

**Department of Community Development
Staff Report**

PROPERTY OWNERS: Zand 78, LLC; Demavand 9, LLC

APPLICANT(S): Partow Payandeh

LOCATION: Apple Manor Road and Audubon Trail

DISTRICT: Marshall

PIN(S): 6022-96-1121-000, 6032-04-4173-000, 6032-06-3415-000, 6032-15-3237-000, 6032-16-8625-000, 6032-27-2904-000, 6032-18-1323-000, and 6022-76-7256-000

ACREAGE: 12.29 (approximate roadway area)

ZONING: Rural Conservation (RC)

LAND USE: Conservation

MEETING DATE: October 13, 2016

REQUEST: WAIV-16-005690: The Applicant is seeking a waiver of the Zoning Ordinance private street limitations, specifically Section 7-302.1.A.2, in order to construct a new section of private street that does not connect directly to a state maintained street.

OUTSTANDING ISSUES: The Board of Supervisors needs to consider whether this application meets the standards found in Section 7-302.2 for granting a waiver.

RECOMMENDATION: Staff recommends that the Board of Supervisors deny the applicant's request to waive the private street limitations as found in Section 7-302 of the Zoning Ordinance. A waiver of the private street limitations would allow for the construction of a roadway that does not conform to the character of the Zoning District, and could negatively impact lot owners within the Apple Manor subdivision through potential increased traffic and maintenance costs.

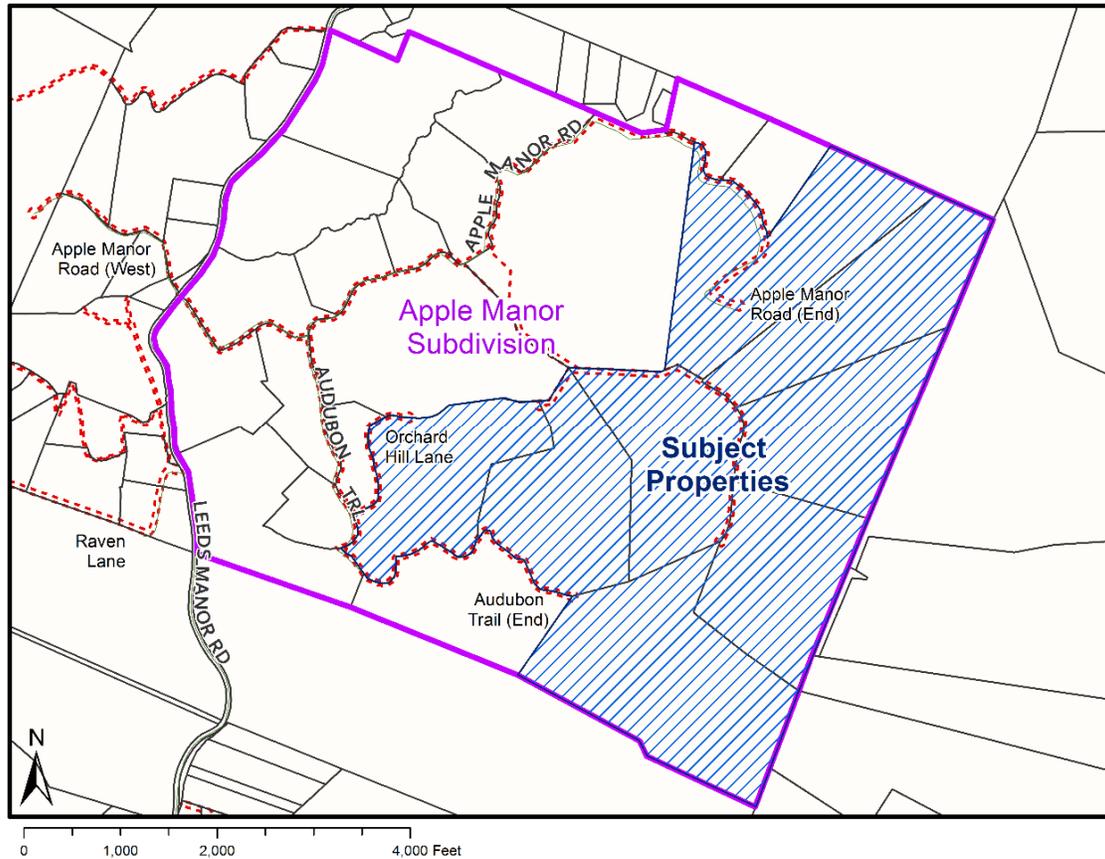
Topic Description:

The Applicant, Partow Payandeh, has requested a waiver of Section 7-302.1.A.2 of the Zoning Ordinance related to limitations on private streets. The waiver request involves two sections of proposed private street – Waiver Segment A, a short access and cul-de-sac off Audubon Trail at

the intersection of Orchard Hill Lane, and Waiver Segment B, a proposed private street section approximately 5,450 feet in length extending Apple Manor Road.

An Infrastructure Plan application (INFP-16-005283) is currently under review by the County that shows the construction of the private street extension from the end of the Apple Manor Road easement to the end of the Audubon Trail easement. The Infrastructure Plan cannot be approved until this waiver request is approved by the Board of Supervisors as the current layout of the roadway under review relies on the connection of an existing private street to another private street, instead of directly to a state-maintained public road.

Apple Manor Subdivision



The statement of justification submitted by the applicant's representative includes exhibits from the submitted Infrastructure Plan showing the proposed connection of the private streets, a copy of the Virginia Outdoors Foundation easement recorded in 1998 for the subject properties, a copy of the Supreme Court order that prompted the submission of the Infrastructure Plan and this associated waiver request, and a letter from the Virginia Outdoors Foundation stating that construction of the private street is allowable under the restrictions of the recorded conservation easement.

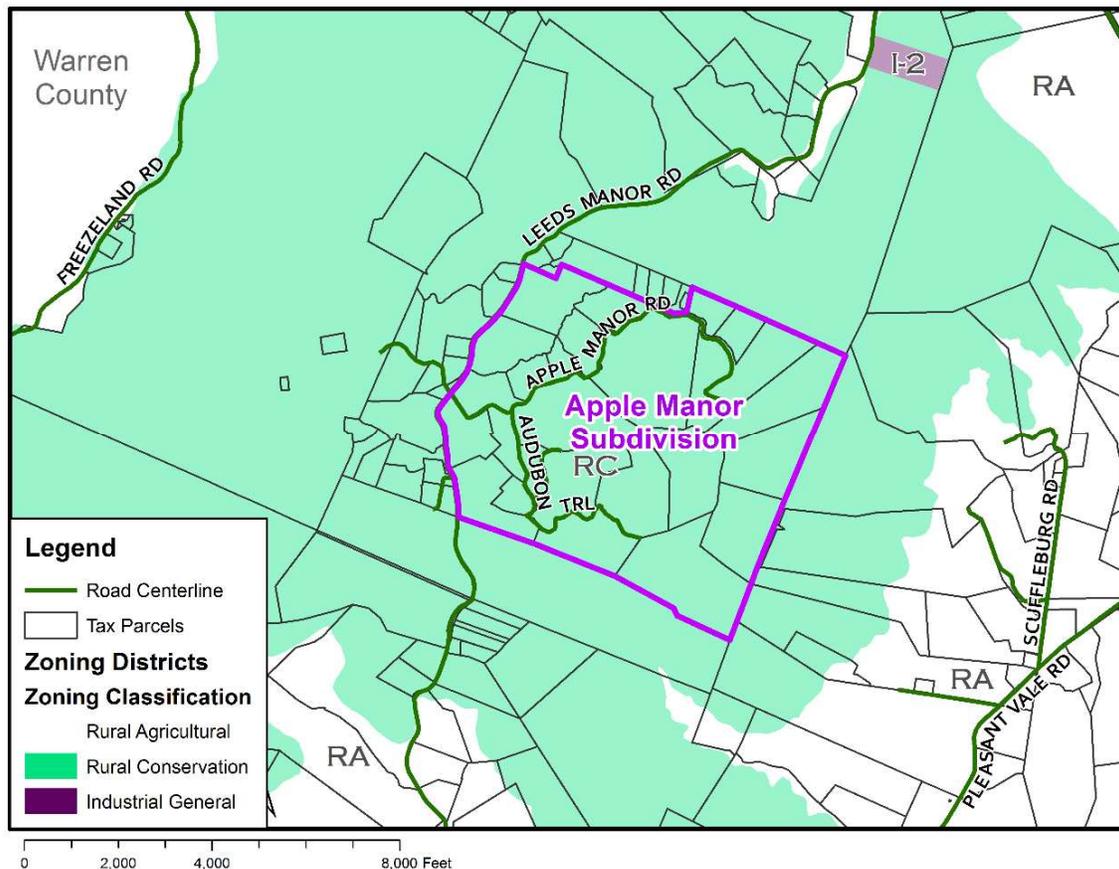
Location, Zoning and Current Land Use:

The eight lots included in this application are known as Apple Manor Lot 7R-1A, Lot 7R-1B, Lot 7R-1C, Lot 8A, Lot 8B, Lot 8C, Lot 9R-1A and Lot 9R-1B. The Apple Manor subdivision is

located to the east side of Leeds Manor Road (Route 688), approximately 3.3 miles south of Winchester Road (Route 17), Marshall Magisterial District. Apple Manor Road is the sole internal subdivision roadway which provides a connection with the public street Leeds Manor Road (Route 688); all roads within the Apple Manor subdivision consist of ingress-egress and private street easements.

The eight subject parcels are zoned to the Conservation (RC) District, and are predominantly under forested cover with no structural improvements other than one outbuilding on Lot 8C. All properties included in this application are subject to a Virginia Outdoors Foundation conservation easement recorded in Deed Book 824 Page 189.

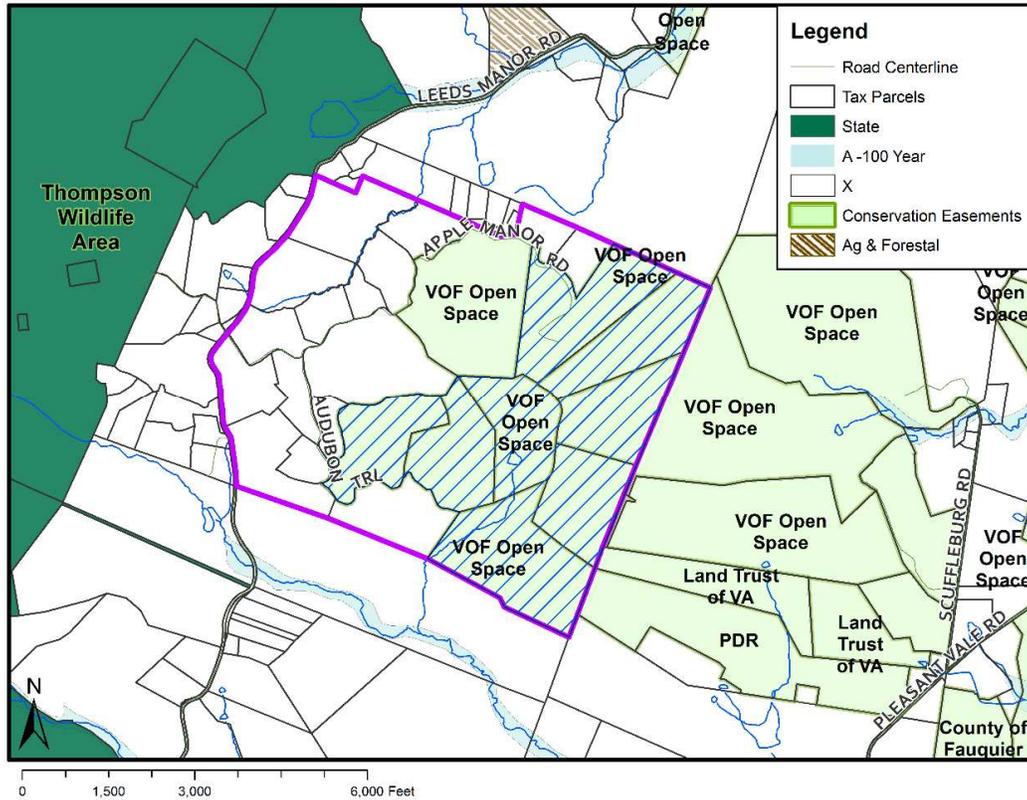
Location and Zoning Map



Surrounding Zoning and Current Land Use:

Neighboring properties are all zoned to the Conservation (RC) District, and either in residential use, or consist of open/vacant land, predominantly in forested conditions. Topography consists of moderate to steep slopes, with steeply sloped areas generally under wooded cover. Site soils are described in Part 2 of the Interpretive Guide to Fauquier County Soils as shallow to rock with steep slopes on high points and alongside slopes, and with drainage features described as having high water tables and frequent flooding.

Land Use Map



Comprehensive Plan:

Chapter 4: Zoning and Land Use of the Comprehensive Plan defines the Conservation District as:

Agricultural and Rural Zoning

2. Conservation (RC) District – contains those mountains which are environmentally sensitive, have physical limitations, and contain much of the County’s timber resources. The regulations are designed with emphasis on the conservation of those areas to minimize the potential adverse impacts of development while providing for compatible very low density residential uses.

Background:

The Apple Manor subdivision was first recorded in June 1993 by the Virginia Beef Corporation and created Lots 1-20 and the 50-foot ingress egress easements Apple Manor Road, Audubon Trail and Orchard Hill Lane. Covenants were recorded with the subdivision that allowed certain parcels—Lots 4R, 7R, 8 and 9R—to be re-subdivided. An amendment to the original covenants occurred in 1997, and the amendment added a stipulation that any resubdivision was subject to the 1997 Fauquier County Subdivision Ordinance regulations.

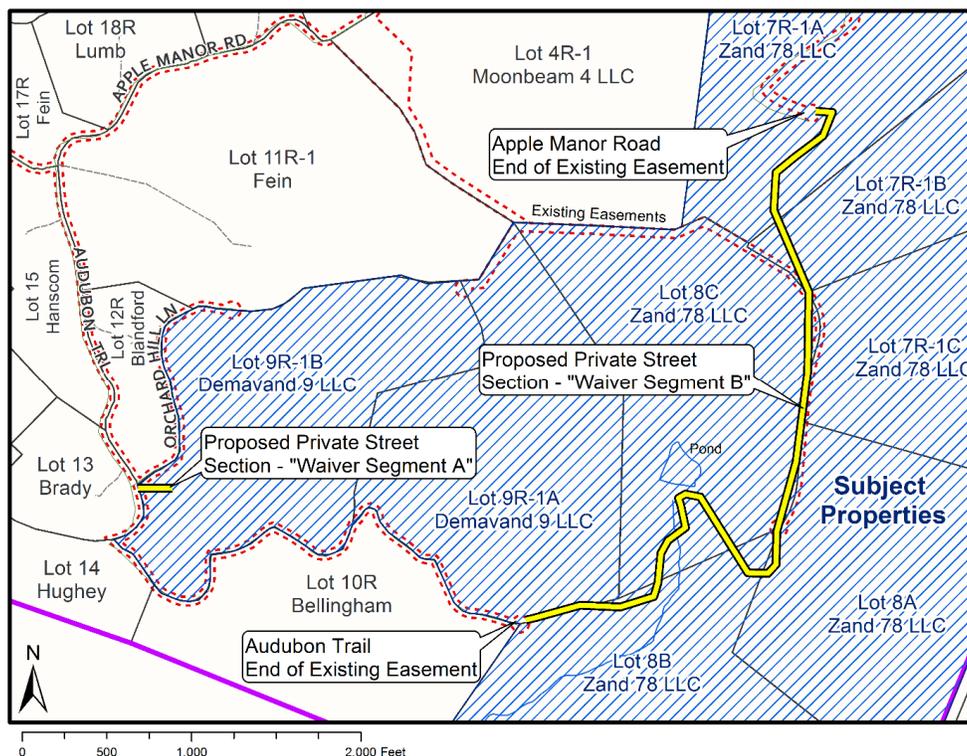
In 2007, Lots 7R, 8 and 9R were boundary line adjusted, and then resubdivided to create eight Large Lots from the three existing lots. A Type III road, requiring no design or construction, was shown on the subdivision plat. In conjunction with the Large Lot subdivision, on May 10, 2007,

the Board of Supervisors approved a waiver to allow the new private street for the resubdivision to connect to the existing private street within Apple Manor subdivision (see attached Resolution of Approval WVRP06-MA-037). Subsequently, on October 15, 2007, a waiver was approved by the then-Director to allow the street to be constructed as a Type III street (see October 15, 2007 Memorandum) The impetus and procedure behind this second waiver is unclear, as historically the Ordinance was interpreted to allow Type III streets without the approval of a waiver; this is not a type of waiver typically approved by the Director; and the original approval of the Large Lot subdivision months earlier had already shown a Type III street. In any case, the end result was County approval of an eight-lot Large Lot subdivision, served by a Type III street; the subdivision was recorded on October 26, 2007.

The 2007 subdivision has been the subject of ongoing litigation between the subdivider (Ms. Payendah) and a neighbor within the original subdivision (Ms. Fein) challenging the legality of the subdivision. At issue is whether the subdivision complied with one of the private covenants of the subdivision. The litigation reached the Supreme Court of Virginia. Ultimately, the Court has ordered that the subdivision be vacated unless a new street, of Type I or II, is provided for the subdivision. The owner is now seeking approval of a Type I street from the County to replace the original Type III streets, in order to meet the private covenant and maintain the subdivision.

On June 8, 2016 the applicant submitted an Infrastructure Plan (application INFP-16-005283) for County review that shows the construction of a Type I private street to serve seven of the subject properties. The plan shows the extension of the private street Apple Manor Road to intersect with the existing terminal end of the private street Audubon Trail. The applicant has indicated that the next submission of plans will show an additional segment of Type I street at the intersection of Audubon Trail and Orchard Hill Lane, to serve the eighth property.

Proposed Private Street Connections



Because both of the newly proposed streets connect to a private street rather than a public street, Section 7-302.1.A.2 of the Zoning Ordinance requires a Board of Supervisors' waiver. While such a waiver was approved in 2007 by the Board as part of the original approval of the subdivision, the Zoning Administrator has determined that a new waiver is required because the newly proposed streets differ significantly in design, as well as location and extent. If the Waiver is not approved, the Infrastructure Plan for the Type I street now being processed by staff cannot be approved. Staff would note that the infrastructure plan can also not be approved until an administrative waiver for the length of Segment A and a boundary line adjustment and dedication plat is approved and recorded. At this time, an application for a Boundary Line Adjustment and Easement Dedication plat have not been submitted to the County for review.

Zoning Ordinance Waiver Provisions:

Section 7-302.1 of the Zoning Ordinance requires that all private streets must connect directly to a state maintained street. However, the Board of Supervisors has the authority to modify this limitation. The specific language of the Zoning Ordinance is:

The private street must connect directly to a state maintained street. In reviewing applications for a waiver of this limitation, the Board may consider as an additional factor in granting such waiver the development limitations which are imposed on the subject property because the proposed division is either (1) a family transfer pursuant to 2-39 of the Fauquier County Subdivision Ordinance, or (2) a large lot subdivision pursuant to 2-310 of this Ordinance provided that the parent property is subject to a conservation easement held by a body politic or a political subdivision of the State.

The Board may modify the foregoing limitations in conjunction with a request for a special exception permit, site plan approval or subdivision plan approval provided that the applicant can show that no other remedy is realistically feasible, that plausible alternatives have been exhausted, that to not so modify the applicable limitation(s) would place an unreasonable restriction on the use of the property and that properties through which access is planned will not be unreasonably affected.

Staff Analysis:

The proposed waiver request would allow the newly designed Type I street to connect to the existing Type III streets that exist within the Apple Manor Subdivision. While private-to-private street waiver requests pursuant to Section 7-302.1 are not unusual, particularly within large lot divisions, it is unusual that a street with higher design and construction standards is requested via waiver to connect into a Type III street, which has no design or construction requirements under the Zoning Ordinance. In this case, the County is not requiring the higher-design Type I street, but there is nothing in the Ordinance to prevent an applicant from seeking approval of a street with higher design and construction requirements, and the applicant is doing so to meet a private covenant.

Building a Type I street triggers multiple Subdivision Ordinance requirements that do not apply to Type III streets. Subdivision Ordinance Section 5 – Streets – General Standards of Design apply. Subsection 5-6 Street Grade, prohibits roadway slopes in excess of 10%. Additionally, this subsection requires paved ditches and catchbasins for any ditch with grades of 5% or more. In order to not exceed the 10% maximum roadway slope criteria, the Infrastructure Plan that was submitted for review shows significant areas of disturbance and grading along the proposed roadway section between existing Apple Manor Road and Audubon Trail that passes through the subject properties. The proposed roadway shown on the submitted plan also includes ditches paved with concrete for the majority of the road length. The waiver application states an approximate area of disturbance for roadway construction of 12.29 acres.

The unusual juxtaposition of the proposed Type I street with the existing Type III streets runs counter to the typical rationale behind granting a waiver. In the rural areas, and particularly in Rural Conservation zoned areas such as the subject property, waivers are typically utilized to minimize the potential grading and construction impacts from proposed streets. The language in the private-to-private waiver requirement acknowledging the relevance of conservation easements and large lot divisions is intended to encourage waivers in conservation areas so that land disturbing and construction can be diminished, not increased.

This significant disturbance of the subject properties would not be in keeping with the goal of the Conservation District, which is described in Section 4 of the Comprehensive Plan as “...*designed with emphasis on the conservation of those areas to minimize the potential adverse impacts of development while providing for compatible very low density residential uses.*” In addition to the broad policy concerns raised by the proposed street, staff has concerns as to whether the specific standards for the waiver as set forth in Section 7-302.1 are met. Each standard is evaluated below.

Standards: *No other remedy is realistically feasible; plausible alternatives have been exhausted.*

The subject properties have no frontage on a public street, and therefore it is true that there is no feasible alternative for connecting directly to a public street. However, it is also true that a private-to-private connection could be made in a manner that is significantly less impactful if the new street maintained its original Type III design or, in the alternative, if the applicant had sought Subdivision Ordinance waivers for some of the design requirements for the Type I street. For example, the Planning Commission has the authority to waive the requirements for a 10% maximum grade or paved ditches and catch-basins and such waivers would have significantly reduced the potential construction impact of the proposed road. Staff acknowledges that the applicant has pursued the proposed approach as a means to comply with a court order, but that does not explain why the applicant chose to pursue only a private-to-private street waiver as opposed to some of these other types of waivers. Nor are any private restrictions imposed by the covenants necessarily relevant to the County’s consideration of this land use issue.

Standard: *To not modify the applicable limitations would place an unreasonable restriction on the use of the property.*

If the Board does not approve the proposed waiver, the submitted infrastructure plan cannot be approved by the County and, presumably, the Courts will vacate the

2007 subdivision, returning what are now eight lots to three lots. The original three lots, before the 2007 subdivision, contained 187.1385, 194.0792 and 106.2911 acres. There are many lots of this size throughout the County that cannot be further subdivided. Additionally, the larger lots could actually have more homes constructed on them (as tenant houses), and so there would still be significant development potential. Furthermore, as noted earlier, there are alternative waivers that could have been requested that might make the private-to-private waiver appropriate.

Standard: *Properties through which access is planned will not be unreasonably affected.*

Due to the topography of the subject properties, the construction of a Type I roadway within the Apple Manor subdivision will require the clearing of forest and significant grading for roadway embankments; therefore, the properties through which the new road will run will themselves be significantly impacted. Additionally, as the two approved dead-end streets are being connected by the new road creating a loop road, daily vehicle trips could potentially increase over the existing sections of Audubon Trail or Apple Manor Road as residents would have an option on which route to use to reach the public road.

Additionally, because the applicant has not yet submitted maintenance agreement documents, it is not entirely clear whether or not the extensive new maintenance requirements related to the new Type I street will be at least partially imposed on the remainder of properties within the subdivision. Typically, all lots within a subdivision share maintenance responsibility for all streets serving the subdivision.

Street Connections

The existing access roads within the Apple Manor subdivision consist of Type III private roads that have no County requirements for construction standards. The existing constructed streets do not match the proposed Type I street in either width of the roadway section nor surfacing of the road and ditches. Typically, if an applicant was constructing a Type I street for a subdivision, they would be required to reconstruct the existing street segments connecting to the public street to the Type I standard. In this case, the applicant has not proposed an upgrade to these existing streets, and because the Type I is not being required by the County, the requirement to upgrade the existing street segments does not apply. While the result may not be precluded by County Ordinances, the result is less than desirable, particularly since the applicant shows no transitions between the two road segments and it does not appear that such transitions can be provided without consent of other property owners in the subdivision.

Public Comment:

Staff has received multiple letters of opposition from area property owners in regards to this waiver application, and it is understood by staff that a petition of opposition has been in circulation. A copy of the letters of opposition, petition and illustrative signature map that have been provided to staff have been included as attachments with this staff report.

Staff Conclusion and Recommendation:

Based upon the evaluation of standards, above, staff is recommending denial of the proposed waiver. Connecting a private street to a private street is typically beneficial in the Conservation district, as it allows significantly less disturbance to occur in conjunction with providing access, but this waiver would allow the opposite, more disturbance. Additional waiver requests could have mitigated this significant impact, but the applicant declined to seek such waivers. While it may be private covenants driving these decisions, the County does not consider private covenants in its decision-making process. The property is afforded a reasonable use whether in the end it consists of three lots, as configured at the time of the applicant's purchase, or eight lots, as proposed with the Type I street. And finally, there will clearly be impacts on the subject properties if the construction of the Type I street occurs, and at least some minimal, and possibly significant, impacts on other properties in the subdivision, depending on the ultimate maintenance responsibilities.

Therefore, Staff recommends that the Board of Supervisors deny the applicant's request to waive the private street limitations as found in Section 7-302 of the Zoning Ordinance. A Resolution of denial has been provided to the Board as a part of the attachments included with this staff report. A Resolution of approval has also been included should the Board wish to approve the waiver request.