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## Chesapeake Bay Critical Area Conservation Plan

**CP-88007/07**

Application	General Data	
<b>Project Name:</b> Indian Queen South  <b>Location:</b> One-half mile southwest of intersection of Edgewater Terrace and Traverse Way  <b>Applicant/Address:</b> Daryl Tompkins et al 10052 Edgewater Terrace Fort Washington, MD 20744	Planning Board Hearing Date:	11/19/09
	Staff Report Date:	11/10/09
	Date Accepted:	09/03/09
	Planning Board Action Limit:	11/19/09
	Most Recent Revision:	05/15/03
	Plan Acreage:	13.5
	Zone:	R-R/L-D-O
	Planning Area:	80
	Council District:	08
	Municipality:	N/A
	200-Scale Base Map:	213SW01

Purpose of Application	Notice Dates	
Request to remove the hiker/biker trail easement.	Adjoining Property Owners: (CB-15-1998)	N/A
	Previous Parties of Record: (CB-13-1997)	N/A
	Sign(s) Posted on Site:	10/19/09
	Variance(s):	None

Staff Recommendation		Staff Reviewer: Raymond Dubicki	
APPROVAL	APPROVAL WITH CONDITIONS	DISAPPROVAL	DISCUSSION
		X	

THE MARYLAND-NATIONAL CAPITAL  
PARK AND PLANNING COMMISSION

PRINCE GEORGE'S COUNTY PLANNING BOARD

STAFF REPORT

SUBJECT: Chesapeake Bay Critical Area  
Conservation Plan CP-88007/07  
Indian Queen South

Council District: 08      Planning Area: 80      Municipality: None

OVERVIEW

The applicants propose revising an existing conservation plan to remove the condition requiring a trail easement on their property. The applicants are owners of fourteen residential lots, identified as Lots 57–70 and Lots 76, 81, and 82, Block C of the Indian Queen South subdivision. The lots are a contiguous block of properties running along the south side of Edgewater Terrace and the north shore of Broad Creek. The property is zoned R-R (Rural Residential) and is within a limited development area of the Chesapeake Bay Critical Area.

The site was subject to a series of previous approvals as outlined in the memorandum from the Environmental Planning Section. Most pertinent to the discussion of the current application are Preliminary Plan of Subdivision 4-75107 and Conservation Plan CP-88007/01.

Preliminary Plan 4-75107 was approved by the Prince George's County Planning Board as PGCPB Resolution No. 75-135 on July 24, 1975. As a cluster subdivision, the Board made several findings about the quality of the subdivision design, the quality of open space, and the preservation of the environment above that of conventional development. Specifically, Finding 4 states:

**The arrangement of lots, streets and open space is such that residents will have good exposure and access to the open space areas. Sixty-seven percent of all lots have direct access to the open space system from the rear or side yards. In addition, the rear yard of 20 lots on the east of the property is contiguous with the M-NCPPC Henson Creek Park. Access to open space is also provided by means of pathway connectors to the street. These connectors link the open space into a continuous system.**

Preliminary Plan 4-75107 was approved with four conditions, including requiring the applicant to record an agreement with the Department of Parks and Recreation for the dedication of open space. This agreement was formalized as a Memorandum of Understanding and recorded as a series of deeds beginning at Liber NLP 5305, Folio 741. The Final Plat of Subdivision, 5-77182 was approved September 8, 1977 and recorded as Record Plat WWW 107 @ 31.

Both the plat and the Memorandum of Understanding contain the following language:

“The hiker-biker trail easement shall revert to the property owners over whose land the easement passes if the hiker-biker trail, 6 to 8 feet in width with an improved hard surface is not constructed in its entirety by the MNCP&PC [sic] or its successor within 10 years from the date of the recording of this subdivision plat or the plat showing section 7.”

Neither houses nor the trail were constructed within ten years of the recording of Record Plat WWW 107 @ 31 and the easement reverted to the owner of the individual lots.

In 1985, the state passed and the county adopted the Chesapeake Bay Critical Area Act. Section 27-548.11 of the Zoning Ordinance requires a conservation plan and conservation agreement for properties in the critical area. Where a preliminary plan of subdivision is not required, the conservation plan must be approved prior to the issuance of building permits.

In 1987, prior to construction of dwellings on the Indian Queen South lots in the critical area, the owner of the property, Front Foote Limited Partnership, was required to file a conservation plan. Conservation Plan CP-88007/01 was approved March 30, 1989 with six conditions. Condition 3 states the following:

**Prior to the issuance of grading permits for Lots 57-71, Block C, a Deed of Easement in perpetuity for a multi-use trail across Lots 57-71, Block C, and Parcel P, shall be approved by M-NCPPC and recorded among the Land Records. If legally feasible, the trail easement shall coincide with the WSSC Sanitary Sewer Easement across Lots 57-71, Block C and Parcel P. However, it will then follow the trail easement as approved on Record Plat NLP 107-33. If the WSSC alignment is not legally feasible, a new easement will be established as a minor revision to this Conservation Plan.**

Under this condition, the location of the easement was moved to coincide with the existing Washington Suburban Sanitary Commission (WSSC) sanitary sewer as an effort to reduce impact within the stream buffer and reduce the amount of property under easements. It is this condition that the applicants request be removed from the conservation plan.

A Deed of Perpetual Easement for Hiker/Biker Trail was recorded in Prince George's County Land Records at Liber 9331, Folio 189 fulfilling this condition. Subsequent to this deed, two further plats were recorded affecting lots encumbered with this easement. On July 11, 2001, Record Plat REP 192 @ 36 was recorded to reflect Final Plat of Subdivision 5-01066. This changed Lot 71 at the western end of the easement to Lot 76 and redesignated Parcel P as Parcel Q. This plat shows both the abandoned 1975 trail and the existing 1988 trail with a reference to the recorded easement.

On March 25, 2005, Record Plat REP 205 @ 81 was recorded to reflect Final Plat of Subdivision 5-05042. This adjusted the boundary between Lots 61 and 62, creating Lots 81 and 82. This plat also shows the existing 1988 trail with a reference to the recorded easement. Any action by the Planning Board under this current application will not change or abandon this easement. As outlined in the memorandum from the Parks Department, further action in accordance with Article 28 of the Maryland Annotated Code will be required.

The applicants have provided a statement of justification in support of this application. The statement addresses several issues that require comment.

“1. There is no District Council approved plan that requires the easement.”

**Comment:** The Potomac River has been designated as a master plan trail corridor on county master plans and functional plans since 1975. The Maryland-National Capital Park and Planning Commission’s (M-NCPPC) plans that have recommended the Potomac Heritage Trail include:

- 1975 *Adopted and Approved Countywide Trails Plan*;
- 1981 *Adopted and Approved Master Plan for Subregion VII, Henson Creek (Planning Areas 76A and 76B) and South Potomac (Planning Area 90)*;
- 1985 *Adopted and Approved Equestrian Addendum to the Countywide Trails Plan*; and
- 1993 *Approved Master Plan and Sectional Map Amendment for Subregion V, Planning Areas 81A, 81B, 83, 84, 85A, 85B*.

The 2006 Approved Master Plan and Sectional Map Amendment for the Henson Creek-South Potomac Planning Area included Policy 5 (under Infrastructure Elements, Transportation Systems, Bicycle, Pedestrian, Trails Element):

**Continue strategies to implement the Potomac Heritage National Scenic Trail on-road bicycle route and off-road trail.**

Under Policy 5, a strategy is included that states,

**Explore opportunities to enhance existing trails or develop new trails on the publicly owned land along the Potomac River.**

It should be noted that the 2006 Henson Creek-South Potomac master plan did not specifically address the issue of trail easements, but left the ultimate alignment of any off-road trail construction to more detailed study and dialogue between the Commission, the National Park Service, and the community. It assumed that the use or vacation of the trail easement would be determined by much more detailed analysis and discussions with the community. However, the strategy cited above does imply that new trails should be built on publicly-owned land.

More recently, the Preliminary Prince George’s County Master Plan of Transportation included a section on the Potomac Heritage Trail and a policy regarding public use trails easements. This policy was amended by Council Resolution CR-54-2009 to read:

**POLICY 4 No construction of the Potomac Heritage Trail is recommended within public use trail easements on private residential lots. Trail connections within this corridor shall be accommodated on public parkland and within public road rights-of-way. Notwithstanding this, trail easements are still necessary for the preservation of equestrian trails in the Rural Tier and for some master plan trails implemented on private homeowners’ association land.**

For several years, staff has been implementing the spirit of this policy through various development review applications and new master plan recommendations. Staff has not

recommended the acquisition of new trail easements on suburban-density private residential lots as part of development review applications. Similarly, as area master plans are updated (as well as the Master Plan of Transportation), staff has made recommendations that major master plan trails be on publicly-owned land or within public rights-of-way. Easements have only been pursued in the Rural Tier for equestrian trails and in some homeowners association (HOA) parcels accommodating part of a master plan trail connection. However, easements are no longer recommended on suburban-density private residential lots. There have also been instances where easements were appropriate along private roads where the associated sidewalk connection serves as a public link to Metro.

After the adoption of the 1985 Equestrian Addendum, a study entitled “Trail Through Time: A Proposed Plan for the Potomac Heritage National Scenic Trail in Prince George’s County, Maryland” was prepared by Clara L. Gouin to evaluate the feasibility of constructing the trail along or near the shoreline. This study was prepared for the Planning Department to analyze possible trail alignments. The study concluded that “over 70% of the trail will be on publicly-owned land.” (p 54) The only areas where trail construction within public use easements was recommended was along already established public use easements or on other undeveloped, vacant properties where an easement could be acquired through the development review process. Consistent with this, the only area where the Department of Parks and Recreation considered constructing the trail on private lots was where there are existing easements acquired specifically for that purpose. Staff is not pursuing new easements on private, suburban-density residential lots, consistent with the Master Plan of Transportation recommendation. The easements that were acquired for the Potomac Heritage Trail were acquired as part of the development approval process for previously undeveloped properties.

- “2. The portion of the easement that crosses Parcel P is invalid, precluding public connection to the remaining Indian Queen easement.”

**Comment:** The parcel discussed is currently identified as Parcel Q per Record Plat REP 192 @ 36. This application is not the appropriate vehicle to adjudicate the validity of the easement that crosses Parcel Q. Parcel Q is not a part of this application. The Planning Board is not the forum for making such determinations.

- “3. The portion of the easement that crosses Block C needs legal review.”

**Comment:** This application is not the appropriate vehicle to review the legality of the easement that crosses Block C. The applicants’ novel argument about the applicability of takings or exactions jurisprudence as subsequent purchasers from a developer who did not make such arguments is only appropriate if the case was under judicial review. The Planning Board is not the forum for making such determinations.

- “4. Connection to M-NCPPC property at the waterfront is opposed by the Broad Creek Historic District (BCHD) Local Advisory Committee (LAC).”

**Comment:** The connection to M-NCPPC property at the waterfront is not opposed by the Broad Creek Historic District (BCHD).

The applicants included correspondence from Carroll J. Savage of the Broad Creek Historic District Advisory Committee, which does not oppose the connection. BCHD points out several challenges that face connections throughout the District, including topography and environmental concerns.

BCHD is a valuable partner of the Commission in working towards establishing a responsible and responsibly constructed trail network. However, their contribution is one voice in an ongoing process for establishing these important linkages. Their proposal does not include methods for acquiring or securing properties on the west side of the District, where the Indian Queen South easement already exists.

Further, the BCHD alignment of the trail that is included by the applicants is not expressly shown on Map 31 of the Henson Creek Master Plan. If the applicants' earlier logic holds, this would preclude such an alternative from ever being considered.

"5. Public use easements and private residential property are incompatible land uses."

**Comment:** The applicants provide no factual basis for this assertion. No part of the Zoning Ordinance, the Chesapeake Bay Critical Area Act, or the *Prince George's County Landscape Manual* identifies trails and private residential property as incompatible land uses. See the comment to applicants' item 7 below for a discussion of the cited Code of Maryland Regulations (COMAR).

"6. The existence of a current easement was not disclosed to all prospective buyers."

**Comment:** Failure to disclose the current easement to all prospective buyers does not quash the existence of the easement or change the circumstances which lead to the conservation plan condition. The easement was appropriately granted and publicly recorded in Prince Georges County Land Records at Liber 9331, Folio 189. It is the responsibility of potential purchasers to perform due diligence.

"7. Vacation of the Indian Queen easement does not impact public waterfront access."

**Comment:** The applicants provide no factual basis for this assertion. Further, at several points in this statement of justification, the applicants cite a provision of the Code of Maryland Regulations which should be identified as COMAR 27.01.02.03D(5). This provision calls on jurisdictions to provide shore access within areas identified as intensely developed areas. Indian Queen South is in a designated limited development area, identified locally as a limited development overlay (LDO). However, the regulation does not preclude access in as a limited development area by calling for access in the intensely developed areas, as the applicants aver. Indeed, the purpose of the regulation is to prevent subdivision and overdevelopment that would bar access to the shoreline to those who do not own a waterfront parcel.

"8. Compensation and alternative rights-of-way."

**Comment:** The applicants provide no alternatives to the current alignment of the trail easement or an analysis of new impacts to the Chesapeake Bay Critical Area (CBCA) buffer created by the relocation of the easement. The 39 items identified by the applicants were all streets or roadways by plat for public use. The current application concerns an easement that was deeded to M-NCPPC for the purpose of a hiker/biker trail.

"9. The issue of grandfathering."

**Comment:** This application is not the appropriate vehicle to review the issue the applicants have identified as grandfathering. See the comment to applicants' item 7 above for a discussion of the cited COMAR regulation.

“10. The cover page.”

**Comment:** The applicants purport that this photograph was taken from Piscataway Park and reflects current practice for pervious surface construction in the CBCA. Piscataway Park is owned and operated by the United States National Park Service. The current practice for pervious surface construction that is shown in this photograph is not the same as is supported by the Broad Creek Historic District Local Advisory Committee proposal discussed in applicants’ item 4 above. It should be noted that the pathway does include a lovely view of the river.

## SITE DESCRIPTION

The subject easement is comprised of approximately 86,200 square feet of land in the R-R and L-D-O (Chesapeake Bay Critical Area Limited Development Overlay) Zones. The easement runs across Lots 57–70, 76, 81, and 82, Block C of the Indian Queen South subdivision, also known as 10026 through 10054 (even only) Edgewater Terrace. There are streams, wetlands, steep slopes, and 100-year floodplain on the lots and the easement. There is woodland on the lots surrounding the easement. There are 100-foot Chesapeake Bay Critical Area buffers on the lots and the easement. The lots are currently developed with single-family detached residential homes. No historic or scenic roads are affected by this proposal. There are no nearby noise sources and the proposed use is not expected to be a noise generator. No species listed by the State of Maryland as rare, threatened, or endangered are known to occur on the subject easement or on adjacent properties. The *Prince George’s County Soil Survey* indicates that the principal soils on the site are in the Aura, Fallsington, and Sassafras series.

## RECOMMENDED FINDINGS

1. The Indian Queen South hiker/biker trail easement is a 35-foot-wide right-of-way easement created by a Deed of Perpetual Easement for Hiker/Biker Trail recorded in Prince George’s County Land Records at Liber 9331, Folio 189. The easement was created by Potomac View Associates, LP for the benefit of M-NCPPC. The easement is further recognized in plats recorded at REP 192 @ 36 and REP 205 @ 81. The easement is currently in full force and effect. The easement runs along the same route as an easement held by Washington Suburban Sanitary Commission (WSSC) recorded at Liber 3245, Folio 43 for the purpose of a sanitary sewer. No improvements have been constructed within the easement by M-NCPPC.
2. The Indian Queen South easement provides approximately 1,700 linear feet of trail corridor near the north shoreline of Broad Creek. This easement for the purpose of a hiker/biker trail conforms to proposed trails shown on Prince George’s County master plans and functional master plans since 1975. Most recently, this area is identified for a proposed trail in the 2006 approved Henson Creek-South Potomac master plan as a portion of the Potomac Heritage National Scenic Trail.
3. The easement connects existing M-NCPPC parkland (Henson Creek Stream Valley Park) to land owned by the Indian Queen South Homeowners Association. The easement provides a portion of a connection linking the Indian Queen South subdivision and surrounding communities with Fort Foote Park and communities to the north.
4. The conservation buffer approved as part of the conservation plan has been retained, as approved, and provides a substantial buffer between the dwellings and the trail easement.

5. No compensation proposal or alternative trail alignment was provided as part of the subject application. Abandoning the easement prior to having an alternative alignment in place may result in no connection ever being made.
6. The applicants provided no justification showing how the proposed revision to the currently adopted conservation plan will improve the plan's conformance to the Conservation Manual, Prince George's County Subtitle 27, or Maryland State law.

#### RECOMMENDATION

DISAPPROVAL of Chesapeake Bay Critical Area Conservation Plan CP-88007/07.