M-NCPPC
THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION
*OFFICE OF THE GENERAL COUNSEL*
*8787 Georgia Avenue*
*Silver Spring, Maryland 20910-3760*
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*Tel: (301) 495-4646 Fax: (301) 495-2173*

**Agenda Date: February 8, 2007**
**Item # 15**
**Reconsideration Request**

February 5, 2007

**REQUEST FOR RECONSIDERATION**

**MEMORANDUM**

TO: Montgomery County Planning Board

VIA: Debra Yerg Daniel, Associate General Counsel DYD by DBL
301.495.4646

FROM: David B. Lieb, Associate General Counsel DBL
301.495.4646

RE: Reconsideration Request for Indian Spring,
Preliminary Plan No. 120060510

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With this memorandum we forward for the Board's review a "request for reconsideration" of the Indian Spring preliminary plan approval, Preliminary Plan No. Preliminary Plan No. 120060510, from the Tivoli Community Association ("TCA").

## I. BACKGROUND

The Board conducted three public hearings on the Indian Spring preliminary plan application. It heard testimony at its September 7, 2006 and September 14, 2006 hearings, and at its September 21, 2006 meeting voted to approve the plan by a 5-0 vote, on motion of Commissioner Bryant, seconded by Commissioner Perdue. The resolution memorializing the Board's approval was mailed on January 19, 2007, making requests of reconsideration due on January 29, 2007.

TCA's "request for reconsideration" was not filed directly with the Commission – it was sent to the County Executive, who forwarded it to the Commission, characterizing it as a request for consideration – raising the question of whether a request that it is not filed with the Commission should be treated as reconsideration request. Moreover, although the letter does not expressly request reconsideration, TCA's request "that the approval process for [the Indian Spring] development be examined and reopened, to

ensure that citizen and environmental concerns are adequately addressed" can reasonably be interpreted as a request for reconsideration. Because the Board's Rules of Procedure simply require that requests for reconsideration be "received" by the Board (not that the filing party direct it to the Board), TCA's letter has been treated as a request for reconsideration.

Although TCA's request for reconsideration was received on January 9, we waited until the January 29 deadline for filing of reconsideration requests passed to bring TCA's request to the Board. To the best of our knowledge, no other requests of reconsideration of the Indian Spring preliminary plan approval have been received.

## II. APPLICABLE STANDARD

Under the Board's Rules of Procedure that were effective as of the date of the filing of the request for reconsideration, the Board may grant a request for reconsideration when presented with:

1. A clear showing that the action of the Board did not conform to relevant law or its rules of procedure;

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 Board is responsible for determining if the grounds stated in support of the reconsideration request are sufficient to merit reconsideration.

## III. RECOMMENDATION

We do not believe there is any legal deficiency in the Planning Board's action approving the Indian Spring preliminary plan that requires reconsideration. But if the Board determines that the reconsideration request demonstrates that any one of the above-listed criteria has been met, the Board may grant the request.

## IV. ATTACHMENTS

Attachment 1: Reconsideration Request Letter submitted the Tivoli Community Association (December 7, 2006)

Attachment 2: Applicant's Opposition to TCA's Reconsideration Request (February 2, 2007)

Attachment 3: Preliminary Plan Resolution (January 19, 2007)

# Attachment 1

OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
*County Executive*



January 5, 2007

Ms. Margie Gertzman, President
Tivoli Homeowners Association
13101 Nordic Hill Drive
Silver Spring, Maryland 20906

Dear Ms. Gertzman:

Thank you for your December 7, 2006, letter requesting reconsideration of the recent Planning Board approval decision for the preliminary plan for the Indian Spring Country Club project. Please understand that I continue to believe that we should not extend Tivoli Lake Boulevard through the community. I also opposed the additional number of homes and removal of the existing golf course.

That being said, the decision to approve subdivision plans does not fall within the jurisdiction of the Executive Branch. That decision authority lies with the Montgomery County Planning Board. By copy of this letter, I am requesting the Chairman of the Planning Board, Dr. Royce Hanson, to reply to your concerns.

Thank you for your interest in improving traffic conditions and protecting the environment in Montgomery County.

Sincerely,

Original signed by Isiah Leggett
Isiah Leggett
County Executive

IL:pc

cc: Dr. Royce Hanson w/incoming

# TIVOLI COMMUNITY ASSOCIATION

December 7, 2006

Ike Leggett
County Executive
Executive Office Building
101 Monroe Street
Rockville, Maryland 20850

Dear County Executive Leggett:

We, the Board of Directors of the Tivoli Homeowners Association, represent 527 homes adjacent to the Indian Spring Country Club. We want to express our appreciation and strong support for your administration's commitment to slower growth and, in particular, your intent to examine infrastructure issues as they are impacted by development. These commitments are key to the future livability of Montgomery County.

In that regard -- thoroughly examining infrastructure issues -- we believe some important issues were glossed over in the approval process of the Poplar Run development to be built on what has been the Indian Spring Country Club property.

1. Traffic.

a) While all of the citizen's associations adjacent to the new development expressed strong concerns about the impact of 773 homes on the already tremendously congested area of Randolph Road and Georgia Avenue, we were apparently not heard. While there is a plan to improve the Randolph/Georgia intersection, logically, that plan will not be executed for years, and, in the meantime, the new development will add to the congestion. Further, we believe that the traffic studies did not factor in the impact of the Inter-County Connector, which will have an interchange on Layhill Road and will increase traffic in both directions to the Georgia Avenue intersection with Randolph Road, further complicating the situation. We believe the developer's traffic analysis failed to take into consideration these key elements.

b) Common sense demonstrates that the proposed extension of Tivoli Lake Boulevard (from Randolph Road through Tivoli and Poplar Run to Layhill Road) will generate significant cut-through traffic through BOTH communities, to the detriment of both. We understand that there is a desire to have more than one access road into the new development, even though the developer's traffic study concluded that it was not necessary, and we understand that no community wants additional traffic. However, we believe that we demonstrated that opening a connection at Foggy Glen, on the north side of the Indian Spring property, would provide emergency access without cut-through traffic, because the route through that opening would be sufficiently out-of-the-way to deter non-community traffic. We would like a formal consideration of this win-win option, before Tivoli Lake Boulevard is extended.

13101 NORDIC HILL DRIVE, SILVER SPRING, MARYLAND 20906 (301) 929-8513

2. Environmental Issues.

We continue to be concerned that adequate environmental safeguards are not in place to protect the Bel Pre Creek buffer zone, should Tivoli Lake Boulevard be extended. Among our several concerns is that the proposed bridge is not adequate. We engaged an expert environmental engineer to examine the creek bed and the plans, and he concluded that: a) the flood plain is larger than the developer is saying it is; and b) the planned too-small bridge will, during heavy rains, dam water upstream, force water through the bridge with excessive force, and cause downstream erosion. Please see the attached photos, which show the effect of rain on the Bel Pre Creek flood plain following the November 16 rainstorm that was heavy, but nothing like a "100-year event." We believe additional environmental studies -- done by an independent entity -- are in order.

For these reasons, we ask that the approval process for this development be examined and reopened, to ensure that citizen and environmental concerns are adequately addressed. We would be more than happy to meet with you and/or your staff on these issues, which will profoundly impact the quality of life in Tivoli and Poplar Run.

Sincerely,

Margie Gertzman

Margie Gertzman
President
Tivoli Homeowners Association

Nise Darling
Vice President

Bill Hellert
Secretary

Sam Friedman
Treasurer

Marsha Mogowski
Director

cc:
Montgomery County Councilman Marc Elrich
Maryland State Delegate-Elect Roger Manno
Maryland State Senator-Elect Mike Lenett

Greg Leck
7-2197

From "Barbara and David Patrick" <patrick1657@verizon.net>
Subject Fw: Bel Pre Creek
Date Thu, November 16, 2006 5:12 pm
To ike@ikeleggett.org,marc@marcelrich.com,roger@rogermanno.com
CC "Margie Gertzman" <margertz@yahoo.com>,"Bill Hellert" <bill.hellert@gmail.com>,"Bill Hoffman" <bhoffman@hoffmanrubin.com>,"Marsha Mogowski" <m.mogowski@conservation.org>,"Sam Friedman" <sosfriedman@verizon.net>,"Marcia Harrad" <marciaharrad@yahoo.com>

Dear Ike, Marc and Roger:

I am forwarding you the letter below that I wrote to the Commissioners at Park & Planning concerning the newly approved development plan for Poplar Run, formerly know as Indian Spring and the extension of the Tivoli Lake Blvd. crossing Bel Pre Creek into the proposed development.

When you visited our neighborhood and asked for our support we promised to give that to you and we delivered. We are very pleased with the election results. And when you visited Tivoli, you asked what our main concerns were and we told you of many. The most pressing was that we opposed the extension of Tivoli Lake Blvd. through Indian Spring, crossing the environmentally sensitive Bel Pre Creek. We gave testimony at the hearings and supported our testimony with expert witnesses to no avail. We opposed the road connection on several issues, environment destruction, cut through traffic and that the road would pose safety risk to our children who must cross the road to access the playground and community center. One of the arguments that the developer used was that crossing the creek would not create an environment problem because they would cross it at the narrowest area and that the 100 year flood plain was much smaller than old maps showed. They provided an expert to attest to this. We too had an expert that disagreed, however, Park and Planning chose to hear the developer and not our small community.

Please look at the photos that are attached here and see that the tiny winding creek became a raging lake today thought the wetlands on 100 year flood plain. This is the exact location of the proposed bridge. I don't know what you can do at this point for us, but perhaps you have some suggestions. The Army Corps of Engineers has yet to approve a permit for this project.

As you may remember the original Indian Spring plan provided for 560 homes built around one of the two golf courses. That plan was denied in March 2005 because of environmental encroachments. Now the plan provides for nearly 800 homes and no golf course. Surely this will have an environmental impact as well. Even worse it will bring additional traffic to an already saturated area of the county. Our infrastructure can not tolerate 1600 more cars at this time.

Tivoli and I would appreciate any help you can give us.

Thank you and congratulations on your success.

Barbara Patrick
Former Chair, Tivoli Roads Committee
----- Original Message -----
**From:** Barbara and David Patrick
**To:** mcp-chairman@mncppc-mc.org
**Cc:** Margie Gertzman ; Bill Hellert ; Bill Hoffman ; Marsha Mogowski ; Sam Friedman ; Marcia Harrad
**Sent:** Thursday, November 16, 2006 3:28 PM
**Subject:** RE: Bel Pre Creek

Dear Commissions: Hanson, Perdue, Bryant, Robinson and Wellington:

I am writing to you today, Thursday, November 16, 2006 because as you will most likely know we are in the midst of heavy rain fall. As the former Chairman of the Tivoli Roads Committee I feel it is my duty to show you in living color why we have opposed the road connection of Tivoli Lake Blvd. into Indian Spring.

I am attaching some photographs that I just took today of the Bel Pre Creek as it overflows its banks by more than 200 feet on either side. This is the precise location that you have decided that a bridge should span the creek extending Tivoli Lake Blvd. into the Poplar Run development (formerly Indian Spring).

In Tivoli's many arguments at Hearings and meetings with Staff we stressed the damage to the environment to fall on deaf ears. I hope that these photos show that the information that was offered by the developer pertaining to the size and frequency of the "flood plain" was incorrect and underestimated the amount of overflow. Today, if a bridge were there spanning the creek it

would forced a narrowing of the flow would increase the velocity of the flow through the bridge and cause irreparable harm to the stream bed and the environment.

I am begging you to reevaluate your decision to extend Tivoli Lake Blvd.

Respectfully yours,

Barbara Patrick
Former Roads Committee Chair

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# Attachment 2

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
8787 Georgia Avenue • Silver Spring, Maryland 20910-3760

JAN 19 2007

**MCPB No. 06-89**
**Preliminary Plan No. 120060510**
**Indian Spring**
**Hearing Dates: September 7, 2006**
**September 14, 2006**
**September 21, 2006**

## MONTGOMERY COUNTY PLANNING BOARD

## RESOLUTION[1]

WHEREAS, pursuant to Montgomery County Code Chapter 50, the Montgomery County Planning Board ("Planning Board" or "Board") is required to review preliminary plan applications; and

WHEREAS, on October 24, 2005, Winchester Homes ("the Applicant"), filed an application for approval of a preliminary plan of subdivision of property that would create 773 lots on 308 acres of land located on the east side of Layhill Road approximately 1300 feet south of Middlevale Lane ("Property" or "Subject Property"), in the Kensington-Wheaton Master Plan (Master Plan") area; and

WHEREAS, the Applicant's preliminary plan application was designated Preliminary Plan No. 120060510, Indian Spring ("Preliminary Plan" or "Application"); and

WHEREAS, following review and analysis of the Application by Planning Board staff ("Staff") and the staffs of other governmental agencies, the Board held a public hearing to review the Application on September 7, 2006, which, due to the volume of testimony presented and due to the Board's interest in receiving clarification on certain issues from Staff, was continued for deliberations to September 14, 2006 and then to September 21, 2006 (the September 7, September 14, and September 21 meetings are referred to collectively herein as the "Hearing"); and

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[1] This Resolution constitutes the written opinion of the Board in this matter and satisfies any requirement under the Montgomery County Code for a written opinion.

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Approved as to
Legal Sufficiency: _____
M-NCPPC Legal Department

WHEREAS, on July 7, 2006, Staff provided the Board with a memorandum setting forth its analysis, and recommendation for approval, of the Application subject to certain conditions, and on September 11, 2006 Staff provided the Board with a written response to several questions that were raised by the Board and members of the public at the Board's September 7 hearing (collectively, the "Staff Report"); and

WHEREAS, at the Hearing, the Planning Board heard testimony and received evidence concerning the Application; and

WHEREAS, on September 21, 2006, at the conclusion of the Hearing, the Board approved the Application subject to certain conditions, on motion of Commissioner Bryant, duly seconded by Commissioner Perdue, with a vote of 5-0, Commissioners Hanson, Bryant, Perdue, Wellington, and Robinson voting in favor; and

NOW, THEREFORE, BE IT RESOLVED THAT, pursuant to Chapter 50 of the Montgomery County Code, the Planning Board approves Preliminary Plan No.120060510 to create 773 lots on 308 acres of land located on the east side of Layhill Road approximately 1300 feet south of Middlevale Lane ("Property" or "Subject Property"), in the Kensington-Wheaton Master Plan area, subject to the following conditions:

1) Approval under this Preliminary Plan is limited to a maximum of 773 one-family residential units (a maximum of 463 one-family detached and 310 one-family attached, including 15% Moderately Priced Dwelling Units ("MPDUs")).

2) In accordance with the Transportation Planning memorandum dated July 7, 2006 the Applicant shall:

    a. Obtain and dedicate sufficient right-of-way from Parcel E, for 35 feet from the centerline of the Indian Spring access road (shown on Entrance Road Concept Plan, dated November 2004) at Layhill Road, and construct an eastbound lane and two westbound approach lanes at the intersection with Layhill Road, as required by the Maryland State Highway Administration ("SHA").

    b. Construct external Indian Spring Access Road to environmental primary residential street standards with 26-foot-wide paving, a sidewalk on the north side, and minor storm water management structures within the available right-of-way, as required by Montgomery County Department of Public Works and Transportation ("DPWT"), from Layhill Road to station

20+00 (approximately) east of Layhill Road. The road shall be open to traffic prior to the issuance of the 150th building permit.

c. Construct internal Indian Spring Access Road (Street "A", within the subject site) as a primary residential roadway with a 70-foot-wide right-of-way, 36-foot-wide paving, and sidewalks on both sides, as required by DPWT, from station 26+50 to the end of Indian Spring Access Road at the community square. The paving shall transition from a 26-foot-wide section to a 36-foot-wide section between stations 20+00 and 26+50. The road shall be open to traffic prior to issuance of the 150th building permit.

d. Construct Tivoli Lake Boulevard extended (south of Street "K" at its southern end to the existing road) as an alternative primary residential roadway with a 70-foot right-of-way, 26-foot-wide paving, and a shared use path on the west side (Montgomery County Department of Transportation standard number MC-212.02). The road shall be open to traffic prior to the issuance of the 580th building permit. This standard pertains to the road surface, and does not modify the requirements for construction of the bridge set forth in Condition number 13(b).

e. Construct internal Tivoli Lake Boulevard (within the subject site), between Street "K" at its southern end and the community square, as a primary residential roadway with a 70-foot-wide right-of-way, 36-foot-wide paving, and sidewalks on both sides. The road shall be open to traffic prior to the issuance of the 580th building permit.

f. Design and construct a traffic signal system at the intersection of Layhill Road and Indian Spring Access Road if required by State Highway Administration. The Applicant shall also conduct a traffic signal warrant analysis for this location and submit it to the State Highway Administration ("SHA") when 75% of the units have been transferred to residents. The Applicant shall submit an annual report to the Planning Director indicating the number of units that have been transferred.

g. Provide a street connection at Foggy Glen Drive to the internal street running north of the community square. This road shall also be named Foggy Glen Drive. The road shall be open to traffic prior to issuance of the 650th building permit.

h. Dedicate a right of way for Alderton Road to stub out at the northern edge of Subject Property. If Montgomery County Public Schools ("MCPS") acts upon a reserved school site at this location, the Applicant shall construct

Alderton Road perpendicular to the Indian Spring Access Road as a secondary residential street. The right-of-way shall be aligned such that it provides connection and frontage for proposed lots in the adjacent Layhill View preliminary plan application (Plan No. 120061080).

3) The Applicant shall provide connection to sidewalks adjacent and abutting the Indian Spring site, and adequate space for sidewalks as determined at site plan.

4) The Applicant shall provide certain right-of-way dedications, and show them on the record plat(s). Specifically, the Applicant shall:

   a. Dedicate 60 feet of right-of-way from the centerline of Layhill Road for a total 120-foot right-of-way width.

   b. Dedicate Indian Spring Access Road as a 70-foot right-of-way from station 20+00 to the square and dedicate the maximum width available from station 20+00 to Layhill Road.

   c. Dedicate Tivoli Lake Boulevard extended (south of Street "K" at its southern end) as an alternative primary residential roadway with a 70-foot right-of-way.

   d. Dedicate internal Tivoli Lake Boulevard (within the subject site), between Street "K" at its southern end and the community square, as a primary residential roadway with a 70-foot-wide right-of-way.

5) The Applicant shall enter into an agreement with SHA to transfer a pro-rata share of the project cost for a grade separated intersection of Georgia Avenue (MD 97) and Randolph Road (SHA contract MO8545171), to satisfy LATR and as required by SHA to mitigate the traffic impact of the proposed development. A total amount of $2,139,000 (based on a pro-rata share of 773 units, which may be adjusted at site plan) shall be transferred in three separate payments:

   a. $713,000 prior to recordation of the first plat.

   b. $713,000 prior to release of the 150th building permit.

   c. $713,000 prior to release of the 350th building permit.

Should the grade separation project not be funded for construction in the Maryland Consolidated Transportation Program by the time of the issuance of the 400th building permit, as detailed in an e-mail dated September 20, 2005 from Steve Foster of SHA to Rick Hawthorne of M-NCPPC, SHA will return the funds

to the Applicant for use in construction of at-grade improvements, or SHA will make at-grade improvements that would mitigate the impact from this development. If the at-grade improvements are not under construction either by SHA or the Applicant by the time 80% of the building permits have been issued, no additional building permits shall be issued until construction of the at-grade improvements begins. In any event, all at-grade improvements shall be open to traffic by the issuance of 90% of the building permits.

6) The Applicant shall construct the Northwest Branch Trail through the site as an eight-foot-wide paved path within a 35-foot wide right-of-way dedicated to the Maryland-National Capital Park and Planning Commission ("M-NCPPC"), with the final alignment to be established at site plan. This improvement shall be open to foot traffic prior to issuance of the 650th building permit.

7) The Applicant shall provide a natural surface trail connection from the community to the master planned natural surface trail system on the east side of Northwest Branch. The trail shall include the necessary boardwalk and bridge across Northwest Branch. The location of trail and bridge must be approved by Staff. The trail and bridge shall be constructed to park standards and specifications within existing and dedicated parkland to allow adequate public access to the trail, and shall be open to foot traffic prior to issuance of 75% of the building permits.

8) The Applicant shall coordinate with Transportation Planning staff to determine the location and type of bike facilities at the time of site plan.

9) The Applicant shall satisfy all requirements of DPWT (as expressed in the DPWT memos dated June 20, 2006 and February 10, 2006) and SHA (as expressed in SHA memos dated February 28, 2006 and June 23, 2006), unless otherwise amended.

10) Specific locations of sewer lines and stormwater management outfalls in M-NCPPC parkland shall be field located and determined at site plan and be reviewed by Staff, including parks staff.

11) Record Plat shall reflect all areas under Homeowners Association ownership; stormwater management parcels shall be specifically labeled.

12) Based on the final number of units approved at the time of site plan, the Applicant shall dedicate a portion of a school site proportionate to the number of elementary school age children that MCPS forecasts will be generated by the Indian Spring subdivision relative to the number 600, which would warrant the dedication of the entire school site (i.e., if the number of elementary school age

children forecasted to be generated is 200, one-third of the school site shall be dedicated). The Applicant shall place, and the Record Plat shall reflect placement of, all remaining lots within the identified school site in reservation for a period not to exceed 36 months from the date of the hearing approving the Preliminary Plan. The area to be dedicated shall be determined at site plan and the reservation plat shall state that "dedication to occur only at such time that MCPS acquires the reservation area." At the time of site plan, this condition may be modified or eliminated if the Board determines that the site is no longer necessary or appropriate for reservation and/or dedication. The Board expects the Applicant, MCPS, Montgomery County Government and Staff, prior to review of the site plan by the Board, to work together to determine whether this site is needed or whether there are alternative school sites that are preferable and feasible.

13) As part of the site plan application and review process, the following shall occur:

a. The Applicant shall retain the traffic circles on Tivoli Lake Boulevard at Street "K" and on Foggy Glen Drive at the northern boundary of the Indian Spring site, and provide further traffic-calming and cut-through prevention measures for Tivoli Lake Boulevard and Foggy Glen Drive.

b. The final design for the crossing of Tivoli Lake Boulevard through the Bel Pre Creek stream valley will be reviewed by Staff (including Parks Natural Resources Division staff) at site plan. The final design of the road crossing shall minimize environmental impacts. At site plan, the design of the stream valley crossing shall be restricted to two lanes with a shared use path on the west side, and shall minimize impacts and provide protection measures that may be identified in the final forest conservation plan for one rare and one watchlist plant species, if present in adjacent parkland. The site plan design shall provide for safe non-erosive passage of the 100-year storm event (as determined by the Montgomery County Department of Permitting Services ("MCDPS")) and for adequate passage of wildlife (as determined by Staff).

c. The Applicant shall modify the Storm Water Management ("SWM") concept in the vicinity of SWM facility #1 to maximize water quality control of offsite drainage. Such control will be reviewed and approved by MCDPS in consultation with the Maryland-National Capital Park and Planning Commission ("M-NCPPC" or "Commission").

d. The Applicant shall revise the lot layout along Street "K" to increase the visual exposure and public access to proposed Park dedication areas in the Northwest Branch and Bel Pre Creek.

e. The Applicant shall explore layout changes that would reduce the "tunnel effect" along Tivoli Lake Boulevard created by the continuous sticks of townhomes as shown on the Preliminary Plan.

14) The record plat shall reflect areas to be dedicated to M-NCPPC for parkland as shown on the Preliminary Plan.

15) The record plat shall reflect a Category I easement over all areas of forest retention, forest planting, and environmental buffers that are not included in the park dedication areas.

16) Prior to the transfer of deed(s) to M-NCPPC for any parkland that will be used for forest mitigation banking, the Applicant must satisfy the planting and maintenance requirements for the forest bank area.

17) The Applicant shall comply with the conditions of approval of the preliminary forest conservation plan prior to approval of the sediment erosion control plan or issuance of the first building permit, as appropriate. Conditions include, but are not limited to, the following:

a. The final forest conservation plan shall include, but not be limited to, the following items:

i. An inventory and protection plan prepared by a professional who is (or professionals who are) qualified to identify rare, threatened, and endangered plant species. The inventory and protection plan must locate in the field the two plant species identified in the "Inventory for Rare Plants and Significant Habitats on M-NCPPC Park Lands in Montgomery County, Maryland" (Md. Department of Natural Resources, February 1997 and February 1999) present in forested parkland in the vicinity of the proposed road crossing. The plan must also minimize impacts and provide protection measures for these plant species, if necessary.

ii. Permanent markers (such as fences or signs) that clearly identify the boundaries of forest retention, forest planting, and environmental buffers.

ii. Plan to control invasive plants to minimize their adverse impacts on forest planting areas.

iii. Tree protection plan for individual trees 24 inches or greater in diameter at breast height that are located outside a forest stand.

iv. Final grading for lots that are adjacent to environmental buffer areas. Any proposed grading within environmental buffers in the rear of these lots must be reviewed and approved by M-NCPPC at site plan and must include mitigation through forest planting in and adjacent to the affected environmental buffers at a denser rate than the minimum required by the forest conservation law.

v. Restoration plan for environmental buffer areas that currently have golf course features and where the existing entrance road crosses the buffer.

vi. Plan for stream channel restoration, wetlands creation, and any other proposed grading within the environmental buffers as part of converting the golf course to a natural area. Such measures must be submitted for review and approval by M-NCPPC, MCDPS, and the Montgomery County Department of Environmental Protection as part of the site plan review process.

b. In administering the onsite areas approved for use as a forest bank, the Applicant shall first offer to sell credits to offsite private development projects for at least one year from the date that long-term protection is provided for the forest bank area. The Applicant must provide the necessary financial security to M-NCPPC for each bank credit sold.

18) Record Plat shall reference the Common Open Space Covenant recorded at Liber 28045 Folio 578 ("Covenant"). The Applicant shall provide verification to Commission Staff prior to release of final building permit that the Applicant's recorded HOA Documents incorporate by reference the Covenant.

19) The Applicant shall comply with the conditions of approval of the MCDPS stormwater management approval dated June 27, 2006, including review and approval of a final stormwater management concept prior to site plan approval.

20) There shall be no clearing, grading, or recordation of plats prior to signature set approval.

21) The final number of MPDUs shall be determined at the time of site plan.

22) The final number and location of dwelling units, on-site parking, site circulation, sidewalks, and bike paths shall be determined at site plan.

23) This Preliminary Plan will remain valid for one hundred and nine (109) months or nine (9) years from the approval date, which is the date of mailing of the Board Opinion. Record Plats for this project must be recorded according to the staging sequence as follows:

Stage I - All land within Phase I and environmental buffers for the entire site, as shown on the approved Preliminary Plan, shall be recorded within 37 months of the approval date.

Stage II – All land within Phase II, as shown on the approved Preliminary Plan, shall be recorded within 73 months of the approval date.

Stage III – All land within Phase III, as shown on the approved Preliminary Plan, shall be recorded within 109 months of the approval date.

Prior to the dates prescribed above a final record plat must be recorded for the lots and open space parcels identified in each phase of development or a request for an extension must be filed in a timely manner with the Board.

24) The Adequate Public Facility (APF) review for the Preliminary Plan will remain valid for twelve years (12) or one hundred and forty-five (145) months from the date of mailing of the Board opinion.

25) Other necessary easements.

BE IT FURTHER RESOLVED, that, having given full consideration to the recommendations and findings of its Staff as set forth in the Staff Report, as supplemented by the July 6, 2006 memorandum from the Transportation Planning Section of the Countywide Planning Division, which the Board adopts and incorporates by reference except as modified herein, the testimony of the Applicant and speakers in favor of and in opposition to the Application and other evidence contained in the Record the Board FINDS that:

1. *The Preliminary Plan substantially conforms to the Kensington –Wheaton Master Plan ("Master Plan").*

(a) Density and Compatibility with Surrounding Subdivisions.

The density proposed under this Preliminary Plan conforms to the R-90 and R-200 zoning recommended in the Master Plan. The Preliminary Plan, as proposed and approved, consists of a maximum of 773 one-family residential units, including 463

detached and 310 attached. The total number of approved units includes a 22% density bonus with the provision of 15% of the total units, or 116 units, as MPDUs.

The Master Plan includes the Indian Spring site among several "'critical areas and parcels' where significant land use and zoning changes have been recommended ... or where charges with significant impacts can occur." Master Plan at 50, 51. The Master Plan establishes for critical parcels and areas the objective of "ensur[ing] that zoning and land use recommendation for sites which have a potential for future development are consistent with the goals of land use stabilization and compatibility with nearby existing development." Master Plan at 50. In light of the Staff Report's conclusion that the proposed infill development "is compatible with the adjoining residential areas in terms of use, density, and scale while it meets much higher environmental standards then the adjoining residential subdivision of the past," the Board finds that the land use stabilization and compatibility goals identified in the Master Plan are met.

(b) Recommendation for a "Special Study."

The Master Plan, which was adopted in 1989, notes (at 51) that "[t]here are currently no indications that this large tract is likely to redevelop," and calls for continuation of R-200/R-90 zoning for the site. The Master Plan further recommends that "[t]his tract should be the subject of a special study should this facility ever become available for redevelopment," but does not specify what the "special study" should consist of. The Board agrees with Planning Staff's conclusion that the Master Plan recommendation to perform a special study was fulfilled by "the analysis performed by the staffs from the M-NCPPC, the County, and the State in the course of review of both the pre-preliminary and preliminary plans."

Since the Indian Spring site became available for development, it has been the subject of three development applications, a pre-preliminary plan application, a previous preliminary plan application that was rejected by the Board due to its failure to protect the stream buffer, and the current Application. In the course of reviewing each of these applications, Planning Staff, consulting County and State agencies, and the Board have reviewed different options for developing the Indian Spring site. In light of the multiple reviews of development proposals for the Indian Spring site that have been performed, the Board believes that the intent of the Master Plan with respect to the conduct of a "special study" has been met.

(c) Transportation.

The Preliminary Plan satisfies the transportation policy objectives for redevelopment of the Indian Spring site set forth in the Master Plan (at 98) by providing

"Class I bicycle and pedestrian access to nearby park trails" and by providing primary road access to arterial roads.

The Master Plan provides (at 98) that if and when the Indian Spring site is developed, it

> should be provided with access from Layhill Road and Randolph Road. Access from Layhill Road should be provided by reconstructing the existing access road to the typical primary residential street standard. Access from East Randolph Road should be provided by extending the primary street named Tivoli Lake Boulevard.

The Master Plan further provides that "[t]he internal street network of any such development should be continuous but designed with the idea of preventing cut-through traffic movement between Layhill Road and Randolph Road." *Id.*

Based upon this language, and for the reasons discussed below, the Board agrees with the recommendations of Transportation Planning Staff that the Indian Spring site be developed with four vehicle access points, two primary residential and two secondary residential streets, with the road modifications and further analysis of the need for an additional traffic light recommended by the Staff Report. Finally, based upon the recommendations of the Master Plan and testimony at the Hearing, the Board finds that traffic-calming and cut-through traffic prevention measures should be provided by the Applicant, and that the precise measures to be provided should be determined at the time of site plan.

i. Primary residential access from Layhill Road (MD 182).

The existing Indian Spring Access Road is a private drive that connects Layhill Road to the existing Indian Spring Country Club's parking area. Indian Spring Access Road is buffered from the residential neighborhoods to the north and south by physical barriers, different vertical grades, and existing trees and vegetation. Therefore, it was not recommended to be connected to the adjacent residential streets of Wagon Way and Middlevale Lane on the northeast, or Middlebridge Drive to the southeast. Under the Applicant's Preliminary Plan, the existing Indian Spring Access Road will be upgraded to a two lane primary residential street. The Applicant is providing additional right-of-way along Indian Spring access road at Layhill Road for an eastbound lane, for a total of three lanes at the intersection with Layhill Road: two westbound lanes and one eastbound lane. The available right-of-way varies from 60.5 feet to 70 feet. Because the existing property width cannot meet minimum right-of-way width requirements, DPWT will accept a road built to an environmental primary residential standard with a sidewalk on one side and minor storm water management structures within the

available right-of-way. In addition, a detailed storm drain and/or floodplain study for this road must be reviewed and approved by DPWT prior to recordation of the plat.

As part of the Local Area Transportation Review (LATR), the future traffic condition at the intersection of Layhill Road and the Indian Spring Access Road was analyzed. The Applicant's transportation engineer submitted a traffic signal warrant study to the SHA to determine if installation of a traffic signal is warranted for the intersection of Indian Spring Road and Layhill Road. SHA has reviewed the traffic study and recommends that an additional (second) westbound approach lane be constructed at Layhill Road. With respect to the need for a traffic signal at the Indian Spring and Layhill Roads, based upon the recommendations of SHA and Transportation Planning Staff, the Board agrees that the Applicant should be required to design and install a traffic signal at the intersection of Layhill Road and Indian Spring Access Road if SHA determines in the future, based on a warrant analysis, that a traffic signal is needed at this location. The Board accepts SHA's recommendation that a traffic signal warrant analysis for this location be prepared and submitted to SHA when the proposed development reaches 75% completion, and conditions its approval of the Preliminary Plan accordingly.

ii. Primary residential access from Randolph Road via Tivoli Lake Boulevard.

Tivoli Lake Boulevard currently provides primary access to more than 500 residential units of the Tivoli Community. At its current northern terminus, near the southern boundary of the Indian Spring site, Tivoli Lake Boulevard is built consistent with primary residential roadway standards, having a 36-foot typical paving width, sidewalks, and parking on both sides of the road.

Based on its review of the Master Plan and on the recommendations of Staff and other public agencies, the Board finds that the extension of Tivoli Lake Boulevard to provide primary road access to the Indian Spring development is both necessary to comply with the Master Plan and important to ensure that the proposed development promotes public safety and connectivity. The extension of Tivoli Lake Boulevard into the Indian Spring site, in the event the Indian Spring site was redeveloped from its existing use, has long been planned for and anticipated. The Master Plan, which was adopted in 1989,[2] specifically calls for the construction of Tivoli Lake Boulevard into the Indian Spring site. The Master Plan (at 88) provides that, if and when the Indian Spring site is developed with another use, access to the site "from East Randolph Road should be provided by extending the primary street named Tivoli Lake Boulevard."

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[2] Thus, the plan to extend Tivoli Lake Boulevard into the Indian Spring site was in place prior to the construction of the Tivoli Community, some of whose residents testified in opposition to the road's extension based upon the impact that the road would have on their properties.

The Master Plan (*id.*) further provides that "the internal street network of any such development should be continuous but designed with the idea of preventing cut-through traffic movement between Layhill Road and Randolph Road." Citing this provision of the Master Plan, a number of parties testified that Tivoli Lake Boulevard should not be extended because it will create cut-through traffic. The Board disagrees.

Whether read alone, or in combination with the express requirement to construct Tivoli Lake Boulevard, the Master Plan's admonition to design the road network "*with the idea* of preventing cut-through traffic" (*id.* (emphasis added)) cannot be read to prohibit Tivoli Lake Boulevard's construction unless cut-through traffic will be prevented entirely. These provisions require that Tivoli Lake Boulevard be constructed, but that the Indian Spring road network, of which Tivoli Lake Boulevard would be a part, be designed in a manner that would limit cut-through traffic. The Board's decision to require the construction of Tivoli Lake Boulevard, but to ensure at site plan that the Indian Spring road network is designed with traffic-calming measures intended, *inter alia*, to prevent cut-through traffic[3] gives meaning to, and harmonizes, the Master Plan's guidance to construct Tivoli Lake Boulevard with the idea of preventing cut-through traffic.

The Board finds that the Indian Spring Access Road-Tivoli Lake Boulevard connection, as designed with the public square and traffic circles, provides the benefits of a primary residential road that collects vehicular traffic from residential subdivisions and distributes traffic to arterials while discouraging non-local traffic. In evaluating the site plan for the proposed Indian Spring development, the Board will look for further traffic-calming measures to be provided. Such measures will be important both to limit cut-through traffic and to promote pedestrian safety.

The Board further supports the extension of Tivoli Lake Boulevard for the purpose of promoting connectivity generally, and for the specific reasons asserted by Staff and DPWT. The Board finds compelling the evidence presented by Staff and DPWT that the extension of Tivoli Lake Boulevard is needed to facilitate both emergency and non-emergency access to the site and to support public transit. If Tivoli Lake Boulevard is not connected, there will be only one primary access route to the Indian Spring Site.[4] In light of evidence that the proposed 773 single-family detached and attached units will generate approximately 585 peak-hour trips (more if the potential elementary school site is ultimately developed), one point of primary road access to the Indian Spring site would be inadequate. The second point of connection may reduce

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[3] The requirement to provide traffic calming measures will also increase pedestrian safety within the Indian Spring site.

[4] Although there will be other road access to the Indian Spring site, including Foggy Glen Drive and possibly Alderton Road, these roads will not provide the necessary access for emergency vehicles or public transportation because neither of them is a primary road at the site.

emergency response times, and would provide an alternative access point in the event that the other is blocked.[5] Moreover, the Indian Spring site can be more efficiently served by public transit if it is part of the larger network of streets; without Tivoli Lake Boulevard, the Indian Spring development would be akin to one large cul de sac through which a bus would have to enter and exit at the same point. The expressed interest of Ride-On Transit Services in extending existing bus route 31 through the Indian Spring site, conditional upon the extension of Tivoli Lake Boulevard, heightens the importance of the road's construction. The Board also agrees with DPWT's assertions about the importance of requiring the construction of Tivoli Lake Boulevard in connection with this proposed development so that the cost of the road construction is borne by the development that created the need for it, rather than spread throughout the entire County.

As noted in the Staff Report, the extension of Tivoli Lake Boulevard will result in an unavoidable environmental impact to the Bel Pre Creek stream valley. In order to limit the environmental impact, the Applicant proposes a design with retaining walls on the southern end of the crossing to minimize clearing and disturbance of forested slopes; creation of fill slopes that are no steeper than 3:1 to allow for planting of trees and shrubs on the slopes up to the road right-of-way; a 54-foot arch culvert over the stream that minimizes disruption to the stream channel and allows for a flat path next to the stream for pedestrian and wildlife movement under the road; and a road cross-section with two lanes, no median, and a sidewalk on only one side to keep the road features as narrow as possible through the stream valley.

The Board finds that the road should be tapered from the existing road section to a section design that is recommended for an environmental primary residential roadway, also known as an alterative primary residential roadway. Staff recommends, and the Board approves, a somewhat narrower cross section, consisting of 26 feet of pavement and a shared use path on the west side, which is intended to reduce the extent of disturbance, and environmental impacts, as the road crosses Bel Pre Creek. The Board finds that this design strikes an appropriate balance between the need to provide an additional primary road access point to the Indian Spring site and environmental protection. In response to Staff concerns, and concerns raised in testimony at the Hearing about whether the culverts under the bridge will be sufficient to permit passage of wildlife and flow of water in the event of significant storms, the Board finds that it will be important to examine the design of the stream valley crossing, including the possible need for additional culverts, as part of the site plan review process, and shall do so.

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[5] The Board also finds that this second entrance will reduce the traffic impact of the proposed development on Layhill Road and on Georgia Avenue north of Randolph Road. The second entrance may also reduce the likelihood of cars cutting through the neighborhoods between Layhill Road and Connecticut Avenue.

iii. Pedestrian Facilities.

The Applicant proposes a network of new sidewalks and pathways throughout the development. Secondary and tertiary residential streets are proposed to have sidewalks on both sides, with ADA ramps at intersections and marked crosswalks. The Indian Spring access road is to have a continuous sidewalk, separated from traffic, on the north side. Tivoli Lake Boulevard is to have a shared-use-path on the west side of the road. In order to limit environmental disturbance and in response to the narrow available right-of-way, both of these entrance roads are proposed with reduced cross sections. Part of the waiver package submitted to DPWT for the reduced cross section includes a proposed sidewalk or shared use path along only one side of each of these two roads. The Board finds that while providing pedestrian facilities on one side of the entrance roads is not ideal for pedestrian access, on balance, it will provide sufficient pedestrian access, while at the same time accomplishing the environmental objectives of reduced grading, impervious surface, and tree loss. Existing sidewalks that intersect the property will be continued onto the site, connecting the pedestrian network where practical. The proposed Preliminary Plan will not adversely affect the existing pedestrian access.

2. *The public facilities will be adequate to support and service the area of the proposed subdivision. The Planning Board finds that the Local Area Transportation Review adequately addresses the traffic impacts of the proposed development on the local road network. Access to the site and site circulation is adequate for police and fire equipment, school and transit busses, and pedestrians. Water and sewer service and all other utility service to the site have been deemed adequate.*

i. LATR.

Based upon the traffic study submitted with the Application, the Board finds that, subject to the conditions of this resolution, the *Local Area Transportation Review (LATR) Guidelines*, adopted and approved July 1, 2004, are met. The traffic study evaluated the impact of the proposed development on eight intersections, three in the Kensington/Wheaton Policy Area, one in the Aspen Hill Policy Area, and four in the Glenmont Metro Policy Area. The traffic study projects that all of the intersections will pass the policy area standards in a total traffic condition, except one. The Georgia Avenue (MD 97) and Randolph Road intersection is not projected to pass the Glenmont policy area standard.

The traffic study identifies potential improvements to the intersection of Georgia Avenue and Randolph Road that would be needed to pass the LATR test. Specifically, according to the traffic study LATR requirements could be satisfied by the addition of

turn lanes to the intersection. Georgia Avenue would need an additional southbound through-right turn lane and a receiving lane on the south side of Randolph Road. A northbound right-turn lane would also be needed on Georgia Avenue. Combined, these improvements would reduce the CLV to below the background traffic condition and could satisfy LATR. The County could require these improvements to satisfy the APF test.

In lieu of the intersection improvements identified in the Applicant's traffic study, Staff recommends that the Applicant be required to help fund, on a pro-rata basis, an SHA-planned and designed grade-separated interchange at the intersection of Georgia Avenue and Randolph Road. This alternative is consistent with the Board's finding at Pre-Preliminary Plan[6] that, if improvement of the intersection capacity at Georgia Avenue and Randolph Road were necessary, the Applicant should be required as part of the Preliminary Plan approval to pay a pro-rata share of the project cost. When it is complete, Randolph Road will have two travel lanes in each direction under Georgia Avenue.[7] Staff calculates that an Indian Spring development of 773 single-family units will contribute approximately 3.45% of the future traffic volume of the interchange, and recommends that a pro-rata contribution of the estimated $62,000,000 project cost would be an appropriate alternative to at-grade improvements to satisfy LATR. The Applicant's contribution to this total cost would be $2,139,000. Staff recommends, and SHA supports, a payment schedule of three payments of $713,000, the timing of which would be benchmarked to the development phasing. The first payment would be made prior to recordation of the first plat; the second would be made prior to release of the 150th building permit; and the third would be made prior to release of the 350th building permit.

The Board adopts Staff's recommendation to condition approval of the Preliminary Plan upon the Applicant's funding of a pro-rata share of a grade-separated interchange at the intersection of Georgia Avenue and Randolph Road, and conditions its approval of the Application accordingly. The Board finds that once the identified improvements are made, the Applicant's site-generated traffic will not exceed the congestion policy standard.

In order to ensure that the grade-separated interchange is constructed in time to serve the traffic generated by the Indian Spring development, the Board requires the Applicant to contribute to the funding of the road improvement in three installments that coincide with benchmarks in the Indian Spring site development. In the event other funding for the grade-separated interchange does not materialize in a timely manner, the Board finds that it would be appropriate for the SHA to return to the Applicant the

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[6] Preliminary Plan No. 7-03058; hearing date April 11, 2004.
[7] The Planning Board commented on the 35% completion design as a Mandatory Referral (MR 04815-SHA-1) in December 9, 2004.

funding committed for its construction to be used by the Applicant in making necessary at-grade improvements necessary to mitigate traffic created by the proposed development, or for SHA to make the necessary at-grade improvements itself, consistent with the conditioning paragraphs of this order.

ii. Other Roads.

The importance of Tivoli Lake Boulevard in providing a second point of access to the Indian Spring site from a primary road is discussed above in relation to the Master Plan, and will not be repeated here. The Indian Spring site will also be connected to the surrounding community via Foggy Glen Drive and possibly Alderton Road.

Foggy Glen Drive currently terminates at the northern property line of the subject property. It is classified as a secondary residential roadway with a 60-foot-wide right-of-way, and provides a circuitous connection to Layhill Road via Wagon Way, Huxley Cove Court/Sullivan Lane, or Middlevale Lane. In the Application, Foggy Glen Drive is shown to continue onto the proposed site as a secondary residential roadway with a 60-foot-wide right-of-way, a 26-foot-wide paving section and sidewalks on both sides. The Board agrees with Staff that in order to be consistent with the existing network the roadway on the site should also be called Foggy Glen Drive.

Alderton Road is a secondary residential roadway that terminates at a private drive for four privately owned lots approximately 300 feet north of the subject site. This portion of Alderton lies within the Kensington/Wheaton Master Plan. To the north, Alderton falls within the Aspen Hill Master Plan, which categorizes Alderton as a primary residential street. The road is interrupted at Mathew Henson State Park before continuing north to Bonifant Road. Each built segment has approximately 15 residential driveways. The Board accepts Transportation Staff's recommendation that a secondary roadway be dedicated on the site to stub out at the northern property limit where the roadway will continue upon redevelopment of the properties north of this site. Further, the Board finds that if MCPS acts upon its reservation to construct a school site the Applicant should be required to dedicate and construct Alderton Road perpendicular to the Indian Spring Access Road as a secondary residential street.

iii. School Site.

Based upon the testimony of representatives of MCPS, the Board finds that it is appropriate to require the Applicant to dedicate a school site in proportion to the projected number of students that will result from the proposed development, and place the remainder of the site in reservation for up to three years. The Board may modify this condition at the time of site plan if it determines that the site is no longer necessary or appropriate for reservation and/or dedication. Prior to site plan, the Board expects the Applicant, MCPS, Montgomery County Government, and Commission Staff to work

to determine whether this site is needed or whether there are alternative school sites that are preferable and feasible.

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

i. General

Although the Board generally finds the size, width, shape, and orientation of the proposed lots to be appropriate for the location of the subdivision, in its review of the Application it has identified at least four site design issues that should addressed at site plan.

First, the design should ensure greater accessibility to community open spaces. There are a number of isolated open spaces within the proposed development that the Board is concerned will be used exclusively by those who live on the lots that abut them.

Second, visibility of the Northwest Branch stream valley park should be increased by revising lot layout to load all units on the side of the road opposite the park, or, at a minimum, by creating wider breaks between units. This plan makes great strides towards preserving the Northwest Branch stream valley and its associated buffer, but obstructs views of this resource by backing homes directly onto the park.

Third, the "tunnel effect" created by the townhomes along Tivoli Lake Boulevard should be reduced by breaking up the townhome sticks, and perhaps by curving the road. The placement of one-family detached units along this stretch of road may also help to alleviate this concern.

Fourth, for Lots 9-17, Block "J," the Applicant should investigate connecting the private driveways serving those townhouses to the local roads so that the driveways function more as public streets for circulation and access.

ii. Request for Waiver of Certain Frontage Requirements

The Applicant seeks waiver under Section 50-38(a)(2) for Lots 9-23, Block "J" of the requirement under Section 50-29 that lots must abut "on a road which has been dedicated to public use or which has acquired the status of a public road," because the lots will abut on a private driveway rather than a public road. The Board rejects the requested waiver as unnecessary and unjustified.

Although Section 50-29 of the Subdivision Code provides that "every lot shall abut on a public street or road which has been dedicated to public use," waiver of this

provision is unnecessary because this provision applies only "[e]xcept as otherwise provided in the Zoning Ordinance." Section 59-C-1.628 (b) of the Zoning Ordinance permits townhouses to front on public streets, private streets, or a common open space, when MPDU optional method standards are used. The units that are the subject of the waiver request abut on a common open space. In addition, the affected townhouses are accessed by private driveways that could be modified to allow them to "attain the status of a public street," which is an alternative to public road frontage requirements of Section 50-29. For these reasons, Staff asserted, and the Board agrees, that a waiver of frontage is not needed. Rather, access and lot orientation in this area should be analyzed as part of the site plan review process.

Even if a waiver were necessary it would not be justified in this case. In arguing for a waiver, the Applicant cites the environmental grounds for obtaining a waiver that are set forth in Section 50-38(a)(2)(b). Further, the Applicant argues that the preservation of open space is paramount to this development as witnessed in the first application that was denied by the Planning Board. However, the Board shares Staff's reluctance to accept the Applicant's use of the Section 50-38 language to justify waiver of the frontage requirements for the subject lots. The Board agrees with Staff that this provision applies to subdivisions that are creating open space, and environmental benefits over and above minimum requirements, which is not the case with the proposed development.

4. *The Application satisfies all applicable requirements of the Forest Conservation Law, Montgomery County Code, Chapter 22A. This finding is subject to the applicable condition(s) of approval.*

The preliminary forest conservation plan shows 2.50 acres of forest clearing (including 0.40 acres of offsite forest removal for Tivoli Lake Boulevard extended and a connection of a new sewer line to an existing line) and 29.55 acres of forest retention. The Preliminary Plan proposes 66.81 acres of forest planting, of which 19.19 acres are required for the project to meet Forest Conservation Law requirements. Another 7.23 acres is proposed to mitigate unavoidable encroachments into the environmental buffer, and 40.39 acres are for a forest mitigation bank. The Board accepts Staff's recommendation for approval of the preliminary forest conservation plan subject to certain conditions.

For this subdivision, the existing forest cover, which is 32.05 acres, is less than the afforestation threshold (46.24 acres). In such a situation, the Forest Conservation Law states that all existing forest must be retained and forest planting must occur on-site so the total on-site forest retention and planting meets or exceeds the afforestation threshold. The Planning Board may waive the forest retention requirement if it finds that retaining all of the forest is "not possible," and the Applicant must provide the "maximum possible" on-site retention and on-site forest planting.

The Applicant proposes 2.50 acres of forest clearing. In Staff's opinion, this clearing is unavoidable because of the need to connect to existing sewer lines, construct the entrance road from Layhill Road, and construct Tivoli Lake Boulevard extended. Other forest clearing is due to grading associated with some proposed lots and internal subdivision roads. Most of the individual forest clearing areas are either small or on the edges of forest stands. Proposed forest planting, in combination with the proposed 29.55 acres of on-site forest retention, will result in a total of 48.74 acres of forest, greater than the minimum on-site forest requirement of 46.24 acres. Staff has stated its belief that, as part of site plan review, additional changes to proposed grading and layout will occur and may affect the final proposed amount of forest clearing. Staff has stated that it will continue to evaluate changes to the project and will determine the final amount of recommended forest clearing at the site plan stage.

According to Staff, the Applicant is required to plant 19.19 acres of forest to meet the Forest Conservation Law requirements. This planting will be located within the environmental buffers. Some environmental buffers will also be planted in forest as mitigation for proposed environmental buffer encroachments. There remain about 40.39 acres of environmental buffers that could be planted in forest. The Applicant proposes to use these remaining buffers to create a forest mitigation bank. The Board concurs with Staff's support of this concept because it creates a relatively large forest bank in a down county area. In addition, it is located in the Northwest Branch watershed, which currently has no forest banks. To date, the majority of forest banks have been created on upcountry sites in a limited number of watersheds, and many of these banks are on agricultural land.

Much of the proposed forest bank area is located within the park dedication area, which is currently covered with golf course features such as fairways, paths, and sand traps. The Board agrees with Staff that forest banking in future parkland is appropriate, provided that the Applicant satisfies the planting and maintenance requirements for the forest bank area before M-NCPPC takes ownership of the land. Through this banking, the Applicant will restore the existing golf course areas within floodplains and other environmentally sensitive areas, which are the highest priority for reforestation, to natural, forested conditions.

5. *The 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 MCDPS that the Stormwater Management Concept Plan meets MCDPS's standards.*

This finding is based upon the Applicant's compliance with each of the conditions set forth in the MCDPS's stormwater management approval dated June 27, 2006,

including review and approval of a final stormwater management concept prior to site plan approval.

The Board agrees with Staff that stormwater management ponds visible from primary residential access roads should be graded so that they may be landscaped in a manner that would be more aesthetically pleasing. The Board will review the detailed site grading and landscaping at the time of site plan.

6. *Pursuant to Section 50-26(d) the Planning Board made a finding as to the need to allow an overlength cul-de-sac on the Property. The Board found that due to topography on the Property, an overlength cul-de-sac was required to provide street access to a particular portion of the site.*

Under Section 50-26(d) of the Subdivision Code, if an Application proposes an overlength cul-de-sac (i.e. a cul-de-sac longer than 500 feet), the Board must make a finding that for reasons of property shape, size, topography, large lot size, or improved street alignments, an overlength cul-de-sac is justified. There is one cul-de-sac in the proposed subdivision (Street "G," Phase III) that exceeds 500 feet in length. The Board agrees with Staff's position that Street "G," the overlength cul-de-sac, is justified because it accesses a buildable portion of the property that extends onto a peninsula surrounded on three sides by stream valley buffers. In order to eliminate the cul-de-sac, it would be necessary either to loop Street "G," which would require encroachment into the stream buffer, or to do away with the lots along Street "G." The Board finds the creation of an overlength cul-de-sac to be preferable to either of these alternatives.

*7. The Applicant's Proposals to Record Lots in Three Phases over a 9-Year Period and for a 12-Year Adequate Public Facilities Validity Period Are Appropriate*

The Applicant has requested permission to record the proposed lots in 3 phases over a 9-year period, which corresponds to the 12-year Adequate Public Facilities validity period requested by the Applicant. Given the large size of the proposed subdivision, the Board finds that approval of the Applicant's proposed phasing schedule, as specified in Condition No. 23 of this Resolution, is appropriate.

Under Section 50-20(c)(3) of the Subdivision Regulations, a determination about the adequacy of public facilities made under this section of the regulations may remain valid for no less than 5 and no more than 12 years, as determined by the Planning Board at the time of subdivision. In light of the scope and complexity of the proposed development, the Board finds that it is appropriate for the Adequate Public Facilities determination to remain valid for 12 years. The Applicant must obtain all building permits for the proposed development within this 12-year period.

written opinion, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules).

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At its regular meeting, held on Thursday, January 4, 2007, in Silver Spring Maryland, the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission, on motion of Commissioner Bryant, seconded by Commissioner Wellington, and with Commissioners Hanson, Bryant, and Wellington voting in favor, and Commissioners Perdue and Robinson absent, ADOPTED Resolution MCPB No. 06-89, Indian Spring; and, subsequently, on motion of Commissioner Bryant, seconded by Commissioner Robinson, and with Commissioners Hanson, Bryant, and Robinson voting in favor, and with Commissioners Perdue and Wellington absent, ADOPTED certain corrections to footnote 4 of this Resolution.[8] Further, at its regular meeting held on Thursday, January 11, 2007, in Silver Spring Maryland, the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission, on motion of Commissioner Robinson, seconded by Commissioner Wellington, and with Commissioners Hanson, Perdue, Robinson, and Wellington voting in favor, and with Commissioner Bryant absent, ADOPTED this Resolution with additional corrections.[9] As Corrected, this Resolution constitutes the

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[8] The originally adopted version of footnote 4 stated: "Although there will be other road access to the Indian Spring site, including Forest Glen Drive and possibly Alderton Road, these roads will not provide the necessary access for emergency vehicles or public transportation because neither of them connects to a primary road." The corrected version of footnote 4 states: "Although there will be other road access to the Indian Spring site, including Foggy Glen Drive and possibly Alderton Road, these roads will not provide the necessary access for emergency vehicles or public transportation because neither of them is a primary road at the site."

[9] At pages 1 and 2, the corrected Resolution adds references to the September 21, 2006, hearing at which the Board finalized conditions and approved the Indian Spring application, which were omitted from the originally adopted Resolution.

Other changes were made in order to more accurately reflect the Board's decision at its September 21, 2006 hearing:

- Under Condition 2(d), (i) "environmental primary residential roadway" was changed to "alternative primary residential roadway"; (ii) a reference to the section of the Montgomery County road code where "alternative primary residential roadway" is defined was added; and (iii) a statement was added to clarify that use of the alternative primary residential roadway "standard pertains to the road surface, and does not modify the requirements for construction of the bridge set forth in Condition number 13(b)."

final decision of the Planning Board and memorializes the Board's findings of fact and conclusions of law for Preliminary Plan No. 1-20060510, Indian Spring.

Royce Hanson, Chairman
Montgomery County Planning Board

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- Under condition 2(f), the requirement to perform a traffic signal warrant analysis was tied to the transfer of 75% of the units (rather than to the number of units occupied), and a requirement for the Applicant to file an annual report stating the percent of units transferred was added.
- Under condition 4(c), "environmental primary residential roadway" was changed to "alternative primary residential roadway."
- Under condition 7, the requirement to provide a trail and bridge by issuance was tied to issuance of 75% of the building permits, rather than to the issuance of the 650th building permit.
- At page 17, the words "and built" were struck from the sentence that read "The Board accepts Transportation Staff's recommendation that a secondary roadway be dedicated and built on the site to stub out at the northern property limit where the roadway will continue upon redevelopment of the properties north of this site."

# Attachment 3

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February 2, 2007

*BY TELECOPIER AND U.S. MAIL*

The Honorable Royce Hanson, Chairman and
Members of the Montgomery County Planning Board
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

**Re: Winchester Homes/Poplar Run (Indian Spring)**
**Preliminary Plan No. 120060510**

Dear Dr. Hanson and Members of the Board:

Our firm represents Winchester Homes, the Applicant for Preliminary Plan of Subdivision No. 120060510 for the Poplar Run (previously known as Indian Spring) development. On September 7, 2006, the Planning Board held a public hearing on the Preliminary Plan and thereafter had two sessions devoted to Board deliberation – one on September 14, 2006 and the other on September 21, 2006. The Board also accepted extensive written rebuttal statements from the various parties prior to its deliberation sessions. The Board thereafter approved the Preliminary Plan by a 5-0 vote at the September 21st session. The Board's Resolution was issued on January 19, 2007 (MCPB No. 06-89).

As the Board knows, the Indian Spring development has been the subject of extensive review, first as part of a Pre-Preliminary Plan, then as an unsuccessful effort for approval of a housing development that included 545 dwelling units and an 18-hole golf course and thereafter for the Preliminary Plan that ultimately was approved by the Planning Board. We recently received a copy of a letter from the Tivoli Community Association ("Tivoli") to County Executive Isiah Leggett dated December 7, 2006, wherein Tivoli requested that the County Executive reconsider the Planning Board's decision and essentially reopen the approval process for the Indian Spring Development to ensure that the citizen and environmental concerns are adequately addressed. In his response, Mr. Leggett appropriately observed that "the decision to approve subdivision plans does not fall within the jurisdiction of the Executive Branch. That decision authority lies with the

Montgomery County Planning Board." Somehow, Tivoli's letter now is being treated as a request for reconsideration before the Planning Board.

Winchester objects to the granting of reconsideration and offers the following comments regarding Tivoli's letter:

1. Tivoli's letter to the County Executive does not qualify under the Board's Rules of Procedure as a reconsideration request. Instead, the letter to Mr. Leggett is a request to engage the County Executive in the process. The County Executive correctly recognized that the subdivision review process is within the purview of the Planning Board. A request for assistance from the County Executive should not somehow transform itself into a request for reconsideration by the Planning Board. At the very least, had Tivoli wanted the Planning Board to reconsider its decision, the Tivoli letter should have been addressed to the Planning Board. We do not believe that was the intent of the Tivoli letter.

2. Even if the Board agrees to treat Tivoli's letter as a request for reconsideration, there are absolutely no new issues being raised that were not or could not have been raised and considered at the public hearing and deliberation sessions. Also, there is no legal deficiency in the Board's Resolution to justify reconsideration. The Board's Rules of Procedure preclude reconsideration under these circumstances.

Other reasons for the Board to deny this request include:

3. Tivoli's letter attempts to reargue the very same case that they argued at the hearing and as part of the two deliberation sessions. At the hearing, Norman Knopf, Esq., Ms. Margie Gertzman (President of the Tivoli Board), Mr. Ralph Schofer (the traffic consultant) and Mr. Joseph Berg (the environmental consultant from Biohabitats, Inc.) as well as many others from the community (by way of much ceded time) were afforded ample time to present their case regarding the extension of Tivoli Lake Boulevard, traffic and the environment. Tivoli did just that and the Board spent a significant amount of time considering all of the evidence of record, and thereafter deliberating each and every issue raised by Tivoli and others at the hearing. All of the issues raised by Tivoli were carefully and comprehensively reviewed by the Planning Board (and its Technical Staff). Absolutely no

issues were "glossed over" at the hearing. Furthermore, the Technical Staff Report (and information prepared by Staff in response to Board questioning at the hearing) also comprehensively reviewed all of the issues raised by Tivoli. Essentially, Tivoli is requesting reconsideration because the Board did not support its position regarding Tivoli Lakes Boulevard. The reconsideration process was not intended to provide a platform for a dissatisfied participant to be able to rehash arguments or to take a second bite at the apple.

All of the issues raised in Tivoli's letter were comprehensively considered by the Board including:

- The central theme articulated in the letter and at the hearing by Tivoli – that Tivoli Lake Boulevard should not be extended – has been addressed. It is obvious that the Tivoli community is once again attempting to assert its objections, albeit to a different audience – the County Executive. Nobody following this matter can deny that the Tivoli road extension issue was a central focus of the hearing and that Tivoli was given ample opportunity to present its position. The Board, Technical Staff, MCDPWT, SHA, other members of the surrounding communities including Layhill View and The Layhill Alliance, all took issue with Tivoli's position and, as the Board found, Tivoli Lake Boulevard as shown on Winchester's plan, complies with the recommendations contained in the Master Plan. Furthermore, DPWT Technical Staff and M-NCPPC's Environmental and Transportation Planning Staffs also reviewed and recommended approval of the design for Tivoli Lake Boulevard (with conditions) taking into account environmental and traffic calming concerns.
- Tivoli raises the very same concerns it raised at the hearing regarding traffic. In her letter to the County Executive, Ms. Gertzman states that Tivoli was "apparently not heard." Despite Tivoli's assertion, the record reflects that substantial time was devoted by the Board to traffic and transportation related matters, including but not limited to those raised by

Tivoli. Furthermore, those communities located along Layhill Road testified in support of the Tivoli connection as a meaningful second access point to the Poplar Run development. Regarding whether Tivoli was heard, Tivoli and its traffic and transportation consultant, Ralph Schofar, were afforded ample time to present its case regarding traffic impacts and the Board evaluated its testimony together with testimony offered by the Board's Transportation Planning Technical Staff, SHA and MCDPWT. Again, no additional issues have been raised by Tivoli that either were not raised at the hearing or could not have been raised, including but not limited to those referenced in Ms. Gertzman's letter (all of which were addressed at the hearing and deliberation sessions as well as in the written responses submitted to the Board).

- Tivoli also raises environmental concerns that were specifically discussed at the public hearing, at the Board's deliberation sessions and in the extensive written materials submitted to the Board by the various parties. Mr. Berg, Mr. Schofar and others from the Tivoli community were afforded substantial opportunities to articulate their positions on the environment and the Tivoli Lake Road crossing. Winchester's experts, including Mr. Mark Burchick of ESA, Inc., and Layhill View's experts, including Mr. Charles Hegberg of KCI Technologies, also testified on the environmental impact of the crossing as did Environmental Planning Technical Staff. The Planning Board went to great lengths to evaluate all of the environmental considerations regarding the road crossing. The Board's deliberations were thoughtful and precise. The Board fully understood the testimony on the environment and the implications of its decision that Tivoli Lake Boulevard should be extended. In fact, the Board conditioned the road crossing so that, "The final design for the crossing of Tivoli Lake Boulevard through the Bel Pre Creek stream valley shall be reviewed by Staff (including Parks Natural Resources Division staff) at site

plan. The final design of the road crossing shall minimize environmental impacts. At site plan, the design of the stream valley crossing shall be restricted to two lanes with a shared use path on the west side, and shall minimize impacts and provide protection measures that may be identified in the final forest conversation plan for one rare and one watchlist plan species, if present in adjacent parkland. The site plan design shall provide for safe non-erosive passage of the 100-year storm (as determined by MCDPS and for adequate passage of wildlife (as determined by Staff)." Clearly, the Planning Board was focused on the environmental sensitivities associated with this road crossing and did not merely "gloss over" this issue as suggested by Tivoli. Again, Tivoli has not presented any new evidence that was not or could not have been presented at the hearing that would, in any way, justify the granting of reconsideration.

- Tivoli also was afforded ample time to articulate its view of what they perceived the impact of the proposed extension of Tivoli Lake Boulevard on the Tivoli neighborhood. Winchester, Technical Staff, and ultimately the Board (via its conditions of approval) addressed these concerns in a sensitive and balanced manner, all focusing its attention on the Tivoli neighborhood and on other communities in the area.

The extension of Tivoli Lake Boulevard is the heart of Tivoli's objection. In fact, Tivoli has publically stated that it does not necessarily oppose the Poplar Run proposal itself – it opposes the extension of Tivoli Lake Boulevard. The Board fairly and comprehensively considered the extension issue and every other issue raised at the public hearing (and as part of written submissions) and deliberation sessions and arrived at its decision of approval based on all of the evidence of record. The Board's decision, as reflected in the Resolution, should stand.

Reconsideration also is not warranted because Winchester explicitly followed the directives articulated by the Planning Board and Technical Staff as part of the denial of the previous Preliminary Plan. The Planning Board mandated, among other things, that Winchester respect the

stream valley buffers on the property even if this meant eliminating the golf course and increasing the density on the property. The hearing and deliberation process as it related to the approved Preliminary Plan was rigorous and comprehensive as it should be. The Board's review of the conditions of approval as part of its deliberation was careful and extremely comprehensive – the Board reviewed each condition almost word by word to make certain that the conditions were reflective of the Board's intent for the approval. Given the comprehensive nature of the Board's review and approval process and, given that Tivoli unquestionably was afforded substantial time to participate in the process and present its positions at the hearing, deliberation sessions and through written submissions, Tivoli has raised absolutely no new issues that were not addressed at the hearing (and could not have been addressed) to warrant reconsideration.

Thank you for considering Winchester's position on this matter. We appreciate the Board's thorough review of this matter as part of the September 7, 14 and 21 hearing and deliberation sessions and thereafter as part of the Resolution that followed. We trust that your prior attention to this plan will lend to a denial of the reconsideration request, to the extent that the request has been properly made.

Sincerely,

Steven A. Robins

Cc: The Honorable Ike Leggett
The Honorable Wendy Perdue, Esq.
The Honorable Allison Bryant, Ph.D
The Honorable John M. Robinson, Esq.
The Honorable Meredith K. Wellington, Esq.
Michael Lemon
Michael Conley

Stephen Nardella
Faroll Hamer
Rose Krasnow
Catherine Conlon
Richard Weaver
Candy Bunnag
Shahriar Etemadi
David Paine
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