.<sup>12</sup> The adoption of the County policy on the use of sand mound septic systems was to make clear that such septic systems are acceptable in the RDT Zone and the use is not in conflict with the Agricultural Master Plan. Mr. Harris noted that the County has for many years approved sand mound septic systems to support development of

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<sup>8</sup> COMAR 26.04.02 ("State Regulation").

<sup>9</sup> Resolution No. 12-1503, adopted by the County Council on February 22, 1994, approving Executive Regulation 28-93AM, is entitled "On-Site Water and On-Site Sewage Disposal Systems" ("County Resolution").

<sup>10</sup> The County Regulations and Reports include (as an attachment to Resolution No. 12-1503) the Health Department Policy on Mound Systems ("Health Department Policy"), the Executive Regulations (28-93AM) titled "On-Site Water and On-Site Sewage Disposal Systems in Montgomery County", and other correspondence and materials providing background for the adoption of the Resolution 12-1503 and Executive Regulations No. 28-93AM.

<sup>11</sup> Resolution No. 12-1503, ¶ 2.

<sup>12</sup> *Id.*; Health Department Policy, ¶ 1.

properties in the RDT Zone. He further noted that the Board recently approved proposed developments in the RDT Zone that employed those systems.

With specific reference to the proposed preliminary plan, Mr. Harris testified that the Department of Permitting Services, the County agency authorized to approve such plans, has approved the use of sand mounds on the Property. He emphasized that the Planning Board during its consideration of the earlier preliminary plan had encouraged the Applicant to revise the plan to better preserve agricultural and rural open space. He stressed that the revised preliminary plan accomplished that goal. He further testified that: (1) the Agricultural Master Plan and the RDT Zone both allow a density of 1 unit per 25 acres; (2) the RDT Zone allows lots as small as 40,000 square feet; and (3) neither the Agricultural Master Plan or the Zoning Ordinance restrict properties zoned RDT to only agricultural uses. Rather, the Plan specifically allows "a variety of land uses," including residential uses. He stated that the RDT Zone allows up to 28 single-family lots on the Property (a density of 1 unit per 25 acres). He stressed that the Applicant, after careful consideration of the Planning Board comments on the earlier plan, had reduced the number of proposed lots to 15 (a density of 1 unit per 47 acres). In conclusion, Mr. Harris summarized the benefits of the Revised Plan as (1) limiting development on the Subject Property to approximately one-half the allowable density; (2) retaining 90% of the farm parcels;<sup>13</sup> and (3) preserving 300 acres of forest, protected in perpetuity at no cost to the County, under the provisions of the Forest Conservation Law and as recommended by the Legacy Open Space master plan; (4) creating three miles of equestrian trails

In rebuttal, Mr. Harris argued that the Resolution and amended Regulations reflect precisely the policy referenced in the Agricultural Master Plan.<sup>14</sup> He further testified that ninety percent of the farmland on the property is being preserved either in the large parcel, or within lots of 25 acres or greater, which the Agricultural Master Plan establishes as a lot size that will encourage the preservation of agricultural uses. Mr. Harris concluded by noting that this site strikes a balance between the private property rights of the property owner, and the public policy goals of the preservation of agricultural uses, open space, and existing forest.

The Board asked the Applicant what assurances it had to offer to assure that the property would be used in agricultural uses. The Applicant testified that it intends to market the units as "farmette" lots, and has agreed to provide an equestrian trail system through the project, that links with adjoining equestrian trails, and expects that many purchasers will buy their properties for that use, and that it expects the 300-acre parcel will be sold as a farm. The Applicant also confirmed that it will file with the Commission a declaration of intent, required under the Forest Conservation Law, that it intends that

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<sup>13</sup> 353 of the 395 acres currently in agricultural use will be preserved for agricultural use through the lot layout in the Revised Plan.

<sup>14</sup> Agricultural Master Plan p. 17.

the property would be farmed for a period of five years. The Applicant also confirmed that it was going to transfer all of the Transferable Development Rights (TDRs) off of the site, which will ensure that there will be no additional development on the site.

The Applicant, again in response to Board questioning, stated that the intent of the RDT zone is not to guarantee only 100, 200 or 300-acre farms. The Applicant stated that instead that the Agricultural Master Plan contemplated a combination of large farms, and smaller farm properties.

### C. Citizen Testimony

Several witnesses testified in opposition to the proposed plan, including Royce Hanson, former Planning Board Chairman, and Dick Tustian, former Director of M-NCPPC's Department of Park and Planning. Royce Hanson framed the issue before the Planning Board as "whether the Board could find that the proposed subdivision, which uses sand mound septic technology, substantially conforms to the Master Plan". Mr. Hanson testified that the Board should find that the Revised Plan does not conform with the Agricultural Master Plan. Mr. Hanson referenced the Agricultural Master Plan language that disallows "alternative systems." Mr. Hanson opined that sand mound septic systems would have been considered "alternative systems" in 1980 at the time the Master Plan was adopted, and testified that the Board should interpret this language to prohibit the use of sand mound septic systems in the Agricultural Reserve in 2005, because in 1980 sand mounds were "alternative systems," and would not have been allowed, and would have resulted in lower densities than can be achieved through use of those systems.

Mr. Hanson further stated that because the Board should not rely on densities achieved through the use of sand mounds, and that use of sand mounds is contrary to the Agricultural Master Plan, the Board should deny the Revised Plan under Section 50-35(l) of the Montgomery County Subdivision Regulations ("Code") for non-conformance with the Master Plan. Mr. Hanson said that the Revised Plan is inconsistent with the Agricultural Master Plan's objective of sustaining a critical mass of farmland, by limiting its fragmentation, recognizing farmland as a permanent use. Mr. Hanson acknowledged that residential uses are allowed by the Plan, but cited to the Master Plan in support of his position that limited residential and commercial uses are allowed to serve the agricultural community, and are allowed only on a limited basis and consistent with the overarching goal of the preservation of agricultural uses.

Finally, Mr. Hanson testified that the Board should not rely on the County's Resolution and Regulations removing sand mounds from the definition of "alternative systems," asserting that to do so would be a *de facto* transfer of master planning authority from the Planning Board to DPS.

David Fisher, legal counsel to the conservation group For A Rural Montgomery ("FARM") testified on behalf of FARM that it believed the preliminary plan did not

substantially conform to the Agricultural Master Plan. He stated FARM's position that sand mounds should be used in the RDT Zone only for failing septic systems or where necessary to support family farms and agricultural activities. Mr. Fisher testified that septic systems should be used as a tool to limit density on properties governed by the Agricultural Master Plan. Like Mr. Tustian, he testified that the County Regulations and Resolutions that redefine sand mounds to remove them from an "alternative system" definition do not constitute an amendment to the Agricultural Master Plan. He further argued that the Board should apply the recommendations of the Agricultural Master Plan as they would have been interpreted and applied in 1980, notwithstanding the reclassification of the status of sand mounds. Additionally, Mr. Fisher stated that the Board should not rely on prior approval of sand mounds as persuasive in granting approval of the Revised Plan, particularly since this plan relies entirely on sand mounds to support its density.

Mr. Fisher also testified that "smaller, clustered lots" are not sanctioned under the Agricultural Master Plan. He stated that notwithstanding the RDT zone's authorization of lots as small as 40,000 square feet, they should not be allowed because they do not protect or promote agricultural uses, and foster the fragmentation of property in agricultural use. In essence, Mr. Fisher testified that any lots that do not contain agricultural uses should be denied. He also took issue with staff's testimony that these smaller lots are located on non-prime agricultural soils.

Finally, Mr. Fisher testified that the Revised Plan did not comply with the Rustic Roads Master Plan because 5 of the clustered lots would be visible from Mount Nebo Road and would "destroy the scenic vista". He requested that the Planning Board deny the Revised Plan.

Richard Tustian, former Planning Director between 1969 and 1990, testified against the Revised Plan. Mr. Tustian testified that, in his opinion, the primary intent of the Agricultural Master Plan and the RDT Zone was to limit use of land within the planning area to open space and the preservation of farmland. He testified that the Agricultural Master Plan is written to allow residential uses in the Agricultural Reserve "only to the extent that they were necessary to support agriculture." He conceded the RDT Zone allows lots as small as 40,000 square feet but argued that the RDT Zone does not mention "clustering." He emphasized that to preserve agricultural uses requires the preservation of large contiguous areas of open space. He said that the Agricultural Master Plan created three general types of uses: (1) agricultural reserve; (2) rural open space; and (3) rural residential, but only as needed to serve agricultural uses. He testified that the intent of the RDT zone was to exclude all residential uses not needed to support agricultural uses.

In support of this position, Mr. Tustian noted the absence of any reference in the RDT zone to the "clustering" of residential lots. He said that the allowance of a 40,000 lot size was intended solely to allow the construction of residential units to support farming needs. He also testified that the creation of these lots would make it more

difficult actually to farm the lots that have been created for agricultural uses (*i.e.*, those lots 25 acres and larger).

In response to Planning Board questioning, Mr. Tustian testified that a landowner is not entitled to full density on property, just by virtue of the fact that the Zoning Ordinance provides a maximum density. He said that the intent of the Agricultural Master Plan was to limit residential density within the RDT zone, by authorizing only the use of septic fields to support residential development, and that use of sand mounds (or other non-septic technologies) are precluded.

Ginny Barnes testified on behalf of the West Montgomery County Citizens' Association and the Montgomery County group of the Sierra Club. She testified that the sole issue is the use of sand mounds in the critical mass of active farmland. She concurred with Mr. Hansen's testimony that deferral to DPS' definition of "alternative systems" effectively cedes the role of master plan interpretation to DPS. Additionally, she stated that it was known that these properties would not generally "perc" for septic system use, and thus at the time the Agricultural Master Plan was approved it was presumed that reliance of percolation tests would limit densities in the RDT zone.

Nancy Wendt testified on behalf of the Olney Coalition. While acknowledging that the Revised Plan was an improvement over the Prior Plan, she raised three concerns about the Plan. First, she testified that the plan should be denied because it relies on sand mound technology, which she testified is not authorized under the Agricultural Master Plan. She referenced the testimony of December 9 from former County Councilmember Nancy Dacek, which stated that sand mounds were allowed in the RDT zone solely to replace failing systems and to serve agricultural uses, in support of her testimony.

Theresa Cummings, Director of Poplar Springs Animal Sanctuary located on a 430-acre farm on Mount Nebo Road, testified in opposition to the Revised Plan. She testified that five of the proposed houses, along with one of the driveways serving those houses, will destroy the scenic vista along Mount Nebo Road. Sheila Cochran, 50-year owner of the farm, submitted a letter into the record opposing the Revised Plan, encouraging the Board to preserve open green space.

Larry Shaudes[?], owner of an adjoining farm, testified that the best land in the geographical area testified that the best land to farm is located where the homes are clustered, and testified in opposition to the Revised Plan.

Subsequent witnesses, including representatives from Solutions Not Sprawl, Historic Medley District, Inc., Peachtree Ridge Civic Association, the Clarksburg Initiative Association, Izaak Walton League (Bethesda-Chevy Chase Chapter), Montgomery County Civic Federation, Montgomery Preservation, Inc., the Audobon Naturalist Society presented cumulative testimony that echoed the objections to the

Revised Plan raised by the first speakers. The record also contains written testimony from other individuals and organizations in opposition to the Revised Plan.

V. PRELIMINARY PLAN

A. ANALYSIS

1. The Subdivision Criteria

An application for subdivision requires the Planning Board to undertake its legislatively delegated authority under the Regional District Act and the Subdivision Regulations. The application should also meet the requirements of the Zoning Ordinance applicable to the subject preliminary plan.

The general provisions for lot design for a subdivision are set forth in Section 50-29 of the Subdivision Regulations. In order to be approved by the Planning Board, lot size, width, shape, and orientation must be appropriate for the location of the subdivision and for the type of use contemplated. Lots also should abut a dedicated street or public road.

Section 50-35 of the Subdivision Regulations sets forth the approval procedure for preliminary plans of subdivision. After presentation of the plan to the Planning Board, the Board must act to approve or disapprove the plan, or to approve the plan subject to conditions and/or modifications necessary to bring the plan into conformance with the Montgomery County Code and all other applicable regulations. The Planning Board's approval procedure for preliminary plans includes review pursuant to Section 50-35(k) of the subdivision Regulations ("Adequate Public Facilities Ordinance" or "APFO"), which directs the Planning Board to approve preliminary plans of subdivision only after finding that public facilities, including the transportation system, will be adequate to serve the proposed subdivision; Section 50-35(l), which requires a finding that the preliminary plan substantially conforms to the Master Plan, unless events have occurred to render the relevant master plan recommendation no longer appropriate; and Section 50-35(o), which mandates that the Board ensure that all requirements of the forest conservation law are satisfied before approving a plan.

B. Board Deliberations

1. Lot Size, Shape, Width, and Depth

The record for the Application includes contested evidence on the issues of whether the lot sizes, width, shape, depth and orientation of the subdivision are appropriate for the location of the subdivision and for the proposed uses.

The Applicant proposes lots ranging in size from 3.5 acres to 309.1 acres. Some witnesses testified that they believed lots smaller than 25 acres should not be allowed in

the RDT Zone and/or that the smaller lots proposed on the Property should not be "clustered". Some witnesses also testified that residential uses should not be allowed in the Agricultural Reserve unless those uses were to support agricultural uses.

The Board notes that the Agricultural Master Plan and the RDT Zone both allow developments with lots as small as 40,000 square feet. The Board further notes that the Agricultural Master Plan and the RDT Zone both allow residential uses as a matter of right in the Agricultural Reserve even if those residential uses are not used in conjunction with or to support traditional agricultural uses. In addition, the Board notes that the Applicant's proposal to group smaller lots in two areas on the Property results in significantly larger contiguous parcels of agricultural land than had been proposed in the original Plan layout, and the majority of Boardmembers note that this revised layout substantially conforms to the recommendations of the Agricultural Master Plan. The Board explicitly clarified that this is not a "cluster" development, which under the Zoning Ordinance allows the placement of homes on smaller lots than otherwise allowed by "right" in certain zones. Rather, the lot sizes in the Revised Plan conform to lot sizes that are allowed "by right" in the RDT zone. The Board pointed out that if the Applicant were to create a series of larger lots, dotted across the Subject Property, that layout would further fragment this property and undermine the purpose of the zone. Moreover, while much of the testimony in opposition to the Revised Plan argued that "farming" means tilling the soil, Boardmembers noted that "agriculture" is defined very broadly in the Zoning Ordinance,<sup>15</sup> and concluded that many of these defined agricultural uses were likely to occur, even on the smaller lots.<sup>16</sup> The Board majority concluded that the layout of the site clearly meets the goal of the Agricultural Master Plan by protecting vast acreage for farming use. For example, the RDT zone allows, by right, non-agricultural uses such as bed-and-breakfast lodging, small group home, mobile home, adult foster-care home, child and adult day-care facilities, and registered home occupations. Code § 59-C-9.3.

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<sup>15</sup> "Agriculture: The business, science and art of cultivating and managing the soil, composting, growing, harvesting, and selling crops and livestock, and the products of forestry, horticulture and hydroponics; breeding, raising, or managing livestock, including horses, poultry, fish, game and fur-bearing animals, dairying, beekeeping and similar activities, and equestrian events and activities. Agriculture includes processing on the farm of an agricultural product in the course of preparing the product for market and may or may not cause a change in the natural form or state of the product." Code § 59-A-2.1 (Definitions).

<sup>16</sup> The Board also rejected the argument that the RDT zone was intended only include farmhouses. The Board noted that the RDT Zone itself allows many non-farming uses by right, and concluded that the District Council would know that these uses would be developed in the RDT zone.

The Board discussion also pointed out that even the Master Plan recognizes that it would be unrealistic to expect all farmland and open space in the Agricultural Reserve to be preserved, and solely for farming, and allows a "variety of land uses."<sup>17</sup> It states that while agriculture is "preferred," it is not the sole use.<sup>18</sup> In addition, the intent section of the RDT Zone in the Zoning Ordinance provides that preservation "is to be accomplished by providing large areas of generally contiguous properties suitable for agriculture and related uses".<sup>19</sup>

2. Adequate Public Facilities

County Code Section 50-35(k) (the Adequate Public Facilities Ordinance) directs the Planning Board to approve preliminary plans of subdivision only after finding that the public facilities, including the transportation system, will be adequate to serve the subdivision. The record includes uncontested evidence that the proposed development does satisfy all the requirements of the Adequate Public Facilities Ordinance.

a. Water and Sewerage

The record includes uncontested evidence that the proposed development will employ sand mound septic systems and wells and that these will be adequate to accommodate the development.

b. Local Area Transportation Review ("LATR")

The Application proposes 14 lots and 1 outlot. The Planning Board guidelines for the administration of the Adequate Public Facilities Ordinance requires Local Area Transportation Review ("LATR") for projects deemed to have a "measurable traffic impact on a specific local area", defined in the guidelines as those projects that generate 30 or more total trips during peak hours. The Board finds that this project is not subject to LATR review because it generates fewer than 30 peak hour trips. As a result, based on uncontested evidence of record, the LATR requirements of the Adequate Public Facilities Ordinance are satisfied.

3. Street Access

The Planning Board finds, based on uncontested testimony and evidence in the record, that the proposed street access to the Property is safe and adequate.

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<sup>17</sup> Agricultural Master Plan, p. 35.

<sup>18</sup> *Id.*

<sup>19</sup> §59-C-9.23, Montgomery County Code (2004, as amended)



4. Stormwater Management

The record includes uncontested evidence that the stormwater management concept and other related matters for the Property is acceptable as conceptually approved by the DPS.

5. Forest Conservation

The record includes uncontested evidence that the Application complies with the requirements of the Forest Conservation Law.

6. Relation to Master Plans

The Agricultural Master Plan recommends the RDT Zone for the Property. The Board discussed at length whether the proposed development, including the use of sand mounds, is in substantial conformance with the Agricultural Master Plan.<sup>20</sup>

The Board majority pointed out that that the Agricultural Master Plan does not prohibit the use of sand mound septic systems in the Agricultural Reserve. While the Plan (at page 62) recommends sewerage guidelines including the recommended denial of private "alternative individual and community systems" in the RDT Zone, the Plan also recommends in the same paragraph that a study of the possible application of private alternative individual and community systems in rural open space areas be undertaken.

The Board notes that the Master Plan was adopted in 1980. The Board further notes that while in 1980, sand mounds were considered "alternative" systems, both

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<sup>20</sup> The Chairman and one other Boardmember found that the proposed development was not in substantial compliance with the Agricultural Master Plan, because it did not comply with the Plan's "perc policy." They noted that, while the RDT zone specifies a density of 1 unit per 25 acres, that the Agricultural Master Plan provided for a lower density - "the population holding capacity" - and that that density was determined by the perc policy that only allowed use of septic systems and prohibited the use of "alternative systems," including sand mounds. In that regard, they concluded that the County Council in its action in 1994 on Executive Regulation 28-93AM, On-Site Water and On-Site Sewage Disposal Systems did not intend to override the Master Plan perc policy; the Council merely sought to permit sand mound septic systems to replace failing septic systems, as a health measure. Since sand mounds were not permitted in the Agricultural Master Plan, and the Plan has not been amended, sand mounds could not be used in the instant case to thwart the Master Plan density limits.

State and County laws, regulations, and/or policies (all of which are part of the Record) currently do not define sand mound septic systems as "alternative" or "experimental systems." DPS has determined that sand mound septic systems are safe and appropriate for use on the Property. In fact, at the December 9, 2004 hearing, Eugene Von Gunten from the Well and Septic office at DPS testified that since 1990 the County has approved approximately 200 to 250 lots that use sand mound septic systems, including properties in the Agricultural Reserve. Mr. Von Gunten further testified that at least five subdivisions have been approved for development exclusively with sand mound septic systems.

The Record is also clear that the use of sand mound septic systems has been approved for other developments in the RDT Zone by the Planning Board and other reviewing agencies. The Board notes that its discussion on the Prior Plan at the December 9, 2004 public hearing centered on the size of the proposed lots, the configuration of those lots, and whether those proposed lots satisfied the Master Plan objective of preserving areas of agricultural land. The Record contains uncontroverted evidence that in the past six years alone, 35 lots in the RDT Zone were approved with sand mound septic systems. After consideration of all the evidence on this issue, the Board finds that the use of sand mound septic systems is permitted in the RDT Zone. The Board majority concluded that the use of sand mound septic systems on the Property substantially complies with the Agricultural Master Plan.

The majority based this decision on a number of factors. First, the Master Plan does not absolutely prohibit the use of sand mounds. While the Master Plan says "deny private use of individual and community use systems,"<sup>21</sup> it Master Plan does not state that this standard is limited to those systems as they were defined in 1980. Second, "sand mounds" are explicitly defined under current law (State Regulation), and are not defined as an alternative system. Thirdly, the Board has in the past approved sand mounds to support residential development in the RDT zone, indicating an agency practice of finding these systems in conformance with the Master Plan. Finally, the majority concluded that while the Council Resolution, which states "Explore ways in which particular site restrictions to allow development by zoning to be constructed," does not allow *carte blanche* use of alternative technologies to achieve the maximum density allowed by the Zone (in this case 1 unit per 25-acres), it does reflect a policy goal to allow alternative septic technologies to be used to support zoned densities *if* proposed additional density can be provided in accordance with all other regulatory restrictions and findings (e.g., RDT zone requirements and Master Plan goals). The majority concluded that the Revised Plan so meets those goals.

In reaching this conclusion the Board noted that the Applicant substantially revised the prior preliminary plan and that the current plan preserves significant agricultural and forested areas. As calculated by the Staff, the proposed development

<sup>21</sup> Agricultural Master Plan p. 62.

will result in the preservation of 353 acres of the 395 acres of farm fields and the retention of 662 of the total 704 acres (including 300 acres of forest) as agriculture or agricultural open space. The Board believes that the clustering of smaller lots in two areas on the Property is a strength of the preliminary plan because it allows more contiguous area of agricultural land as recommended in the Agricultural Master Plan.

Additionally, the uncontested evidence of record reflects that the Revised Plan conforms to the Legacy Open Space (LOS) program recommendations that the 300-acre forested portion of the site be protected through the Farmland and Rural Open Space target area. The Board majority concluded that it agreed with its LOS staff recommendations that the density be limited to a maximum of 15 lots with all remaining development rights to be separated from the property, resulting in an overall density of one unit per 47 acres, consistent with the *Legacy Open Space Functional Master Plan* recommendation that density be kept below one unit per 50 acres to keep as much viable farmland and rural open space as possible. The Board further concurs with its LOS staff conclusion that the size distribution and density of lots within the site substantially meets the reduced density goal for Legacy Open Space and does provide several lots that have the potential for continuing agriculture use.

The Board further determined that the preliminary plan is in compliance with the Rustic Roads Master Plan. As explained in the Staff Report, Staff conditioned its recommendation for the approval of this preliminary plan upon the Applicant submitting a house location and landscaping plan to Legacy Open Space Staff for review and approval prior to the issuance of building permits. The Board finds that this condition adequately ensures that the houses will be situated on the Property in a manner that satisfies the Rustic Roads Master Plan.

The Board has considered the Technical Staff's position on substantial compliance with the Master Plan, the Applicant's materials, exhibits and testimony on substantial compliance with the Master Plans, and the opponents' materials, exhibits and testimony on the question of substantial compliance with the Master Plan. The Board is persuaded for the reasons set forth herein that the proposed subdivision will be in substantial compliance with the Agricultural Master Plan and the Rustic Roads Master Plan.

## ii. General Items

The subdivision Application was referred to outside agencies for comment and review, including, the Department of Public Works and Transportation, the Department of Permitting Services, and the various public utilities. None of the agencies opposed approval of the Application.

## B. FINDINGS

After review and consideration of the evidence of record, including testimony given at the public hearings, the recommendations of its Staff, the recommendations of the applicable public agencies, the applicant's position, the positions of those who appeared in opposition, and other evidence contained in the Record, which is hereby incorporated in its entirety into this Opinion, the Montgomery County Planning Board finds that with the conditions set forth in Section VI below:

a) Preliminary Plan No. 1-05029 substantially conforms to the Agricultural and Rural Open Space Master Plan, the Rustic Roads Master Plan, and the Legacy Open Space Functional Master Plan for the reasons discussed in Section V.B.6 above, incorporated herein by reference.

b) The uncontested evidence of record confirms that public facilities will be adequate to support and service the area of the proposed subdivision.

c) The size, width, shape, and orientation of the proposed lots are appropriate for the location of the subdivision for the reasons discussed in Section V.B.1 above, incorporated herein by reference..

d) The uncontested evidence of record confirms that the Preliminary Plan satisfies all the applicable requirements of the Forest Conservation Law, Montgomery County Code, Chapter 22A. This finding is subject to the applicable condition(s) of approval.

e) The uncontested evidence of record confirms that the Preliminary Plan application meets all applicable stormwater management requirements and will provide adequate control of stormwater runoff from the site. This finding is based on the determination by the Montgomery County Department of Permitting Services ("MCDPS") that the Stormwater Management Concept Plan meets MCDPS' standards.

f) The Planning Board finds that any objection concerning a substantive issue that was not raised prior to the closing of the Record is waived.

## VI. CONDITIONS OF APPROVAL

Having considered all of the evidence presented, including the comments of the outside reviewing agencies, and all of the testimony taken, the Planning Board finds Preliminary Plan No. 1-05029 to be in accordance with the purposes and all applicable regulations of the Subdivision Regulations (Montgomery County Code, Chapter 50) and Article 28 of the Maryland Code Annotated. Therefore, the Planning Board approves Preliminary Plan No. 1-05029, subject to the following conditions:

- 1) Approval under this preliminary plan is limited to 14 lots and 1 outlet.
- 2) Compliance with the conditions of approval for the preliminary forest conservation plan including requirements that reforestation occur during the first planting season after issuance of the first sediment control permit and that applicant construct a permanent, split rail fence on lots 6 and 9 to protect and delineate the forest conservation easement area. The applicant must satisfy all conditions prior to recording of plat(s) or MCDPS issuance of sediment and erosion control permits.
- 3) Prior to issuance of building permits for each lot, a house location and landscaping plan shall be submitted to M-NCPPC Legacy Open Space staff for review and approval.
- 4) Future contract of sale for proposed lot 2 shall include notification to potential buyers that the lot contains a historic resource included on the Historic Preservation Locational Atlas (Resource # 17/32, Log Cabin - Offutt Road).
- 5) Future contracts of sale for all houses shall include notification to potential buyers of the shooting range operated on the adjacent Izaak Walton League property.
- 6) Prior to recordation of plats, applicant shall conduct necessary stabilization measures for the existing historic structure in coordination with Historic Preservation Staff.<sup>22</sup>
- 7) All road rights-of-way shown on the approved preliminary plan shall be dedicated by the applicant to the full width mandated by the Rustic Road Master Plan, unless otherwise designated on the preliminary plan.
- 8) Dedicate five (5) additional feet of right-of-way for a total of 35 feet from the centerline of Mount Nebo Road, as required for rustic road R-27.
- 9) Compliance with conditions of approval of the MCDPS stormwater management approval dated October 29, 2004.
- 10) Compliance with conditions of MCDPS (Health Dept.) septic approval.

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<sup>22</sup> At the December 9, 2004 public hearing, at the Applicant's request for clarification of this condition, the Board agreed that the term "stabilization" contained in condition number six does not mean "restoration." "Stabilization" means maintaining the roof and building so that the structure is protected from the elements.

11) Applicant to establish 25' Public Use Trail Easements in the following locations:

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a) From Edwards Ferry Road to the eastern boundary of the subject property to promote access to Broad Run Stream Valley Park. Alignment to be sufficiently set back from West Offutt Road to allow a useable trail to be aligned therein that adequately protects users from road traffic, but extending no further than 35 feet from the proposed road right of way unless otherwise agreed to by Applicant and M-NCPPC staff;

b) South from West Offutt Road along the entire eastern border of proposed Lot 3;

c) South from West Offutt Road along the approximate Mount Nebo Road alignment to the southern boundary of the property sufficiently set back from Mount Nebo Road to allow a useable trail to be aligned therein that adequately protects users from road traffic but extending no further than 35 feet from the proposed road right-of-way, unless otherwise agreed to by Applicant and M-NCPPC staff; and

d) South from West Offutt Road through the eastern portion of the subject property to the southern property boundary, to be located east of proposed Lots 14, 12, 11 and 10, and west of the Potomac River tributary that runs from north to south through the property.

12) Compliance with conditions of MCDPWT letter dated November 12, 2004, unless otherwise amended.

13) Record plat to reflect a Category I easement over all areas of stream valley buffers and forest conservation, including the proposed forest conservation bank area on Lot 15.

4F 14) Record plat to reflect common ingress/egress and utility easements over all shared driveways.

15) Provide an affidavit to verify the availability of a TDR for each existing and proposed dwelling unit shown on the approved preliminary plan. Include a note and reference the affidavit on record plat.

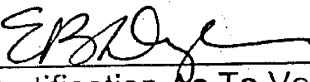
16) Other necessary easements.

[CERTIFICATION OF BOARD VOTE ADOPTING OPINION ON FOLLOWING PAGE]

MC 12/12/05  
Approved for legal sufficiency  
M-NCPPC Office of General Counsel

CERTIFICATION OF BOARD VOTE ADOPTING OPINION

At its regular meeting, held on Thursday, December 15, 2005, in Silver Spring, Maryland, the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, by unanimous consent, ADOPTED the above Opinion, which constitutes the final decision of the Planning Board and memorializes the Board's findings of fact and conclusions of law for Stoney Springs (Casey Property), Preliminary Plan No. 1-05029. Commissioner Bryant was absent.

  
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Certification As To Vote of Adoption  
Technical Writer