



June 5, 2009


REQUEST FOR RECONSIDERATION

MEMORANDUM

TO: Montgomery County Planning Board

FROM: Carol Rubin, Associate General Counsel
301.495.4648

RE: Reconsideration Request for Mill Creek South
Preliminary Plan No. 11991069A



With this memorandum we forward for the Board's review a request for reconsideration of the Mill Creek South preliminary plan amendment, Preliminary Plan No. 11991069A, received from the Planning Board's staff. The Office of General Counsel supports staff's recommendation that the Board grant the reconsideration and set a new hearing for July 2.

I. BACKGROUND

On February 26, 2009, the Board approved the Mill Creek South preliminary plan amendment to create State Highway Administration ICC right-of-way and remove conservation easements within the right-of-way on 0.064 acre out of 4.80 acres of land located on the western cul-de-sac of Briardale Road, in the Shady Grove Sector Plan area, subject to conditions approved for the replacement of conservation easements impacted by the ICC. Following the hearing, and before the Resolution had been adopted, staff came to the realization that the noticing for the public hearing had been in error and had inadvertently excluded eight residents of the Mill Creek South subdivision. The notice was defective as it did not include all interested parties.

The staff has prepared a memo to the Planning Board requesting reconsideration of the Board's previous vote to provide an opportunity for all interested parties to testify.

II. APPLICABLE RULES

According to Rule 4.11.2 of the Board's Rules of Procedure, "[once] the Board votes to approve, approve with conditions, or disapprove an item, the record of proceedings before the Board must be closed." Therefore, the record can only be reopened for additional testimony through reconsideration of the matter. The reconsideration request must "specify any alleged errors of fact or law and state fully all grounds for reconsideration because of mistake, inadvertence, surprise, fraud, or other good cause." Rule 4.12.1. The Board is responsible for determining if

the grounds stated in support of the reconsideration request are sufficient to merit reconsideration.

Only a Board member who voted in the majority of the decision that is the subject of the request for reconsideration can move to reconsider the decision. In this case, the Board voted unanimously in favor of the amendment. Therefore, any Member may move to reconsider. If there is no motion for reconsideration, the request for reconsideration is denied. Any motion to reconsider must be supported by a majority of the Board members present who either participated in the previous decision or read the record on which it was based.

III. RECOMMENDATION

Because the notice for the public hearing for the amendment to Mill Creek South preliminary plan was defective and did not include all interested parties, the request for reconsideration is justified in this case on the basis of mistake and inadvertence. The Office of General Counsel supports staff's recommendation that the Board grant the reconsideration request and set the new hearing for July 2, giving all interested parties the opportunity to testify.

IV. ATTACHMENTS

1. Memo from the Planning Director to the Planning Board requesting reconsideration of Mill Creek South Preliminary Plan Amendment.
2. Relevant provisions of the Staff Report dated February 13, 2009 recommending approval of the amendment to Mill Creek South preliminary plan.

ATTACHMENTS



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

MEMORANDUM

TO: Montgomery County Planning Board

FROM: Rollin Stanley, Planning Director *RS*

VIA: Rose Krasnow, Chief *RK*
Mark Pfefferle, Acting Chief *MP*
Catherine Conlon, Supervisor *CC*
Andrea Stone, Senior Planner (301) 495-4718 *ams*
Development Review and Environmental Planning Divisions

RE: Reconsideration Request for Mill Creek South
Preliminary Plan No. 11991069A

On February 26, 2009 a preliminary plan for Mill Creek South, Preliminary Plan No. 11991069A, was brought before the Planning Board. Based on the information provided in the original staff report (excerpts in Attachment 1) and after hearing testimony from interested citizens, the Board voted unanimously to amend the Mill Creek South preliminary plan to remove the conservation easement from the State Highway Administration Right-of-Way for the Intercounty Connector (ICC) and accept mitigation in the form of fee-in-lieu to plant forest elsewhere in the watershed.

Subsequent to this decision, and prior to a resolution being adopted by the Board, staff realized that the original notice for the public hearing failed to include all interested parties in the mailing of the notice pursuant to Section 4(b) of the Manual of Development Review Procedures (Approved and Adopted, December 2007).

In order to give the opportunity for all interested parties to testify, staff requests reconsideration of the previous action on the preliminary plan. If the Board concurs, staff will schedule the item for the next available hearing date.



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

MCPB
Item # **8**
2/26/09

MEMORANDUM

Date: February 13, 2009

TO: Montgomery County Planning Board

VIA: Mark Pfefferle, Acting Chief *MP*
Stephen D. Federline, Master Planner *SDF*
Environmental Planning Division

FROM: Andrea Stone, Senior Planner *AS*
Candy Bunnag, Planner Coordinator *CB*
Environmental Planning Division

REVIEW TYPE: Forest Conservation Plan Amendments

APPLYING FOR: Amendments to Forest Conservation Plans (FCP) and limited Preliminary Plan Amendments to modify approved Forest Conservation Plans and/or Conservation Easements. Proposal to remove conservation easements and replace offsite, or pay county fee-in-lieu to address SHA Intercounty Connector (ICC) Plans

PLAN NAMES AND PLAN NUMBERS: Mill Creek South, #11991069A; Woodlawn/Rock Creek Ridge, #12005038A; Small's Nursery, #11994011A; Golden Bear Golf Center, #11997003A; Washington Christian Academy, #12004055A; Willson Property, #11996077A; Cross Creek Club, #11998048B; Graystone Property (Neuberg Property), offsite forest retention site for Kaufman Property, #119980960; Vihara Property, offsite forest retention site for Kaufman Property, #119980960

REVIEW BASIS: Forest Conservation Regulations, Section 113.A.(2), Regulation No. 1-01AM (COMCOR) 18-01AM

LOCATIONS: At various locations adjacent to the ICC Right-of-Way (see Attachment 1)

APPLICANT: State Highway Administration (SHA)
ENGINEER: Melinda B. Peters
Director, Office of the Intercounty Connector
State Highway Administration

HEARING DATE: February 26, 2009

RECOMMENDATIONS:

Staff recommendations are presented in two groups based on the watershed in which the affected sites are located. Sites to the west of Georgia Avenue lie within the Potomac River watershed (e.g., Rock Creek). Those to the east of Georgia Avenue lie within the Anacostia River watershed (e.g., Northwest Branch, Paint Branch, Little Paint Branch).

1. Approval of the following plans located to the west of Georgia Avenue:

- **Limited Preliminary Plan Amendment for:**
 #19991069A (Mill Creek South)
- **Forest Conservation Plan and Limited Preliminary Plan Amendments for:**
 #12005038A (Woodlawn/Rock Creek Ridge) and
 #11994011A (Small's Nursery)

subject to the following conditions:

- a. SHA to pay a fee-in-lieu amount of \$221,110.56, as may be provided in cash, and/or by transfer of assets found to be of comparable value to M-NCPPC, to allow the M-NCPPC Department of Parks to plant and maintain 5.64 acres of forest on parkland located in the Potomac River watershed. Payment to be made no later than June 30, 2009.
- b. Amended conservation easements for affected properties to be shown on the land records for the affected properties. SHA to submit all documents related to the amended conservation easements no later than June 30, 2009 for staff review and approval prior to recording these documents in the land records.

2. Approval of the following plans located to the east of Georgia Avenue:

- **Forest Conservation Plan Amendment for:**
 - * **1998096A (Kaufman Property)**
- **Forest Conservation Plan and Limited Preliminary Plan Amendments for:**
 - * **11997003A (Golden Bear Golf Course Center)**
 - * **12004055A (Washington Christian Academy)**
 - * **11996077A (Willson Property)**
 - * **11998048B (Cross Creek Club)**

subject to the following conditions:

- a. SHA to place a Category I conservation easement in a form approved by M-NCPPC for 1.87 acres of existing forest on Parcel 36, Plat Number 17473, Reservation Plat of Land for Public Use, Intercounty Connector, adjacent to Briggs Chaney Road and ICC interchange, and 5.39 acres of existing forest on Cross Creek Property, Map KR61 Parcel P326.
- b. Category I conservation easements in a form approved by the M-NCPPC on Parcel 36, Plat Number 17473, Reservation Plat of Land for Public Use, Intercounty Connector, adjacent to Briggs Chaney Road and ICC interchange and Cross Creek Property, Map KR61 Parcel P326 and amended conservation easements for affected properties to be shown on the land records for the affected properties. SHA to submit all documents

related to these conservation easements no later than June 30, 2009 for staff review and approval prior to recording these documents in the land records.

BACKGROUND

There are nine sites adjacent to the ICC ROW which have conservation easements displaced by construction of the ICC. These platted properties had existing conservation easements recorded in the county land records prior to SHA obtaining portions of these properties for the ICC ROW.

Six of these sites have conservation easements that were created to meet approved Forest Conservation Plan requirements. One site is a subdivision (Mill Creek South, #19991069A) approved prior to the adoption of the County Forest Conservation Law, which includes a conservation easement created to protect a forested environmental buffer area. The remaining two sites (Graystone Property and Vihara Property) have conservation easements that were created to protect offsite forest retention areas in the same watershed as required per condition of approval of a subdivision.

The locations of these nine sites are shown in Attachment 1.

PLANNING BOARD REVIEW AUTHORITY

The Forest Conservation Regulations require Planning Board action on certain types of modifications to an approved forest conservation plan. Section 113.A(2) of the Forest Conservation Regulation states:

"Major amendments which entail more than a total of 5000 square feet of additional forest clearing must be approved by the Planning Board or Planning Directory (depending on who approved the original plan). Notice of each major plan amendment must be given to adjacent property owners as part of the Planning Board or Planning Directory approval processes."

Each of these amendments proposes more than 5,000 square feet of additional forest removal when compared to the originally approved plan. These amendments therefore qualify as major amendments. Since each of these forest conservation plans was approved as part of a preliminary subdivision plan, the Planning Board must also review and act on the preliminary plan amendment.

PROPOSED FOREST CONSERVATION AND PRELIMINARY PLAN CHANGES

SHA proposes to remove and amend conservation easements on a total of 9 sites. Staff has grouped them according to the watershed they lie in: there are 3 sites within the Potomac River watershed (west of Georgia Avenue) and 6 sites (east of Georgia Avenue) within the Anacostia River watershed. Staff finds that the loss of the specific conservation easement areas within each of these sites is unavoidable and necessary since the ICC ROW overlaps on these areas. Staff recommends, and SHA agrees, that the mitigation should occur in the same watershed as the easements that will be removed.

Based on the Resolution of Conservation Easements within ICC Limits of Disturbance between SHA and M-NCPPC, dated July 31, 2008 and amended November 10, 2008, the conservation easements are proposed to be mitigated as follows:

1 acre of replacement forest
per acre of conservation easement removed -- if replaced with existing forest onsite

2 acres of replacement forest
per acre of conservation easement removed -- if replaced with existing forest offsite or with newly planted forest

Potomac River Watershed

There are three sites that lie west of Georgia Avenue, within the Potomac River watershed. A total of 52.8 acres of forested conservation easements lie on these sites. SHA proposes to remove 2.82 acres of conservation easements because they lie within the ICC ROW. A total of 49.98 acres of conservation easements will remain on the original sites. To mitigate for the loss, SHA proposes to pay a fee-in-lieu of \$221,110.56, as may be provided in cash, and/or by transfer of assets found to be of comparable value to M-NCPPC, to allow the M-NCPPC Department of Parks to plant and maintain 5.64 acres of forest on parkland located in the Potomac River watershed. This amount of forest planting is twice as much as the total amount of conservation easement areas that will be lost on sites lying within the Potomac River watershed.

Anacostia River Watershed

Within the Anacostia River watershed, there are six sites with a total of 53.3 acres of forested conservation easements. SHA proposes to remove 4.69 acres of conservation easements. A total of 48.7 acres of conservation easements will remain on the original sites.

SHA proposes to mitigate the loss of conservation easements on two separate properties that SHA owns: SHA proposes to protect 5.39 acres of existing upland forest on Cross Creek Property, Map KR61 Parcel P326 and 1.87 acres of upland forest on Parcel 36, Plat Number 17473, Reservation Plat of Land for Public Use, Intercounty Connector (see Attachment 2).

On Parcel 36, Plat Number 17473, Reservation Plat of Land for Public Use, Intercounty Connector, adjacent to Briggs Chaney Road and ICC interchange, SHA will also be protecting 3.80 acres of contiguous forest to help meet Maryland Department of Natural Resources requirements for State forest conservation requirements for the ICC. This protected forest is adjacent to the upland forest that is proposed to mitigate the loss of conservation easements. The site adjoins M-NCPPC Tanglewood Neighborhood Park to the west of the stream (Attachment 3).

On Cross Creek Property, Map KR61 Parcel P326, the proposed mitigation area is an existing forested area adjacent to the remaining conservation easement that will be reduced in size.

List of Preliminary Plans and Forest Conservation Plans Proposed for Amendments by State Highway Administration for the Intercounty Connector Project. The amended plans are included in Attachment 4, with page number referenced in the table.

Name of Plan	Plan File No.	Location	Master Plan Area	Amendment to:		Category I Conservation Easements		
				Forest Conservation Plan	Preliminary Plan	Total in Plan	Proposed for Removal by SHA	Proposed Mitigation by SHA
Plans in Potomac River Watershed:								
Mill Creek South (Attachment 5, pg. 12)	11991069A	Mill Creek South, Briardale Rd., 1500ft. northwest of Shady Grove Rd.	Shady Grove Sector Plan		✓	1.3ac.	0.064 ac.	Fee-in-lieu for 0.13 ac.
Woodlawn/Rock Creek Ridge (pg. 13)	12005038A	Northwest and southeast sides of Needwood Rd., 600 ft. southwest of Muncaster Mill Rd.	Upper Rock Creek Master Plan	✓	✓	3.66 ac.	2.50 ac.	Fee-in-lieu for 5.00 ac.
Small's Nursery (pg. 15)	11994011A	Northwest quadrant of intersection of Georgia Ave. and Norbeck Rd.	Olney Master Plan	✓	✓	47.89 ac.	0.255 ac.	Fee-in-lieu for 0.51 ac.

REVIEW ISSUES

Community Notification

On Friday, February 13, 2009, staff mailed notifications of the proposed amendments to property owners within the subdivisions with proposed amendments to conservation easements and property owners adjoining these affected subdivisions.

Staff Analysis/Position

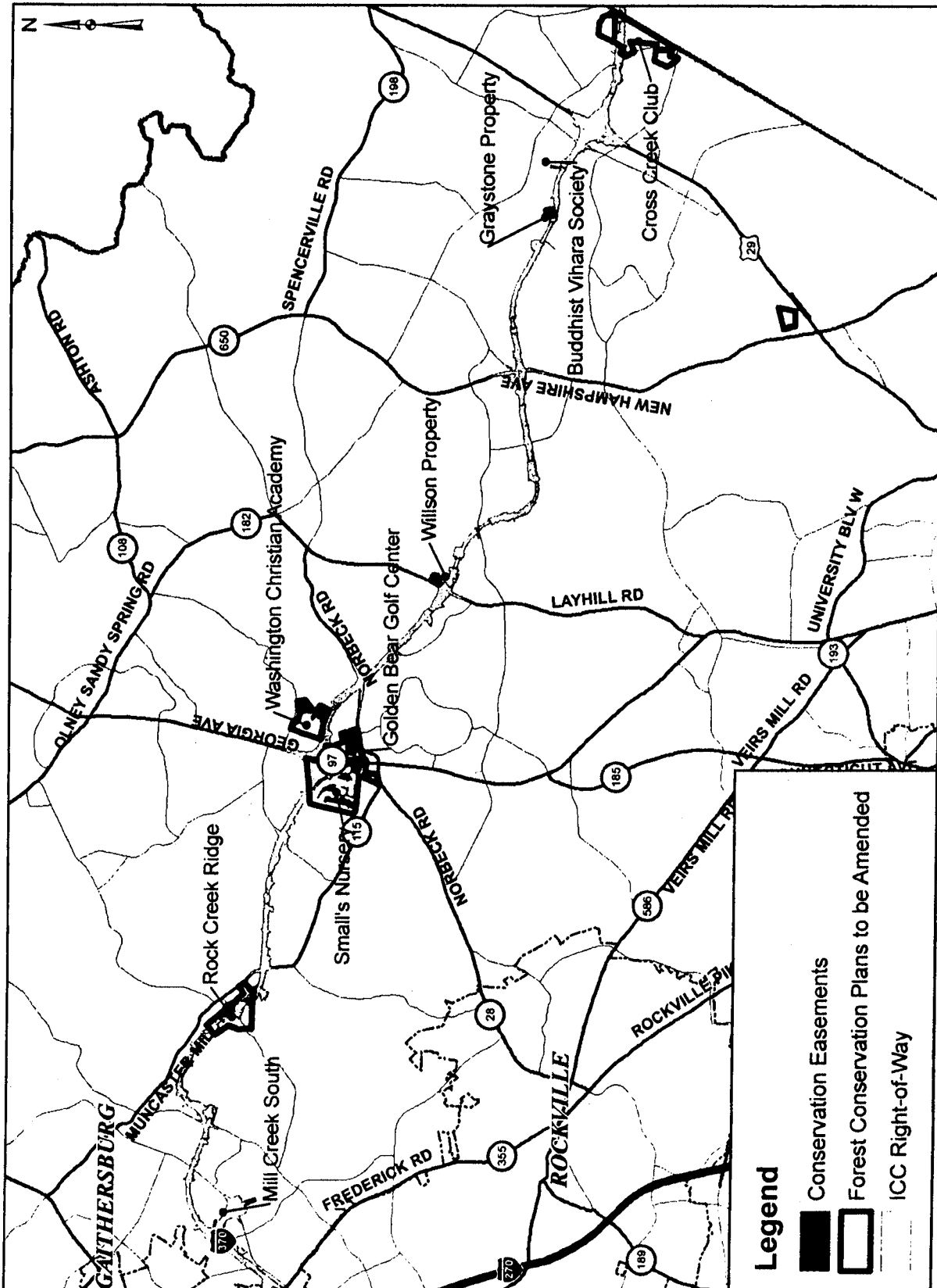
SHA's proposed mitigation acreages for each of the group of sites within the Potomac River and the Anacostia River watersheds are consistent with the SHA and M-NCPPC MOU (July 31, 2008, amended November 10, 2008).

To mitigate for the loss of 2.82 acres of conservation easements on sites within the Potomac River watershed, staff supports the payment of a fee-in-lieu and recommends that SHA pay a fee-in-lieu of \$221,100.56. This amount is based on 90 cents per square foot of forest planting, which is the county fee-in-lieu rate. Parks staff have indicated that they can plant 5.64 acres of forest within parkland in the Potomac River watershed.

On the two proposed mitigation sites within the Anacostia River watershed, the forest stands that will be protected are upland stands that would not normally be preserved in the County's regulatory process if these sites were developed. In addition, the two forest stands are adjacent to either an existing conservation easement area or a proposed forested conservation area that SHA proposes to create to meet Maryland DNR forest conservation requirements.

Staff finds that SHA's proposal, with staff's recommended conditions, will result in the protection of existing forest and creation of planted forest that exceed the amount of conservation easements areas that will be removed and that are consistent with the SHA and M-NCPPC MOU.

S:\Documents, Data, & Inspection Forms\Forest Conservation Easements\Staff Report 20090213.doc



Attachment 4

COORDINATE TABLE		
POINT NO.	NORTHING	EASTING
1	534783.7030	1265273.1860
2	534784.4745	1265317.1550
3	534741.8272	1265270.6469
4	534211.2874	1265238.4787
5	534205.8223	1265267.2747
6	534162.2649	1265280.5014
7	534170.6500	1265242.0420
8	534170.3250	1265235.9950

