MCPB
Item #
10/04/07

MEMORANDUM

DATE: September 21, 2007

TO: Montgomery County Planning Board

VIA: Rose Krasnow, Chief
Development Review Division

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

REVIEW TYPE: Pre-preliminary Plan Review
APPLYING FOR: Minor subdivision of 3 lots (3 Child Lots)

PROJECT NAME: Dufresne Property
CASE #: 720060540
REVIEW BASIS: Chapter 50, Section 50-35A(a)(8), Montgomery County Subdivision Regulations

ZONE: RDT
LOCATION: Located on the west side of Georgia Avenue (MD 97), approximately 3,500 feet south of New Hampshire Avenue (MD 650) a.k.a. Damascus Road
MASTER PLAN: Agricultural and Rural Open Space (AROS)

APPLICANT: Ms. Shirley M. Dufresne
ATTORNEY: Michele M. Rosenfeld
ENGINEER: Macris, Hendricks and Glascock

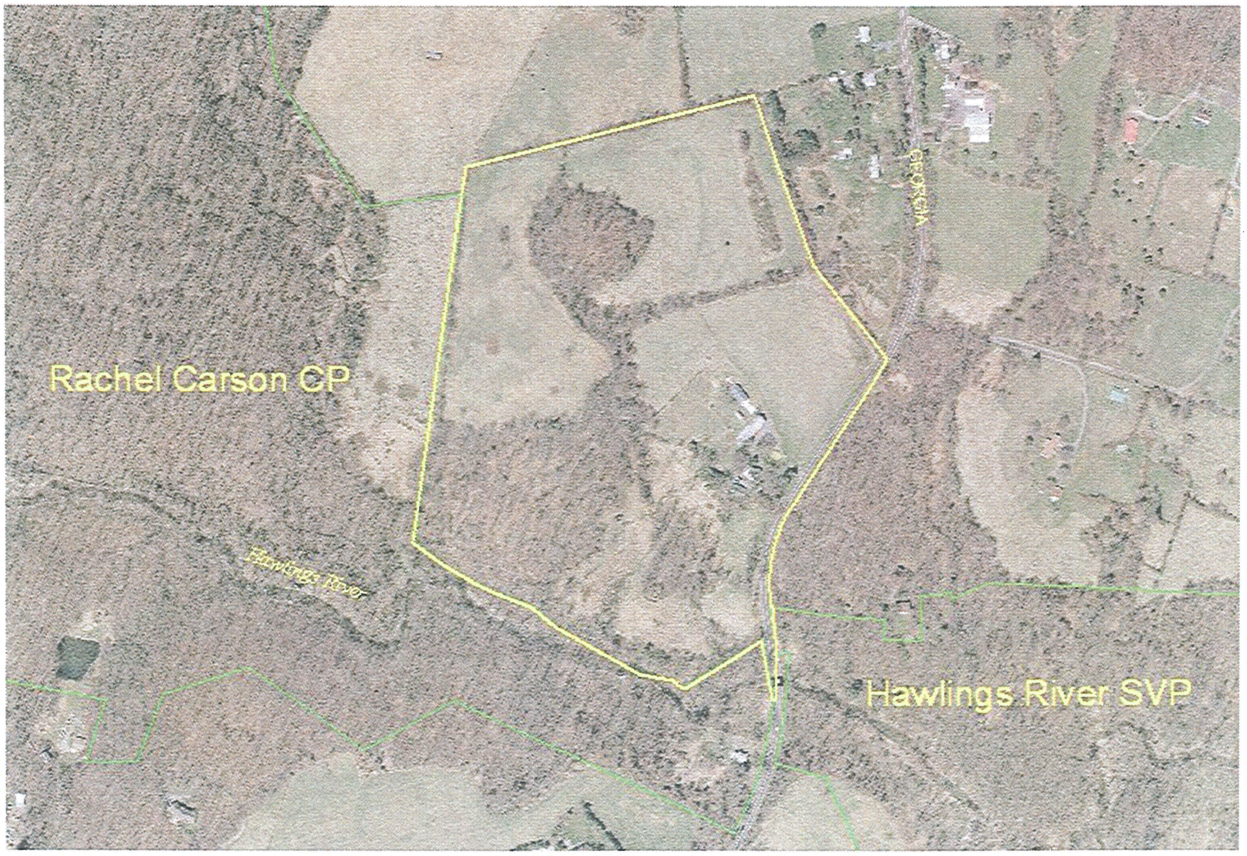
FILING DATE: March 28, 2006
HEARING DATE: October 4, 2007

STAFF RECOMMENDATION: Denial

I. SITE DESCRIPTION

The 44.55-acre Dufresne Property ("Subject Property" or "Property"), shown below and on the vicinity map in Attachment A, is located on the west side of Georgia Avenue (MD 97) approximately 3,500 feet south of its intersection with Damascus Road/New Hampshire Avenue (MD 650) in the village of Sunshine. The Rural Density Transfer (RDT) zoned Property is within the Olney Master Plan area and currently contains a one-family detached residence, farm buildings, lawn, pasture, and forest. The property abuts parkland to the west and south.

The Property is within the Hawlings River watershed (Use Classification IV-P), which is a primary tributary to the Patuxent River and a drinking-water supply reservoir, and part of the Patuxent River Primary Management Area (PMA). The main stem of Hawlings River flows along the southern boundary of the Property and it is bisected from north to south by a tributary stream. The open fields on the eastern half of the property contain prime agricultural soils.



II. PROJECT DESCRIPTION

The pre-preliminary plan proposes to create three "child lots", pursuant to Section 59-C-9.74(b)(4) of the Montgomery County Code, through the minor subdivision process

(Attachment B). Proposed lot sizes are 3.8, 2.8, and 3.3 acres, respectively. The existing residential dwelling and farm structures are retained on the remaining ±33 acres of the property, which will remain an unplatted parcel. The proposed lots encompass the eastern portion of the site and have pipestem lot frontages on Georgia Avenue (MD 97). Access to the lots from Georgia Avenue is via a shared driveway that crosses the farm parcel.

All existing forest and stream buffer areas are within the remaining farm parcel. Most of the area containing prime agricultural soils will be within the proposed lots. All the lots are approved by MCDPS for standard septic systems and private wells.

III. ANALYSIS AND FINDINGS

A. Compliance with RDT Density and Minor Subdivision Requirements

Density Permitted in the RDT Zone

In order to approve the proposed lots, the Board must find that they conform to the requirements of the RDT zone. According to Section 59-C-9.41, the base density of the RDT zone is limited to one one-family dwelling unit per 25 acres, except that certain dwelling units are excluded from this calculation provided they are accessory uses to a farm. The section states:

> **"59-C-9.41. Density in RDT zone.**
>
> Only one one-family dwelling unit per 25 acres is permitted. (See section 59-C-9.6 for permitted transferable density.) The following dwelling units on land in the RDT zone are excluded from this calculation, provided that the use remains accessory to a farm. Once the property is subdivided, the dwelling is not excluded:
>
> (a) A farm tenant dwelling, farm tenant mobile home or guest house as defined in section 59-A-2.1, title "Definitions."
> (b) An accessory apartment or accessory dwelling regulated by the special exception provisions of division 59-G-1 and 59-G-2."

The provisions of the zone also include exemptions for certain lots and parcels as contained in Section 59-C-9.74. This section states:

> **"59-C-9.74. Exempted lots and parcels – Rural Density Transfer zone.**
>
> (a) The number of lots created for children in accordance with the Maryland Agricultural Land Preservation Program must not exceed the development rights assigned to the property.
>
> (b) The following lots are exempt from the area and dimensional requirements of section 59-C-9.4 but must meet the requirements of the zone applicable to them prior to their classification in the Rural Density Transfer zone.

(1) A recorded lot created by subdivision, if the record plat was approved for recordation by the Planning Board prior to the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone.

(2) A lot created by deed executed on or before the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone.

(3) A record lot having an area of less than 5 acres created after the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone by replatting 2 or more lots; provided that the resulting number of lots is not greater than the number which were replatted.

(4) A lot created for use for a one-family residence by a child, or the spouse of a child, of the property owner, provided that the following conditions are met:

(i) The property owner can establish that he had legal title on or before the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone;
(ii) This provision applies to only one such lot for each child of the property owner; and
(iii) Any lots created for use for one-family residence by children of the property owner must not exceed the number of development rights for the property."

The subject application proposes to create child lots pursuant to Section 59-C-9.74(b)(4), however, the proposed density exceeds what is permitted in Section 59-C-9.41. As written, these two sections are in conflict because one permits lots to be created on land areas that are less than 25 acres, and in numbers that are equal to the development rights assigned to the property (1 per 5 acres); and the other limits density to one dwelling unit per 25 acres. Although child lots exceeding base density have been permitted in the past, in more recent discussions on this topic, the Planning Board has questioned the validity of this interpretation. During these discussions the Board has heard strong opposition to the past interpretation presented by citizen groups such as, the Conservation Federation of Maryland, Inc. (CFM) and T/A For a Rural Montgomery (FARM), because dwellings for children are not specifically excluded from the density calculations by Section 59-C-9.41. And strong support for maintaining this interpretation has been received from the County's Agricultural Preservation Advisory Board and Agricultural Advisory Committee based upon their understanding of the legislative history and intent of the Section 59-C-9.74 exemption provisions.

APPLICANT'S POSITION

In a letter dated August 22, 2007 (Attachment C), the Applicant's representative discusses the legal grounds that she believes support approval of the requested child lots. Her primary arguments are: 1) the application meets the three statutory requirements of Section 59-C-9.74(b)(4); 2) interpretation of the law to permit child lots in excess of base density is consistent with previous Agency practice and Planning Board actions; and 3) an interpretation that limits child lots to base density renders the Section 59-C-9.74 exemption provision meaningless, which is contrary to standard statutory construction rules. She also believes that the legislative history supports the practice of exempting child lots from base density. She argues that a comparison of the language of the child lot provisions of the Rural zone (which specifically limits overall density based on acreage), versus the language in the RDT zone (which limits density by the number of development rights associated with the property), demonstrates that the District Council was aware of the distinction between development rights and density in these zones, and intended to limit development in the RDT zone by development rights, not base density, when child lots were being created.

STAFF'S POSITION

A plain reading of the Section 59-C-9.4 RDT density provisions does not support creation of child lots in excess of the one dwelling unit per 25-acres density limit. Absent a decision by the District Council to change the language of the zone as part of the pending zoning text amendments, staff does not believe child lots should be created in excess of base density.

Minor Subdivision Requirements

The proposed lots are requested pursuant to Section 50-35A(a) of the Subdivision Regulations. Section 50-35A(a)(8) establishes the ability to plat up to five (5) lots in the RDT zone through the minor subdivision process after Planning Staff or Planning Board approval of a pre-preliminary plan, and if the application meets the following criteria:

a. Written approval for a proposed septic area must be received from the Montgomery County Department of Permitting Services, Well and Septic Section prior to recordation of the plat;
b. Any required street dedications along the frontage of the proposed lot(s) must be shown on the record plat;
c. An easement must be recorded for the balance of the property noting that density and TDRs have been utilized for the new lots. Reference to this easement must be reflected in the record plat for the lots;
d. Lots created in the RDT zone through the minor subdivision procedure must not exceed an average lot size of five (5) acres in size unless approved by the Planning Board in the review of a pre-preliminary plan of subdivision; and
e. Forest conservation requirements must be satisfied prior to recording of the plat.

The proposed application meets some, but not all the requirements for minor subdivision. MCDPS Well and Septic Section has approved standard septic systems and well locations for the proposed lots. Compliance with the right of way dedication requirements would, as a matter of process, be reviewed by the Department of Public Works and Transportation at the time of record plat. Recordation of an easement noting the use of TDRs from the parent parcel could be added as a condition of approval if the Planning Board decides to support this application, and the proposed lots do not exceed five acres in size. Staff does not, however, support the currently proposed forest conservation plan (as discussed below).

In addition to the specific criteria above, all minor subdivision applications are also subject to the general requirements of sections 50-35A(b)-(e). Section 50-35A(d) states:

> "(d) Any lot created through the minor subdivision process and any lot replatted as part of a minor lot line adjustment must satisfy all applicable zoning requirements as contained in Chapter 59 of this Code."

As discussed above, the proposed lots do not satisfy all zoning requirements, and therefore, the application does not meet the Section 50-35A(d) requirement for minor subdivision.

B. Conformance to the Master Plan and Purpose of the RDT Zone

Both the Functional Master Plan for the Preservation of Agriculture and Rural Open Space (AROS) and the Olney Master Plan include the subject property. The Olney Master Plan describes Northern Olney, where the property is located, as the area north of the Town of Brookeville. The plan highlights the fact that this area includes a portion of the Patuxent River mainstem watershed and the entirety of the Hawlings River watershed, a major tributary to the Patuxent River. Both these watersheds drain to drinking-water supply reservoirs, and as previously noted, the Hawlings River flows along the southern boundary of the subject property. As to land use, the Olney Master Plan states:

> "Zoning in these watersheds was specifically designed to maintain rural character by transferring development from the area west of Georgia Avenue and concentrating it around the Town Center. The current zoning of one unit per 25 acres (RDT zone) and the existing uses in the Patuxent and Hawlings River watersheds have provided significant protection to the area's environmental resources, and should be maintained." p. 17

> "No zoning changes are recommended for Northern Olney since the current zoning and land use framework is appropriate for this area. Agriculture and rural open space in the area west of Georgia Avenue and rural open space in the area east of Georgia Avenue are the recommended primary land uses." p. 18

The property also falls within the Agricultural Reserve area described in the AROS plan. The plan describes the Reserve as area that "includes the majority of the remaining working farms, as well as other land uses that will serve to define and support those working

farms" (p. 38), and as areas that "contain a critical mass of productive farmland worthy of protection, as well as other non-farmland uses which serve to support and define the critical mass" (p. 41). The plan recommends RDT zoning and transfer of development density to help preserve farmland and farming in these areas. The purpose clause of the RDT zone also speaks to this intent:

> "The intent of this zone is to promote agriculture as the primary land use * * *. This is to be accomplished by providing large areas of generally contiguous properties suitable for agricultural and related uses and permitting the transfer of development rights from properties in this zone to designated receiving areas. * * * Agriculture is the preferred use in the Rural Density Transfer zone."

In staff's opinion, the proposed pre-preliminary plan layout does not adequately preserve agricultural use of the property. The proposed lots encompass 9.3 acres of the overall ±44-acre tract, and proposed density is approximately one dwelling unit per 11 acres. The farm remainder parcel contains the majority of the overall acreage and one dwelling unit, but approximately half the existing agricultural fields, including most of the prime agricultural soils, would be eliminated to make way for residential lots. The area outside the proposed lots consists mostly of steeply sloping stream valley and associated floodplain, wetlands, rocky soils and forest; and access to the majority of the remaining fields (in the northwest corner of the property) is limited by the boundaries of the lots and the steep stream valley slopes. The Applicant's existing farm operation involves leasing fields to others for crops, but the loss of prime agricultural soils and the restricted access to available fields would limit continuation of this commercial agriculture. Loss of the opportunity to lease these types of prime agricultural land makes it more difficult for farmers who lease to assemble sufficient land to make it economically feasible to continue farming. Based on the configuration of the proposed lots, the most productive farmland area and the best area for continued commercial agriculture would be lost.

One purpose of child lots is to permit inter-generational transfer of farm properties and the continuation of family farming operations. If three child lots are deemed necessary to the working of a 44.5 acre farm, less than one third the Montgomery County average, they should be the minimum possible size, minimize fragmentation of the property, and maximize the viable farmland. The proposed plan utilizes too much of the best available farmland for placement of residential lots, and therefore, the application does not substantially conform with the AROS and Olney Master Plans or the purpose of the RDT zone.

C. Environmental Review

A Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) describing the environmental features of the property was approved by Environmental Planning staff on February 10, 2006 (NRI/FSD #4200061690). This plan indicates that the site includes streams, wetlands, floodplains, forested area and steep slopes. The site is within the Hawlings River watershed and the Patuxent River Primary Management Area. The proposed lots are subject to the requirements of the Forest Conservation Law, and a Forest

Conservation Plan has been submitted.

Environmental Guidelines

The majority of the stream valleys and associated environmental features are located on the proposed farm remainder parcel, and so would not be covered by the Planning Board's *Environmental Guidelines for Development*. Within the proposed lots included in this application, the requirements of the guidelines are being met by establishment of a limit of disturbance that does not permit any encroachment into stream valley or wetland buffers. The plan does propose a significant amount of grading on steep slopes to create homesites and the proposed shared driveway, however, impacts to adjacent wetland buffer from this grading should be able to be avoided with application of appropriate sediment and erosion control measures. The areas of stream and wetland buffer that fall within proposed lots should be placed in a Category I conservation easement if the Planning Board decides to approve the application.

Forest Conservation

The Environmental Planning staff have reviewed the submitted Forest Conservation Plan and do not support the plan as currently proposed. The plan would create 1.98 acres of forest on the three proposed child lots through afforestation planting. While the planting area includes some stream valley and wetland buffer, more than 55% is non-priority area, and the resulting forest stand would be isolated and only 50' wide in many places. Based on staff's past experience with these types of areas, it will be very difficult to control invasive species and maintain the planted trees, and the benefit of trying to do so in non-priority area is minimal. In addition, locating these types of areas within residential yards is impractical and has inevitably proven to be an administrative and enforcement burden. In the short- to mid-term the areas will be overgrown and not particularly attractive since only selective removal of invasive species is permitted, and mowing may not occur.

The proposed afforestation does not meet the requirements of Section 22A-12(e)(1)(A), which prioritizes how afforestation and reforestation requirements should be met. First priority is enhancement of existing forest, and then planting within priority forest areas, such as environmental buffers. There are many other areas on the farm remainder portion of the site that are both entirely within environmental buffers, and contiguous to existing forest. Portions of the existing forest on the farm remainder could also be permanently protected to meet forest conservation requirements. Given this property's proximity to the Hawlings River, and the contribution that protection or enhancement of the environmental resources on the farm remainder would make toward its protection, staff does not support the forest conservation plan as proposed.

Patuxent Primary Management Area

The subject property is almost entirely within the Patuxent Primary Management Area (PMA) and is subject to the PMA requirements. One requirement is that overall imperviousness should not exceed 10 percent for the entire site. Another requirement is that septic fields be setback a minimum of 200' from stream channels. The proposed plan meets

these requirements.

D. Parks

The subject property is located adjacent to the eastern side of the Rachel Carson Conservation Park, one of the top natural areas in the County park system, and includes an area that is recommended by the Olney Master Plan, Rachel Carson Conservation Park Master Plan, and Rachel Carson Greenway Trail Corridor Plan, for inclusion in the park. Current parkland along the north side of the Hawlings River mainstem adjacent to this property is very narrow and does not include portions of the river, or important adjacent stream buffer area and forested steep slopes. Although this area is not a part of the lots included in the pre-preliminary plan application, it has been, and will continue to be an area that the Parks Department is trying to acquire.

IV. CITIZEN CORRESPONDENCE

Written notice of the application and the date of the public hearing were given for this pre-preliminary plan. As of the date of this staff memorandum, one letter and several verbal comments have been received by staff regarding the application. The letter was from Mr. George Lechlider, President of the Montgomery County Farm Bureau (Attachment D). Mr. Lechlider writes in support of the proposed child lots and in continuing the past practice of approving child lots in excess of base density. The verbal comments received have been on both sides of the argument surrounding the child lot issue. In staff's opinion, action of the District Council regarding the proposed zoning text amendments is needed to resolve this issue.

CONCLUSION:

The Planning Board should disapprove the subject pre-preliminary plan application for several reasons. First, the lots included in the application are requested pursuant to Section 59-C-9.74(b)(4) of the Zoning Ordinance which exempts certain lots from the area and dimensional requirements of the RDT zone, provided among other things, that the lots are not created in excess of the development rights available on the property. This section has been interpreted in past cases to grant exemption from the RDT zone base density requirement of one dwelling unit per 25 acres, but plain reading of these two sections does not support this interpretation. Absent a decision on the currently pending zoning text amendments that will decide this issue by the District Council, staff recommends disapproval of the pre-preliminary plan application.

Staff also recommends disapproval because the pre-preliminary plan does not substantially conform with the recommendations of the applicable master plans, or the purpose of the RDT zone. The proposed plan does not preserve the most productive agricultural use (fields for crops) because half the existing agricultural fields, including most of the prime agricultural soils, are replaced with residential lots. In addition, access to the remaining area that might be utilized for agriculture is limited by the placement of the lots.

Finally, staff recommends disapproval of the proposed forest conservation plan because it proposes afforestation planting in non-priority areas when alternative area is available, and

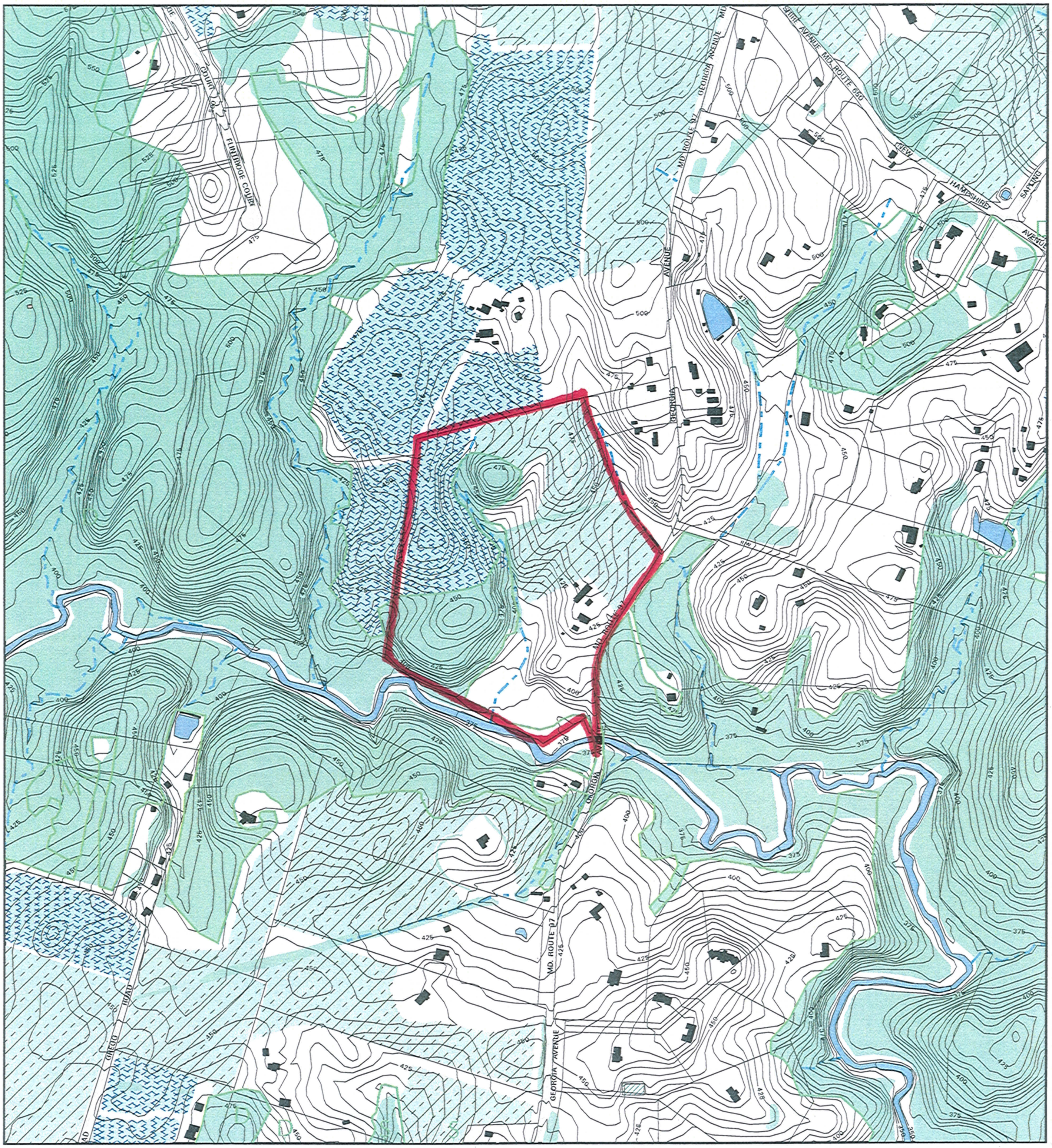
because the configuration of the proposed forest stand is undesirable.

ATTACHMENTS:

Attachment A – Vicinity Map
Attachment B – Pre- preliminary Plan
Attachment C – Applicant's Letter
Attachment D – Citizen Letter

Attachment A

DUFRESNE PROPERTY (720060540)



Map compiled on April 17, 2006 at 1:46 PM | Site located on base sheet no - 230NW03

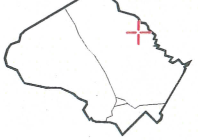
NOTICE

The planimetric, property, and topographic information shown on this map is based on copyrighted Map Products from the Montgomery County Department of Park and Planning of the Maryland -National Capital Park and Planning Commission, and may not be copied or reproduced without written permission from M-NCPPC.

Property lines are compiled by adjusting the property lines to topography created from aerial photography and should not be interpreted as actual field surveys. Planimetric features were compiled from 1:14400 scale aerial photography using stereo photogrammetric methods.

This map is created from a variety of data sources, and may not reflect the most current conditions in any one location and may not be completely accurate or up to date. All map features are approximately within five feet of their true location. This map may not be the same as a map of the same area plotted at an earlier time as the data is continuously updated. Use of this map, other than for general planning purposes is not recommended. - Copyright 1998

Key Map



N

RESOURCES FOR ACTION

Research & Technology Center

0 800

1 inch = 800 feet
1 : 9600

M-NCPPC

MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
8787 Georgia Avenue - Silver Spring, Maryland 20910-3760

Attachment B

SURVEYOR'S CERTIFICATE

I hereby certify that the boundary shown hereon is correct based on existing deeds and plats recorded among the Land Records of Montgomery County, Maryland, subject to change upon completion of a final survey. Topography from sources noted hereon.

8/17/06
Date

Barry E. Hoyle
Macris, Hendricks & Glascock, P.A.
By: Barry E. Hoyle
Professional Land Surveyor
Maryland Reg. No. 21135

PERCOLATION CERTIFICATE

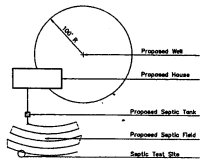
I hereby certify that the septic test sites as shown on this plan have been field surveyed

8/17/06
Date

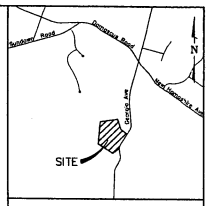
Barry E. Hoyle
Barry E. Hoyle
Professional Land Surveyor
MD Reg. No. 21135

GRAPHIC SCALE
(IN FEET)
1 inch = 100 ft.

Call "Miss Utility"
Telephone 1-800-257-7777
For Utility Locations At
Least 48 Hours Before
Beginning Construction



LEGEND
No Scale



VICINITY MAP
SCALE 1" = 2,000'

NOTES

1. Topography from Potomac Aerial surveys dated December 2005, 2'contour interval.
2. Boundary information from surveys by this office.
3. Water and sewer category W-6 and S-6, respectively.
4. The property is zoned RDT. The proposed land use is Residential and Farming.
5. Number of lots proposed by this plan: 3 and the farm as a remainder.
   Number of Development Rights = 8
   This proposal is being developed using Sec. 50-35A(6) Minor Subdivisions ------ Approval Procedure
   The existing home site will become the remainder of the parcel and continues as a farm owned by the DuFresne family, one dwelling unit per 25 acres, by right.
   Lots – 1,2 & 3 are being created using section 59-C-9.74(4), a lot created for use for a one-family residence by a child, or the spouse of a child, of the property owner.
6. A Natural Resources Inventory Map/Forest Stand Delineation Plan has been approved by M-NCP&PC Environmental Planning Division, the number is 4-06106.
7. This site is within Rural Open Space Master Plan Area, Planning Area # 23.
8. The site drains to the Hawlings River. The State of Maryland has designated this portion of the watershed as Class IV-P.
10. This plan is not for construction purposes.
11. Property lines and areas are subject to adjustment at final plat computations.
12. Building locations and grading are graphical representations. Final building location and grading to be completed at Building Permit phase.
13. Servicing utility companies include:

Water & Sewer:	On-Site Private Wells & Septic
Electric:	PEPCO
Telephone:	Verizon

(2)

AREA TABULATION

TOTAL SITE AREA	44.5+/- Ac.
PROPOSED ROAD DEDICATION	1.0+/- Ac.
NET SITE AREA	43.5+/- Ac.

DEVELOPMENT STANDARDS – R.D.T.

	* Required/Permitted	Proposed
Density of development (59-C-9.41):	Tract Area/25 Ac.	***
Minimum Lot Area (59-C-9.42):	40,000 sf	130,680sf
Minimum Lot Width (59-C-9.42): –At Street Line –At Building Restriction Line	25 ft. min. 125 ft. min.	25 ft. min. 125 ft. min.
Setback From Street (59-C-9.44):	50 ft. min.*	50 ft. min.*
Yard Requirements (59-C-9.44): –Side:	20ft. min.(one side) 40 ft. min.(total)	20 ft. min.(one side) 40 ft. min.(total)
–Rear:	35 ft. min.	35 ft. min.
Building Height (59-C-9.47)	50 ft. max.**	50 ft. max.**
Building Coverage (59-C-9.48)	10% max.	10% max.

* This setback must consist of any scenic setback indicated on an approved and adopted master plan or 50 feet, whichever is greater.
** – Except that there is no height limit for agricultural buildings.
*** 59-C-9.74 Exempted lots and parcels---- Rural Density Transfer zone.

SEPTIC DESIGN CHART

LOT Ex.	SITE	TIME (MIN.)	DEPTH	SITE	TIME (MIN.)	DEPTH	SITE	TIME (MIN.)	DEPTH	SITE	TIME (MIN.)	DEPTH	AVG. TIME (MIN.)	DEPTH OF STONE	INITIAL TRENCH	TOTAL TRENCH	NUMBER OF BEDROOMS
Ex.	1E	14	3 & 12	1L	11	3 & 14	2E	24	2.5&14.5	2F	11	3 & 14	15	4	217	1700	Ex.
1	4E	15	2.5 & 10	5D	6	3.5 & 12	–	–	–	–	–	–	12	4	217	1700	6 *
2	4F	14	5 & 13	3A	13	4.5&13.5	3C	18	4&14	–	–	–	15	4	217	1700	6 *
3	3C	18	4 & 14	2H	7	3 & 11	2I	20	3.5 & 12.5	–	–	–	15	4	217	1700	6 # *

* No Gravity Basement Sewer
# NOTE: House location requires the use of effluent pumps.

INVERT TABLE

LOT	TOP OF TANK	INVERT IN	INVERT OUT	INVERT @ TRENCH	LOWEST FIXTURE	BASEMENT FLOOR
	Existing					
1	473.5	472.5	472.3	470.5	479.5	469.5
2	471.0	470.0	469.8	468.5	475.5	465.5
3	439.0	438.0	437.8	445.0	443.5	433.5

TAX MAP HV52 WSSC 230NW03

PREPARED FOR
Mr. Steve DuFresne
21510 Georgia Ave.
Sunshine, MD. 20833
Ph: 301-774-7597
Fax: 301-774-0932

NO.	DATE	DESCRIPTION	BY

PRE-PRELIMINARY PLAN
P 777
DUFRESNE PROPERTY
L. 10965 F. 539
1ST ELECTION DISTRICT – MONTGOMERY COUNTY – MARYLAND

MHG Macris, Hendricks & Glascock, P.A.
Engineers • Planners
Landscape Architects • Surveyors
9220 Wightman Road, Suite 120
Montgomery Village, Maryland
20886-1279
Phone 301.670.0840
Fax 301.948.0693
www.mhgpa.com

Proj. Mgr.	Designer
DAC	DAC
Date	Scale
3-2-06	1"=100'
Project No.	Sheet
05.246.10	1 of 1

Attachment C

Michele M. Rosenfeld
The Law Office of Michele M. Rosenfeld
11913 Ambleside Drive
Potomac MD 20854
301-204-0913
rosenfeldlaw@verizon.net

August 22, 2007

Via Courier

Cathy Conlon
Subdivision Coordinator
Development Review Division
MNCPPC
8787 Georgia Avenue
Silver Spring MD 20910

RE: Dufresne Property
Minor Subdivision No. 720060540

Dear Ms. Conlon:

This letter details the legal grounds in support of the above-referenced minor subdivision application, and I ask that you submit this letter into the record. In summary, Mrs. Shirley Dufresne's application meets the legal standards of the Zoning Ordinance and Subdivision Regulations and should be approved.

This application is for three lots on a 44.55-acre parcel of land ("Dufresne Property") in the Rural Density Transfer zone ("RDT") pursuant to Section 59-C-9.74(b)(4) of the Montgomery County Code ("Exempted lots and parcels – Rural Density Transfer zone) ("Exemption Provisions"). Lots created under the Exemption Provisions are commonly referred to as "child lots."[1]

A. The Application Meets the Current Zoning Ordinance Standards for Child Lots in the RDT Zone As It Did When The Planning Board Approved Eight Child Lots On The Dufresne Property In 1990.

The Exemption Provisions allow property owners in the RDT zone to create lots for "use for a one-family residence by a child . . . of the property

[1] This application does not seek the creation of any "market lots," and does not require the use of sand mounds.

owner" if the application meets three statutory conditions. As detailed below, this application meets all three requirements.

1. The property owner can establish that or she had legal title on or before the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone. (Montgomery County Code Chapter 59-C-9.74(b)(4)(i)).

Mrs. Dufresne's property was first rezoned to the RDT zone in 1981. Mrs. Dufresne has personally held a property interest in the property sine 1962, long pre-dating the rezoning. As such, Mrs. Dufresne clearly meets this standard.

2. This provision applies to only one such lot for each child of the property owner. (Montgomery County Code Chapter 59-C-9.74(b)(4)(ii)).

Mrs. Dufresne has three children: Kathryn J. Dufresne, Alice A. Dufresne, and J. Stevens Dufresne. Mrs. Dufresne intends to create one lot for the use of each of her three children, and all three children intend to live on the properties.

3. Any lots created for use for one-family residence by children of the property owner must not exceed the number of development rights for the property. [2] (Montgomery County Code Chapter 59-C-9.74(b)(1)(iii)).

Mrs. Dufresne has eight development rights associated with the subject property (one right for every five acres of land). None have been sold or used in connection with any other development.

The fact that this application meets the Child Lot Exemption Provisions is underscored by the fact that in 1990, the Planning Board approved eight

[2] The development rights referenced in this section are the "transferable development rights" associated with the RDT zone. These are "development rights" that are severable from the property, at a ratio of one development right for every five acres of land owned by the property owner.

child lots on this site pursuant to the same Exemption Provisions in effect now.[3] This application seeks no market lots, and only one lot for each of Mrs. Dufresne's children.

B. The Planning Board's Recently Stated Policy To Limit The Number of Child Lots to Base Density (1 Residence Per 25 Acres) is Contrary to Prior Interpretation by Chairman Hanson, Which Interpretation Was Consistent With Long-Standing Agency Practice

The Board recently decided as a matter of policy to limit the number of child lots that a property owner could create to one residence per 25 acres, notwithstanding Zoning Ordinance authority to create child lots pursuant to the Exemption Provisions. On March 12, 2007, Chairman Hanson sent a letter to County Council President Marilyn Praisner stating that "the total number of lots created from a parcel, *including child lots*, must not exceed the density limitations of the zone (i.e. 1 residence: 25 acres)." (Emphasis added). Mr. Hanson's letter further states that the Planning Board's long-standing agency practice of approving child lots above base density will "be discontinued and [the Board] intends to do so in its review of applications for subdivisions that include child lots."

This interpretation is directly contrary to the interpretation given by Mr. Hanson to the County Council on this precise issue in February, 2006, when he said:

> The ordinance allows a family lot to be created for every child . . . regardless of number, so long as there are still enough untransferred development rights available – one for every five acres. *The exemption for family lots is from the dimensional requirements of the zone, but as written, it permits . . . [child] lots in excess of the density of 1 residence for each 25 acres so long as there are enough development rights available to provide a dwelling for each child.*

Attachment Two, pages 4, 5 (emphasis in original).

---

[3] The 1990 subdivision created lots for Mrs. Dufresne's four children. See Attachment One. These children also held title to the Dufresne property before 1981 and they created four additional lots for their own children (Mrs. Dufresne's grandchildren). Subsequent to the Planning Board's approval of that plan, one of Mrs. Dufresne's children passed away, and the pending application does not seek any lots for her grandchildren.

Mrs. Dufresne filed her application for the pending subdivision just weeks after Mr. Hanson published this February, 2006 memorandum. The Zoning Ordinance has NOT been amended from the language as written in 2006, and the Board's reversal in March of 2007 of the preceding 26 years of practice, particularly in light of the Chairman's previous reading of the law in a manner consistent with decades of Board practice, is arbitrary, capricious, and an illegal application of the zoning law as it currently stands.

Moreover, the agency has long published (and re-published) a document called *Plowing New Ground,* intended to answer common questions about the Agricultural and Rural Open Space Preservation Program. Its most recent iteration (2001) is entirely consistent with Mr. Hanson's conclusion, above. In response to the question as to whether the number of lots created for the landowner's children can exceed the density of one dwelling unit per 25 acres, the Planning Board's published answer is:

> If the lots created are for the children of the property owner of record before January 6, 1981 (the time of the placement of the property in the RDT Zone), lots can be created at the **density** [sic] one dwelling per five acres of the previous Rural Zone, but there must be a TDR for each lot.

Plowing New Ground, p. 10, Question 9 (2001) (emphasis added).

Under the law as written and applied for decades, the Dufresne Property meets the letter and spirit of the law, and this minor subdivision should be approved.

C. Limiting the Number of Child Lots To The Base Density Renders The Entire Exemption Provision Meaningless, A Result Contrary To Standard Statutory Construction Rules

Limiting the number of child lots to one unit per 25 acres utterly negates the Exemption Provisions of the RDT zone. Maryland law repeatedly underscores that statutes are to be read "so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory."[4] Limiting the number of child lots to the same number of lots allowed "by right" (*i.e.,* one dwelling per 25 acres) renders the entirety of Section 59-C-9.74(4) utterly meaningless.

---

[4] *Wesley Chapel Bluemount Association et al. v. Baltimore County, Maryland,* 347 Md. 125, 148, 699 A.2d 434, 446 (1996) (citations omitted).

By limiting the number of child lots to the number of lots that can be created "by right" under the base density (*i.e.*, four lots per 100 acres), the "exemption" provision becomes a superfluous provision in the Zoning Ordinance in that it creates absolutely no rights additional to those created by the base zone. It creates an "exemption" with meaningless standards – a property owner could create the same number of lots by right without having to meet two of the three qualifying statutory criteria detailed above for establishing child lots (*i.e.*, date of ownership and the limitation of one lot per child).[5] Under ordinary rules of statutory construction, therefore, the Exemption Provision can only be read to mean that child lots can be created in excess of base density provided the property owner meets the qualifying statutory criterion.

There has been a suggestion that density should be limited because the precatory language to the Exemption Provision states that the child lots are "exempt from the area and dimensional requirements of [the Zoning Ordinance] but must meet the requirements of the zone applicable to them prior to their classification in the Rural Density Transfer zone." 59-C-9.74. This clause, if read literally, also renders the Exemption Provisions a nullity, since the minimum lot size in the RDT zone is 40,000 square feet (just under an acre). Properties in the RDT zone had <u>larger</u> minimum lot sizes before they were downzoned in 1981 (predominantly five-acre zoning and some two-acre zoning), and so "exempting" RDT properties from a minimum lot size requirement that they can meet under the current zone is unnecessary.

D. <u>Legislative History Supports the Agency Practice Of Exempting Child Lots from Base Density Limitations</u>

A review of the legislative history surrounding the initial adoption of child lot provisions in the RDT and Rural zones is particularly enlightening on this issue. In 1977, the Rural Zone (minimum lot size of five acres) included a child lot exemption. This exemption provision read in relevant part as follows:

> A lot created for use for a one-family residence by a child . . . of the property owner; provided, that such property owner can establish that he had legal title on or before June 4, 1974, and provide, that this provision shall apply to only one such lot for each child of the property owner.[6]

---

[5] A property owner must have retained one development right for each new lot under either scenario.

[6] Montgomery County Code 59-C-9.3 (Exempted Lots and Parcels) (1972 Code, 1977 Replacement Volume).

As with the current RDT child lot exemption, this provision stated that child lots shall be "exempt from the area and dimensional requirements" of the Rural Zone (*i.e.,* five-acre minimum lot size), but could meet the requirements of the zone applicable to them before rezoned to the Rural Zone. In 1981, the District Council once again amended the Rural Zone. The District Council amended the Rural Zone to say specifically that previously approved child lots would be grandfathered provided "the overall density of the property does not exceed one dwelling unit per five acres . . . "[7]

In 1980 the District Council created the RDT zone, and limited the maximum number of child lots that could be created in the RDT zone very differently. The District Council -- at the recommendation of the Planning Board -- added clarifying language to the RDT zone as follows: "Any lots created for use for a one-family residence by children of the property owner shall not exceed the number of development rights for the property."[8] Of course, with one development right per 5 acres, there are more development rights than the RDT zone's base density otherwise would permit (one dwelling per 25 acres.) This provision differs significantly from the one in the Rural Zone by using development rights to establish the number of child lots that can be created, and not acreage.

Read in their entirety, the existing statutory provisions and legislative history demonstrate that the District Council was aware of the distinction between development rights and density in these zones. The District Council wrote legislation demonstrating its intent to cap the number of child lots in the Rural Zone to no more than one lot per five acres. In the RDT Zone, however, the number of potential child lots is limited by the number development rights associated with the property (and not by the base density of one dwelling unit per 25 acres). Any other reading renders the Exemption Provisions a nullity and disregards the statutory scheme as a whole.

E. The Dufresne Property Meets Master Plan Goals of the Preservation of Rural Communities.

The *Functional Master Plan for the Preservation of Agriculture and Rural Open Space in Montgomery County,* ("Master Plan") which set the stage for creation of the RDT zone, was not solely dedicated to the preservation

---

[7] Montgomery County Ordinance No. 9-49, Adopted November 17, 1981 (emphasis added).

[8] Montgomery County Ordinance No. 9-18, Adopted July 8, 1980 (emphasis added).

of agriculture in Montgomery County. The Master Plan specifically called out rural communities within the Agricultural Preservation Study Area, noting that "These rural communities are characterized by a strong sense of place and strong ties of kinship. Most residents wish to continue living in them and want their children to have the same opportunity." The Dufresne Property is located in a community called Sunshine, and is one of the rural communities identified in the Master Plan. Approval of the Dufresne subdivision application thus furthers one of the underlying goals of the Master Plan by allowing a successive generation of the Dufresne family to live and raise their own families in the community where they grew up.

Additionally, the Master Plan recognizes the "significant farm ownership trend" of part-time farmers that depend, in part, upon non-farm sources of income.[9] The Dufresne family supports its agricultural uses with non-farming income. Their agricultural uses include leasing acreage for crops (currently corn), pasturing horses ("managing livestock") and the periodic timbering of their land ("the products of forestry"). The Master Plan points out that "Farmland preservation policies should not ignore this trend that contributes to the support of the critical mass [of farmland] in Montgomery County."[10]

F. <u>The Exemption Provisions Were Intended to Create Family Equity for Property Owners Who Suffered Significant Downzoning in 1981 -- A Retroactive Change In Planning Board Policy To This Application Deprives the Dufresne Family of Procedural and Substantive Due Process Rights.</u>

Many people in the agricultural community consider the child lot Exemption Provisions "a source of compensation, in addition to TDRs, for the loss of equity landowners experienced during the 1981 downzoning."[11] There certainly is ample evidence in the public record to support this view.[12] In fact, based on 26 years of Planning Board practice and

---

[9] Master Plan page 24.

[10] Master Plan page 24.

[11] Final Report of the Ad Hoc Agricultural Policy Working Group, Montgomery County, Maryland January 2007, page 22 (hereinafter "Agricultural Policy Final Report").

[12] *See, e.g.,* letters dated July 19, 2007 from the Agricultural Advisory Committee and Agricultural Preservation Advisory Board to County Council President Marilyn J. Praisner (Attachments Three and Four).

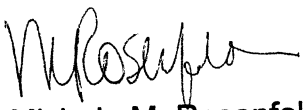
publications -- and in this particular case the specific prior approval of eight child lots on the Dufresne Property itself -- the Dufresnes had a reasonable expectation that they would be able to create these three lots. As stated by Scott Fosler in the Final Report of the Ad Hoc Agricultural Policy Working Group (and a member of the District Council and co-sponsor of the legislation creating the Agricultural Reserve in 1981), the proposal of the group recommending that child lots be created in excess of base density "essentially accepts a quarter-century practice – and hence reasonable expectations on the part of bona fide farmers in calculating the equity in their property – in defining the density permitted by child lots . . . "[13]

This application was filed long before the Planning Board changed its policy, and shortly after the current Chairman had publicly stated that child lots in excess of base density were provided for in the law as written. As a matter of due process and equity, the Planning Board should not retroactively apply its new policy to this application. The Dufresnes ask that the Planning Board approve the application as filed, under the current legal standards and long-standing agency practice. Failing to waive the new policy deprives the applicants of procedural and substantive due process and deprives them of a substantial economic benefit of the property that the family has held for more than 45 years. Particularly with respect to the three Dufresne children, a denial of this application would deprive them of all economic value of the child lots that Mrs. Dufresne is entitled to create for their benefit, effectively taking their property interests.

G. Conclusion

Mrs. Dufresne asks the Board to grant approval of her minor subdivision application for the legal, factual and equitable reasons detailed above.

Sincerely,



Michele M. Rosenfeld

[13] Agricultural Policy Final Report p. A-15.

Attachments:

1. 1990 Planning Board Opinion approving 8 child lots on Dufresne Property
2. February 6, 2006 Memorandum from Royce Hanson to Montgomery County Council
3. July 19, 2007 Letter from Agricultural Advisory Committee to Montgomery County Council
4. July 19, 2007 Letter from Agricultural Preservation Advisory Board to Montgomery County Council

F.Y.E.

Date Mailed: 10/18/90

Attachment One

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

8787 Georgia Avenue • Silver Spring, Maryland 20910-3760

Action: Approved Staff Recommendation
(Motion of Comm. Keeney, seconded by Comm. Hewitt, with a vote of 3-1; Commissioners Keeney, Hewitt and Bauman voting in favor, with Comm. Floreen opposed, with Comm. Henry being absent).

MONTGOMERY COUNTY PLANNING BOARD

OPINION

Preliminary Plan 1-84231
NAME OF PLAN: BROOKE GROVE, ADDITION

On 10-16-84 J.P.&S.M. DUFRESNE,ET AL , submitted an application for the approval of a preliminary plan of subdivision of property in the RDT zone. The application proposed to create 8 lots on 44.54 ACRES of land. The application was designated Preliminary Plan 1-84231. On 10-04-90, Preliminary Plan 1-84231 was brought before the Montgomery County Planning Board for a public hearing. At the public hearing , the Montgomery County Planning Board heard testimony and received evidence submitted in the record on the application. Based upon the testimony and evidence presented by Staff and the information on the Preliminary Subdivision Plan Application Form attached hereto and made a part hereof, the Montgomery County Planning Board finds Preliminary Plan 1-84231 to be in accordance with the purposes and requirements of the Subdivision Regulations (Chapter 50, Montgomery County Code,as amended) and approves Preliminary Plan 1-84231, subject to the following conditions:

(1) Prior to Recording of Plat(s) Submit Affidavit that Lot(s) are Being Created Pursuant to Section 59-C-9.74 (b) (4)

(2) Conditions of Health Department Memo Dated 7-25-90

(3) Dedication of Georgia Avenue (Route 97) in Accordance with Master Plan Alignment

(4) Access and Improvements as Required to be Approved by MD SHA

(5) Necessary Easements

(12)

Attachment Two

MEMORANDUM

February 6, 2006 Replaces Memo of Feb.2

To: County Council/ T&E & PHED Committees

From: Royce Hanson

Subject: The Next Planning Mess and How to Prevent It: Few thoughts on festering issues in the Agriculture Reserve.

I hope you will indulge me in taking advantage of the reservation in my agreement with the Council to speak on some matters as a citizen. Because I believe issues arising from the Reserve are a vivid example of the deficit in institutional and intellectual leadership I discussed in Memorandum # 2 and which, if unattended, may become the next planning crisis, I have determined at least to convey those concerns to you.

The main thrust of my comments is that it is hazardous to the protection of the Reserve to consider the issues that remain in isolation, because so doing ignores the relationship successful resolution of one issue has to others. Establishing a way of extinguishing large numbers of buildable development rights, for example, is as important a means of dealing with abuse of family member lots or sand mound subdivisions as directly regulating them. Reciprocally, dealing with family lots and sand mounds can help address the buildable lot issue. Resolving how to approach sewage disposal and water supply for large institutions that are not candidates for extension of public systems is critical to preventing fragmentation of the Reserve, and should not be resolved on a case by case basis, or with a general rule that has been tailored to a specific situation, even if that is necessary as a stop gap measure.

Some of the most vexing issues could be resolved by rigorous enforcement of the Master Plan through the subdivision and permitting processes. Others may require amendments to the Master Plan and zoning ordinance as well as the Water and Sewerage Plan. They are not intellectually or politically daunting, and they are even less so if considered in context rather than isolation. ***In short, you can chose patchwork and continue frittering away one of the most important resources in the region and leave a legacy of having lost a national model of land conservation, or you can ensure its maintenance and enhancement.***

The following sections deal with the respective issues in the context of the overall objectives of the Reserve as a working landscape protected in perpetuity as a combination of local agricultural products that can change with markets and technology, a regional amenity and cultural heritage, and an irreplaceable environmental asset for the protection of land and water resources of the county and the Chesapeake Bay region. In future years it will be even more valuable as an unmatched resource in the region. It has and will continue to have a major impact on the quality of life of the county.

(13)

Private Institutional Uses

The Council's November 2005 action denying extension of public water and sewerage was an important first step in curtailing development of large-scale institutions that would transform the Reserve's essential function. Your action clearly enforces the explicit recommendation of the Master Plan, which on page 61, states: "Deny public water and sewer service to areas designated for agricultural preservation that utilize the Rural Density Transfer Zone (RDT)" (Emphasis in original).

That action did not address the question of what to do about land that could be intensively developed without public water and sewer service, provided some kind of multi-use or community system could be approved to serve it. The Master Plan also anticipated that issue and on page 62 recommended: **"Deny private use of alternative individual and community systems in all areas designated for the Rural Density Transfer Zone (RDT)"** (Emphasis in original). ***If the county would simply enforce the recommendation of the Master Plan, further action should be unnecessary.*** A multi-use system would not be approved.

Since the ability or will to enforce the Master Plan seems elusive, Mr. Knapp's proposal to limit multi-use septic systems to the capacity that would be expected for the remaining permitted residences on a parcel is a good faith effort to address the potential for overbuilding on such sites. Although crafted in response to a specific situation it has broad implications for the Reserve, and I urge the Council to consider whether it is ultimately an adequate response to the general problem of large institutions that seek to develop facilities in the Reserve.

I believe there is a better approach to this and other issues that threaten the viability of the Reserve.

The first question in dealing with any land use matter is whether it furthers the goals of the Master Plan and the purposes of the zone. The ability to prevent placing "a right thing in the wrong place, like a pig in the parlor instead of the barnyard," as Justice Sutherland said in *Euclid* v. *Ambler*, is at the heart of the power to plan and zone. The "right thing in the wrong place" can involve both an inappropriate use and an inappropriate scale of an otherwise unobjectionable use. The issue in the case of institutional uses is scale rather than use—or even volumes of waste. A dairy may produce a lot of waste, but it is an appropriate use in an agricultural zone, though not in an apartment district.

The overarching objective of the Reserve is to preserve agriculture and rural communities. The RDT zone is an *agricultural* zone. It is so identified in the Zoning Ordinance. It is not a residential or an institutional zone. Agriculture is the primary and preferred use. Residences and other uses that were deemed to further or support agriculture and rural life were permitted in the RDT zone. When we designed the RDT

zone in 1980, we permitted some private institutional uses, having in mind the 60 country churches and private schools that served the rural communities of the Reserve and were vital parts of community life. I can say with assurance that when we designed the zone we did not contemplate facilities serving thousands, many if not most of which would not be residents of the Reserve's rural communities. But times and institutions have changed, and we should recognize that if the goals of the plan have not changed, we must adapt our regulations to deal with assumptions that no longer hold in order to sustain those goals.

It is clear to me that **the most effective approach to addressing this problem is to amend the RDT zone to require that institutional facilities that cannot be served with *individual* septic systems should be subject to the special exception process.** As an interim measure, you could amend the Water and Sewerage Plan to deny multiuse systems to projects that have not been granted a special exception. There are several reasons for making this recommendation:

1. It would ensure that any large scale project is consistent with and advances the goals of the master plan to protect the critical mass of agricultural land, and that it is compatible with the neighborhood in which it is proposed. A monastery pursuing agricultural industries might fit well in the Reserve but a large residential school with no agricultural activity might not.

2. It would require analysis of the traffic and environmental impacts of the project, and evidence that adverse effects can be ameliorated.

3. It would require development in accordance with a site plan.

4. It provides well-established and fair procedures, careful analysis, and public participation in the process.

5. It is a system that can be applied to all such projects, and does not single out any category of institutions for unique treatment.

The objections voiced to this approach appear to involve the cost of going through the special exception process and concern that requiring special exceptions might violate the Free Exercise Clause of the First Amendment, since the requirement would apply to both secular and religious institutions.

As we are talking about large institutions that will need to employ architects and engineers for their project, the marginal cost of obtaining a special exception is not an onerous burden, and may serve to improve the quality of the project.

While the U.S. Court of Appeals for the 4th Circuit held in *Renzi v. Connelly School Of The Holy Child* (2000) that Montgomery County could exempt religious schools from having to obtain special exceptions in residential zones, the U.S. Supreme Court has consistently held that governments may adopt and enforce regulations that have a secular

purpose, as proposed above, even though they may incidentally affect religious institutions or practices, *Smith v. Oregon* 485 U.S. 660 (1988), and that Congress could not, consistent with the Fourteenth Amendment, enact legislation that would permit religious institutions to override such local laws *City of Bourne v. Flores* 521 U.S.507 (1997).

Whatever action the Council takes on the Knapp amendment, it should charge the Planning Board with two tasks:

1. ***Review the RDT Zone to see if there are other uses that seemed reasonable to permit in 1980, which have metamorphosed in the intervening years such that special exceptions should be required for them in their entirety or if they exceed some scale. Ideally, this would be done in connection with an overall revision and codification of the zoning ordinance, but because of the urgency and uniqueness of the RDT zone, it could be done separately.***
2. ***Determine if the Master Plan should be amended to recommend approval of multi-use/community systems only in connection with special exceptions.***

The Family Member Lot Issue

The objective of the family lot provision in the Master Plan and zoning ordinance was to permit the creation, on a smaller lot than otherwise required, of a home for a family member that expected to remain on and participate in farming the land. It was limited to those that owned land in 1980 to prevent abuse by subsequent owners that bought farmland with the intent of converting it to subdivisions. In some instances—and an increasing number of them—owners have seen this not as a means of maintaining a family farm, but as a means of subdividing the land for market sale of residences, without so much as having a family member ever take title. The ordinance allows a family lot to be created for every child or spouse of a child, regardless of number, so long as there are still enough untransferred development rights available-- one for every five acres. *The exemption for family lots is from the dimensional requirements of the zone, but as written, it permits such lots in excess of the density of 1 residence for each 25 acres so long as there are enough development rights available to provide a dwelling for each child.*[1] *But*

---

[1] See § 59-C-9.74.(b): The following lots are exempt from the area and dimensional requirements of Section 59-C-9.4, but must meet the requirements of the zone applicable to them prior to their classification in the Rural Density Transfer Zone. .....
(4) a lot created for use for a one-family residence by a child, or the spouse of a child, of the property owner, provided that the following conditions are met:

i. The property owner can establish that he had legal title on or before the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone;

ii. This provision applies to only one such lot for each child of the property owner; and

iii. *Any lots created for use for one-family residence by children of the property owner must not exceed the number of development rights for the property.(Italics added)*

there is nothing in the ordinance to support the idea that further market subdivisions of the farm are then possible if the allowable zoning density has been achieved, much less exceeded, by the family lots. Thus, while it is possible to exceed the zoning density if a farmer has a large number of children, one cannot further fragment the property by selling another lot for each 25 acres. A currently proposed subdivision, for example, asked for 3 market lots on an 80+ acre parcel (the maximum allowed by zoning), and five family member lots, producing a 10-acre subdivision. This violates both the letter and spirit of the law

The concept of allowing a lot for a family member to be created in order to help sustain family farming remains a reasonable one, but that is not always being achieved by current practices.

- First of all, the Planning Board needs to make clear that if the total number of family residences created from a parcel equals or exceeds one per 25 acres, an owner may not further subdivide the property and be allowed to have his cake and eat it—in some cases twice. Moreover, if market subdivison occurs prior to the or simultaneously with creation of child lots, an owner may retain only the proportion of development rights represented by the fraction of the original density the owner retains.
- Second, the family member for whom the lot is being created should be required to hold the title, and the record plat should show that the lot is a family lot and an easement should be recorded showing that a development right has been extinguished.
- Third, the Board should use its powers more aggressively in reviewing subdivisions that propose family lots by requiring that the applicant demonstrate that it is, indeed a family lot, and to show how, by its location, etc., it contributes to the farming enterprise. The Board should deny lots that are blatantly designed to be placed directly on or flipped to the exurban residential market.
- Fourth, the zoning text should be revised to clarify the extent to which family lots should be permitted in excess of the zoning density. There probably needs to be a scale established that might, for example, allow one family lot in excess of base density for each 100 acres. The objective is to facilitate family farming, not housing that is essentially unrelated to the framing enterprise, even if related to the farmer.
- Fifth, abuse of the family lot provision could be substantially ameliorated by adoption of a program designed to expunge some of the retained *buildable* development rights (see discussion below).
- Sixth, as this issue is examined in relation with others, consideration should be given to sunsetting the provision, since it has now been available for 25 years.

Sand Mounds

This issue again involves the meaning of the Master Plan's statement on page 62: "**Deny private use of alternative individual and community systems in all areas designated**

for the Rural Density Transfer Zone (RDT)" (Emphasis in original). The Planning Board majority has used three arguments to allow subdivisions on sand mounds in the RDT Zone:

- The majority took the position that the Master Plan's admonition against the use of alternate septic technologies must have contemplated a moving target, so that any new technology considered alternative in 1980 that is later redefined by DPS as conventional is OK. This view is reinforced by the 1994 Council Resolution approving Executive Regulation No. 28-93am, which declared sand mound technology to be "conventional,"[2] and appended a statement from the Department of Health to the effect that using sand mounds would allow development at the maximum density permitted in the RDT zone (again, notwithstanding the Master Plan's clear position that development should not achieve full zoning capacity due to the unsuitability of much of the Reserve's soils for traditional septic systems. While the 1994 r resolution is unfortunate, it is not an amendment of the Master Plan, as it was adopted by the Council sitting as the Board of Health and not as the District Council. It is, at most, aberrant dicta in an otherwise good Council record of rhetorical support for the Reserve.

- The majority misread a sentence in the same paragraph, which states: "Study the possible application of private alternative individual and community systems *in rural open space areas*" (*Italics* added) as support for their first argument. This reading blithely ignores the distinction made throughout the Master Plan between the RDT Zone applied in the Reserve, and rural open space areas, which were placed in the Rural Cluster Zone where it makes sense to use technologies that support clustering by allowing a better grouping of lots on poorer soils to protect *open space*—which is clearly distinguished from the *critical mass of agricultural land* in the Reserve and the RDT Zone (See Master Plan: pp. 40-41).

- The Board had previously approved 35 sand mound subdivisions in the past in the RDT Zone, apparently without questioning their consistency with the Master Plan, so they should continue to do so.[3]

There are legitimate uses for sand mounds—to replace failing conventional systems and to allow the building of homes for family members on legitimate family lots or accessory units for farm tenants. Their use for market subdivisions in the RDT Zone, however, is contrary to both the letter and spirit of the Master Plan and the purpose of the zone. They contribute to fragmentation of the critical mass of farmland. They are being used to subdivide farms into *de facto* clusters of McMansion estates on relatively small lots, turning the RDT zone into a somewhat less dense version of the Rural Cluster Zone and

---

[2] DPS advises that the technology is innovative/alternative, however, if the percolation tests establish infiltration rates of 60 minutes or more per inch. Constructive Comments, Montgomery County Department of Permitting Services, August 2003. p. 7.
http://permittingservices.montgomerycountymd.gov/August%202003.pdf

[3] See p. 15, Montgomery County Planning Board Opinion. Preliminary Plan 1-05029. Stoney Springs (Casey Property) 2005.

confusing the preservation of open space with the protection of a working agricultural landscape. The Board has it within its power under the subdivision regulations to prevent this erosion of the Reserve, but has been reluctant to use its authority to deny subdivisions dependent on sand mounds.

The willingness of the Board to roll over on the sand mound issue by permitting their indiscriminate use is an important factor in the extraordinary inflation in prices for residual development rights. So long as any tract of land can be fully developed, regardless of its natural carrying capacity, it will be virtually impossible to protect it for agriculture, even after all the additional TDRs have been sold. ***Basically, the use of sand mounds is condemning the Reserve to the very fate the Master Plan and the combination of zoning, TDRs, and limits on sanitary technology were designed, working in concert, to prevent.***

The Council should take the following actions:

Adopt the resolution offered by Council Members Praisner and Perez to prevent further abuses of the use of sand mounds while the issue is explored in conjunction with the other issues. There are concerns among the farming community that can and should be addressed in resolving the problem. In doing so, it is vital to keep in mind that: (1) the purpose of the Plan, zone, and sewerage regulations is to protect agriculture. (2) Residences and other uses are permitted in the Reserve to support agriculture and a working landscape—the RDT zone is not a residential zone; it is an agricultural zone. (3) The RDT zone is not a cluster zone.\

- ***Rescind its implied endorsement of the attachment to the 1994 sand mounds resolution*** to signal to the Planning Board that it explicitly does not intend sand mounds to be used to circumvent the intent of the Plan. In the alternative, the Council should advise the Board that in its opinion the Master Plan for Preservation of Agriculture & Rural Open Space does not support the use of sewage technologies other than traditional septic systems in the RDT zone for purposes of residential subdivision.
- ***Put a high priority on the production of a comprehensive report on Reserve issues and specific solutions for them.*** Planning staff has done a great deal of work on these issues over the past several years, and the Board has considered many of them. **What is needed is a *comprehensive* package of measures presented in actionable form to the Council.**

Extinguishing Excess Residual Development Rights

The use of Transferable Development Rights (TDRs) was one of the key components of the strategy that has created the Agricultural Reserve. The TDR program has been the national model for market-based land preservation on the urban edge. *The fundamental idea behind its success is that the market should set prices for transferable development rights, and the market should be made competitive by providing a sufficient number of*

receiving areas where the transferred density can be served. The program is voluntary; there must be a willing buyer and a willing seller who arrive at a price. While every landowner in the RDT Zone was allocated one TDR for each five acres of land (the zoning that had been applied previously to the RDT zone), many that have sold TDRs have retained one development right for each 25 acres.

There is currently a robust market for TDRs, with sales reported at over $30,000 each, a radical increase over the $6000 going rate of a few years ago. This price reflects some combination of the short supply of TDRs, the value of the additional units that can be built using them, and the number of builders bidding for them. Even these high values, however, are dwarfed by the value of a buildable lot in the RDT Zone, on which a large home can be constructed and sold for well over a million dollars. Ironically, the limits on development in the Reserve have made the land to which these development rights remain attached even more valuable as home sites for an elite market of potential buyers that seek a rural residence but have relatively little, if any interest in farming. Large development firms are entering the Reserve, purchasing or optioning large tracts, and seeking to subdivide them. This is in sharp contrast from past practice of individual buyers purchasing a farm and building a home. Thus, these retained development rights that are attached to the land represent for landowners the prospect of future windfalls from subdivision, which are far greater than incomes expected from farming or selling to a new farmer on retirement,. By driving the price of land far above its agricultural value, they erect a high barrier to entry by young farmers or to the acquisition of additional land to enlarge a farm. The use of sand mounds means that full density can now be extracted from every parcel and that there is no undevelopable land in the Reserve. The problem is exacerbated when *de facto* clustering is permitted by Planning Board practices.

If a working landscape is to be protected in the Reserve, it is imperative to restore the subdivision potential of the land to its natural holding capacity. It would be desirable to go beyond that to extinguish most of these residual development rights, substantially reducing the prospects for subdivision into rural estate homes with good views of each other, and of Sugarloaf in the distance.

This again suggests the need for a comprehensive rather than a piecemeal approach. It is likely to involve several measures, applied in concert:

- Limit the use of sand mounds and any other sewerage technologies that encourage efforts to develop to the limits of the zoning envelope.
- Broaden the market for TDRs by:
    - Increasing the number of receiving areas.
    - Requiring the use of TDRs for increased densities in some receiving areas and/or optional development methods.
    - Allow TDRs to be used for density increases associated with affordable housing in appropriate locations, as has been done in Suffolk County, NY.
    - Allow TDRs to be used in high-density commercial and office projects.
    - Create a new class of "Super TDRs" for those rights that remain attached to the land *and that could support subdivision at normal holding capacity*

density. This idea has merit, but the devil will be in the details. There are issues of their impact on the general market for TDRs, how they should be valued (if not by the market), and how and where they should be used. It may be possible to exchange some number of county-owed development rights for each super TDR in return for an easement limiting in perpetuity the number of remaining development rights.

- Create a Quasi-Public Agricultural Land Conservancy to seek "first refusal" agreements with landowners to acquire their land in the event they want to sell it. The conservancy would then extinguish the development rights in excess of those needed for a farmstead by selling them to builders in receiving areas, grant a perpetual easement to a land trust, and then sell the land to a buyer interested in keeping it in agricultural uses.

Some of these ideas have broad support, and have been considered by a TDR task force and the Planning Board. Others have not yet been fully explored. Some are highly controversial and hotly contested. They are evidence, however, that if their is a will to do it, there are ways to reconcile the equity interests of landowners with the public interest in sustaining a working rural landscape as an integral feature of a great metropolitan county. ***Indeed, the county has a long-standing covenant with its citizens, in which they accepted higher densities in the urban corridors so that the Reserve, as the low-density wedge of the General Plan, could be preserved. Hundreds of millions of private and public dollars have been spent in acquisition of development rights, provision of services in receiving areas, and purchases of parkland within the Reserve. That investment now needs to be protected.***

Attachment Three

AGRICULTURAL ADVISORY COMMITTEE

July 19, 2007

The Honorable Marilyn J. Praisner
Montgomery County Council President
100 Maryland Avenue, COB, 6th Floor
Rockville, Maryland 20850

Re: Public Hearing: July 19th – Agricultural Reserve Policy

Dear Council President Praisner:

Please accept this correspondence as the Montgomery County Agricultural Advisory Committee's (AAC) written testimony regarding the following legislative proposals:

- Bill 12-07 – Real Property – Agricultural Zones – Real Estate Disclosure Statement
- ZTA 07-06 – Child Lot Standards – Ad Hoc Recommendation
- ZTA 07-07 – Use Limitations – Lands encumbered by TDR easements
- ZTA 07-08 – TDR receiving area standards – removes 2/3 use requirement
- ZTA 07-09 - Child Lot Standards – Planning Board Recommendation
- SRA 07-02 – Eliminates 2/3 use requirement in Sub-Division Regulation
- Resolution to approve amendments to 10 year comprehensive water supply and sewerage system plan – Child Lots
- Comments regarding the Draft Executive Regulations Building Lot Termination Program and Fiscal Impact Analysis

General Comments:

The AAC was represented on the Ad-Hoc Agricultural Policy Working Group and we endorsed the recommendations as contained in the report dated January 2007. The AAC supports Bill 12-07, ZTA 07-06, ZTA 07-07, ZTA 07-08, SRA 07-02, the proposed Building Lot Termination Program and the Resolution to approve amendments to 10 year comprehensive water supply and sewerage system plan – Child Lots.

* The AAC is concerned regarding the Planning Board's proposed ZTA on Child Lot Standards (ZTA 07-09) because it is not consistent with the recommendation of the Ad-Hoc Policy Working Group reflected in ZTA 07-06. The AAC supports ZTA 07-06 as a part of the total package of recommendations supported by the working group, although we understand the effective date of the Rural Density Transfer Zone was January 6, 1981. We do not know why the proposed

ZTA references January 7, 1981. ZTA 07-09 would create an outcry from the farmers by changing over 26 years of interpretation and application of the zoning ordinance. The ZTA 07-09 in essence eliminates child lots because it simply allows them at density permitted by the zone. This will force the parents to decide which of their children can have a child lot and this represents an infringement of vested rights provided to certain landowners resulting from the change in zoning in 1981.

The AAC recognizes that the Agricultural Reserve Policy recommendations represent the basis of the Ad-Hoc Agricultural Policy Working Group's recommendations. The AAC encourages the Council to take action on the whole package that will collectively achieve the desired outcome of further protecting our important agricultural resources.

Specific Comments:

Bill 12-07 – Real Property – Agricultural Zones – Real Estate Disclosure Statement – Support

The AAC believes this bill will help to inform and educate new residents of the Agricultural Reserve that they are buying property in the agricultural zone. The disclosure will inform them that they are living in an area where agriculture is the primary land-use and that agricultural operations are permitted at all times. The AAC hopes this disclosure will help to protect farmers from nuisance claims and the AAC recommends support for Bill 12-07.

ZTA 07-06 – Child Lot Standards – Ad Hoc Recommendation – Support with one question

The AAC supports ZTA 07-06 and we only question the effective date of the RDT zone as January 6, 1981. The AAC believes the total number of potential child lots is not significant and this number will naturally decrease over time. The AAC supports the existing interpretation of the zoning ordinance, where child lots are permitted in addition to base zone density. In recognition of potentials for abuse, the AAC concurs that safeguards provided within this ZTA will go a long way to ensure that potential abuse of any child lot will be curtailed.

ZTA 07-07 – Use Limitations – Lands encumbered by TDR easements – Support with amendments

The AAC supports the legislative intent of TDR easements that sets forth a procedure for the preservation of agricultural land while providing low density residential development. The proposed ZTA will only allow properties encumbered by TDR easements to be used for one-family dwellings, all agricultural uses, all agricultural-industrial uses, and all agricultural-commercial uses. Each use that requires a special exception under Sec. 59C-9.3 is allowed only by the approval of a special exception. The AAC recommends that ZTA 07-07 should be amended to include 59-C-9-(j) Miscellaneous Uses as they are all permitted by right in the RDT zone and these miscellaneous uses are also consistent with the intent of the TDR Easement. The AAC supports the ZTA and as amended, it will fulfill the legislative intent of TDR Easements.

ZTA 07-08 – TDR receiving area standards – removes 2/3 use requirement – Support
SRA 07-02 – Eliminates 2/3 use requirement in Sub-Division Regulation - Support

The AAC supports both ZTA 07-08 and SRA 07-02 which will remove the 2/3 use requirements for TDRs in receiving areas. The AAC understands that the 2/3 use requirement has created challenges for developers using TDRs especially in smaller receiving areas where competing environmental and other subdivision requirements may prohibit a developer from achieving the 2/3 TDR use requirement. This outcome often results in the developer deciding to not use the TDR option for development. The AAC believes that using some TDRs is superior to no TDRs being used in receiving areas, therefore removing the 2/3 use requirement from both the zoning ordinance and the sub-division regulations will facilitate the use of TDRs in receiving areas wherever possible.

ZTA 07-09 - Child Lot Standards – Planning Board Recommendation - Oppose

The AAC opposes the Planning Board's ZTA on Child Lot Standards (ZTA 07-09). The ZTA 07-09 would reduce the equity in farmland by changing the application of the zoning ordinance that has been practiced for over 26 years. This outcome would negatively impact vested rights provided to landowners that were impacted by the change in zoning in 1981. The ZTA also serves to undermine months of deliberations and final consensus reached by the Ad-Hoc Agricultural Policy Working Group. The Planning Board's ZTA 07-09 as written, ignores the relationship of other items recommended as a package by the working group. The package of items is designed to holistically address the challenges facing the agricultural reserve while at the same time providing a means for equity protection to landowners impacted by proposed changes. ZTA 07-09 falls short of addressing these issues important to Rural landowners who were impacted by the down-zoning in 1981. At the same time, the ZTA 07-09 ignores the interpretation of the zoning ordinance as referenced in MNCPPC publications during the past 26 years provided to landowners so they could make informed decisions regarding retained rights with their lands.

Resolution to approve amendments to 10 year comprehensive water supply and sewerage system plan – Child Lots - Support

The AAC concurs that there should be limited circumstances in which public water can be provided to child lots. The AAC endorses the Resolution to approve amendments to 10 year comprehensive water supply and sewerage system plan to provide public water to a child lot when the child lot can be served from an existing, abutting water main and will not allow service to other areas.

The AAC also concurs that any request for public water to a child lot in the RDT zone be conducted as an action of the County Council rather than through administrative approval.

Comments regarding the Draft Executive Regulations Building Lot Termination Program-Support

The proposed BLT program represents the center piece or the cornerstone of important legislative items recommended by the Ad-Hoc Agricultural Policy Working Group. The BLT provided the impetus which enabled all stakeholders to begin constructive dialogue and facilitated the compromises and consensus reached on the agricultural policy issues brought before this group. The AAC believes the preservation of the agricultural reserve through the recommendations of the Ad Hoc Agricultural Policy Working Group will be measured by whether or not the BLT program is developed and funded by both the public and private sector.

We encourage the County Council to embrace this program and work in cooperation with the Executive Branch to explore private funding mechanisms to provide a steady stream of revenue to fund this important program. We support the public funds as part of Phase I of the BLT program to get it up and running and that other means of compensation will have to be explored as part of Phase II of the BLT.

In recognition that our current TDR program only allows TDRs to be used in residential TDR receiving areas, the AAC supports the expansion of the our TDR program that will create new opportunities for using TDRs in Research and Development zones and Commercial zones. The AAC hopes the proposed BLT program will be used to focus on alternative uses to market the "Buildable TDRs" to developers in special receiving areas for non-residential uses. The concept is recommended by the working group and we endorse this approach. In this way, private sector resources will once again be helpful to further protect the agricultural reserve.

Please accept these comments as official Agricultural Advisory Committee testimony. We look forward to working with the County Council as part of the July 30, 2007 PHED committee.

Sincerely,

Wade Butler, JVC

Wade Butler, Chairman
Agricultural Advisory Committee

cc: County Council Members
Paul Folkers, Assistant Chief Administrative Officer

E:/AAC/AAC2007aacadhoctestimony1.doc (AAC stick)

Attachment Four

AGRICULTURAL PRESERVATION ADVISORY BOARD

July 19, 2007

The Honorable Marilyn J. Praisner
Montgomery County Council President
100 Maryland Avenue COB, 6th Floor
Rockville, Maryland 20850

Re: Public Hearing: July 19th – Agricultural Reserve Policy

Dear Council President Praisner:

Please accept this correspondence as the Montgomery County Agricultural Preservation Advisory Board's (APAB) written testimony regarding the following legislative proposals:

- Bill 12-07 – Real Property – Agricultural Zones – Real Estate Disclosure Statement
- ZTA 07-06 – Child Lot Standards – Ad Hoc Recommendation
- ZTA 07-07 – Use Limitations – Lands encumbered by TDR easements
- ZTA 07-08 – TDR receiving area standards – removes 2/3 use requirement
- ZTA 07-09 - Child Lot Standards – Planning Board Recommendation
- SRA 07-02 – Eliminates 2/3 use requirement in Sub-Division Regulation
- Resolution to approve amendments to 10 year comprehensive water supply and sewerage system plan – Child Lots
- Comments regarding the Draft Executive Regulations for Building Lot Termination Program and Fiscal Impact Analysis

General Comments:

In general, the Agricultural Preservation Advisory Board (APAB) has closely monitored the work of the Ad-Hoc Agricultural Policy Working Group over the past year and supports Bill 12-07, ZTA 07-06, ZTA 07-07, ZTA 07-08, SRA 07-02, the proposed Building Lot Termination Program and the Resolution to approve amendments to 10 year comprehensive water supply and sewerage system plan – Child Lots.

The Board understands that the Planning Board has submitted a separate ZTA on Child Lot Standards (ZTA 07-09) that is substantially different from the recommendation of the Ad-Hoc Policy Working Group reflected in ZTA 07-06. The Board fully endorses ZTA 07-06 as a part of the total package of recommendations supported by the working group. ZTA 07-09 would create an imbalance changing over 26 years of standard interpretation of the zoning ordinance thereby negatively impacting vested rights provided to certain landowners as a matter of equity retention resulting from the change in zoning in 1981.

Department of Economic Development • Agricultural Services Division
18410 Muncaster Road • Derwood, Maryland 20855 • 301/590-2823, FAX 301/590-2839

The Board recognizes that the policy recommendations reflected in the package of legislative action items represents a compromise by the various stakeholders who served on the working group. While these action items may not be perfect, they do represent positive steps in the right direction to ensure a future for agriculture in Montgomery County. The legislative proposals represent the foundation of the Ad-Hoc Agricultural Policy Working Groups recommendations. Therefore, the Board strongly encourages the Council to resist the temptation of acting on each proposal as singular issues, but rather embrace each item as part of a package that will collectively achieve the desired outcome of further protecting our important agricultural resources.

Specific Comments:

Bill 12-07 – Real Property – Agricultural Zones – Real Estate Disclosure Statement – Support

The Board believes this bill will help put in place a notification system that will put a buyer of property in an agricultural zone, on notice that they are living in an area where agriculture is the primary land-use and cannot be considered a nuisance. The Board recommends support for Bill 12-07.

ZTA 07-06 – Child Lot Standards – Ad Hoc Recommendation - Support

The APAB fully endorses ZTA 07-06 as a part of the total package of recommendations supported by the working group. The APAB firmly believes that the total number of child lots remaining to be exercised will continue to dwindle as each year passes. The Board believes that leaving in place the existing interpretation of the zoning ordinance, where child lots are permitted in addition to base zone density, will not create an equity imbalance which would negatively impact vested rights provided to certain landowners resulting from the change in zoning in 1981. In recognition of potentials for abuse, the Board concurs that safeguards provided within this ZTA will go a long way to ensure that potential abuse of any child lot will be curtailed.

ZTA 07-07 – Use Limitations – Lands encumbered by TDR easements – Support with amendments

The APAB agrees that the legislative intent of TDR easements is to protect agricultural resources while providing low density residential development. The proposed ZTA will only allow properties encumbered by TDR easements to be used for one-family dwellings; all agricultural uses; all agricultural-industrial uses; and all agricultural-commercial uses. Each use that requires a special exception under Sec. 59C-9.3 is allowed only by the approval of a special exception. The Board recommends that ZTA 07-07 should be amended to include (j) Miscellaneous uses as they are all permitted by right in the RDT zone and these miscellaneous uses are also consistent with the intent of the TDR Easement. The Board believes the ZTA as amended will fulfill the legislative intent of TDR easements and the lands they encumber.

ZTA 07-08 – TDR receiving area standards – removes 2/3 use requirement – Support
SRA 07-02 – Eliminates 2/3 use requirement in Sub-Division Regulation - Support

The APAB supports both ZTA 07-08 and SRA 07-02 which will remove the 2/3 use requirements for TDRs in receiving areas. The Board understands that the 2/3 use requirement has created challenges for developers using TDRs especially in smaller receiving areas where

competing environmental and other subdivision requirements may prohibit a developer from achieving the 2/3 TDR use requirement. This outcome often results in the developer deciding to not use the TDR option for development. The Board firmly believes that using some TDRs is superior to no TDRs being used in receiving areas, therefore removing the 2/3 use requirement from both the zoning ordinance and the sub-division regulations will facilitate the use of TDRs in receiving areas wherever possible.

ZTA 07-09 - Child Lot Standards – Planning Board Recommendation - Oppose

The APAB believes that Planning Board's ZTA on Child Lot Standards (ZTA 07-09) is substantially different from the recommendation of the Ad-Hoc Policy Working Group as reflected in ZTA 07-06 which the Board supports. ZTA 07-09 would create an equity imbalance changing the existing interpretation and application of the zoning ordinance for over 26 years thereby negatively impacting vested rights provided to certain landowners resulting from the change in zoning in 1981. The ZTA also serves to undermine months of deliberations and final consensus reached by the Ad-Hoc Agricultural Policy Working Group. ZTA 07-09 as written by the Planning Board, ignores the relationship of other action items recommended as a package by the working group. The package of action items is designed to provide a way to holistically address the challenges facing the agricultural reserve while at the same time providing a means for equity protection to landowners impacted by proposed changes. ZTA 07-09 falls short of addressing these issues important to Rural landowners who were impacted by the down-zoning in 1981 while at the same time ignoring the interpretation of the zoning ordinance as referenced in MNCPPC publications during the past 26 years provided to landowners so they could make informed decisions regarding retained rights with their lands.

Resolution to approve amendments to 10 year comprehensive water supply and sewerage system plan – Child Lots - Support

The APAB concurs that there should be limited circumstances in which public water can be provided to child lots. The Board endorses the Resolution to approve amendments to 10 year comprehensive water supply and sewerage system plan to provide public water to a child lot when the child lot can be served from an existing, abutting water main and will not allow service to others, and when public water service can be provided in a manner that would not prevent the future application for a State or County easement to preserve agriculture.

The Board also concurs that any request for public water to a child lot in the RDT zone be conducted as an action of the County Council rather than through administrative approval.

Comments regarding the Draft Executive Regulations Building Lot Termination (BLT) Program- Support

The proposed BLT program is the single most important legislative item recommended by the Ad-Hoc Agricultural Policy Working Group. As the cornerstone recommendation, the BLT provided the impetus which enabled all stakeholders to begin constructive dialog and facilitated the compromises and consensus reached on the agricultural policy issues brought before this group. The Board believes the protection of the agricultural reserve through the recommendations of the Ad Hoc Agricultural Policy Working Group will be measured by whether or not the BLT program is developed and funded by both the public and private sector.

The APAB is up to the challenge of working with the Department of Economic Development to implement this new tool for our agricultural land preservation tool box which will help maximize the protection of our remaining agricultural lands. We encourage the County Council to embrace this program and work in cooperation with the Executive Branch to explore private funding mechanisms to provide a steady stream of revenue to fund this important program. We support the public funds as part of Phase I of the BLT program to get it up and running, and that other means of compensation will have to be explored as part of Phase II.

Alternative uses to market the "Buildable TDRs" to developers in special receiving areas for non-residential uses is recommended by the working group and we endorse this approach. In this way, private sector resources will once again be helpful to further protect the agricultural reserve.

Please accept these comments as official APAB testimony. We hope you will embrace the action items offered by the Ad-Hoc Agricultural Policy Working Group as a package of recommendations that will go a long way to ensure the protection of our agricultural resources while providing the means to protect the vested property rights as a matter of equity to rural landowners.

Sincerely,

W. Drew Stabler, JVC

W. Drew Stabler, Chairman
Agricultural Preservation Advisory Board

cc: County Council Members
Paul Folkers, Assistant Chief Administrative Officer

E:praisnerstabler(apab07)

Attachment D

Mr. George Lechlider
24110 Laytonsville Road
Gaithersburg MD 20882

Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring MD 20910

RE: Dufresne Property
Minor Subdivision Application No. 720060540

Dear Members of the Planning Board:

I am writing in support of the application for three child lots filed by the Dufresne family. Their application seeks three lots on 45 acres of property in the Rural Density Transfer ("RDT") zone, which requires the Planning Board to approve lots above "base density." This application is consistent with the Montgomery County Zoning Ordinance as written, and as the Planning Board has applied the child lot provisions for 26 years.

I am President of the Montgomery County Farm Bureau, and as you know the Bureau has formally supported the continued approval of child lots above base density in the RDT zone as long as the property owner has a transferable development right to support that lot (see letter dated July 19, 2007 to County Council President Marilyn Praisner). I participated in the downzoning process in 1980 and 1981 as a property owner, and continue to own and operate my farm to this day. When the County Council downzoned properties now in the RDT zone from one home per 5 acres to one home per 25 acres, it created an exception that allowed a property owner to create one lot for use of each the property owner's children ("child lots").

Many public officials now take the position that the "child lot" exception was not provided as a form of equity or compensation for the property owners. While "equity" may not have been a consideration for the legislators, it was a significant concession from the point of view of the property owners being downzoned. The importance of this property interest became even more compelling over time, since the Planning Board uniformly approved these child lots over the next 25 years. For those property owners who were downzoned, the ability to create lots for their children was – and remains – of great financial importance for a number of purposes include property valuation and estate planning. These considerations are vital to the overall longevity of a farming operation, along with the ability to encourage children to remain on the farm and help operate the business.

I urge the Planning Board to approve this application because it conforms to the law as it was written and as it has been applied for decades.

Sincerely,

George Lechlider

George Lechlider

Cc: Mrs. Shirley Dufresne