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April 1, 2015

HAND-DELIVERED

Chairman and Members of the Fairfax County Board of Zoning Appeals
c/o Clerk, Board of Zoning Appeals
Department of Planning & Zoning
Zoning Administration Division
12055 Government Center Parkway, Suite 801
Fairfax, Virginia 22035

Re: Appeal Application A 2012-HM-020 ("the Appeal")
RN Golf Management, LLC
Tax Map Ref Nos. 17-4 ((11))4A, 26-1((2))8 and 26-1((5))4

Chairman and Members of the Board of Zoning Appeals:

Thank you for the opportunity to provide the Board of Zoning Appeals (BZA) with additional documents and information regarding the above-referenced matter. This document supplements the submission of Rescue Reston dated January 5, 2015.[1]

**1. The fact that there are no "Approved" stamps on the 1971 development plans, including those located by County Zoning staff and Rescue Reston, is a "red herring." No such "Approved" stamp was used by the County at the time the development plans were approved.**

Based upon discussions with County Zoning staff, and the review of County zoning records from the 1970s and 1980s, no "Approved" stamp was used by the County on rezoning plans (including RPC development plans) until the mid-1980s. Thus, it is no surprise that such a stamp is not found on the 1971 development plans.

[1] Exhibits to Rescue Reston's January 5, 2015, submission were numbered 1-15. Exhibits to this submission will start with number 16. For ease of review, this submission also contains 11"x17" copies of Rescue Reston Exhs. 3, 4 and 5 previously submitted on January 5, 2015, as 8.5"x11" copies.

In this case, County Zoning staff has confirmed that the County's records of the development plans they have for C-203 and C-281, hand-marked "Final" and "Final Copy" respectively, are the approved development plans for those applications. Notably, both plans clearly show the golf course property designated as "South Golf Course" and "Permanent Open Space." These two plans are the same as the C-203 and C-281 development plans submitted by Rescue Reston to the BZA on January 5, 2015 (Rescue Reston Exhs. 4 & 5). Given what is shown on the C-203 and C-281 "Final" development plans in the County's files, and the development plan for C-135 located in the GMU Library special collections section with Reston zoning records by Rescue Reston's counsel, which also shows the golf course property shown as "South Golf Course" and "Permanent Open Space" (*see* Rescue Reston Exh. 3), it would be arbitrary and unreasonable to conclude that the C-135 development plan would have stated anything inconsistent with "South Golf Course" and "Permanent Open Space" as to the golf course property. This is especially true in view of the fact that C-135 was approved by the Board of Supervisors on the *same* day as C-203 and the Reston Master Plan also recognized that property as being intended for golf course and open space uses.

Furthermore, the Clerk to the Board of Supervisors maintains records for the approval of rezoning applications. As is typically the case in rezoning matters, only the first sheet of rezoning plans are kept in the Clerk's records – including the development plans for each of the 1971 applications. Copies of those first sheets from C-135, C-203 and C-281 are attached as Exhibits 16A, 16B and 16C, respectively. Notably, the first sheets for all three development plans in the Clerk to the Board of Supervisors' files match the first sheets of the development plans submitted to the BZA by Rescue Reston (*see* Rescue Reston Exhs. 3, 4 & 5).

It is abundantly evident that what was legislatively approved by the Board of Supervisors in 1971 for the golf course property were golf course and open space uses, and nothing before the BZA contradicts that fact.

**2. Numerous other documents in the Clerk to the Board of Supervisors' files support the position of the County Zoning staff (and Rescue Reston) as to the zoning determination at issue.**

A number of other documents in the Clerk to the Board of Supervisors' files support the Zoning Staff's position (and that of Rescue Reston) in this appeal. In addition to the first sheets of the development plans for C-135, C-203 and C-281 referenced above, legal notices for newspaper advertisements, rezoning application forms, and statements of justification filed by the rezoning applicant at the time, Gulf Reston, Inc. ("Gulf Reston"), all support the Zoning Staff's determination here.

A. Legal Notices. The legal notices for all three rezoning applications state that they were to include golf course and open space uses – separate and apart from any residential uses:

C-135: "[T]o rezone land . . . from the RE-2 District to the RPC District, being approx. 136.6529 acres" for the purpose of rezoning "the same for townhouses, patio

houses, garden apartments, recreational facilities, ***golf course and permanent open space.***" (Emphasis added.) (Rescue Reston Exh. 17A.)

C-203: "[T]o rezone land . . . from the RE-2 District to the RPC District, being approx. 158.9388 acres" for the purpose of rezoning "the same for townhouses, houses, garden court lots, single-family lots, ***open space (golf course)*** and elementary school." (Emphasis added.) (Rescue Reston Exh. 17A.)

C-281: "[T]o rezone land . . . from the RE-2 District to the RPC District, being approx. 109.2959 acres" for the purpose of rezoning "the same for townhouses, patio or garden court houses, garden apartments, ***golf course, open space***." (Emphasis added.) (Rescue Reston Exh. 17B.)

From the legal advertisements, it is clear that golf course and open space uses were specifically among the uses that were requested by the applicant.

Further, Va. Code § 15.1-493, as in effect in 1971, mandated that "no land may be zoned to a more intensive use classification than was contained in the public notice without an additional public hearing after notice required by § 15.1-431."[2] Thus, even back in 1971, the Board of Supervisors could not have rezoned these properties with the golf course and open space uses taken off the development plans in favor of residential uses without additional public advertising and hearings, as to do so would have been to intensify them in violation of Va. Code § 15.1-493. Because the Board of Supervisors could not have legislatively changed the advertised golf course and open space uses to residential uses back in 1971 without additional public notice and hearings, it is absurd to believe that the landowner is allowed to do so administratively (with no legislative review) 40-plus years later.

B. Rezoning Applications. The actual rezoning applications for C-135, C-203 and C-281 plainly state that they include golf course and open space uses:

C-135: Proposed Use: Town houses, Patio houses, Garden court houses, Garden Apartments, High & Medium Rise Apartments, recreational facilities, ***Golf Course and permanent open space***. (Emphasis added.) (Rescue Reston Exh. 18A.)

C-203: Proposed Use: Townhouse, patio, garden court lots, single family lots, ***open space (golf course)*** and elementary school. (Emphasis added.) (Rescue Reston Exh. 18B.)

C-281: Proposed Use: Townhouses, patio or garden court houses, garden apartments, ***golf course, open space.*** (Emphasis added.) (Rescue Reston Exh. 18C.)

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[2] Likewise, Va. Code § 15.2-2285(C) now states that "no land may be zoned to a more intensive use classification than was contained in the public notice without additional public hearing after notice required by § 15.2-2204."

As with the legal advertisements, the zoning applications themselves make clear that golf course and open space uses were specifically intended and requested by the rezoning applicant, Gulf Reston. Indeed, the use of the golf course property all these years confirms this intention.

C. Statements of Justification. The statements of justification filed by Gulf Reston for two of the rezoning applications also were found in the Clerk to the Board of Supervisors' records. Notably, in each case, the statement of justification clearly identified that any residential use was to occur *outside* the golf course property:

C-203: This application contains a total of 159 acres on a portion of which is constructed part of the existing Reston South Golf Course. ***The balance of this land*** will be subdivided into approximately 137 detached single family lots ranging in size from 8,000 to 20,000 square feet each, 120 townhouse, patio or garden court houses, and an elementary school.

The proposed uses and densities are in accordance with the adopted Master Plan for Reston and the County's Comprehensive Plans.

(Emphasis added.) (Rescue Reston Exh. 19A.)

C-281: This application contains a total of 109 acres, on a portion of which is constructed the Reston South Golf Course. ***The balance of this land*** will be subdivided into several blocks on which will be constructed 140 townhouse, patio, or garden court houses and 240 garden apartments.

The proposed uses and densities are in accordance with the adopted Master Plan for Reston and the County's Comprehensive Plans.

(Emphasis added.) (Rescue Reston Exh. 19B.)

From these statements of justification, it is clear that the golf course property was intended to remain for golf course and open space uses and that *only* in the remaining areas ("the balance of this land") was the applicant allowed to establish any type of residential development.

**3. The BZA does not have the power to allow uses of the golf course property that were not specifically approved by the Board of Supervisors and shown on the development plans.**

Only the "governing body" has the power to allow or change zoning uses. Va. Code § 15.2-2285(C). Neither the BZA, nor the County staff, has the legal authority to authorize changes in zoning uses. *Krisnathevin v. Board of Zoning Appeals*, 243 Va. 251 (1992). (Copy attached as Rescue Reston Exh. 20.) In *Krisnathevin*, the County staff administratively allowed a landowner to re-arrange the locations of two zoning uses (a "convenience center" and "community facilities") that were shown on a development plan approved in conjunction with a

PRC rezoning application in Reston. The staff contended that the swapping of the two uses was merely a "minor modification" to the development plan that was allowed under the PRC zoning regulations.

The BZA upheld the staff and the Circuit Court affirmed the BZA's decision, but the Supreme Court of Virginia ruled otherwise and reversed their decisions. The Supreme Court ruled that modifying the locations approved for the two uses constituted a change in the legislatively-approved uses and that only the local governing body had such power. *Krisnathevin,* 243 Va. at 254. In addressing the County's argument that the PRC regulations allowed staff to make minor modifications to matters shown on development plans, the Supreme Court also found that changing the locations of the "community activity" and "convenience center" uses was in fact a "significant modification." 243 Va. at 254.

Here, *Krisnathevin* precludes the BZA from authorizing zoning uses where the Board of Supervisors did not legislatively approve them. Clearly, there is overwhelming evidence that the Board of Supervisors has not approved residential uses on the golf course property. If allowing the locations of "convenience center" and "community activity" to be rearranged was an illegal modification to the legislatively-approved uses shown on the approved development plans, then allowing residential uses in areas where only open space and golf course uses were shown on the approved development plans likewise would be illegal.

**4. Rezoning applications C-135, C-203 and C-281 do not "reserve" the right of the landowner to change in the future uses shown on the development plans.**

The Appellant, RN Golf Management, LLC ("RN Golf"), has never presented any alternative development plan or document establishing that at the time that the Board of Supervisors' approved rezoning applications C-135, C-203 or C-281, Gulf Reston "reserved" the right to make future use of the golf course property for any use other than golf course and open space uses. If RN Golf had that right, Gulf Reston's rezoning applications, statements of justification and/or legal advertisements for these rezonings would have said so – but they did not. Furthermore, there is nothing in the minutes of the Planning Commission or the Board of Supervisors for these three rezonings that any request to "reserve" any right to change uses in the future.

Indeed, the very concept of being able to "reserve" an unidentified future use is antithetical to the whole notion of the PRC district. Zoning Ordinance § 30-2.2.2(E)(1) and (E)(6) clearly mandated that only uses "designated on the development plan" were allowed – not hypothetical, unidentified future uses. Furthermore, § 30-2.2.2(B)(3) recognized that any significant modification to a development plan was not allowed until after the Board of Supervisors and Planning Commission had reviewed the proposed change "in the manner of an original application." These ordinance provisions unequivocally establish that in the PRC District (and now the RPC District), future hypothetical and unidentified uses could not be approved at the time of a rezoning. Further, applying *Krisnathevin* to this situation, just as the Supreme Court of Virginia found that changing the locations of "convenience center" and "community activity" uses shown on the face of a development plan was a significant

modification, clearly authorizing residential uses to occur in areas where no such uses are shown on *any* development plan for the golf course property would be an unauthorized and illegal significant modification. This is especially true when, as here, such areas on the development plans are shown to be for open space and golf course uses.

**5. The development plans submitted by the County and Rescue Reston are not contradicted by any other development plans offered by RN Golf.**

RN Golf has not submitted any development plans that show anything different for the golf course property than what is shown on the development plans provided to the BZA by the County and Rescue Reston. In fact, there are no rezoning-related documents that support RN Golf's position. Instead, the Appellant clings to an obvious misinterpretation of a note shown on certain dedication and subdivision plats from years after the 1971 rezonings. As noted in its January 5, 2015, submission to the BZA, Rescue Reston believes that RN Golf's interpretation of these notes is simply wrong and that that any approval by an administrative official would have been void as administrative officials cannot lawfully approve uses not authorized by the governing body. *See* 1/5/15 Rescue Reston submission at p. 6; *Foster v. Geller*, 248 Va. 562, 568 (1994). Even worse, here, RN Golf's argument really is that an administrative official can authorize an unidentified, hypothetical use 40+ years in the future that is clearly not shown on *any* development plan simply by allowing a note on a dedication or subdivision plan. This argument is factually and legally unfounded.

Furthermore, no matter what RN Golf now claims was its intention when it bought the property in 2005, it is clear that the intention of the zoning applicant, Gulf Reston, was that any residential use only take place *outside* the golf course property – and that it believed that its application was, and had to be, in accordance with the Reston Master Plan and the County's Comprehensive Plan. (*See* Rescue Reston Exhs. 19A & 19B.) There is no dispute that the Reston Master Plan and the County's Comprehensive Plan in 1971 called for the golf course property to be used for open space and golf course uses, and that the same is true even today. Residential use of the golf course property would be contrary to the recognition in the Reston Master Plan (dating back to the 1960s) and the County's Comprehensive Plan that the property was to be used for golf course and open space uses.

**6. Melinda Artman's 1993 letter does not support RN Golf's position.**

Contrary to RN Golf's position, Melinda Artman's 1993 letter does not support its position. As Ms. Artman put in her attached statement:

> My March 30, 1993 letter is simply a zoning compliance letter confirming that the use of a golf course on the property was legal under its approved PRC rezonings and district regulations. My letter was in no way intended to imply that any use other than the golf course use was allowed on the property. Furthermore, in no way was my letter ever intended to imply that development or redevelopment of the golf course property with residential

> use was allowed without the approval of a Comprehensive Plan amendment and development plan amendments from the Board of Supervisors.

(Rescue Reston Exh. 21.)

RN Golf ignores the fact that zoning compliance letters were also issued for the golf course property in 2002 and 2005. Notably, both opined that the approved development plans depicted golf course use of the property. (*See* Rescue Reston Exhs. 22A & 22B.) Neither mentions any possibility of residential use. The 2005 letter was for RN Golf, the contract purchaser at that time. Notably, the November 24, 2004, letter from LeClair Ryan requesting the zoning compliance letter asks for verification that "the current use of the golf course is permitted under the current zoning ordinance." (Rescue Reston Exh. 22B.) Nothing is mentioned about residential use of the golf course property. While counsel for RN Golf told the BZA that his client purchased the property thinking it could be used for residential purposes, one must question that position when its zoning compliance request letter did not even address that issue.

**7. Where were zoning documents pertaining to the golf course property found at the George Mason University (GMU) Library?**

The GMU Fenwick Library has at least four "special collections and archives" ("Collection") specifically addressing the planning and development of Reston. These include the "Martha Pennino Papers," 1960-2005 (creator/donor Martha Pennino), Collection # C0146; the "Reston Community Association Planning and Zoning Committee Records," 1961-1997 (creator/donor John T. Dockery), Collection # C0143; the "Francis C. Steinbauer Reston Development and Planning Collection," 1962-1990 (creator/donor Francis C. Steinbauer), Collection # C0152; and the "Robert E. Simon Papers," 1960-2006 (creator/donor Robert E Simon), Collection # C0162. Copies of the development plans submitted with the Rescue Reston submission on January 5, 2015, were located in John T. Dockery's donation to GMU (Collection # C0143). Mr. Dockery served on the Reston Community Association Planning and Zoning Committee for numerous years. As can be seen on the attached "Content's List" of this Collection, Mr. Dockery kept detailed records of Reston zoning files, including development plans. (*See* Rescue Reston Exh. 23 at pp. 19-24). Counsel for Rescue Reston found copies of the development plans for rezonings C-135 and C-203 on the first visit to the GMU Special Collections Library and cannot explain why RN Golf's counsel was unable to locate these plans. County staff had already located the approved "Final Copy" development plan for C-281.

**8. Are the colored marking on Rescue Reston's exhibits, including those submitted on January 5, 2015, on the originals?**

No, the colored markings on the exhibits attached to Rescue Reston's submissions were added by Rescue Reston's counsel to identify them or to highlight portions of them.

**9. The pre-1971 approval of a special permit for a golf course has no legal impact on this matter.**

The 1971 approvals of RPC rezonings C-135, C-203 and C-281 superseded any approvals under the prior RE-2 zoning of the property. As is evident from the rezoning applications, the statements of justification for the applications, and the development plans, the golf course property was included as part of the property being rezoned in those applications to the RPC district. (*See* Rescue Reston Exhs. 3, 4, 5, 17A-B, 18A-C, 19A-B.)

**10. The Board of Supervisors' recent approval of an office building in Reston purportedly different than called for in the Comprehensive Plan has no legal impact on this matter?**

At the January 21, 2015, BZA hearing, an issue was raised regarding the Board of Supervisors' approval of an office building in Reston purportedly different from the Comprehensive Plan's use statement for the site. Even assuming for the sake of argument that the Board of Supervisors took such an action, that does not mean that the BZA has the power to disregard the provisions of the Zoning Ordinance or to allow zoning uses which have never been approved by the Board of Supervisors.

**Conclusion**

For the reasons stated above, those set forth in Rescue Reston's January 5, 2015, submission, and those argued by Rescue Reston and the County Zoning staff, Ms. Belgin's June 20, 2012, determination should be affirmed by the BZA. The golf course property has always been intended to be used and approved for golf course and open space uses, not residential uses. This is borne out by the development plans; the Reston Master Plan and the County's Comprehensive Plan; legal advertisements, zoning applications and statements of justification for C-135, C-203 and C-281; zoning compliance letters for the golf course property; and other documents. It was also borne out in the letters, emails and testimony before the BZA on January 21, 2015, of members of the Reston community, including many among the 5,900 supporters of Rescue Reston, who voiced their opinions and concerns regarding the protection of their property rights and the values of their homes, as well as the importance and integrity of the Reston Master Plan and its intended impact upon development in Reston.

Before residential use can be authorized on the golf course property, it is clear that amendments by the Board of Supervisors to the Comprehensive Plan and to the approved development plans, along with the approval of a new PRC plan, are required. Therefore, RN Golf's Appeal Application A 2012-HM-020 should denied by the BZA.

Sincerely,

Randall T. Greehan
Greehan Taves Pandak & Stoner PLLC
Counsel for Rescue Reston

Exhibits contained in notebook submitted with this letter

cc: Connie Hartke, President, Rescue Reston
David Burns, Rescue Reston
Francis McDermott, Esquire, Counsel for RN Golf
John McBride, Esquire, Counsel for Reston Association