



MEMORANDUM

DATE: March 10, 2005

TO: Montgomery County Planning Board

VIA: Rose Krasnow, Chief *RK*
Development Review Division

FROM: Catherine Conlon, Acting Subdivision Supervisor (301) 495-4542
Development Review Division *CC*

REVIEW TYPE: Preliminary Plan of Subdivision

APPLYING FOR: Preliminary Plan approval of fourteen (14) lots and one (1) outlot; fifteen (15) one family detached dwelling units

PROJECT NAME: Stoney Springs (Casey Property)
CASE NO. 1-05029

REVIEW BASIS: Pursuant to Chapter 50, the Subdivision Regulations and Chapter 59, the Zoning Ordinance

ZONE: RDT

LOCATION: Located on the south side of Offutt Road and west side of Mount Nebo Road at the intersection of West Offutt Road and Mount Nebo Road

MASTER PLAN: Agricultural and Rural Open Space

APPLICANT: Winchester Homes
ENGINEER: Benning & Associates, Inc.
ATTORNEY: Holland and Knight, LLP

HEARING DATE: March 17, 2005

Staff Recommendation: Approval subject to the following conditions:

- 1) Approval under this preliminary plan is limited to 14 lots and 1 outlot.
- 2) Compliance with the conditions of approval for the preliminary forest conservation plan including requirements that reforestation occur during the first planting season after issuance of the first sediment control permit and that applicant construct a permanent, split rail fence on lots 6 and 9 to protect and delineate the forest conservation easement area. The applicant must satisfy all conditions prior to recording of plat(s) or MCDPS issuance of sediment and erosion control permits.
- 3) Prior to issuance of building permits for each lot, a house location and landscaping plan shall be submitted to MNCPPC Legacy Open Space staff for review and approval.
- 4) Future contract of sale for proposed lot 2 shall include notification to potential buyers that the lot contains a historic resource included on the Historic Preservation Locational Atlas (Resource #17/32, Log Cabin - Offutt Road).
- 5) Future contracts of sale for all houses shall include notification to potential buyers of the shooting range operated on the adjacent Izaak Walton League property.
- 6) Prior to recordation of plats, applicant shall conduct necessary stabilization measures for the existing historic structure in coordination with Historic Preservation staff.
- 7) All road rights-of-way shown on the approved preliminary plan shall be dedicated by the applicant to the full width mandated by the Rustic Road Master Plan, unless otherwise designated on the preliminary plan.
- 8) Dedicate five (5) additional feet of right-of-way for a total of 35 feet from the centerline of Mount Nebo Road, as required for rustic road R-27.
- 9) Compliance with the conditions of approval of the MCDPS stormwater management approval dated October 29, 2004.
- 10) Compliance with conditions of MCDPS (Health Dept.) septic approval.
- 11) Applicant to establish 25' Public Use Trail Easements in the following locations:
 - a. From Edwards Ferry Road to the eastern boundary of the subject property to promote access to Broad Run Stream Valley Park. Alignment to be sufficiently set back from West Offutt Road to allow a useable trail to be aligned therein that adequately protects users from road traffic, but extending no further than 35 feet from the proposed road right of way unless otherwise agreed to by Applicant and M-NCPPC staff.
 - b. South from West Offutt Road along the entire eastern border of proposed Lot 3;
 - c. South from West Offutt Road along the approximate Mount Nebo Road alignment to the southern boundary of the property sufficiently set back from Mount Nebo Road to allow a useable trail to be aligned therein that adequately protects users from road traffic but extending no further than 35 feet from the proposed road right of way, unless otherwise agreed to by Applicant and M-NCPPC staff; and
 - d. South from West Offutt Road through the eastern portion of the subject property to the southern property boundary, to be located east of proposed Lots 14, 12, 11 and 10, and west of the Potomac River tributary that runs from north to south through the property.

Exact alignment of said easements to be field located by Applicant and M-NCPPC staff and established by Applicant on the record plat. Easement and trail to be adequately identified by the applicant with appropriate signage.

- 12) Compliance with conditions of MCDPWT letter dated November 12, 2004, unless otherwise amended.
- 13) Record plat to reflect a Category I easement over all areas of stream valley buffers and forest conservation, including the proposed forest conservation bank area on Lot 15.
- 14) Record plat to reflect common ingress/egress and utility easements over all shared driveways.
- 15) Provide an affidavit to verify the availability of a TDR for each existing and proposed dwelling unit shown on the approved preliminary plan. Include a note referencing the affidavit on record plat.
- 16) Other necessary easements.

SITE DESCRIPTION and SURROUNDING AREA:

The Stoney Springs property is a 704-acre site on the north and south sides of West Offutt Road east of its intersection with Edwards Ferry Road, and on the south side of West Offutt Road east of its intersection with Mount Nebo Road (see Attachment A). The property is zoned RDT and includes an existing farmhouse and outbuildings. The property is currently fallow fields, but has been actively farmed. The property includes numerous streams, wetlands, floodplains, and 304 acres of forest. Edwards Ferry Road is designated as “exceptional and rustic” in the Rustic Roads Functional Master Plan, and West Offutt and Mount Nebo Roads are designated “rustic”. The surrounding properties contain agricultural uses or forest with the exception of a cluster of residential lots abutting the property on the west side of Edwards Ferry Road. A conservation property owned by the Izaak Walton League abuts the southeast corner of this property. A shooting range is currently operated on this property.

PREVIOUS PLAN HISTORY

A pre-preliminary plan application (Pre-preliminary Plan No. 7-03023) which included 28 potential residential lots was submitted in January, 2003 for this property for staff review and septic testing purposes. This pre-preliminary plan was followed in August, 2004 by a preliminary plan application for 13 lots and 8 outlots (Attachment B). The proposed lots and outlots ranged in size from a lot of 3.5 acres to an outlot of 301 acres. Most of the proposed lots averaged 9 acres, with two very large lots of 62 acres and 70 acres. The smallest proposed outlot was 8.6 acres with most of them being greater than 15 acres. All the lots were proposed to be served by private “sand mound” septic systems and wells.

The preliminary plan was presented to the Planning Board on December 9, 2004 with a staff recommendation of approval, with conditions. Staff based the approval recommendation on the fact that the proposed lots complied with the dimensional requirements for Rural Density Transfer (RDT) zoned property found in Chapter 59, the Zoning Ordinance, and the belief that the subdivision met the intent of the zone.

The RDT Zone allows single-family residential uses by right at a density of one dwelling per twenty-five acres, with a minimum net lot area is 40,000 square feet. The intent in allowing this flexible lot size was to allow property owners to carve off smaller lots while retaining the bulk of their land in contiguous fields for agricultural purposes. The intent of the zone in the Ordinance states: “*agriculture is the preferred use*”, and “*this is to be accomplished by providing large areas of generally contiguous properties suitable for agricultural and related uses..*”. The support for the preliminary plan in the staff report reflected a belief that the subdivision would provide large contiguous field areas on the larger lots which could continue to support traditional farming uses (i.e., crops).

Prior to and during the Planning Board hearing, concerns were raised by citizens and environmental groups regarding the proposed density on the property and the size of the proposed lots. Additional concern was raised regarding the use of sand mound septic systems in the RDT zone as the means of achieving the proposed density. The Planning Board discussed these concerns and the merits of the proposed plans and concluded that the proposed preliminary plan was not in keeping with the intent of the RDT zone as contained in the Agricultural and Rural Open Space (AROS) Master Plan. In response to the Board’s discussion, the applicant requested deferral of the plan.

CURRENT PROJECT DESCRIPTION

The revised preliminary plan proposes to create fourteen (14) lots and one (1) outlot on the 704-acre subject property (Attachment C). The applicant proposes to remove all remaining development rights from the property, so no additional lots will be created. This will reduce the overall density on the property to one dwelling per 50 acres; or one dwelling per 47 acres if the outlot is ever converted to a building lot.

The proposed building lots range in size from 3.5 acres to 309.1 acres. The two smallest lots are 3.5 and 3.6 acres in size. Nine of the fifteen lots are greater than 20 acres in size, and eight out of nine of these lots are greater than 30 acres in size. The proposed lot layout consists of two areas where smaller lots are clustered, and several widely dispersed larger lots. The first lot cluster is located in the southwest portion of the site and consists of 4 lots clustered at the end of an extremely long driveway. Existing forest and tree cover provides visual buffering between houses on these lots and the road frontages. The second lot cluster consists of 4 lots on the east side of Mount Nebo Road at the end of a shared driveway that rises in elevation from the road frontage. Houses on these lots and a fifth lot in the same proximity would be in view from the road frontage.

A total of six lots are less than or equal to eight acres in size. These lots are large enough to support private horse stables, but they will not provide for the more significant types of agricultural uses envisioned by the AROS plan. However, the clustering of these smaller lots does provide large areas of generally contiguous property which are suitable for agricultural and related uses. Factoring out the area encompassed by the smaller lots (35 acres), non-farmable portions of mostly wooded lots (7 acres), and the portions of the overall property which will remain forested (309 acres), a total of 353 acres of the currently existing 395 acres of available agricultural land will remain available for agricultural uses. When combined with the 309 acres

of forest protection and planting, approximately 662 acres of the total property will be preserved for agriculture and agricultural open space. Overall proposed density on the property is now approximately one dwelling unit per forty-seven acres.

CONFORMANCE TO THE MASTER PLAN

RDT Zoning

The proposed reconfigured preliminary plan meets the requirements for the RDT Zone, and more fully complies with the intent of the zone stated in 59-C-9.23. The zone allows single-family dwellings as a permitted use in the zone, and the current proposal has a density significantly lower than the allowed density of one dwelling per twenty-five acres.

Further, the proposed configuration creates more contiguous open space that could be used for agriculture. As stated in the Master Plan (page 30), *“The open space qualities of farmland preservation are significant. It provides productive, privately maintained agricultural open space with environmental benefits that include rural aesthetics and air and water quality. The significance of open space, as a result of large lot residential clustered development, cannot be underestimated. These open space areas are vital to the buffering of the agricultural preservation areas and can also provide leaseback arrangements for interested farmers.”*

Sand Mound Septic Systems

Chapter VI of the AROS plan includes recommended Water and Sewer Guidelines to be applied in areas designated for agricultural preservation. On page 62 the guidelines state: “Deny private use of alternative individual and community systems in all areas designated for the Rural Density Transfer Zone (RDT)”. A number of individuals testifying during the original preliminary plan hearing stated the belief that the proposed use of sand mound septic systems on the subject property violated this guideline.

The Montgomery County Code, Chapter 27A describes innovative and alternative on-site sewage disposal systems as, “an experimental system and/or innovative technology not currently described in these Regulations but described in State of Maryland Regulations or policy letters.” Mound systems are described in the county regulations and are routinely approved. According to staff’s research, a total of 35 lots in the RDT zone have received approval for sand mound septic systems since 1999. In the State of Maryland Regulations, “mound systems” are included in the definition of “conventional on-site sewage disposal systems”, and “non-conventional on-site sewage disposal systems” are separately defined (see Attachment D).

Concern has also been raised regarding the adequacy of sand mound septic systems for water quality protection. The Montgomery County Department of Permitting Services (MCDPS) is the lead agency that reviews and approves applications for all on-site sewage disposal systems in the county. MCDPS Well and Septic staff present at the previous hearing stated that sand mounds are comparable, and in some ways superior to, typical septic trench systems. As is the case with a trench septic system, a mound system must meet percolation standards and have

back-up mounds approved in case of failure. Cost for repairs and replacement of a mound system are borne by the property owner.

MCDPS Well and Septic staff have reviewed and approved the proposed sand mounds for the 14 lots being created as part of this subdivision. Conversion of the proposed outlot to a lot through the minor subdivision process will be contingent on further MCDPS approval. In accord with the MDPS recommendation, staff finds that the proposed well and septic is adequate.

Despite this conformance with County regulations, this subdivision proposal has raised a question regarding the intent of the Master Plan in regard to septic disposal systems vs. the current state of technology for septic disposal. The truly provocative question is whether the state of septic technology in 1980 should govern density – imposing “defacto” density standards far more restrictive than what the zoning permits. Establishing an answer to that question is a deeply divisive policy interpretation that is very debatable.

Zoning law sets certain development standards that define the limits of property rights. But in certain instances, those limits are further restricted by subsequent decisions that further limit development potential. This has happened in many areas where new environmental regulations have curtailed development potential; or where a property is outside the sewer envelope and therefore cannot develop at the full zoning potential.

This situation is somewhat different. In 1980 septic technologies like “sand mounds” were new and considered “alternative”; and the Master Plan determined that using these systems would undermine the intent of the Plan. But the Plan had already established that it was the County agency (DEP at the time, DPS now) that defined what was “alternative.”

The Master Plan discusses the population holding capacity of the Agricultural study area (page 17), and states that the projected holding capacity under the existing Rural Zone with its 5 acre density (35,000 dwelling units) is significantly higher than the holding capacity based on septic system suitability (20,000 dwelling units). This study establishes the reason for creating a public policy regarding the private use of “alternative individual or community sewerage systems outside the sewer envelope”, and the much lower density Rural Density Transfer Zone that is proposed later in the Plan. That discussion also notes that septic systems are regulated by the Montgomery County Department of Environmental Protection; and emphasizes that this “perc” policy is one of the most significant factors in limiting residential development in the agricultural study area. The implication of the Study is that residential development density should be lower than one dwelling per five acres; but septic policy – regulated by the MCDEP – is an insufficient means to keep the otherwise allowed density restricted; therefore a much lower density zone is needed.

Later, in its description of the state of the Agricultural Community (page 25) the Plan states that farming is under stress, and the five-acre density of the Rural Zone is not effective in curbing residential conversion and limiting future development. The plan states this is due to “recent advances in small scale community sewerage system technology, [as] these systems can overcome the most severe of soil conditions” (from footnote 24). The Plan further notes that the lack of public water and/or sewer do not deter development activity, so new land use policies and

a new zone must be developed that will address future development with an emphasis on farmland preservation.

To address the stated concern, the Plan proposes the new RDT Zone and water and sewerage guidelines (page 59-60). The Plan specifically supports denying the private use of “*alternative individual and community systems in all areas designated for the Rural Density Transfer Zone.*” This phrase is at the core of the policy question today. Who is authorized to determine or define what is an “alternative individual system”? According to the Master Plan (page 17) the regulatory agency is the Department of Environmental Protection (now regulated by the Department of Permitting Services). If they are the defining regulatory agency, and they determine that sand mound systems are no longer “alternative”, then these systems should be found acceptable.

If this interpretation is within the legal authority of the Planning Board, then they can decide that the underlying intent of denying sand mounds as a means to reduce density below that allowed in the zone is sufficient to deny any subdivision that uses sand mounds. The staff sees several problems with relying too heavily on this approach:

First, the Planning Board has already approved a number of subdivisions using sand mounds, so it would not be consistent with past practice.

Second, the Plan itself states that septic disposal is regulated by the County, which implies that they have the authority to determine what an “alternative” system is.

Third, the intent in the Plan’s “Holding Capacity Study” was to show why a 25-acre density zone was needed, instead of the existing 5 acre density zone; since septic systems did not stop development at 5 acre density.

Finally, the staff believes that using an artificial construct of septic viability as a means to restrict density otherwise allowed in the zone is not a particularly honest approach. If lower densities overall are desired for the RDT Zone, that should be openly debated and decided.

But there are other reasons and stronger authority for pushing developers to propose more creative subdivision designs that better achieve the goal of preserving open farmland – which may often result in lower density as a byproduct. The staff believes that getting a better subdivision design that better preserves large contiguous areas that could potentially be farmed is a stronger basis for reviewing subdivisions in the RDT Zone.

The Planning Board was correct in pushing this developer to reconfigure this subdivision to better achieve the intent of the zone, and for that reason it is in better conformance with the Master Plan. But septic methods are evolving swiftly, and soon there will be septic treatments that will work on virtually any soils, and will be far more protective of groundwater – and ultimately our drinking water and the Chesapeake Bay – than any systems currently used. The staff would find it difficult to recommend denying the use of those systems, because the 1980 Master Plan would have considered them to be “alternative.” The staff believes that using the

1980 argument against the use of the Rural Zone, as the basis for denying development in the RDT Zone that was designed to “cure” the problem, is not sustainable, and perhaps not fair.

ENVIRONMENTAL

The property includes numerous streams, wetlands, floodplains, and 304 acres of forest. Most of these environmentally sensitive areas, some of which are very high quality, will be protected and preserved as part of the proposed plan. Long-term protection will be provided by placing these areas in Category I conservation easements.

Forest Conservation

There are 304-acres of existing forest on the property. This development is occurring in an agricultural resource area and therefore must comply with Section 22A-12(f) of the Montgomery County Code, Forest Conservation Law. This section requires retention and/or planting of a certain percentage of the net tract area as forest. For this particular plan, the appropriate percentage is equal to the “afforestation threshold” for the property, or twenty percent.

The applicant has requested an agricultural exemption from forest conservation for proposed Lot 15. This lot is 309 acres in size and includes 144 acres of existing forest. The forest is both within stream buffers and upland. All forest is high priority and includes good diversity in canopy and understory trees. This forest will be placed in a Category I conservation easement and protected as part of the plan. In the future, the applicant will be permitted to use or sell “credits” from this forest bank area to meet the offsite reforestation requirements of other development projects. This bank will not inhibit the remainder of the site being used for agricultural purposes. The net tract area to which forest conservation requirements apply has been reduced to reflect the exemption of proposed Lot 15, however, if the lot is not used for agriculture the forest conservation plan will be required to be revised.

The plan is proposing the removal of 4.5-acres of forest. As a result of this forest removal the forest conservation law requires the applicant to plant 9-acres of new forest. The applicant is proposing to plant along an unforested stream buffer. This planting will not result in the reforestation of all stream buffers, but it is sufficient to meet the minimum requirements of the forest conservation law.

Environmental Guidelines

The site includes stream buffers, floodplains, and wetlands. These areas will be protected by Category I forest conservation easements. Stream buffers that are not currently forested or will not be reforested will also be protected with a category I forest conservation easement. The existing farmhouse and outbuildings are partially within the stream buffer and the applicant proposes to remove these structures.

LEGACY OPEN SPACE

The Planning Board approved the addition of the property for the above-referenced plan to the Legacy Open Space (LOS) program on May 13, 2004 (known as the Casey Farm in LOS documents). The site was added to the Farmland and Rural Open Space target area and recommended for protection through agricultural easement programs or directly through the Legacy Open Space program. The site was identified as an exceptional property within the Agricultural Reserve due to the high quality of the forested wetlands on the property, the ecological connectivity that those forests provide between significant natural areas, and the large size of the agricultural fields. Staff recommended that the applicant consider agricultural conservation easements for parts of the property to reduce density and minimize impact on the environmental and rural character of this site. Legacy Open Space staff have reviewed the Preliminary Plan at several stages and have the following comments on the current plan.

Density/Lot Layout

The current plan asks for a maximum of 15 lots with all remaining development rights to be separated from the property, resulting in an overall density of one unit per 47 acres. The *Legacy Open Space Functional Master Plan* recommends that density be kept below one unit per 50 acres to keep as much viable farmland and rural open space as possible. The lot size distribution on this plan will provide a mix of smaller estate lots (six lots less than eight acres), larger estate or small farm lots (eight lots ranging from 20 to 78 acres), and one large farm outlot of 309 acres. This size distribution and density, while increasing the developed area significantly over the current land use, does almost meet the reduced density goal for Legacy Open Space and does provide several lots that have the potential for continuing agriculture use.

Forest Protection

This development plan protects most of the existing forest on the site through easements on the larger lots with fencing in critical locations to define the edge of protected forest. Legacy staff understands that the forest and stream valley buffers on the 309-acre farm (Lot 15) will be preserved in easement to meet offsite forest conservation requirements for other developments. This level of protection of the existing forest meets the Legacy Open Space goals for the property.

Rural Viewshed Protection

The *Legacy Open Space Functional Master Plan* also recommends protection of rural vistas along designated Rustic Roads. All three roads adjacent to this subdivision (Mount Nebo, West Offutt, and Edwards Ferry) are Rustic Roads. Staff recommends that care be taken as building permits are issued to fine tune landscaping and placement of houses on the lots to minimize impact to the rural viewsheds (see proposed Condition #3).

CITIZEN CONCERNS

A number of letters have been received in response to the pre-preliminary and preliminary plans, most of which express opposition. A packet containing the letters previously submitted to the Board as part of the first hearing has been placed in the Chairman's office for reference. Several selected letters which express the main concerns are attached to this staff memo along with written testimony from the first hearing and new letters. Staff has attempted to address the issues raised in these letters in this staff memo.

CONCLUSION

The plan was reviewed for consistency with Chapter 50, the Subdivision Regulations and found to comply with all applicable sections of that chapter. Staff also finds the lots comply with the dimensional requirements for Rural Density Transfer (RDT) zoned property found in Chapter 59, the Zoning Ordinance. As such, Staff recommends approval of the preliminary plan, subject to the conditions included above.

ATTACHMENTS

- Attachment A – Vicinity Map
- Attachment B – Previous Preliminary Plan
- Attachment C – Revised Preliminary Plan (Current Proposal)
- Attachment D – State Septic Definitions
- Attachment E – Citizen Correspondence