



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

Item #
MCPB 6-18-09

MEMORANDUM

DATE: June 4, 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, Planner 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: Marsden Tract (Lot 11)
PLAN NUMBER: 11994066A
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: RE-2
LOCATION: Located on MacArthur Boulevard northwest of Canal Bridge Court in Potomac.
APPLICANT: Mike Magruder
ATTORNEY: Anne Martin, Linowes and Blocher LLP
HEARING DATE: June 18, 2009

STAFF RECOMMENDATION: Staff recommends DENIAL of the Limited Amendment to the Preliminary Plan and associated Final Forest Conservation Plan.

BACKGROUND

The Montgomery County Planning Board approved Preliminary Plan #119940660 "Marsden Tract", on December 1, 1994. The original approval was for the creation of 7 lots on 3.81-acres of land in the R-200 zone. The forest conservation law of Montgomery County (Chapter 22A of the County Code) applies to this plan, and a forest conservation plan (FCP) was required.

The final FCP was approved on August 4, 1995 and showed 2.57 existing forest on-site with 1.18 acres being retained and 1.39 acres being cleared within the overall subdivision. The final FCP did not generate a planting requirement.

This amendment does not include the entire subdivision, but only applies to Lot 11 Marsden Tract - 10641 MacArthur Boulevard, in Potomac. The subject property is currently in violation

of the approved FCP and the terms of the Category I conservation easement. The property includes a patio and retaining wall within the Category I conservation easement to the rear of the house. Aerial photographs and visits by previous Forest Conservation Inspectors indicate that these encroachments existed prior to acquisition of the property by the current owner. No citation has been issued to date.

The applicant is requesting the Planning Board approve a revision to the preliminary plan of subdivision and the forest conservation plan so that a house addition can be constructed on top of the existing patio that is located within the conservation easement. The current property owner is also requesting the remainder of the existing patio, which will not be constructed upon, be removed from the conservation easement area.

SITE DESCRIPTION

The subject property is located on MacArthur Boulevard northwest of Canal Bridge Court in Potomac. The property includes a single family residence on a 24,144 square foot (0.55 acres) lot. The lot contains 12,229 square feet (0.28 acres) of Category I conservation easement.

Exhibit 1 Vicinity Map



PLANNING BOARD REVIEW AUTHORITY

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

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...

Although the total modification in this case is below the 5000 square foot threshold, staff believes that removal of, or significant change to the conservation easement, should be addressed in a public forum with a decision from the Planning Board.

Exhibit 2 Lot 11



Red Line = Property Line Green Line = Cat I easement Orange = Cat II easement

PROPOSAL

Applicant's Position

On January 5, 2009 the applicant submitted a Limited Amendment to the Preliminary Plan and a Forest Conservation Plan Amendment. The submission lays out their position in terms of what part of the easement was to be removed and how it was to be mitigated. The revised Forest Conservation Plan proposal shows the removal of 4,365 square feet (0.10 acres) of Category I conservation easement with 2:1 mitigation off-site for the area removed. The proposed off-site mitigation for this amendment would be 8,730 square feet (0.20 acres). Additionally, the applicant submitted a letter of justification for the amendments from the applicant's attorney on May 27, 2009 which is discussed further below. (See Attachment A)

Notification and Community Comment

The subject property was posted with notification of the upcoming preliminary plan amendment prior to the January 5, 2009 submission. All adjoining and confronting property owners and people of interest will be notified of the public hearing on the proposed amendment in accordance with Planning Board policy. Any comments received will be forwarded to the Board. As of the date of this report, staff has received one letter. The letter was received on March 10, 2009 from the adjoining homeowners association.

The adjacent homeowners association expressed concern with tree removal in the easement area (Attachment B):

“Loss of any trees will cause problems for our HOA members. It will greatly reduce privacy between the applicant’s property and that of three RFHOA owners immediately adjacent to his property.”

“We therefore request that the Park and Planning Commission deny permission for the removal of any trees on the conservation easement.”

REVIEW

Staff Analysis/Position

The subject lot currently has approximately 1,500 square feet (0.03 acres) of existing encroachment into the Category I conservation easement. The Category I conservation easement meets the more stringent current standards for forest dimensions than those applied at time of approval, and is contiguous to adjacent Category I conservation easements on the southeast and northeast sides of the property. The western property edge abuts existing forest on a HOA-owned outlot which, while not formally protected, has very little development potential. The conservation easement on this lot was placed over retained forest, and is shown on record plat #19990. The record plat references the standard Category I conservation easement recorded in the Montgomery County Land Records at Liber 13178 Folio 412.

This property is in direct violation of the identified restrictions contained within the easement; specifically restrictions # 2, 6a, 6b, and 6d cited below:

“NOW, THEREFORE, the Grantor has executed this Agreement for no monetary consideration but for the purpose of ensuring compliance with development standards imposed in accordance with Montgomery County law as a condition of development approval. The Grantor does hereby grant and convey unto the Planning Board, in perpetuity, an easement on the Property of the size and location described in Exhibit A attached hereto and incorporated by reference into the terms of this Agreement, and further described on the applicable record plat(s), of the nature and character described herein. This easement agreement constitutes a covenant real running with the title of the land, and is granted to preserve, protect and maintain the general topography and

natural character of the land. Grantor, its heirs, successors and assigns covenant to abide by the following restrictions within the Easement: ...

“2. No living trees or shrubs (of any size or type) shall be cut down, removed or destroyed without prior written consent from the Planning Board. Diseased or hazardous trees or limbs may be removed to prevent personal injury or property damage after reasonable notice to the Planning Board, unless such notice is not practical in an emergency situation or removal of trees is undertaken pursuant to a forest management plan approved by the Planning Director....

6. The following activities may not occur at any time within the Easement area:

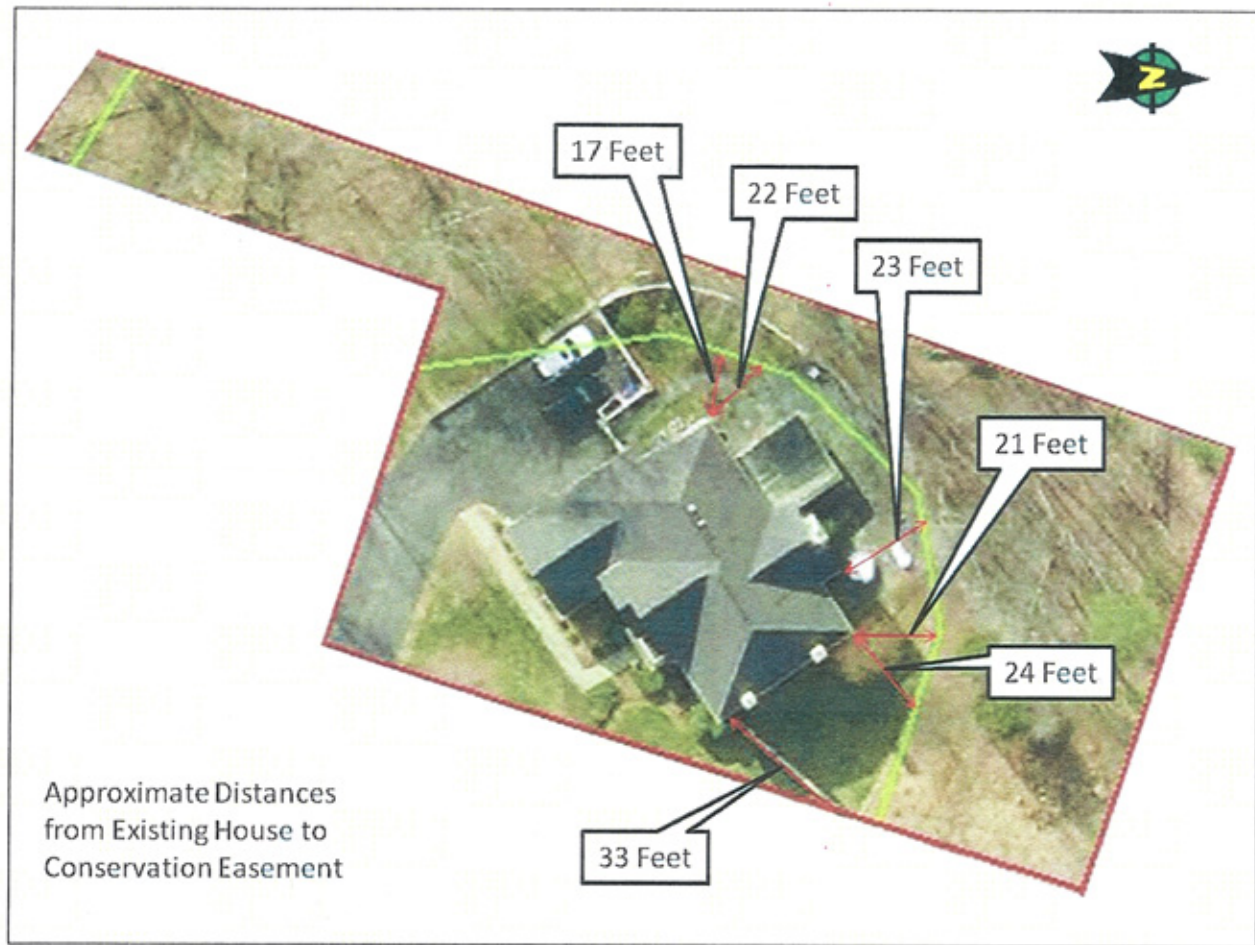
- a. Construction, excavation or grading (except for afforestation and reforestation efforts conducted in compliance with an approved forest conservation plan).*
- b. Erection of any building or structural improvements on or above ground, including (but not limited to) sheds, dog pens, play equipment and retaining walls....*
- d. Activities which in any way could alter or interfere with the natural ground cover or drainage (including alteration of stream channels, stream currents or stream flow).*

Staff does not support the proposed removal of the conservation easement because there is sufficient space outside the easement for usable yard area and house improvements. Since the advent of the forest program in the early 1990's, staff's priority has been to retain existing forest and also, where appropriate, create forest that can be sustained in perpetuity. On the subject lot, the forest conservation plan included forest retention. There was a good balance of buildable area on the lot, with easement around the outside. The easement location may not be ideal, but is sustainable due to its size, shape, and proximity to protected and unprotected contiguous forest on adjoining properties.

This lot has 0.21 acres (9,288 square feet) unencumbered by easements or building setbacks. Although this is a single family residential lot with on-lot forest conservation easements, in staff's opinion, the property is not overly constrained in terms of restricted buildable area and has additional room to expand. As noted in Exhibit 3, the applicant appears to have room available for expansion to the northeast side of the house outside the easement.

Furthermore, Staff notes that the applicant had access to information highlighting the restrictions of the conservation easement on the property at the time of purchase or property transfer, since the easement appears on the record plat. No permits were required or issued by County Department of Permitting Services (DPS) for the construction of the existing garden wall or patio. The applicant came to M-NCPPC prior to going to DPS for a building permit, knowing that there was a Category I conservation easement in the area of their proposed expansion and that they would need to alter or remove the easement prior to getting a building permit.

Exhibit 3 Approximate Distances from House to Easement



The applicant's May 27, 2009 letter makes several references to staff's implicit recommendation supporting Planning Board approval if staff's "instruction(s)" and staff's "direction(s)" were followed. While staff did discuss minimums with the applicant as would be necessary to secure a positive recommendation from staff, these were done with keen awareness and explicit caution to the applicant that the Board would have the final say. Indeed, subsequent to that meeting and prior to this staff report, the Board took a strong policy position on a comparable case (ref: May 7, 2009 Planning Board Item #8: Preliminary Plan No. 11996019A, Winterset – Lot 46 – (a.k.a. Paez Property) and did not support the concept of compensation and easement removal, even though planted forest had never been established on that lot and would not meet current standards. By contrast, natural forest did exist within the easement on this property, its dimensions meet current standards, and its quality far exceeds the situation on Paez, as this lot's forest was part of a large contiguous forest stand in the locally and national critical viewshed of the Potomac River valley. Both situations are comparable in that they make efforts to legitimize current violations through compensation.

In addition to the specific facts of this case and the policy guidance from the Planning Board, staff has significant concerns about establishing precedent. If the portion of the easement in violation is vacated and mitigated off-site, it may establish precedent that compromises the

concept of perpetual easements. In this particular case, changes are proposed based on existing conditions which are in violation of the conservation easement, but the fact that this violation occurred does not lessen the value and importance of the original easement area. In addition to maintaining the perpetual integrity of the easement, staff is also concerned about the environmental justice associated with being able to pay to secure the release of a recorded easement's obligations by going offsite.

RECOMMENDATION

For all of the reasons cited above, staff recommends the Planning Board DENY this limited preliminary plan of subdivision and revision to the forest conservation plan to remove a portion of the easement, and further recommends restoration of the impacted area.

If the Planning Board supports staff recommendations, an Administrative Order for Corrective Action will be issued by the Planning Director, under section 22A-17 of the Montgomery County Forest Conservation Law. The Administrative Order would instruct the applicant on how specifically the easement will have to be restored and reforested, including the removal of all non-complying usages in the conservation easement.

Staff believes these recommendations best fit the intent of the easement and the unauthorized encroachment upon it, and prevents the establishment of a precedent which compromises forest sustainability and environmental justice in the enforcement of the forest conservation law.

Attachment A: Applicant's Letter

LINOWES
AND | BLOCHER LLP
ATTORNEYS AT LAW

May 27, 2009

Anne C. Martin
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amartin@linowes-law.com

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

Re: 10641 MacArthur Boulevard (the "Property"); Forest Conservation Plan Amendment
(Limited Preliminary Plan Amendment No. 11994066A)

Dear Mr. Penn:

On behalf of Mr. Michael Magruder (the "Applicant"), we hereby submit the justification statement you requested for the June 18th hearing on this Forest Conservation Plan Amendment (the "FCP Amendment"). We reiterate that this FCP Amendment, as first discussed with Staff on September 5, 2008, is based on the proactive effort of the Applicant to correct the Category I Forest Conservation Easement (the "Easement") on the Property to accurately reflect the existing forested areas and provide improved awareness and protection of the forests for the future. There is no tree removal proposed. As explained herein, the Applicant proposes to provide 2:1 off-site forest conservation mitigation, or 8,730 square feet of forest preservation, for the portion of the Property to be removed from the Easement, although less than 2,069 square feet of forest was cleared by the previous owner.

For background, the Property is identified as the original Lot 2 (now Lot 11) of the seven lot Marsden subdivision on MacArthur Boulevard known as Riverside Terrace. The original Forest Conservation Plan ("FCP") was approved for Riverside Terrace on August 4, 1995, with forest retention and easement areas on all of the private lots. The FCP reflected that the Riverside Terrace subdivision provided .11 acre (4,791 square feet) of forest retention in excess of the requirements at that time. The Applicant's Property (consisting of 24,144 square feet) contained the subject Easement of approximately 12,229 square feet, which is slightly over 50% of the lot. Subsequent to the construction of a home on the Property, but prior to the Applicant's purchase of the Property in 2005, a portion of wooded area of less than 2,069 square feet of the Easement was removed to provide a back patio with a stone wall border. However, the majority of the Easement on the Property, approximately 10,160 square feet,

Mr. Joshua Penn
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remains as forested area to provide a mutual buffer to/from homes in the River Falls Homeowners Association ("RFHOA") to the north and MacArthur Boulevard to the south, and to provide a continuity of forest to the outlot of the RFHOA to the west.

When reviewing potential home improvement plans last year, the Applicant became aware of the clearance of wooded area within the Easement by the previous owner. The Applicant's initial proposal to Staff on September 26, 2008, included a revised Easement that started 5 feet from the face of the stone wall at the edge of the back patio area. This would maintain 10,160 square feet, or 83%, of the Easement. However, per Staff's instruction on October 27, 2008, the Applicant "remove(d) a little bit more easement area to create straight edges and provide more usable living space, this will help maintain the easement area and prevent encroachments," and further proposed to provide the "standard mitigation for such removal" of Easement of 2:1 of the area removed. Therefore, the Applicant's formal FCP Amendment submission on December 1, 2008 was consistent with Staff's direction and proposed to maintain 7,864 square feet of the Easement, or 64% of the Easement, and provide a 2:1 ratio of off-site forest mitigation (8,730 square feet) for the 4,365 square feet to be removed from the Easement to create the straight edges of the Easement. No tree removal is/was proposed, including the existing wooded areas adjacent to the stone wall that would no longer be in the Easement area. The Applicant has recently met neighbors and RFHOA representatives to review the proposed FCP Amendment and clarify that there is no tree removal proposed.

The Applicant agrees that the Staff's initial recommendation to create straight edges for the Easement area will help maintain the forested nature of the Easement in the future and prevent encroachments. However, in consideration of recent Staff comments and concerns regarding the Applicant's FCP Amendment as described above (to correct the Easement area to be consistent with the unfortunate clearance by the previous owner and the off-site mitigation of 2:1 ratio for the area taken out of the Easement as recommended by Staff), the Applicant proffers that his original proposal with a larger forested area to remain in the Easement on the Property, 10,160 square feet (83% of the Easement), along with the 2:1 ratio of mitigation of the smaller area removed from Easement, may be a desirable alternative to address the revised Staff position and concerns. The attached Exhibit A reflects this original alternative should the Staff and Planning Board prefer a larger area to remain in Easement on the Property over the clear, straight edges for the Easement and larger (doubled in size) off-site preservation area.

Based on the circumstances of this FCP Amendment and the previous instruction and guidance from Staff, we respectfully request that the Planning Board approve the FCP Amendment as proposed, or as proposed in the alternative attached as Exhibit A. As noted herein, this Applicant proactively sought the FCP Amendment to remedy the clearance of the previous

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owner. Fortunately, a relatively minor portion of the significant Easement on the Property was disturbed for the back patio (less than 17%), and the Applicant has already sought off-site reforestation contracts to provide forest protection in the County at a ratio of 2:1 of the area removed from the Easement. This off-site forest preservation of 8,730 square feet of forest in the County to correct the clearance of less than 2,069 square feet of forest on the Property by the previous owner addresses the interest of the Planning Board to maintain protected forest within the County. Further, the significant area to remain in Easement, 7,864 square feet, serves the public interest and continues to provide a continuous forested buffer to the RFHOA residents, the adjoining forested RFHOA outlot, and the MacArthur Boulevard frontage. Lastly, although the regulations have changed since the original FCP for the Marsden subdivision was approved in 1995, the original FCP did provide 4,791 square feet of conservation area above the requirements. Therefore, the proposed reduction of Easement on this Property of 4,365 square feet (to be replaced off-site at a 2:1 ratio) would not render the subdivision out of compliance with the original requirements.

Thank you for your consideration of our justification statement for this FCP Amendment (and proffered alternative). Please do not hesitate to contact us if you have any questions.

Very truly yours,

LINOWES AND BLOCHER LLP


Anne C. Martin

ACM:pi
Enclosure

cc: Mr. Richard Weaver, M-NCPPC
Mr. Michael Magruder, Applicant
Mr. Eric Tidd, CAS Engineering
Ms. Jean Oberstar, RFHOA President

Attachment B: Community Correspondence

March 3, 2009

COPY
Original Filed

Maryland-National Capital Park and Planning Commission
Subdivision Office, Development Review Division
8787 Georgia Avenue
Silver Spring, MD 20910

MAR 10 2009

RE: M-NCP&PC File No. 11994066A

To Whom It May Concern:

We are the board members of the River Falls Home Owners Association (RFHOA) in Potomac, MD. Some of our home owners on Stable Way have brought to our attention an application to the Park and Planning Commission to clear trees on private property in the subdivision called Riverside Terrace (Marsden Tract) that is immediately adjacent to RFHOA owners' property. That part of the Riverside Terrace owner's property for which he is seeking an exception is a conservation area and thus removal of healthy mature trees is not allowed.

Loss of any trees will cause problems for our HOA members. It will greatly reduce privacy between the applicant's property and that of the three RFHOA owners immediately adjacent to his property. Loss of privacy also can cause loss of property value to RFHOA owners. We further understand that last summer the Riverside Terrace property owner removed mature trees in the conservation area and left the resulting logs to rot in a pile, thus further degrading the area and impinging on RFHOA owners' their right to enjoyment of their property.

We therefore request that the Park and Planning Commission deny permission for the removal of trees on the conservation easement. Any correspondence addressed to River Falls Homeowners Association should be sent to our property management company, Paul Associates, Inc. located at 6935 Wisconsin Avenue, Suite 400, Chevy Chase, Maryland 20815.

Sincerely,

Jean Oberstar – President, RFHOA

Robert Goldman – Secretary, RFHOA

Stephen Lehrman – Treasurer, RFHOA

Cc: Eric B. Tidd