




**Agenda Date: June 16, 2011**  
**Item # 2**  
**Reconsideration Request**

June 8, 2011

## REQUEST FOR RECONSIDERATION

### MEMORANDUM

TO: Montgomery County Planning Board

FROM: Carol S. Rubin, Associate General Counsel   
301-495-4646

RE: Reconsideration Request for Willerburn Acres  
Preliminary Plan No. 120110110  
MCPB Resolution No. 11-39

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With this memorandum I forward for the Board's review a Petition to Reconsider MCPB No. 11-39, the Planning Board's approval of the Willerburn Acres Preliminary Plan, submitted by Albert Arking (**Attachment 1**)<sup>1</sup>. The Petition to Reconsider was received on May 23, 2011, within the required ten days of the Resolution mailing date.

#### I. BACKGROUND

On May 5, 2011, the Planning Board voted to approve the Preliminary Plan of Subdivision (Resubdivision) for Willerburn Acres with a vote of 3-0; Commissioners Carrier, Dreyfuss, and Wells-Harley voting in favor. Commissioners Alfandre and Presley were absent from the hearing. The Resolution memorializing the Board's approval was mailed on May 25, 2011 (**Attachment 2**).

The Preliminary Plan created two lots, 24,011 s.f., and 20,118 s.f. from an existing 1.01 acre lot in the R-90 zone, located on the east side of Gainsborough Road, approximately 400 feet southeast of Whistler Court in the Potomac Subregion master plan area. Because this Preliminary Plan is a resubdivision, it required evaluation under §50-29(b)(2) of the Subdivision Regulations, which provides:

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<sup>1</sup> Mr. Arking indicates that he filed the Petition on behalf of himself and twelve other homeowners, of which six are ineligible to file under Planning Board Rule of Procedure 4.12.1.

"Lots on a plat for the resubdivision of any lot, tract or other parcel of land that is a part of an existing subdivision previously recorded in a plat book shall be of the same character as to street frontage, alignment, size, shape, width, area and suitability for residential use as other lots within the existing block, neighborhood or subdivision."

The neighborhood delineated by Staff and approved by the Board, as well as the Board's finding that the new lots are of similar character to the existing lots in the neighborhood form the basis of the reconsideration request.

## **II. APPLICABLE RULES**

A reconsideration request must "specify any alleged errors of fact or law and state fully all grounds for reconsideration because of mistake, inadvertence, surprise, fraud, or other good cause." The Board is responsible for determining if the grounds stated in support of the reconsideration request are sufficient to merit reconsideration.

In accordance with Rule 4.12.2, only a Board member who voted in the majority of the decision that is the subject of the request for reconsideration can move to reconsider the decision. Any motion to reconsider must be supported by a majority of the Board members who either participated in the previous decision or read the record on which it was based. In this case, only Commissioners Carrier, Dreyfuss or Wells-Harley are eligible to move for reconsideration and participate in the decision whether to reconsider. However, Commissioners Alfandre and Presley may participate in the decision if they review the record of the proceeding. If there is no motion for reconsideration, the request for reconsideration fails, and no further action is necessary. However, if the Board grants the reconsideration request, the Resolution approving the Preliminary Plan is void, and a new hearing on the Plan must be scheduled<sup>2</sup>.

## **III. RECONSIDERATION REQUEST**

A copy of the Request for Reconsideration is attached for your review. Mr. Arking asserts that Staff's delineation of the neighborhood, and the Board's finding that the new lots are of the same character as to street frontage, alignment, size, shape, width, area and suitability for residential use as other lots within the neighborhood is based upon incorrect and incomplete information. He alleges:

1. The existing Willerburn Acres Subdivision is divided into two separately identified Sections distinctly different in character, and the delineated neighborhood should have been limited to Section 1.

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<sup>2</sup> Under Planning Board Rules of Procedure, if the Board votes to reconsider, the reconsidered Resolution is void, and the Chair must promptly schedule a public hearing. (Rules 4.12.2 and 4.12.3)

2. Staff failed to disclose that three other applications for resubdivision previously limited the defined neighborhood to Section 1; and
3. Because certain criteria, specifically street frontage, lot size, width at building line, and buildable area of the new lots are below the median as compared to other lots in the neighborhood, they do not meet the intent of the law regarding resubdivision.

#### IV. DISCUSSION/RECOMMENDATION

In addition to the Board's Rules requiring mistake, inadvertence, surprise, fraud, or other good cause to be shown for the Board to reconsider a decision, Maryland law supports the premise that it would be inappropriate for the Planning Board to simply change its mind if it had already considered evidence and argument in reaching its decision. *Building Owners and Managers Association of Metropolitan Baltimore, Inc. v. Public Service Commission of Maryland, et al.*, 93 Md. App 741 (1992) provides that when a petition for reconsideration presents no additional evidence and no additional argument not already considered by the administrative agency prior to its final decision, the courts cannot reasonably expect the agency to change its decision.

The Legal Department has reviewed the specific grounds raised in the Request for Reconsideration, and after consultation with Staff does not believe there is any mistake, inadvertence, surprise, fraud, or other good cause for the Planning Board to revisit its prior approval of the Preliminary Plan. In each of the arguments raised, either the Board had before it substantial evidence related to the issue raised by which it deliberated, or Maryland law does not support Mr. Arking's position. The following discussion addresses each of the issues raised<sup>3</sup>:

1. *Whether the identified Sections in the existing Willerburn Acres Subdivision are so different in character as to warrant a limitation of the neighborhood delineation to Section 1.*

In his Petition, Mr. Arking argues that the Planning Board should not have accepted Staff's recommendation of the neighborhood delineation. He asserts that Staff included what has now been identified as Section 2 of the existing Willerburn Acres Subdivision, the area developed with generally smaller lots than Section 1; that the two Sections differ so much in character as to warrant a smaller neighborhood delineation. He states that because the Staff Report did not specifically address the reasons for the differences, or the Staff relied on incorrect information (timing of sewer extensions that allowed for smaller lots) to form the basis of its recommended neighborhood delineation, the Planning Board should reconsider its decision to adopt the Staff's recommendation.

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<sup>3</sup> Mr. Arking lists four separate issues in his Petition. However, I have consolidated and reorganized the issues for clarity since they contain overlapping arguments.

However, a discussion of two areas in the existing Subdivision with somewhat different characteristics and a transition area between them was a part of the Planning Board's deliberations. There are underlying reasons that the development characteristics of the two Sections of the Subdivision may vary. But that does not negate the acknowledgment of the differences and the Board's consideration of those differences to ultimately define the "neighborhood" for purposes of resubdivision analysis. Substantial evidence was presented in the form of public testimony and Staff discussion. In fact, several Board members made statements about the neighborhood characteristics during their deliberations and subsequent vote. As required in the *Building Owners* case for reconsideration, Mr. Arking presents no additional evidence and no additional argument not already considered by the Planning Board when it found that the neighborhood delineation recommended by Staff was appropriate.

In *Lee v. Maryland-National Capital Park and Planning Commission*, 107 Md.App. 486 (1995), the seminal resubdivision case under Maryland law, the Court required that the Planning Board consider evidence related to all seven criteria set forth in §50-29(b)(2) of the Subdivision Regulations - street frontage, alignment, size, shape, width, area and suitability for residential use to find that the proposed lots are of the same character as the existing lots in the neighborhood. The Court defined character as "the aggregate of features and traits that form the apparent individual nature of some person or thing." *Lee* at 494.

Maryland law has not specifically addressed the required delineation of a neighborhood for purposes of resubdivision analysis. However, since the basis for the strict analysis of resubdivision is to avoid a change in character to an established neighborhood, the Court considered the definition of "character" as it applied to the existing neighborhood citing *Hooper v. Mayor of Gaithersburg*, 270 Md. 628 (1974) (increase in number of people in community did not affect a change in character), and *Helfrich v. Mongelli*, 248 Md. 498 (1968) (widening of street did not change character of neighborhood).

The Staff considered the differences in lot sizes generally in its recommendation. However, the entire Subdivision is zoned R-90, and most of the lots in both Sections are larger than the minimum lot size required. In fact, Staff also considered the master plan, street frontage, and development patterns. Mr. Arking asserts that different the development patterns within the delineated neighborhood means the character of the two Sections cannot be combined. However, the Court states that an increase in the population of the community (and I assert development patterns as a result), and street widening does not affect a change in character. *Lee* at FN4. Therefore, Mr. Arking's assertion that narrower roadway without curbing in one Section versus the other should warrant splitting the Subdivision is not necessarily the case.

2. *Whether the Planning Board's knowledge of previous limited delineations of the neighborhood in the Willerburn Acres Subdivision is sufficient to warrant reconsideration of this Preliminary Plan.*

Regardless of three prior resubdivision cases (decided in 2004 and 2005) in which the Board accepted a more limited delineation of the Willerburn Acres Subdivision, the Board accepted the same delineated neighborhood as in this case with its the most recent case (decided in 2010) for resubdivision in the existing Willerburn Acres Subdivision. Furthermore, the lots proposed for resubdivision in the 2010 case were located much further from the "transition area." No objections were filed at that application.

3. *Whether Maryland law allows for the Planning Board to find that the new lots are similar in character to the existing lots in the neighborhood if some of the resubdivision criteria for the new lots fall within the range, but below the median as compared to other lots in the neighborhood.*

The Court in *Lee* held that the Planning Board needed to find that a proposed resubdivision complies with all seven criteria to ensure that the new lots will be of the same character as existing lots in the neighborhood. However, "lots need not be cookie cutter matches to existing lots in the neighborhood. The correlation, however, between [each of the seven criteria] must be high." *Lee* at 495. I submit that based on the definition of "character" that the Court relies on in the case - "the aggregate of features and traits that form the apparent individual nature of some person or thing," Staff's recommendation, and the Board's finding that the new lots were of similar character as the existing lots based on a comprehensive application of all seven criteria. That four of the seven criteria fall below the median but within the range is not necessarily grounds for denial. In any event, a discussion of each of the seven criteria was included in the Staff Report, discussed during the Hearing, and was a part of the Planning Board's deliberations. Therefore, unless Mr. Arking provides additional evidence or additional argument in his petition that was not already considered by the Planning Board, reconsideration of the issue is not the appropriate process by which to challenge the Board's decision. Mr. Arking is questioning the Board's application of the resubdivision analysis under *Lee*, and therefore, the courts may be the more appropriate venue for this issue.

If the Board determines that Mr. Arking's reconsideration request demonstrates that there was a mistake, inadvertence, surprise, or fraud in its earlier decision, or that he has shown other good cause for reconsideration, the Board may grant the request.

#### **IV. ATTACHMENTS**

Attachment 1 –Petition for Reconsideration

Attachment 2 –Planning Board Resolution (MCPB 11-39)

# **ALBERT ARKING**

11810 Gainsborough Road  
Potomac, Maryland 20854

May 19, 2011

Montgomery County Planning Board  
Maryland-National Capital Park and Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910

**RECEIVED**  
0475  
MAY 23 2011

OFFICE OF THE CHAIRMAN  
THE MARYLAND-NATIONAL CAPITAL  
PARK AND PLANNING COMMISSION

Ladies and Gentlemen of the Board:

This letter is a request on behalf of myself and 12 other homeowners residing on Gainsborough Rd in Willerburn Acres (listed below) that the Planning Board reconsider its decision to approve Preliminary Plan No. 120110110. The Staff review of the plan, which recommended approval and was the basis on which the Board made its decision, is deficient in many respects, as described below. Those deficiencies led to the Board's ab initio acceptance of Staff's delineation of the neighborhood of the subject lot. Staff's choice of neighborhood is not consistent with delineations in prior applications nor is it consistent with the intent of applicable law. A proper delineation of the neighborhood would result in the conclusion that the proposed lots fail to meet four of seven resubdivision criteria that must be met in order to affirm that the lots are in conformance with the character of the neighborhood in which they are located.

The underlying issue is whether it is permissible to determine if a lot in a resubdivision plan is of the "same character ... as other lots within the existing block, neighborhood or subdivision" [Section 50-29(b)(2) of the Montgomery County Code] by expanding the neighborhood to include lots from a neighboring section of the subdivision that differs substantially in character from the section in which the subject lot is located. Staff did not deal with this issue.

Furthermore, the Staff report, including oral testimony at the hearing on May 5, omits important information and contains misleading statements, including a factually incorrect statement regarding the subject lot's relationship to the neighborhood that was delineated. The particulars are as follows:

1. The neighborhood delineated for evaluation of the proposed plan includes a section of Gainsborough Rd that has an entirely different character from the section in which the property is located. The subject lot is located along Gainsborough Rd, East of Seven Locks Rd, in a section of Willerburn Acres that was subdivided in 1955, commonly referred to as Section 1. At the time, Gainsborough Rd ended at a point that is approximately 100 ft beyond the

## ATTACHMENT 1

Gainsborough Rd ended at a point that is approximately 100 ft beyond the subject lot. Eight years later, in 1963, a plan was approved to develop Section 2, which lies to the north of Section 1 and is accessed from Seven Locks Rd along streets that are north of Gainsborough Rd as well as from Gainsborough Rd, which was then extended to Fontaine St. To delineate a neighborhood, which then serves as the reference for determining whether the lots in the proposed resubdivision plan are of the same character as "other lots within the existing block, neighborhood or subdivision", as required by law, Staff combined lots along Gainsborough Rd in Section 1 with lots in Section 2. The applicable law, Section 50-29(b)(2) of the Montgomery County Code, states:

***Resubdivision.** Lots on a plat for the Resubdivision of any lot, tract or other parcel of land that is part of an existing subdivision previously recorded in a plat book shall be of the same character as to street frontage, alignment, size, shape, width, area and suitability for residential use as other lots within the existing block, neighborhood or subdivision.*

The neighborhood delineated by Staff is not the appropriate neighborhood of the subject lot. Since the subject lot is located in Section 1, the neighborhood should consist of nearby lots in the same section. Expanding the neighborhood to include lots in Section 2 biased the report in favor of approval of the resubdivision plan. Furthermore, the report is deficient in not noting that the choice of neighborhood played a critical role in arriving at the recommendation that the plan be approved.

2. Sections 1 and 2 of Willerburn Acres differ in character to such an extent that they could not within reason be merged into a single neighborhood. The vicinity map in Attachment A shows a clear difference with respect to frontage, lot size, and separation of houses. Attachment B shows the statistical differences with respect to four of the criteria for determining the character of the neighborhood: frontage, lot size, width at building line, and buildable area. The minimum, average, and maximum square feet of the lots (lot size and buildable area) in the Section 1 portion of the delineated neighborhood are approximately twice as large as in the Section 2 portion. Correspondingly, minimum, average, and maximum widths (street frontage and width at building line) are higher by approximately 50%. Also, the roadway in Section 1 is narrower and without a curb, compared to and in contrast with Section 2. As readily seen (Attachment B) the smaller of the proposed lots closely matches the Section 2 average in each of the four criteria, but falls completely outside the range (below the minimum) of Section 1 in each criterion. The Staff report did not disclose this information.

ATTACHMENT 1

3. The Staff report attempts to justify its choice of neighborhood in two ways, but in doing so it makes false and misleading statements:

(a) The report states, "This Neighborhood [combined lots from Sec. 1 and Sec. 2] is consistent with the Neighborhoods accepted by the Planning Board for two other resubdivision application reviews on the same segment of Gainsborough." As far as we are able to determine this occurred in only one case (Preliminary Plan 120090400), a plan that was not contested and the dimensions of the lots involved were not at issue. Furthermore, the report fails to disclose that there were three other applications for resubdivision on Gainsborough Rd where the neighborhood was restricted to lots exclusively in Section 1 (Preliminary Plan 1-05073, Preliminary Plan 1-04037, and a Pre-Preliminary Plan for Lot 4 Block A).

(b) The report states that "the location of the two proposed lots is at the transition area where lots that were originally platted on septic, abut lots that were platted after sewer was extended." This is false. The subject lot does NOT abut any lot that was platted after sewer was extended. In fact, park land 95 ft wide separates the subject lot from the nearest lot "platted after sewer was extended." The park land clearly separates the two sections of Willerburn Acres. Furthermore, the lots in what the report calls a "transition area" are larger on average, in both frontage and lot size, than the lots along Section 1 of Gainsborough Rd, and of course, much larger than those in Section 2.

4. Even with Staff's delineation of the neighborhood—with lots drawn from Sections 1 and 2 of Willerburn Acres—the proposed lots fail to meet the requirement that they shall be of the same character as other lots within the neighborhood with respect to the seven resubdivision criteria. With respect to four of the seven criteria—street frontage, lot size, width at building line, and buildable area—the smaller lot is at the 34th, 32nd, 29th, and 25th percentile, respectively, with the larger lot only slightly above. These percentiles are considerably below the median—i.e., the 50th percentile. The text of the Staff report hides this fact by stating that "Staff ... does not disagree that the proposed lots are *just on the smaller side of the median* [emphasis mine]."

We homeowners feel that the intent of the law regarding resubdivision is to protect neighborhoods from changes that will alter its character. We therefore request that the Board reconsider its approval of the proposed plan.

Sincerely,

  
Albert Arking

Contact Info

TEL: 301-299-2478

E-M: aa@arking.net



ATTACHMENT 1

The following homeowners, who live on Gainsborough Rd within 0.4 miles of Lot 17, Block B in Willerburn Acres, endorse the above request that the Montgomery County Planning Board reconsider its approval of Preliminary Plan No. 120110110. Signatures will be provided upon request.

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Norma Perna  
11820 Gainsborough Rd

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Mark Arking  
11815 Gainsborough Rd

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Hing Lew  
11807 Gainsborough Rd

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Thomas Lewis  
11801 Gainsborough Rd

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Louis Wood  
11760 Gainsborough Rd

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Solomon Sobel  
11769 Gainsborough Rd

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Halvor Juul  
11748 Gainsborough Rd

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Sue Halpern  
11747 Gainsborough Rd

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Curriel Rodolfo  
11733 Gainsborough Rd

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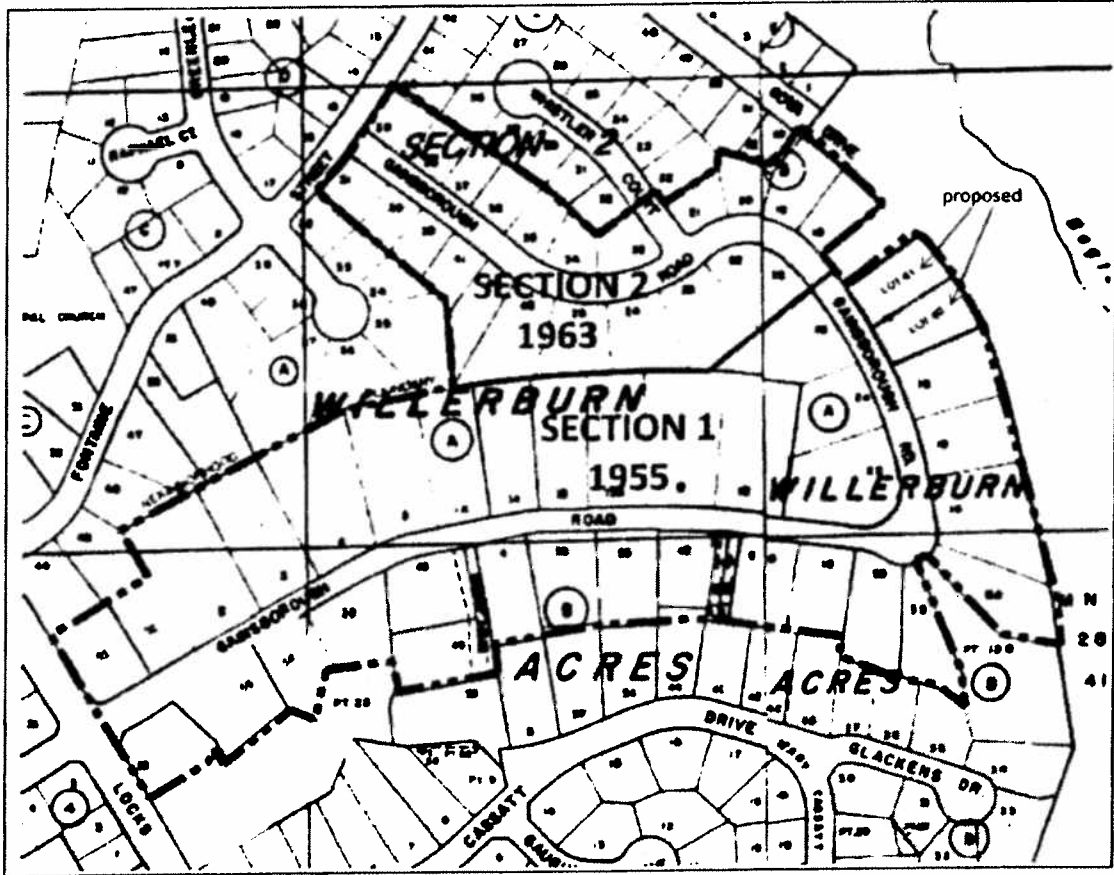
Rikki Lewin  
11723 Gainsborough Rd

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Stanley Miller  
11712 Gainsborough Rd

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Susan Gallagher  
11706 Gainsborough Rd



proposed

FRONTAGE		96
Section 1	Section 2	
105	74	MIN
145	94	AVG
211	133	MAX

LOT SIZE		20,000
Section 1	Section 2	
22,000	10,000	MIN
34,000	16,000	AVG
55,000	30,000	MAX

WIDTH AT BLDG LINE		99
Section 1	Section 2	
108	82	MIN
144	100	AVG
203	120	MAX

BUILDABLE AREA		8,000
Section 1	Section 2	
10,000	3,000	MIN
20,000	7,000	AVG
39,000	18,000	MAX



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

MCPB No. 11-39  
Preliminary Plan No. 120110110  
Willerburn Acres  
Date of Hearing: May 5, 2011

**MAY 25 2011**

MONTGOMERY COUNTY PLANNING BOARD

RESOLUTION

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

WHEREAS, on January 6, 2011, Tamara Corporation ("Applicant"), filed an application for approval of a preliminary plan of subdivision of property that would create two lots on 1.01 acres of land in the R-90 zone, located on the east side of Gainsborough Road, approximately 400 feet southeast of Whistler Court ("Property" or "Subject Property"), in the Potomac Subregion master plan ("Master Plan") area; and

WHEREAS, Applicant's preliminary plan application was designated Preliminary Plan No. 120110110, Willerburn Acres ("Preliminary Plan" or "Application"); and

WHEREAS, Planning Board staff ("Staff") issued a memorandum to the Planning Board, dated April 22, 2011, setting forth its analysis, and recommendation for approval of the Application subject to certain conditions ("Staff Report"); and

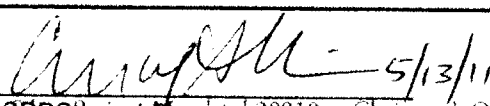
WHEREAS, following review and analysis of the Application by Staff and the staff of other governmental agencies, on May 5, 2011, the Planning Board held a public hearing on the Application (the "Hearing"); and

WHEREAS, at the Hearing, the Planning Board heard testimony and received evidence submitted for the record on the Application; and

WHEREAS, on May 5, 2011, the Planning Board approved the Application subject to certain conditions, on motion of Commissioner Dreyfuss; seconded by Commissioner Wells-Harley; with a vote of 3-0, Commissioners Carrier, Dreyfuss, and Wells-Harley voting in favor, commissioners Alfandre and Presley were absent.

NOW, THEREFORE, BE IT RESOLVED, that, pursuant to the relevant provisions of Montgomery County Code Chapter 50, the Planning Board approved

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Approved as to  
Legal Sufficiency:  5/13/11  
8787 Georgia Avenue, N.W., Suite 200, Silver Spring, MD 20910 Chairman's Office: 301.495.4605 Fax: 301.495.1320  
www.MCParkandPlanning.org E-Mail: mcp-chairman@mncppc.org

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Preliminary Plan No. 120110110  
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Preliminary Plan No. 120110110 to create two lots on the Property subject to the following conditions:

- 1) Approval under this preliminary plan is limited to two lots for two dwelling units.
- 2) The Applicant must submit a revised final forest conservation plan which shows all forest onsite as cleared and the entire planting requirement to be met off-site<sup>1</sup>. The Applicant must satisfy all conditions prior to recording of plat(s) or Montgomery County Department of Permitting Services (MCDPS) issuance of sediment and erosion control permits, as applicable.
- 3) At the time of final survey and prior to recordation of the plat, Applicant must place an approved Park boundary marker in the northeast corner and southeast corner of the Subject Property.
- 4) The Applicant must construct all road improvements within the rights-of-way shown on the approved preliminary plan to the full width mandated by the master plan and to the design standards imposed by all applicable road codes.
- 5) The Applicant must satisfy MCDPS requirements prior to recordation of the plat to ensure the construction of a five-foot-wide sidewalk along the property frontage on Gainsborough Road, unless construction is waived by MCDPS.
- 6) The Applicant must comply with the conditions of the MCDPS stormwater management approval dated December 14, 2010. These conditions may be amended by MCDPS, provided the amendments do not conflict with other conditions of the Preliminary Plan approval.
- 7) The Applicant must comply with the conditions of the Montgomery County Department of Transportation (MCDOT) letter dated March 11, 2011. These conditions may be amended by MCDOT, provided the amendments do not conflict with other conditions of the preliminary plan approval.
- 8) The Applicant must satisfy provisions for access and improvements as required by MCDOT prior to recordation of plat.
- 9) Any building permits for one-family residences that are issued pursuant to this preliminary plan must show that the buildings are to be built in substantially the same locations and orientations as shown on the certified preliminary plan.
- 10) The Adequate Public Facility review for the preliminary plan will remain valid for eighty-five (85) months from the date of mailing of the Planning Board resolution.
- 11) The record plat must show necessary easements.

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<sup>1</sup> The revised forest conservation plan can show a change to the limit of disturbance since all forest onsite will be shown as cleared.

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

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

The Preliminary Plan shows development on a vacant property that is being resubdivided in conformance with the R-90 zoning recommended in the Master Plan. The subdivision and subsequent development for two homes is consistent with the land use and zoning recommendations shown on the Existing and Proposed Zoning map and the Land Use, Parks, and Community Facilities map within the Master Plan. Therefore, the Planning Board finds the Application to be consistent with the 2002 Potomac Subregion master plan.

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

The new lots will not generate 30 or more vehicle trips during the morning or evening peak-hours. Therefore, the Application is not subject to Local Area Transportation Review and it meets the de minimus provision of the Policy Area Mobility Review (PAMR) and is, therefore; not subject to PAMR. The Property is not within a school moratorium area and is not subject to a School Facilities Payment. Right-of-way dedication is not required since all appropriate dedications have already been made for the Property and the road is built to County standards. Sidewalks are required by the Montgomery County Department of Permitting Services but the Applicant has expressed interest in pursuing a waiver of this requirement from MCDPS. In order to more fully protect the character of this neighborhood which currently lacks paved sidewalks, the Planning Board supports the Applicant with respect to any sidewalk waiver request for this Property's frontage. The Planning Board finds that vehicular access and circulation is adequate for the proposed lots. Pedestrian circulation, without sidewalks, can be safely accommodated using the edge of pavement or grass apron of Gainsborough Road. Fire and Rescue has determined that the Property has appropriate access for fire and rescue vehicles. All other public facilities and services, including utilities are adequate to serve the two lots.

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

The Planning Board finds that the Preliminary Plan complies with all other requirements of the Montgomery County Subdivision Regulations. This finding is based on a determination that the size, shape, width and orientation of each of the proposed lots is appropriate for their location within the Willerburn Acres Subdivision having also taken into account any pertinent recommendations in the Potomac Master Plan. The Planning Board analyzed the location of the subdivision within the greater Willerburn Acres Subdivision specifically for those lots fronting on Gainsborough Road between Seven Locks and Fontaine Street. The Planning Board believes that the location of the two lots is at the transition area where lots that were originally platted on septic abut lots that were platted after sewer was extended. The dimensions of each lot is substantially consistent with respect to the size, shape, width and orientation of nearby lots and they also fit into this section of the overall subdivision. It was also observed by the Planning Board that existing Lot 12 (Subject Property) is among the largest of lots in the overall subdivision, and the two lots in this Application are more in character with the rest of the subdivision. The Planning Board finds that the proposed lots' size, shape, width and orientation are appropriate at this location.

4. *The Application satisfies all the applicable requirements of the Forest Conservation Law, Montgomery County Code, Chapter 22A and the protection of environmentally sensitive features:*

A. Forest Conservation

The Board finds that with the conditions imposed by this Resolution the Preliminary Forest Conservation Plan complies with the requirements of Chapter 22A, the Montgomery County Forest Conservation Law.

B. Forest Conservation Variance

Section 5-1607(c) of the Natural Resources Article, MD Ann. Code identifies certain individual trees as high priority for retention and protection (Protected Trees). Any impact to these Protected Trees, including removal or any disturbance within a Protected Tree's critical root zone (CRZ), requires a variance under Section 22A-12(b)(3) of the County Code. Otherwise such resources must be left in an undisturbed condition.

As more specifically identified in the Staff Report, this project will require two Protected Trees, 30 inches and greater DBH to be impacted.

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Therefore, a variance is required. Although the Applicant proposed tree preservation measures to help ensure the Protected Trees with anticipated impacts survive construction, the variance is required simply due to the impact.

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

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

Granting the Tree Variance will not confer a special privilege as based on the topography of the site and the proposed house locations, the applicant has devised a plan that does not remove any trees requiring a Tree Variance and has only minor impacts to two trees.

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

The requested Tree Variance is not based on conditions or circumstances which are the result of actions of the Applicant. The variance is based on the topography of the site and the proposed house locations. The applicant has devised a plan that does not remove any trees requiring a Tree Variance and has only minor impacts to two trees.

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

The requested variance is a result of the proposed development and not a result of land or building use on a neighboring property.

- iv. *Granting the Tree Variance will not violate State water quality standards or cause measurable degradation in water quality.*

The variance will not violate State water quality standards or cause measurable degradation in water quality. The specimen trees being removed or disturbed are not within a stream buffer, wetland, or a special protection area. A Stormwater Management Concept Plan has been approved by the Montgomery County Department of Permitting Services.



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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 the Montgomery County Department of Permitting Services ("MCDPS") that the Stormwater Management Concept Plan meets MCDPS' standards.*

The Planning Board finds that 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 the Montgomery County Department of Permitting Services that the Stormwater Management Concept Plan approved December 14, 2010, meets MCDPS' standards. The stormwater management concept uses Environmental Site Design techniques that include drywells for rooftop runoff and disconnects for non-rooftop runoff.

6. *In accordance with Section 50-29(b)(2) of the County Code, the proposed lots are of the same character as to street frontage, alignment, size, shape, width, area and suitability for residential use as other lots within the existing neighborhood (as delineated by Staff in the Staff Report) ("Neighborhood"), as analyzed below.*

**Size:** The lot sizes are in character with the size of existing lots in the neighborhood. The range of Neighborhood lot sizes are from 9,783 square feet to 54,763 square feet. The lots are at 24,011 square feet for Lot 60 and 20,118 square feet for Lot 61 and within the range of all lot sizes.

**Width:** The lots will be in character with existing lots in the Neighborhood with respect to width. The two lots will be subject to an established building line (EBL) at the time of building permit. The Applicant has calculated the proposed EBL and measured the lot width at that point. The width of Lot 60 will be 108 feet and the width of Lot 61 will be 99 feet. The lot widths in the Neighborhood range from 82 feet to 203 feet. The lots are within the range of overall lot widths.

**Frontage:** The lots will be of the same character as existing lots in the Neighborhood with respect to lot frontage. The lots have frontages of 101 feet and 96 feet for proposed lots 60 and 61, respectively. There is a wide range of frontage widths for the existing lots in the Neighborhood from 25 feet to 204 feet. The lots fit into the middle of this range.

**Area:** The lots will be of the same character as other lots in the Neighborhood with respect to buildable area. The building envelope "area" for the lots in the Neighborhood range from 3,437 square feet to 38,736

square feet. Lot 60 and 61 will have buildable areas of 9,454 and 7,604 respectively

Alignment: The lots are of the same character as existing lots with respect to the alignment criterion. All Neighborhood lots that front on a straight segment of Gainsborough Road align in a perpendicular manner; all lots that front to a curved segment of Gainsborough align in a radial manner. Corner lots tend to align perpendicularly to the two streets on which they front. The proposed lots front on a straight section of Gainsborough Road and align in a perpendicular manner that is of the same character as other lots.

Shape: The shapes of the lots are in character with shapes of the existing lots. There is a wide variety of lot shapes in the Neighborhood with many standard shapes and irregular shapes. The two lots are best described as standard rectangles and similar to many other lots in the Neighborhood.

Suitability for Residential Use: The new lots are zoned residential and the land is suitable for residential use.

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

BE IT FURTHER RESOLVED, that this Resolution constitutes the written opinion of the Board in this matter, and the date of this Resolution is WAY 25 2011 (which is the date that this Resolution is mailed to all parties of record); and

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

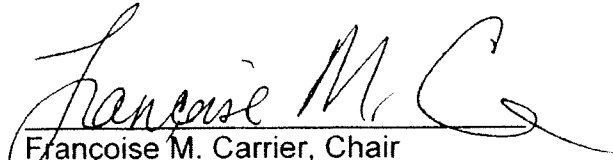
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CERTIFICATION

This is to certify that the foregoing is a true and correct copy of a resolution adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and

MCPB No. 11-39  
Preliminary Plan No. 120110110  
Willerburn Acres  
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Planning Commission on motion of Commissioner Dreyfuss, seconded by Commissioner Presley, with Chair Carrier, Vice Chair Wells-Harley, and Commissioners Dreyfuss and Presley voting in favor of the motion, and with Commissioner Alfandre absent, at its regular meeting held on Thursday, May 19, 2011, in Silver Spring, Maryland.



Françoise M. Carrier, Chair  
Montgomery County Planning Board