



MONTGOMERY COUNTY PLANNING DEPARTMENT
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Item #
MCPB 4-02-09

MEMORANDUM

DATE: March 11, 2009
TO: Montgomery County Planning Board
VIA: Catherine Conlon, Supervisor, *CC*
Development Review Division
Mark Pfefferle, Acting Chief, Environmental Planning *MP*
Stephen Federline, Master Planner, Environmental Planning *SF*
FROM: Richard A. Weaver, Coordinator, *RAW*
Development Review Division
Josh Penn, Senior Planner, Environmental Planning *JP*
REVIEW TYPE: Limited Amendment to the Preliminary Plan, including associated Final Forest Conservation Plan (FCP)
APPLYING FOR: Amendment to a Preliminary Plan and Final Forest Conservation Plan (FCP)
PLAN NAME: Winterset (Lot 46)
PLAN NUMBER: 11996019A
PLAN TYPE: Preliminary Plan and Final Forest Conservation Plan
REVIEW BASIS: Forest Conservation Regulations, Section 113.A.(2), Regulation No. 1-01AM (COMCOR) 18-01AM
ZONE: R-200
LOCATION: Located on Winterset Terrace west of the intersection of Glen road and Falls Road in Potomac.
APPLICANT: Ramiro Paez
ATTORNEY: Steve Robins, Lerch, Early, and Brewer
HEARING DATE: April 2, 2009

STAFF RECOMMENDATION: Staff recommends approval of the Limited Amendment to the Preliminary Plan and associated Final Forest Conservation Plan with the following conditions:

1. Within nine (9) months of the approval date of this limited amendment the applicant must record a new plat for 11701 Winterset Terrace that shows the removal of the conservation easement.
2. Prior to Planning Board approval of the record plat applicant must receive staff approval of the certificate of compliance for an offsite forest conservation mitigation bank.

All other applicable conditions of approval remain in full force and effect.

BACKGROUND

The Montgomery County Planning Board approved Preliminary Plan #119960190 "Winterset", on February 22, 1996. The original approval was for the creation of 10 lots on 6.73-acres of land

in the R-200 zone. The forest conservation law of Montgomery County (Chapter 22A of the County Code) applied to this plan, and a forest conservation plan (FCP) was required.

The FCP showed no existing forest on-site. This resulted in an afforestation requirement of 1.02-acres. The approved forest conservation plan showed that the applicant was going to meet the afforestation requirements by planting on-site (i.e., the full 6.73 acre site) and placing these areas into category I conservation easements. There is no indication in the record that the onsite afforestation areas were for any other purpose than to meet the afforestation requirements.

The proposed amendment is to remove the entirety (17,569 square feet or 0.40 acres) of the Category I conservation easement from Lot 46, Block 2 of the Winterset 11701 Winterset Terrace (32,416 square feet). The proposed change requires both the preliminary plan and the final forest conservation plan to be amended.

The category I conservation easements on lot 46 overlaps two Washington Gas and Light easements. The two gas easements overlap, one is 20 feet wide and the other is 30 feet wide, both starting from the eastern property edge. The easements both clearly state the Washington Gas Light Company can trim, cut, or remove all vegetation and not be required to replace any trees or shrubbery. Therefore, the forest/trees may be removed at any time by the agencies holding those easements without replacement to repair or replace utilities within them.

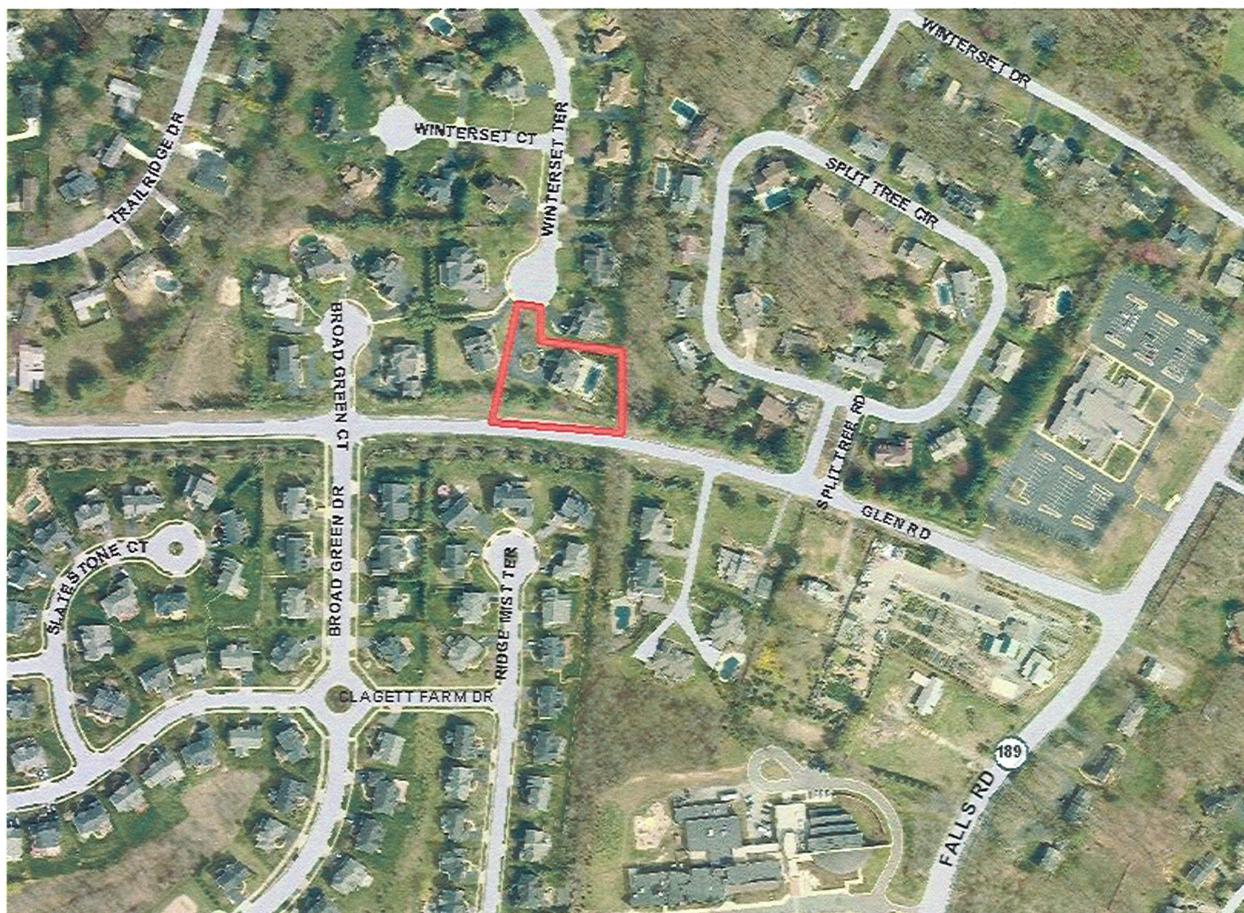
The applicant requests revision to the preliminary plan of subdivision and the forest conservation plan so that he can proceed with the construction of garage that would be located between the existing house and Glen Road.

SITE DESCRIPTION

The subject property is located on Winterset Terrace west of the intersection of Glen Road and Falls Road in Potomac. This amendment applies only to Lot 46, Block 2 Winterset Subdivision and covers 32,416 square feet (0.74 acres). The subject property is a developed single family residence and includes a swimming pool. The site contains no forest and 17,569 square feet (0.40-acres) of Category I conservation easement.

The site currently has many non-compliant and/or unapproved uses within the easement. Fences; walls; maintained turf grass; a concrete walkway/stairway; two benches; a 14 foot by 6 foot shed; a 31 foot by 8 foot gravel area; part of a stone/concrete patio, part of the driveway; and part of an in-ground swimming pool and deck area inside the existing category I conservation easement. The applicant for the preliminary plan of subdivision planted the subject property after house construction in 1997. Based on available aerial information and a subdivision-wide inspection in 2002, some planting was done in the area between the house/circular driveway and Glen Road, but full planting in accord with the FCP was never done within the confines of the pool fence/backyard area. Thus, the 10,000 square foot planted area needed to achieve the minimum forest size dimension was never achieved. The bond for the planting remains intact and was never released. . Accordingly, recent inspections by Environmental Planning review staff determined that there is no forest on the subject site.

Exhibit 1 Vicinity Map



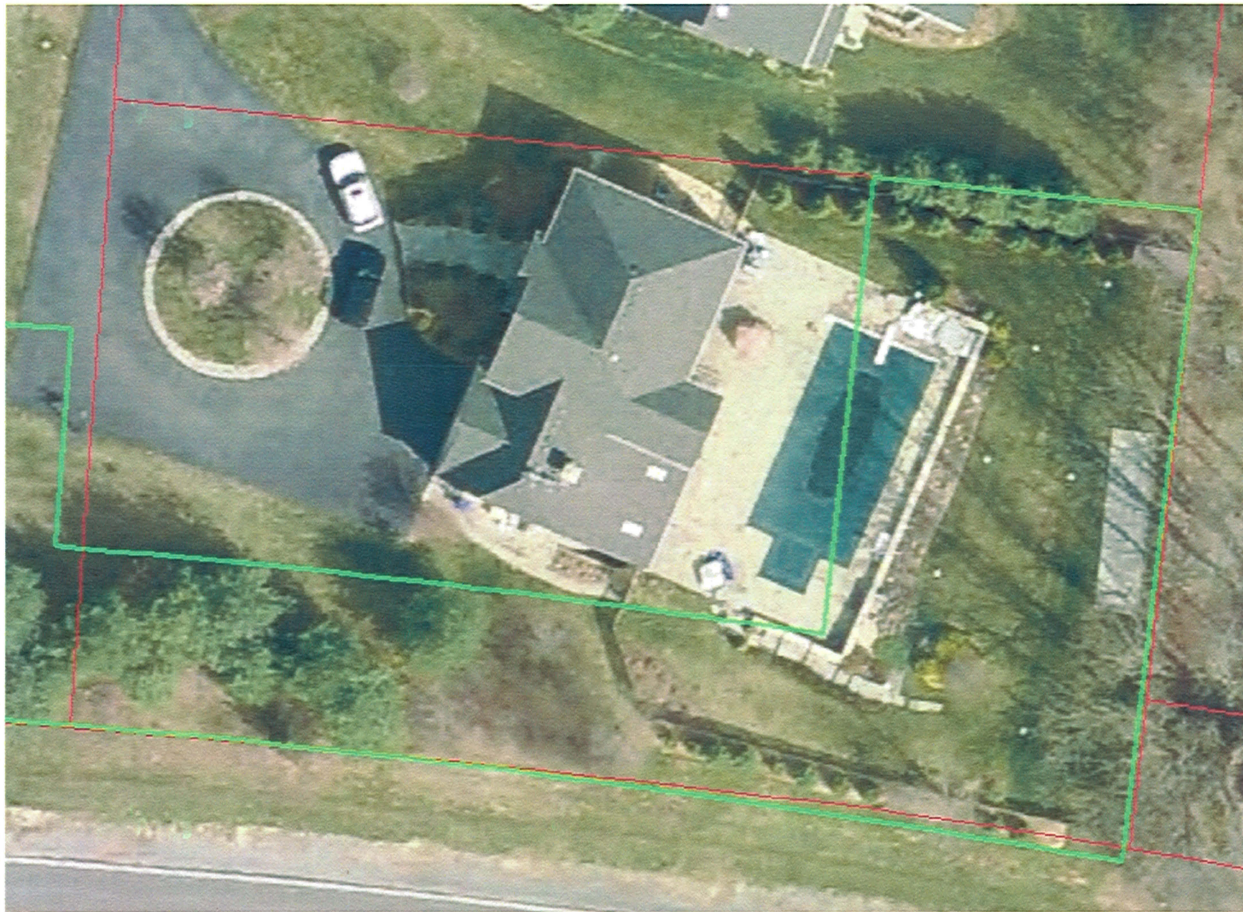
PLANNING BOARD REVIEW AUTHORITY

The Forest Conservation Regulations requires Planning Board action of certain types of modifications to an approved FCP. Section 113.A.(1) of the Forest Conservation Regulation states:

Minor amendments which do not result in more than a total of 5000 square feet of additional forest clearing may be approved by the planning director on a case by case basis...

The proposed amendment does not result in any additional forest clearing. The proposed amendment would remove the entire 17,569 square feet (0.40 acres) of recorded category I conservation easement. With the easements removal, all existing vegetation may be removed without prior approval. Since the easement constitutes a property interest held by M-NCPPC, staff believes removal of a property interest should be addressed in a public forum with a final decision from the Planning Board.

Exhibit 2 Lot 46, Block 2



Red Line = Property Line Green Line = Conservation Easement

PROPOSED CHANGES

The applicant proposes to amend the Preliminary Plan subdivision and Forest Conservation Plan 119960190 by removing the category I conservation neasement from Lot 46, Block 2, Winterset. The amendment includes the removal of 17,569 square feet (0.40 acres) of category I conservation easement from 11701 Winterset Terrace. If approved, the amendment will remove all conservation easements from Lot 46, Block 2 Winterset.

REVIEW ISSUES

Applicant's Position

The applicant wishes to build a new garage on his property as an addition to his existing single family home. Part of the garage is proposed to be located within the conservation easement. The addition requires a building permit from Montgomery County Department of Permitting Services (DPS). Without removal of the easement the property owner will be denied a building permit, and would be unable to construct the garage as desired.

The applicant through his attorney wrote a letter detailing his position on why the easement should be removed, which can be found as Attachment A. In brief, the applicant believes the lot is overly constrained by the conservation easement. The lot is 32,416 square feet (0.74 acres) in size and the existing easement is 17,569 square foot (0.40 acres). Approximately 54 percent of the lot is included in the conservation easement. Furthermore, the applicant correctly states that there is no forest or contiguous forest in or next to the easement area, no other environmental features in the easement area, and the easement has utility easements traversing the area that significantly limit the potential for the easement area to attain and sustain forest in the long term. The Washington Gas and Light Easements total 3,870 square feet, leaving 13,699 square feet of conservation easement not encumbered by any other easements.

The applicant proposes to mitigate for the loss of conservation easement by retaining 70,132 square feet (1.61 acres) of existing forest in a forest mitigation bank. This equates to 35,138 square feet (0.80 acres) of planting, or approximately double the original approval's forest planting requirement on this lot.

Community Issues

All adjoining and confronting property owners and people of interest were notified of the proposed amendment on or about March 13, 2009. Any comments received will be forwarded to the Board.

As of the date of this report, staff had received two emails of inquiry about this project expressing concerns that conservation easements are/should be in perpetuity and wish to express their feelings that the easements should remain:

"I object to the idea of "extinguishing" the Forest Conservation Easement on the Paez property – FCP 119960190. It should be a top priority of MNCPPC to see that all of their conservation easements are permanently retained. If landowners can remove these easements for any reason, it makes the easement useless."

and

"If property owners can simply "extinguish" existing Conservation Easements, why have them? These easements, when placed serve vital functions which are not diminished over time and certainly not at the whim of property owners who find them inconvenient for whatever reason. We are firmly opposed to this Amendment Application."

Additionally, a letter was received on February 13, 2009 from the Winterset II Home Owners Association. This letter was in support of the amendment, as proposed by the applicant, and was signed by the Home Owners Association and every property owner within the subdivision.

The letter and emails are included as attachment B.

Staff Analysis/Position

Lot 46, Block 2 of the Winterset Subdivision contains no forest and the conservation easements were for planting of new forest to dimensional standards acceptable at that time. Portions of the

designated afforestation areas were planted in 1997, and in 2000 were inspected and deemed successfully planted. Currently the conservation easement on the subject property contains no existing forest.

The Montgomery County Department of Permitting Services (DPS) issued permits to the property owner for the construction of the existing swimming pool on November 13, 1997. . The permit to construct the retaining wall was approved by DPS on November 26, 1997. DPS issued permits for their construction in contradiction to the conservation easement restriction on the record plat. In addition to the swimming pool and retaining wall, the applicant has installed fences, a concrete walkway/stairway, two benches, a 14 foot by 6 foot shed, a 31 foot by 8 foot gravel area, part of a stone/concrete patio, and part of his driveway in the category I conservation easement. The remaining area within easement is maintained as manicured lawn and/or a landscaped area.

Staff has always supported the basic objectives set forth in the testimony summarized above. Since the advent of the forest program in the early 1990's, staff has sought first to preserve forest, but also, where appropriate, create forest that can be sustained in perpetuity. However, over time, the ability to create, maintain, and enforce planted forest conditions, particularly on individual residential lots, has been very difficult to accomplish.

Looking at the subject site in 2009, staff finds many conditions and circumstances unique to this site that, in retrospect, would work contrary to creation of sustainable and high quality forest conditions over time. First, protection of a created forest on this site would never be wholly under the control of the homeowner(s) due to pre-emptive easements (two Washington Gas and Light easements) overlapping the conservation easement. Second, the easement contains no existing forest, is not contiguous to any forest, and is not in a priority planting location such as an environmental buffer. Other factors supporting removal and replacement include: creation of a perpetually isolated forest (in the best case); and acknowledgement that the easement does not meet current dimensional requirements, and would be inconsistent with current staff practices.

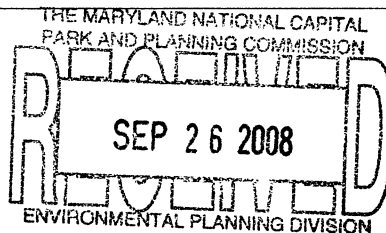
Three other factors deserve mention in this deliberation, although they are not germane to staff's objective judgment as to the long term viability of the forest easement on this property. First, aerial photography indicates that the homeowner has been maintaining the property contrary to the conservation easement at least as far back as 1997. Second, local government approved a building permit for the pool, associated deck, and retaining wall in the conservation easement. Third, staff acknowledges past weaknesses in its enforcement program, and is working diligently towards a more comprehensive program for enforcement, including a consistent process for evaluating proposals to remove or amend existing forest conservation easements.

The applicant has proposed to permanently protect 1.61 acres of *existing* forest (which give one acre forest credit for each two acres saved) to offset the removal of 17,569 square feet (0.40 acres) of easement. This proffer represents replacement of forest at a two for one ratio, which staff considers as an absolute minimum ratio when requests are made to grant variations from standards restrictions (e.g., encroachment into stream buffers) or changes/amendments to formally approved plans. The Planning Board recently confirmed the two for one (2:1) ratio as the minimum level for in-kind compensation at a Roundtable discussion. Staff will look for Board judgment as to the appropriateness of the proposed level of compensation, considering all the factors in this particular case.

RECOMMENDATION

Staff recommends the Planning Board approve this limited preliminary plan of subdivision to revise the forest conservation plan with the condition that the applicant submit and obtain approval of new record plat, and acceptable offsite compensation prior to the issuance of a building permit. Staff believes the overall Montgomery County environment and forest retention would be better served by the removal and off-site compensation of these easement areas.

Attachment A: Applicant Letter



STEVEN A. ROBINS
DIRECT 301.657.0747
FAX 301.347.1778
SAROBINS@LERCHEARLY.COM

September 25, 2008

BY HAND DELIVERY

Mr. Joshua Penn
Environmental Planning Division
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910-3760

**Re: Request to Amend Forest Conservation Plan No.
119960190**

Dear Mr. Penn:

Our firm represents Ramiro Paez, the owner of property located at 11701 Winterset Terrace in Potomac, Maryland (the "Property"). We are submitting this Statement in Support of an Amendment to the Approved Forest Conservation Plan ("FCP") No. 119960190.¹ This statement supplements the materials that we previously submitted on June 4, 2008. The Amendment would extinguish a 17,569 square foot Category I Conservation Easement Area ("Conservation Easement") on the Property that was created as part of the approved FCP.

We respectfully request that the Planning Board approve this Amendment to the FCP for the following reasons:

1. The Property is a small lot containing 32,416 square feet. Of the 32,416 square feet, the Conservation Easement encumbers over half of the site (17,569 square feet). The Property is located at the "bulb" of a cul de sac and is oddly shaped. The Conservation Easement truly constrains the reasonable use and enjoyment of the lot.
2. A significant portion of the Conservation Easement abuts Glen Road, a seventy foot wide, well travelled right-of-way, which is a major vehicular through route in the Potomac area. There is little space between the Conservation Easement, the right-of-way and the road bed. Due to its

¹ Forest Conservation Plan No. 119960190 is pursuant to Preliminary Plan of Subdivision No. 1-95106 for the Winterset Subdivision.

Mr. Joshua Penn
September 25, 2008
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proximity to Glen Road, the Conservation Easement really does not adequately protect the type of environment that one would typically expect of an easement area.

3. The Property is not situated next to any contiguous forest and the Conservation Easement does not protect any environmental buffer regions. There are no environmentally sensitive areas that are being protected by this easement. Therefore, the area protected by the Conservation Easement constitutes at best, fragmented forest, which cannot support the same degree of biodiversity that a single contiguous forest can hold. This is not the type of area that should be protected by a Category I conservation easement.

4. The Conservation Easement is not comprised of existing forest. Instead, it is comprised of planted trees, which do not resemble the type of forest that one would expect under a conservation easement.

5. There are several public utility easements that traverse the Property within the Conservation Easement area. These easements also undermine the quality of the Conservation Easement.


As you know, to offset the area currently protected in the Conservation Easement, Mr. Paez has worked with Technical Staff to arrive at a reasonable compensatory solution – Mr. Paez has contracted to purchase and permanently protect 1.614 acres of existing forest from an approved mitigation bank. This area to be protected is four times the amount of the area that will be extinguished. Specifically, Mr. Paez has an agreement with Winchester Homes to purchase Forest Conservation Credits from the Stoney Springs Forest Conservation Mitigation Bank. These off-site Forest Conservation Credits will satisfy the Property's forest conservation obligations pursuant to the Forest Conservation Plan and Article II of Chapter 22A of the Montgomery County Code. Unlike the Conservation Easement on the Property, this protected area is part of an existing, contiguous forest, which is of the quality and scope anticipated by the Forest Conservation laws to be protected.

We greatly appreciate Staff's efforts in working with us on this matter. We respectfully request that you schedule this item for a Planning

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Board hearing as soon as possible. Thank you again for your prompt attention to this matter.

Sincerely,



Steven A. Robins

cc: Ramiro Paez
April H. Birnbaum, Esq.

Attachment B: Community Correspondence

Penn, Joshua

From: Ginny Barnes [ginnybarnes@juno.com]
Sent: Wednesday, October 01, 2008 7:34 AM
To: Penn, Joshua
Subject: amendment to Forest Conservation Plan No. 119960190

To: Joshua Penn: Environmental Planning Division - M-NCPPC

Re: Amendment to Forest Conservation Plan No. 119960190

Dear Josh,-

I received notice by mail of this request to P&P and do not like it one bit. 'Extinguishing' (Mr. Paez lawyer's language, not mine) an existing Forest Conservation Easement is a very serious matter, especially in these times of climate crisis. This is a Category I easement totalling 17,569 square feet. It backs onto Glen Rd. and to my mind plays an important role in both stormwater attenuation, carbon sequestering, and as a visual buffer. Since this is R-200 zoning and according to Mr. Paez lawyer, Steve Robins, it 'encumbers over half of the property', I suspect this easement was placed at the time of subdivision and as such had a good reason to be there. Mr. Paez lot has a total sq. footage of 32,415 which means he has ample property for the zone. What remains for his use is in keeping with surrounding lots in the Winterset subdivision. I have several questions:.

-What is the reason for wishing to terminate the easement? It is not given in Attorney Steve Robins letter. Since the definition of a forest includes a size specification of 10,000 sq. ft, Mr. Paez is proposing to extinguish over 1 and 1/2 forests for what exactly? .

-What was the reason for placing the easement on the property in the first place? It is my recollection it was established by the original owner, Lavinia Robey, a long time resident of the Glen who certainly expected it to remain there in perpetuity.

-Will this go before the Planning Board in a public hearing?

If property owners can simply 'extinguish' existing Conservation Easements, why have them? These easements, when placed serve vital functions which are not diminished over time and certainly not at the whim of property owners who find them inconvenient for whatever reason. We are firmly opposed to this Amendment Application.

Sincerely,

Ginny Barnes, Environmental Chair
West Montgomery County Citizens Association
10311 Glen Road
Potomac, MD. 20854
(301) 762-6423 -phone / (301) 762-9287 - fax

Penn, Joshua

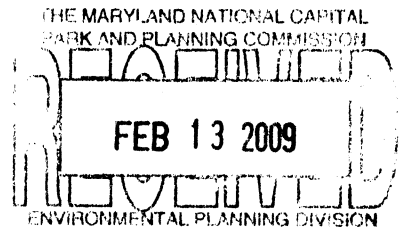
From: AncientOak@aol.com
Sent: Wednesday, October 01, 2008 8:50 AM
To: Penn, Joshua
Subject: Amendment for FCP 119960190

Dear Mr. Penn:

I live in the North Glen Hills area of Rockville. I am a member of the West Montgomery County Civic Association. I object to the idea of "extinguishing" the Forest Conservation Easement on the Paez property - FCP 119960190. It should be a top priority of MNCPPC to see that all of their conservation easements are permanently retained. If landowners can remove these easements for any reason, it makes the easement useless. I urge you to leave the conservation on this easement. If this issue does come before the Planning Board, I would like to be notified so I can testify against any easement removal. Thank you.

Cynthia Fain
12900 Circle Drive
Rockville, MD 20850
301-251-0750

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Sincerely,

Rebecca Mandir

Rebecca (President Winterset II Home Owners Association) & William Mandir
11705 Winterset Terrace

Matthew & Eileen Ascher
Matthew & Eileen Ascher
11709 Winterset Terrace

Manny & Soraya Bahrami
Manny & Soraya Bahrami
11600 Broad Green Court

Ted & Bonnie Chorvinsky
Ted & Bonnie Chorvinsky
11603 Broad Green Court

Sheri & Alan Heller
Sheri & Alan Heller
11604 Broad Green Court

Francisco & Clara Hoyos
Francisco & Clara Hoyos
11700 Winterset Terrace

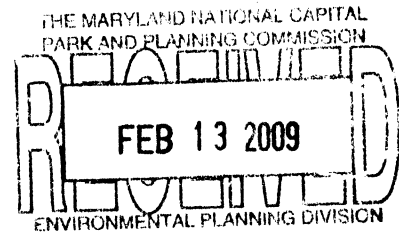
David & Bilha Marcus
David & Bilha Marcus
11704 Winterset Terrace

Ramiro & Loretta Paez
Ramiro and Loretta Paez
11701 Winterset Terrace

Steven & Debra Robins
Steven & Debra Robins
11601 Broad Green Court

Paul & Karen Hachado
PAUL & KAREN Hachado
11761 SPLIT TREE CIRCLE

February 10, 2009



The Honorable Royce Hanson and
Members of the Montgomery County Planning Board
The Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

**Re: Limited Amendment to Preliminary Plan No.
11996019A (amending the Forest Conservation Plan)**

Chairman Hanson and Members of the Board:

We are signing this letter as owners of various properties in a 10 lot subdivision known as Winterset II. We also are members of the Winterset II Home Owners Association. We are writing to express our support (individually and as the Association) for the Limited Amendment to Preliminary Plan No. 11996019A filed by Ramiro Paez, to amend the Forest Conservation Plan that is part of the original subdivision plan. Mr. Paez is requesting this Amendment to remove a 17,569 square foot Category I Conservation Easement Area on his property located at 11701 Winterset Terrace in Potomac, Maryland. We have reviewed the plans that are part of the application for consideration by the Planning Board.

Mr. Paez' lot is only 32,416 square feet in size. At 17,569 square feet, the Conservation Easement covers more than half of his property. Candidly, we question the wisdom behind the original requirement to place certain portions of the property in a Conservation Easement. Our subdivision, and more particularly Mr. Paez' property, is directly adjacent to well traveled Glen Road, and is by no means an ideal location for forest conservation. Instead, we understand that Mr. Paez is proposing to replace the 17,569 square feet of "forest" currently subject to the Conservation Easement with approximately 1.6 acres of pre-existing, protected forest in an offsite forest mitigation bank. A forest replacement rate of 4:1 is significant and represents in our judgment the reasonable mitigation needed to approve the amendment.

We respectfully request that the Planning Board approve Mr. Paez' Amendment. Again, we think it is a reasonable compromise and really takes into consideration the best interests of the County and its citizenry. Thank you very much for your consideration of our position.

N.T. Umamaheswaran

**N. T. & Mallika Umamaheswaran
11602 Broad Green Court**

