

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

SEP 17, 2009

MCPB No. 09-42
Preliminary Plan No. 120061100
Stanmore
Date of Hearing: April 2, 2009

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 April 28, 2006, Stanmore Limited Partnership ("Applicant"), filed an application for approval of a preliminary plan of subdivision of property that would create 30 lots on 50.93 acres of land located on the east side of Batchellors Forest Road, approximately 400 feet south of Dr. Bird Road (MD 182) ("Property" or "Subject Property"), in the Olney master plan area ("Master Plan"); and

WHEREAS, Applicant's preliminary plan application was designated Preliminary Plan No. 120061100, Stanmore ("Preliminary Plan" or "Application"); and

WHEREAS, a final revision to the Application was submitted by the Applicant on February 3, 2009 to create 19 lots on the Property; and

WHEREAS, Planning Board staff ("Staff") issued a memorandum to the Planning Board, dated March 20, 2009, setting forth its analysis, and recommendation for approval, of the revised Application subject to certain conditions ("Staff Report"); and

WHEREAS, following review and analysis of the Application by Staff and the staffs of other governmental agencies, on April 2, 2009, 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 April 2, 2009, the Planning Board approved the Application subject to certain conditions, on motion of Commissioner Robinson seconded by Commissioner Presley, with a vote of 4-0, Commissioners Cryor, Hanson, Presley and Robinson voting in favor, and Commissioner Alfandre absent.

Approved as to
Legal Sufficiency:

8787 Georgia Avenue, Suite 200, Silver Spring, MD 20910 Chairman's Office: 301.495.4605 Fax: 301.495.1320

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NOW, THEREFORE, BE IT RESOLVED THAT, pursuant to the relevant provisions of Montgomery County Code Chapter 50, the Planning Board approves Preliminary Plan No. 120061100 to create a maximum of 17 lots on approximately 51 acres of land located on the east side of Batchellors Forest Road approximately 400 feet south of Dr. Bird Road (MD 182) ("Property" or "Subject Property"), in the Olney master plan area ("Master Plan"), including a waiver of the requirement to construct a sidewalk along the Dr. Bird Road (MD 182) property frontage pursuant to Chapter 49 of the Montgomery County Code, and subject to the following conditions:

- 1) Approval under this Preliminary Plan is limited to a maximum of seventeen (17) lots for seventeen (17) residential dwelling units, including the three existing units. To achieve seventeen lots, prior to preliminary plan certification the Applicant must provide a survey of the Subject Property that is certified by a registered Land Surveyor and verifies that the net tract area of the Property is at least the minimum area necessary for 17 lots under the RNC zone. Absent the submission of such a survey, the maximum density that can be achieved on this Property is limited to sixteen (16) dwelling units, including the three existing units.
- 2) The Applicant must revise the Preliminary Plan prior to certification to bring it into conformance with condition 1 by removing an appropriate number of lots and reconfiguring the internal lot lines of proposed lots on Private Street "A" and/or Private Street "B."
- 3) No clearing, grading, or recording of plats prior to site plan approval.
- 4) Final approval of the number and location of buildings, dwelling units, sidewalks, and bikepaths will be determined at site plan.
- 5) The Applicant must comply with the conditions of approval for the Final Forest Conservation Plan dated March 16, 2009. The applicant must meet all conditions prior to the recording of plat(s) or Montgomery County Department of Permitting Services ("MCDPS") issuance of sediment and erosion control permit(s), as applicable. Conditions include, but are not limited to:
 - a) Split rail fencing is required along lots 5-7, 13, 14, and 16, directly adjacent to areas of reforestation.
- 6) The final record plat must show dedication as well as centerline for the following rights-of-way, consistent with the 2005 Approved and Adopted *Olney Master Plan*:
 - a) Batchellors Forest Road – 35 feet from the road right-of-way centerline or full-width dedication of 70 feet along Property frontage, as appropriate.
 - b) Dr. Bird Road – 60 feet from the road right-of-way centerline. Access to the subdivision from Batchellors Forest Road shall be restricted to the proposed interior residential private streets and the two existing private driveways.
- 7) The Applicant must construct any necessary road improvements, except a sidewalk within the road right-of-way for Dr. Bird Road (MD 182), along the

Property frontages to the full width mandated by the Master Plan and to the design standards imposed by all applicable road codes.

- 8) The Applicant must construct the proposed private roads to the structural standards of a public tertiary street and provide an engineer's certification to the MCDPS, Roadway Permitting Section prior to issuance of access permits to verify that this condition has been met.
- 9) The Applicant must comply with conditions of the Montgomery County Department of Transportation (MCDOT) letter dated June 20, 2006. These conditions may be amended by MCDOT provided the amendments do not conflict with any other conditions of the Preliminary Plan approval.
- 10) The Applicant must comply with the conditions of MCDPS, Well and Septic Section approval. These conditions may be amended by MCDPS, Well and Septic provided the amendments do not conflict with any other conditions of the Preliminary Plan approval.
- 11) The Applicant must comply with the conditions of the MCDPS stormwater management approval dated February 10, 2009. These conditions may be amended by MCDPS provided the amendments do not conflict with any other conditions of the Preliminary Plan approval.
- 12) The Applicant must comply with any MCDOT requirements for access and improvements for Batchellors Forest Road prior to recordation of plat(s), and with any Maryland State Highway Administration (MDSHA) requirements for improvements for Dr. Bird Road (MD 182).
- 13) The record plat must reflect a public use and access easement over Private Streets "A" and "B."
- 14) The record plat must reflect "denied access" to Dr. Bird Road (MD 182) along the Property frontage.
- 15) The record plat must reflect a Category I conservation easement over all areas of stream valley buffer and forest conservation.
- 16) The record plat must reflect delineation of Rural Open Space areas and make note of the Liber and Folio of an easement agreement or covenant recorded in the land records which restricts the uses in the rural open space to those set forth in the RNC zone and establishes procedures for the management of natural or agricultural features as set forth in the approved site plan. Record plat to have the following note: "The land contained hereon is within an approved cluster development and subdivision or resubdivision is not permitted after the Property is developed."
- 17) The record plat must reflect common ingress/egress and utility easements over any shared driveways.
- 18) The record plat must reflect all parcels under Homeowners Association control, and separately designate stormwater management parcels.
- 19) The Adequate Public Facility (APF) review for the preliminary plan will remain valid for eighty-five (85) months from the date of mailing of the Planning Board opinion.

20) Other necessary easements must be shown on the record plat.

BE IT FURTHER RESOLVED, that, having given full consideration to the recommendations and findings of its Staff, 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 maximum allowable density on the Subject Property is limited to 0.33 dwelling units per acre as calculated on the net tract area of the Subject Property. The transfer of density from the adjacent, RC-zoned Good Counsel High School property (Preliminary Plan No. 120020820) is not permitted.*

The Application proposed a total of 19 lots in the RNC zone. In order to achieve this density, the Applicant requested the Planning Board's approval to transfer density from the adjacent Good Counsel High School property, which was owned by the Applicant prior to being subdivided for the school and is in the Rural Cluster (RC) zone, by treating this as a combined cluster development. The Application does not comply with the express requirements established by the Board when it previously considered the potential for density transfer between the Good Counsel property and the Subject Property. More importantly, because the Zoning Ordinance does not permit the transfer of density between the RC zone and the RNC zone, in which the subject property is located, the Board cannot allow the proposed density transfer.

The Board contemplated the possibility of a density transfer between the Good Counsel site and the Subject Property when it approved the preliminary plan for the Good Counsel property. But in contemplating the possibility of a density transfer between the sites, the Board made clear that a transfer could happen only under certain circumstances that this Application does not satisfy. When the Board considered Preliminary Plan No. 120020820 for Good Counsel, the Olney Master Plan, which covers the Subject Property, was in the process of being drafted. The Board recognized at that time that the Subject Property would likely be rezoned, but did not know what the zoning would be or whether it would allow for transfer of density through combined clustering. Therefore, in its opinion approving the Good Counsel preliminary plan, which included all of the approximately 100-acre property owned by the Hyde family on both sides of Batchellors Forest Road, including the Subject Property, the Board stated that "there is no guarantee that the Master Plan recommendations will result in rezonings that allow this density allocation and that there is no guarantee that all of the combined potential density will be achieved." Further, in an Amended Opinion for this preliminary plan, the Board made clear that a density transfer would be allowed only if two legal prerequisites were met:

“density associated with the School Site may be considered across the entire Property, provided that 1) the entire Property is rezoned to one cluster zone, or to two different cluster zones that qualify under the Zoning Ordinance as combined cluster development; and 2) the School Site is included in any future preliminary plan application.”¹

The Application meets neither of these conditions. The Good Counsel site and the Subject Property were neither rezoned to one cluster zone nor to two different cluster zones that qualify under the Zoning Ordinance for combined cluster development. Moreover, the Good Counsel site was not included in this Application. Therefore, the Board cannot permit a transfer of density between the two properties.

The Applicant makes two arguments for why the Board should extend the combined cluster provision of the Residential Zones to the Agricultural Zones, neither of which is correct. First, it argues that there is nothing in the Zoning Ordinance stating that the combined cluster provisions of the Residential Zones apply only to Residential Zones. Second, it argues that language in Section 59-C-1.1, which lists the zones included under the Residential Zone umbrella, noting that “[r]esidences are also permitted in certain other zones, including the central district zones, the planned unit development zones and the rural zone” means that the provisions of Section 59-C-1 are intended to apply in any zone that permits residential uses.

With respect to the Applicant’s first argument, the Board finds that the negative inference that the Applicant seeks to draw from the lack of a statement in the zoning ordinance specifying that the combined clustering provision of the zoning ordinance does not apply in the Agricultural Zones is incorrect. Except where otherwise specified, the development standards that appear in one section of the zoning ordinance – in this case Section 59-C-1 (Residential Zones) – do not apply in another – in this case Section 59-C-9 (Agricultural Zones). Each family of zones, including the Residential Zones and Agricultural Zones has a different purpose. Similarly, each specific zone within a family of zones has a different purpose. Further, each family of zones and each zone has its own detailed set of development standards designed to meet its intended purpose. Thus, the requirements of each zone must be read separately. The Applicant’s attempt to read the provisions of one set of zones to apply to another set of zones makes no sense within the structure of the zoning ordinance, and, if accepted, would lead to a great deal of confusion about what development standards apply to a

¹ At the time of the approval of Preliminary Plan No. 120020820, the Good Counsel High School side of the property was zoned RC and the remainder of the property was zoned RE-2.

given zone. Finally, the fact that the Residential Zones expressly allow combined clustering under certain circumstances highlights the absence of such an allowance in the Agricultural Zones.

With respect to the Applicant's second argument, none of the language in Section 59-C-1 suggests that the clustering provisions of Section 59-C-1.526 apply to the Agricultural Zones, as the Applicant claims. In support of this contention, the Applicant points to language in Section 59-C-1.1 that follows a list of Residential Zones. This language serves merely to clarify that although there are a limited number of zones that are called "Residential Zones" there are other zones that also allow residential development. This language does not extend any of the development standards of Section 59-C-1 to other zones or families of zones where residential development is also allowed. Moreover, even if the Applicant were correct in reading Section 59-C-1.1 to extend the development standards of the Residential Zones to other zones, the precise language upon which the Applicant relies does not mention Agricultural Zones. It mentions the "rural zone," a specific zone within the Agricultural Zone family that is distinct from the RC and RNC zones.

The Board's reading of the Zoning Ordinance not to allow the transfer of density through combined clustering between the RC and RNC zones is fully consistent with its decision in Preliminary Plan No. 120020820. In the Amended Opinion approving that plan – specifically, when the Board stated that transferring density would require rezoning the Good Counsel site and the Subject Property either to a single cluster zone or two different cluster zones that qualify under the Zoning Ordinance as combined cluster development – the Board recognized that there are some cluster zones that allow combined clustering and some that do not. If all cluster zones allowed combined clustering, as the Applicant implicitly argues,² there would have been no reason for the Board to say in its Amended Opinion that the Good Counsel site and the Subject Property would have to be rezoned to two cluster zones that allow combined clustering. The Board would have simply stated that the two properties had to be rezoned to one or more cluster zones.

At the public hearing, the Applicant further argued that the transfer of residential density from the Good Counsel site to the Subject Property would have been allowed if the property had been subdivided at the same time with one plan, and the fact that they are not being subdivided at the same time should not stand in the way of the density transfer. The premise of this argument is fundamentally

² The Applicant has not argued that all cluster zones allow combined clustering per se, but implicitly so argues because only the Residential Zones and Agricultural Zones contain clustering provisions, and the Applicant argued that the combined clustering provisions in the Residential Zones apply in the Agricultural Zones.

flawed. If the applicable zoning does not allow the transfer of density through combined clustering, transfer of density is not permitted across the zone boundary in any circumstance, regardless of whether the property were to be subdivided under a single plan or separate plans.

Finally, in response to the Applicant's argument that a transfer of density should be permitted because it reflects the previous agreement made between Staff and the Applicant, the Board finds that nothing that occurred in any discussions between the staff and the Applicant at the time of the Good Counsel subdivision created any rights or in any way bound the Planning Board. Moreover, the Board specifically found at that time that any potential future density transfer was not guaranteed. At the public hearing, the Applicant argued that at the time the Good Counsel preliminary plan was approved there was a gentlemen's agreement between the Applicant and the Planning Board's staff that the density transfer would be permitted in the future. Even if such an agreement existed, an agreement made by Staff does not bind the Planning Board. Moreover, as discussed above, the Board made clear its position on the possibility of a density transfer in the Good Counsel preliminary plan resolution. Therefore, the Applicant has long been on notice of what would be required to obtain approval of a plan that called for combined clustering.

The Board further finds that potential density on the Subject Property is limited by the Master Plan. In the RNC zone, density on a property using the optional method of development (i.e., cluster development on sewer) must conform to the recommendations and guidelines of the applicable master or sector plan. The Olney Master Plan recommends a density of 0.33 dwelling units per acre for the RNC zoned portion of the Hyde property, with no provision for transfer of density from the RC zoned portion of the site. Therefore, the Board finds that under the RNC zone development standards, density on the Hyde property must not exceed 0.33 dwelling units per acre. The transfer of density proposed by the Applicant would exceed this limit.

2. The Preliminary Plan substantially conforms to the Olney Master Plan.

The Subject Property is identified as #2, Hyde and Bowns Properties (page 27) in the Land Use section of the Olney Master Plan. The Plan has general recommendations for the Southeast Quadrant of Olney, where this property is located, and specific recommendations about this property.

The Plan's comments about the Southeast Quadrant focus on preserving the existing low-density residential character of the area in general and the character of Batchellors Forest Road in particular. The Plan states:

"this road has visual character and other attributes to qualify it as a Rustic Road and should be designated as such, precluding any change or improvement that may alter the character of the road" (page 22, second paragraph).

"Preserve open space, streams, significant forests, and the low-density character of the Southeast Quadrant through cluster development, on community sewer where appropriate.

Protect the rustic character of Batchellors Forest Road by using topography, clustering of houses away from the road, and landscaping to preclude, or minimize, the visibility of new development from Batchellors Forest Road."(Page 23)

On page 25, Design Guidelines for all RNC properties in the Southeast Quadrant, the Plan states, among others:

"Minimize new driveway entrances on Batchellors Forest Road to preserve its rustic character."

"Preserve exceptional vistas of open fields on larger properties from Batchellors Forest Road, especially on Casey, Hyde and Polinger properties by clustering homes in such a way that they are not visible from the road. If that is not feasible, use landscaping techniques to screen houses from the road."

The specific comments and recommendation regarding this Property are included in the Land Use section of the Plan (#2, Hyde and Bowns Properties, page 27). The Plan recommended rezoning of the Property to the RNC zone on community water and sewer, if feasible, with 0.33 units per acre. The Plan states that the "feasibility of providing public sewer through gravity to this property should be determined at the time of subdivision. The property should be placed in the recommended sewer envelope. However, putting it in the sewer envelope would not automatically entitle this property to development on public sewer."

The Board finds that the most critical portion of the site in terms of protecting the visual quality and character of Batchellors Forest Road and the surrounding area is the southern half of the Property because of its rolling topography, rural character, and high visibility from Batchellors Forest Road. The proposed Preliminary Plan meets the Master Plan's recommendation for protecting the rustic character of Batchellors Forest Road by keeping this southern portion of the Property in its current state and preserving it as Rural Open Space under the requirements of the RNC Zone. All the new houses are clustered in two areas in the central and northern portion of the site where they will be well screened from Batchellors Forest Road by existing trees on the Property. The existing houses

on the property (two along Batchellors Forest and the third slightly back in the woods) will contribute towards preservation of existing conditions and the character of Batchellors Forest Road. The Plan also preserves open space, streams, significant forests, and the low-density character of the site by clustering development.

3. *The Plan satisfies the conditions of the Montgomery County Council's category change action for WSCCR 06A-OLN-01 under Council Resolution 14-1638.*

The Planning Board finds the Preliminary Plan satisfies the Montgomery County Council's conditions for water and sewer category change to W-3 and S-3. The Preliminary Plan uses the RNC optional cluster development method and, with the conditions of approval, fully satisfies each of the purposes and objectives of the RNC zone, the 2005 Olney Master Plan and the Rustic Road statute. Sewer service to the Property will be provided only through access to the existing main to the west of the site. The Board finds that the use of grinder pumps to provide sewer service to the middle cluster of development is acceptable because it keeps the southern portion of the Property free of any new construction and uses a location best suited for new construction due to the screening provided by existing trees on the site.

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

Roads and Transportation Facilities

The Board finds that the existing and proposed roadways will provide safe and adequate access and circulation for vehicles and pedestrians. The vehicle trips from the proposed development during the weekday morning and evening peak-periods will not exceed 30 trips. Therefore, a traffic study was not required and the Application passes the Local Area Transportation Review portion of the Adequate Public Facilities (APF) test. The proposed development does not require a Policy Area Mobility Review test because the Application was filed prior to January 1, 2007. The Property has frontage on Batchellors Forest Road and Dr. Bird Road (MD 182). Batchellors Forest Road is classified as a two-lane rustic road with a 70-foot-wide right-of-way. Consistent with the Functional Master Plan for Rural and Rustic Roads, Batchellors Forest Road will not be improved as part of this Application. The roadway provides the shared road bikeway recommended in the Master Plan. Dr. Bird Road is classified as a two-lane major highway with a minimum 120-foot-wide right-of-way. A Class I bikeway is recommended on the northern side of the roadway and the standard cross-section calls for the Applicant to construct a 5-foot sidewalk along the Subject Property's southern frontage. The Planning Board finds that a waiver of

this requirement is justified because the resulting section of sidewalk does not connect to the closest existing path and would be unsafe because it would require a dangerous crossing of Dr. Bird Road to reach that path. The Board also finds that retaining the existing mature forest that would be removed by constructing the sidewalk will be more beneficial to the area than providing a sidewalk that would not be used for the foreseeable future.

Other Public Facilities and Services

Other public facilities and services are available and will be adequate to serve the proposed development. The Property will be served by public water and sewer systems, although two of the existing houses have been approved to remain on wells and/or standard septic systems. The application has been reviewed by the Montgomery County Fire and Rescue Service who have determined that the Property has appropriate access for fire and rescue vehicles. Electrical and telecommunications services are also available to serve the Property. Other public facilities and services, such as schools, police stations, firehouses and health services are operating according to the Growth Policy resolution currently in effect and will be adequate to serve the Property. The Application is not within a school moratorium area and is not subject to payment of School Facilities Payment.

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

The lots as proposed will meet all the dimensional requirements for area, frontage, width and setbacks in the RNC zone. The lot layout protects the portion of the site recommended as the most appropriate for open space in the Olney Master Plan, and minimizes disturbance to environmentally sensitive area. The Plan exceeds the minimum requirement of 65% rural open space, and the location of the open space will protect environmentally sensitive areas, scenic vistas, and priority forest. The spatial relationship between houses and the open space protects the rustic character of Batchellors Forest Road by keeping the southern portion of the Property in its current state and clustering new homes in areas where they will be well screened from the road. The required reduction in the number of lots should be carried out in a manner that further promotes creation of open spaces and buffering, especially in the northern portion of the site.

6. *The Application satisfies all the applicable requirements of the Forest Conservation Law, Montgomery County Code, Chapter 22A.*

From the forest conservation perspective, this is the second phase of the Final Forest Conservation Plan that was approved in conjunction with the preliminary plan for the Good Counsel site. The previously approved forest conservation plan established areas of forest retention and planting. The current application is consistent with the overall approved forest conservation plan. A total of 16.03 acres of existing forest is retained and an additional 3.85 acres of forest has already been planted within the stream valley buffers.

The Application meets the minimum on-site forest requirements of Sec. 22A-12(f)(2)(B) of the Forest Conservation Law for this property by retaining and planting a total of 19.88 acres of forest which exceeds the conservation threshold of 25%, or 12.73 acres.

7. *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's standards.*

The MCDPS Stormwater Management Section approved the stormwater management concept for the project on February 10, 2009. The proposed stormwater management plan includes on-site water quality control via construction of six structural water quality facilities. On-site recharge is provided via the use of open section roadways and storage areas that will be incorporated below the stormwater facilities wherever practical. Channel protection volume is not required because the one-year post development peak discharge from the site is less than or equal to 2 cubic feet per second.

8. *Due to topography and location of natural features on the Property, overlength cul-de-sacs are required to provide street access to the site.*

The roadway design for the property includes the creation of two private cul-de-sac roads which will be greater than 500 feet in length. Per Section 50-26(d) of the Montgomery County Code, a cul-de-sac road should be no longer than 500 feet unless a greater length is justified by reason of property shape, size, topography, large lot size, or improved street alignment. The Planning Board finds that the design of these over-length roadways are justified by the topography and location of natural features on the property, and the fact that the proposed street alignment minimizes views of new houses from Batchellors Forest Road, provides protection of environmentally sensitive areas, and avoids stream and wetland crossings. If a roadway loop or other connection were required for these roads, sensitive environmental areas would be impacted.

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 Montgomery County Land Records or a request for an extension must be filed; and

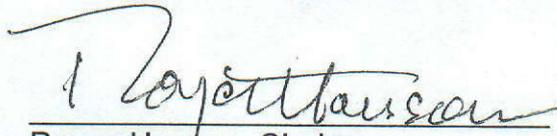
BE IT FURTHER RESOLVED, that this Resolution constitutes the written opinion of the Board in this matter, and the date of this Resolution is SEP 17 2009 (which is the date that this Resolution is mailed to all parties of record); and

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 Planning Commission on motion of Commissioner Wells-Harley, seconded by Commissioner Presley, with Commissioners Hanson, Alfandre, Presley, and Wells-Harley voting in favor of the motion, and with Commissioner Cryor absent, at its regular meeting held on Thursday, September 10, 2009, in Silver Spring, Maryland.



Royce Hanson, Chairman
Montgomery County Planning Board