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February 3, 2016

Via Electronic mail and  
First Class U.S. Mail

Mr. Casey Anderson, Chair  
Montgomery County Planning Board  
Maryland-National Capital  
Park and Planning Commission  
8787 Georgia Avenue  
Silver Spring, Maryland 20910

Re: Woodfield Commons  
MCPB No. 15-153 Preliminary Plan No. 120150170  
MCPB No. 15-154 Site Plan No. 820150090

Dear Chairman Casey:

As you are aware this office represents Woodfield Commons Associates, LLC, (“Woodfield” or “Applicant”) in the above referenced matters, which were publically heard before the Montgomery County Planning Board (“Planning Board” or “Board”) on December 17, 2015. The purpose of this letter is to respond to the Petition for Reconsideration (“Petition”) submitted by Seth Gottesman, individually. On behalf of the Applicant we are respectfully requesting that the Planning Board deny the Petition and re-affirm the well-reasoned decisions embodied in Resolutions (MCPB No. 15-153 and 15-154). The allegations set forth in the Petition do not begin the rise to the standard of review set forth in the Board’s Rule of Procedure. The alleged unsubstantiated errors of law and fact are insufficient grounds to support a finding of mistake, inadvertence, surprise, fraud or other good cause, as required by Rule 4.12.

In *Gaywood Community Association, Inc. v. Metropolitan Transit Authority, et al.*, 246 Md. 93, 227 A.2d 735 (1967), the Maryland Court of Special Appeals stated that “there must be evidence of fraud, surprise, mistake, inadvertence or some change in fact or in law in order to justify the reversal.” *Id at 99*. If evidence of one of the aforementioned elements is met, the administrative agency as a matter of law is entitled to and may hear a reconsideration of the issues presented by the Request for Reconsideration. Under Maryland law, “[a]n agency . . . not otherwise constrained, may reconsider an action previously taken and come to a different conclusion upon a showing that the original action was the product of fraud, surprise, mistake, or inadvertence, or that some new or different factual situation exists that justifies the different conclusion.” *Cinque v. Montgomery County Planning Bd.*, 173 Md. App. 349, 361, 918 A.2d 1254 (2007). It follows, then, that “an agency may not reconsider and reverse a decision based on a ‘mere change of mind.’” *Id at 361*.

#### Wetlands:

See pages 19-21 of the Technical Staff Report (“TSR”), dated 12/04/15. Specifically, at the bottom of page 19, staff writes: “the Army Corps of Engineers and the Maryland Department of the Environment have refused to take jurisdiction” over a wetland area on site “that appears to have developed due to man-made impacts that blocked a natural drainage feature.” Despite the determinations by the appropriate Federal and State agencies which regulate wetlands, the M-NCPPC staff found that M-NCPPC’s “Environmental Guidelines” directed them to consider appropriate protection measures.<sup>1</sup> Applying those guidelines the Staff found that the approved limited disturbance to this isolated man-made wetlands avoided, minimized and mitigated the impacts to the wetlands. The existing soils, slopes, tree save areas, and required maintenance of hydrology, invasive species management and supplemental plantings were all thoroughly considered by Staff. The substantial evidence in the record supports the Board’s decision for the requested and approved limited wetland disturbance.

#### Sight Lines:

The Master Plan Guideline for Rural Vista Protection cited applies only to “Special Exceptions”. The applications before the Planning Board were for a preliminary plan of subdivision and a site plan. Therefore the guideline is inapplicable and may not serve as a basis for the reconsideration request.

#### Zoning/Density:

The Applicant agrees with Mr. Gottesman that a portion of the proposed density is a result of the property given to Montgomery County by the previous property owner to construct the Woodfield Road Extension and that calculating the density is “technically correct”. What the Opposition fails to acknowledge is that the Staff found that the proposed development, “falls well below the maximum density recommended by the Master Plan.” *See* TSR, page 16. Further, any reference to an alleged statement by Councilman Craig Rice, is hearsay and was not in the record before the Board.

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<sup>1</sup> Applicant submitted a 15 page Wetland Impact Statement of Justification to M-NCPPC which addressed the formation of the “wetland” and a point by point analysis of how the Applicant had avoided, minimized and mitigated the impacts to the isolated wetland area.

### Senior Housing:

The portion of the Master Plan text quoted in the Petition makes it clear that moderate-density within the Town Center, may include senior housing opportunities, but does not restrict said development to only senior housing. The second sentence quoted is inapplicable to the instant applications in that the subject property is with the Town Center, not beyond the Town Center. (Emphasis supplied).

### No Need for Additional Affordable Housing:

The “research” illustrating “that Damascus has an abundance of low-income or subsidized housing” was not introduced into the record as part of the Opposition’s evidence. The Applicant did not have the opportunity to question the source or accuracy of the information cited. The information therefore cannot be considered by the Board as a basis for reconsideration.

### Traffic/Parking:

Applicant prepared and filed a traffic study, dated March 28, 2015 in full accordance applicable standard guidelines. M-NCPPC Staff analyzed the study and determined that the proposed development as conditioned will satisfy the requirements for adequate public facilities. *See* TSR, page 17-18. Likewise, the parking was found to conform to the development standards of the CRT Zone. *See* TSR, page 27-28. Opposition argues that the “county guidelines are inadequate”. The Opposition’s opinion regarding the adequacy of the current Montgomery County legal standards and guidelines for preliminary plans and site plans cannot be a basis for the requested relief.

### H.O.C. Involvement:

The means and methods of financing the project being utilized by the Applicant is not a criteria for the grant of a preliminary plan or site plan application. The text attributed to the H.O.C. from the December 17, 2014 agenda was not introduced into the record by the Opposition. There was no opportunity for the Applicant to object to its introduction as being irrelevant. Further, based on the presentation in the Petition there is no way to determine whether the sections provided are direct quotes or a paraphrasing of the information. In either case, the H.O.C. issues raised are not relevant.

### Level of Low Income Housing:

Contrary to the bald allegations made by Mr. Gottesman, the Staff found that “(p)roviding broadly affordable housing at this location meets the Master Plan objectives for adding to the area’s inventory of affordable units” and that “the development will provide housing, specifically affordable housing, in the Town Center at a density and scale that is compatible with the surrounding development.” *See* TSR, page 16.

Finally, Petitioner's contention that the Damascus community "welcomes residents of all income levels" and is only motivated to oppose the development by its noble concern that the future residents of Woodfield Commons will be isolated behind the Safeway loading dock and the rear of the Post Office is severely undermined by the statements in the next paragraph under the same heading on page 14. "Damascus is currently comprised of an excellent mix of races<sup>2</sup>." "We are only opposed to warehousing **them** in a high density conclave [sic]."<sup>3</sup>(Emphasis supplied) and "A discussion of crime statistics in Low Income Housing Developments does not imply racism..." Applicant will refrain from any characterization of these statements.

#### Conifer Realty Misleading Testimony:

Ms. Zuniga did not mislead the Planning Board through her testimony. She truthfully testified that Conifer's primary business is residential. The Planning Board had every opportunity to ask Ms. Zuniga any relevant questions, if they believed there was any issue with the veracity of her testimony. The allegation that Ms. Zuniga would be less than open, honest and forthcoming in her testimony is offensive and unfounded and should be retracted by Mr. Gottesman.

#### Due Process:

Mr. Gottesman alleges that the posting of the notice signs was not done in complete conformance with all applicable codes and ordinances and that somehow his due process rights were violated. He falsely states that the notice sign illustrated on page 15 "is facing the wrong direction". The large notice sign that is clearly visible in that photograph is located in accordance with the instructions received from M-NCPPC Staff,<sup>4</sup> facing Woodfield Road Extended and is clearly visible and legible from the public right-of-way. The small sign in the foreground is not the notice sign. Even more egregious is the allegation that the second sign, located on the property was "blocked by the cement base of a lamp pole". First, the second sign was completely voluntary on the part of the Applicant, the M-NCPPC posting requirements were for only one sign.<sup>5</sup> Second, at the time the signs were posted the Applicant's agent contemporaneously took photographs of the locations. Please find a photograph, not taken from a deceptive point of view, which more accurately reflects the visibility of the second sign.<sup>6</sup> Applicant will refrain from raising any further issues of Petitioner's credibility, as the comparison of the photograph included on page 16 of the Petition and Exhibit No. 3 speaks for itself.

#### Intimidation/Advocacy/Petition:

The alleged actions of Councilman Rice are irrelevant. The allegation that the professional planning staff were advocates for the application is unfounded. In fact, the Staff

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<sup>2</sup> The Applicant would respectfully request that the Board take judicial notice of the fact that the U.S. Census Bureau, 2010-2014 American Community Survey 5-Year Estimate, projected that in 2014, 80.1% of the population of the Damascus CDP, Maryland was white. While the U.S. Census Bureau QuickFacts provides that in Montgomery County as a whole the percentage of the 2014 population that is white is only 62%.

<sup>3</sup> Conclave is defined by the Merriam-Webster on-line dictionary as "a private meeting or secret assembly; especially: a meeting of Roman Catholic cardinals secluded continuously while choosing a pope."

<sup>4</sup> See Exhibit No.1.

<sup>5</sup> See Exhibit No 2.

<sup>6</sup> See Exhibit No. 3.

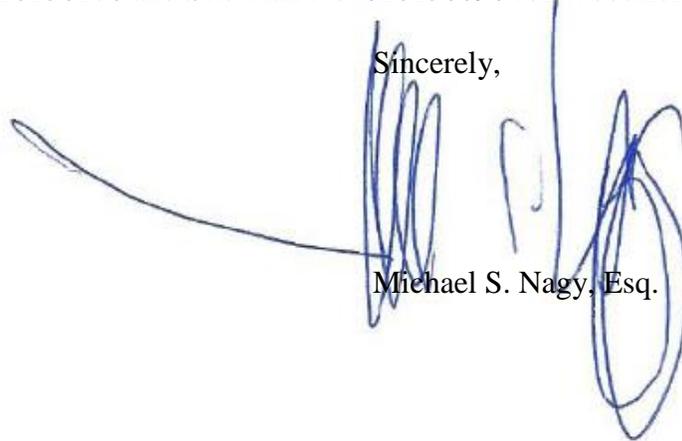
went well beyond the what was required of them to provide information to the Opposition, even holding a separate meeting at the Baker Middle School prior to the Planning Board hearing. Contrary to the Petitioner's allegations, M-NCPPC Staff simply applied the facts of the application to the law of Montgomery County and made the only recommendation that could have been made based on the substantial evidence in the record (Approval with Conditions). The number of signatures on a petition are irrelevant. Fortunately, for all involved in the application process planning matters are decided by the Planning Board based on substantial evidence in the record, not by plebiscite.

Warehouse the Tenants:

The Opposition concludes with a rehashing of the argument that the proposed development will be a haven for crime, too dense, and too isolated. The residents of Woodfield Commons will be effectively cut off from communicating with the existing citizens of Damascus and would be precluded from participation in Damascus daily life. As a result "(t)he residents will be forced to create a culture only among themselves." And despite the fact that "we are friendly" the design of their development "will make it impossible for them to reach us." There is no basis in fact and no evidence in the record to support these allegations.

For all of the reasons set forth above, the Applicant respectfully requests The Planning Board to deny the Petition for Reconsideration and to re-affirm the well-reasoned decisions of this Honorable Board embodied in Resolutions (MCPB No. 15-153 and 15-154) approving Preliminary Plan No. 120150170 and Site Plan No. 820150090 for Woodfield Commons.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael S. Nagy, Esq.", with a long horizontal flourish extending to the left.

Michael S. Nagy, Esq.

Attachments:

cc: Seth Gottesman