



Preliminary Plan Amendment in Response to a Violation No. 11998096B, Kaufman Property - Lot 11, Block A

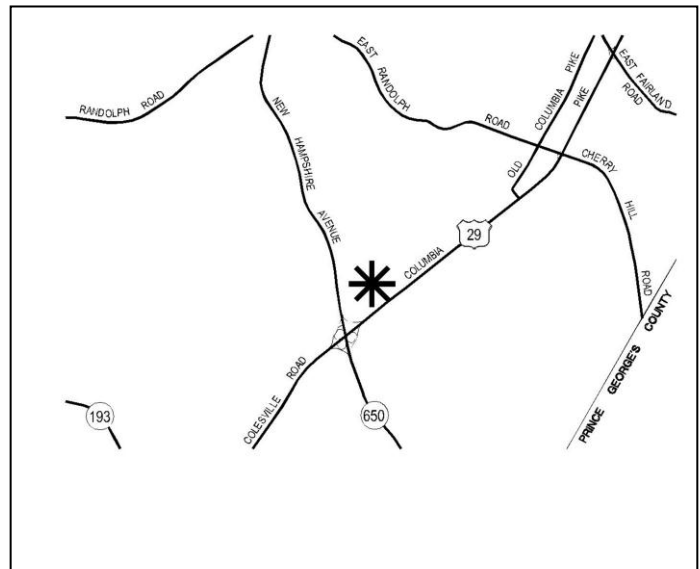
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Completed: 03/29/12

Description

Limited Amendment to Preliminary Plan 11998096B for the purpose of amending the Final Forest Conservation Plan to replace the existing 0.086-acre Category I Conservation Easement with a Category II Conservation Easement

- Request is in response to a Notice of Violation
- 1020 Heartfields Drive, Silver Spring, MD 20904
- Lot 11, Block A of the Kaufman Property Subdivision
- 0.25 acres, R-90
- 1997 White Oak Master Plan
- Applicant – Christopher M. and Robin Pirtle
- Filing date: 9/30/2011



Summary

- Staff recommends **denial**.
- Staff does not support this Preliminary Plan Amendment because:
 - The Planning Board deliberately placed a Category I Conservation Easement on Lot 11 (Subject Property) and other lots in the 49-lot Kaufman Property subdivision (the Subdivision).
 - The conservation easement on the Subject Property is part of a larger, contiguous protected area; changing the designation to a Category II Conservation Easement would create a discontinuity.
 - The original purpose of Category I Conservation Easement—compatibility and forest preservation—will not be achieved by a Category II Conservation Easement.

Overview

The owners (the Applicant) of the Subject Property have requested a Limited Amendment to the Preliminary Plan in order to amend the approved Forest Conservation Plan (FCP) by replacing the existing Category I Conservation Easement with a Category II Conservation Easement. The Category I Conservation Easement on the Subject Property is part of a larger Category I Conservation Easement area that covers adjoining lots in this Subdivision. (See Figure 1)

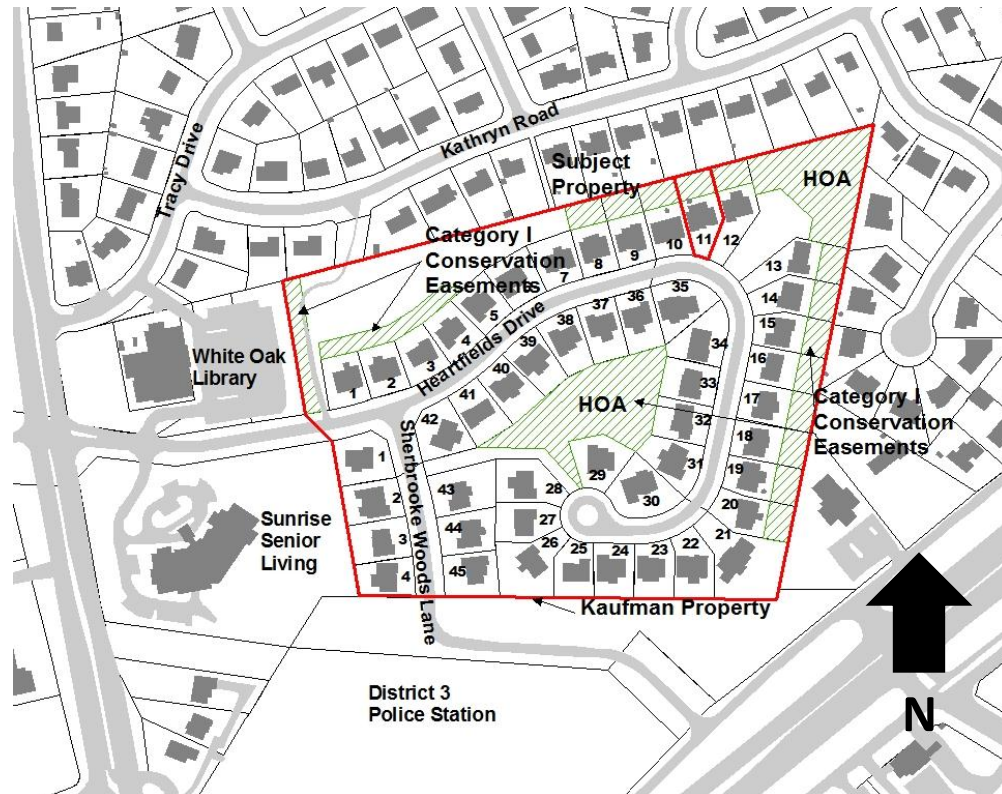


Figure 1 -- Existing Category I Conservation Easements on the Subject Property and the Subdivision

This application was submitted in response to a violation of the Category I Conservation Easement; the violation consisted of clearing of understory and the construction of a swing set. The Administrative Law Judge heard the case on December 8, 2010, and recommended an administrative civil penalty and corrective action. On March 10, 2011, the Planning Board reviewed the Administrative Law Judge's recommendations and decided that:

1. Respondent must pay an administrative civil penalty of \$2,697.50 to the Commission within 60 days of the mailing date of this Resolution; and
2. Respondent must do one of the following:
 - a. Respondent must file a preliminary plan amendment to modify the Category I Conservation Easement located on Respondent's property modified to a Category II Conservation Easement (herein "Conservation Easement Modification") subject to the following conditions:
 - i. Respondent must submit a complete application for the Conservation Easement Modification no later than 60 days after the mailing date of this resolution; and
 - ii. Respondent's application for the Conservation Easement Modification must be approved no later than 6 months after the mailing date of this Resolution.

If Respondent timely complies with this condition he is not required to perform the corrective actions required by the Recommended Order.

- b. If Respondent does not timely comply with each of the requirements of condition (a) above, he must perform the corrective actions required by the Recommended Order no later than 60 days after failing to comply.*

The Applicant paid the administrative civil penalty on September 30, 2011 and has chosen to follow condition 2(a). After analyzing the regulatory history, the intent of the Planning Board’s decision to place a Category I Conservation Easement, and site-specific factors involved in this case, staff recommends denial of this amendment and recommends that the Applicant follow the Administrative Law Judge’s corrective action, as outlined in 2(b).

Review Authority

The Forest Conservation Regulations require Planning Board action on certain types of modifications to an approved FCP. Section 22A.00.01.13.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...

Although the total modification is below the 5000-square foot threshold, the Planning Board has established a policy that the removal of, or change to, any recorded conservation easement warrants consideration in a public forum with a final decision by the Planning Board.

Background

The Planning Board approved Preliminary Plan No. 119980960 for the Subdivision and the associated Preliminary Forest Conservation Plan, on December 17, 1998. This approval created 49 lots on 18.5 acres using the cluster method of the R-90 Zone. The Subdivision is located in the northeast quadrant of the intersection of New Hampshire Avenue (MD 650) and Columbia Pike (US 29). (See Figure 2)

At the time of Preliminary Plan approval, the Subdivision site was forested and contained the intermittent remnant of a headwater stream. The topography of the Subdivision is characterized by an abrupt hill along the northern property line, which makes the backyards of the Subdivision lots along Heartfields Drive between 10 and 18 feet higher than the adjacent properties. Category I Conservation Easements were placed along the northern and eastern



Figure 2 -- Vicinity map

borders of the Subdivision and on the HOA property to ensure community compatibility and protect the surrounding communities from adverse effects of development, exacerbated by the elevation differential. (See Figure 1)

Site Description

The 0.25-acre Subject Property is located at 1020 Heartfields Drive, and backs up to single-family residences on comparably-sized lots. It sits between 14 and 16 feet higher than the adjacent properties in the rear (fronting on Kathryn Road, see Figure 2), and generally slopes to the north with stormwater draining to the northeast corner of the property. The Category I Conservation Easement was placed in the rear of the Subject Property, along with other properties in the Subdivision, to protect existing forest and to provide compatibility with the existing adjacent properties. (See Figure 3)

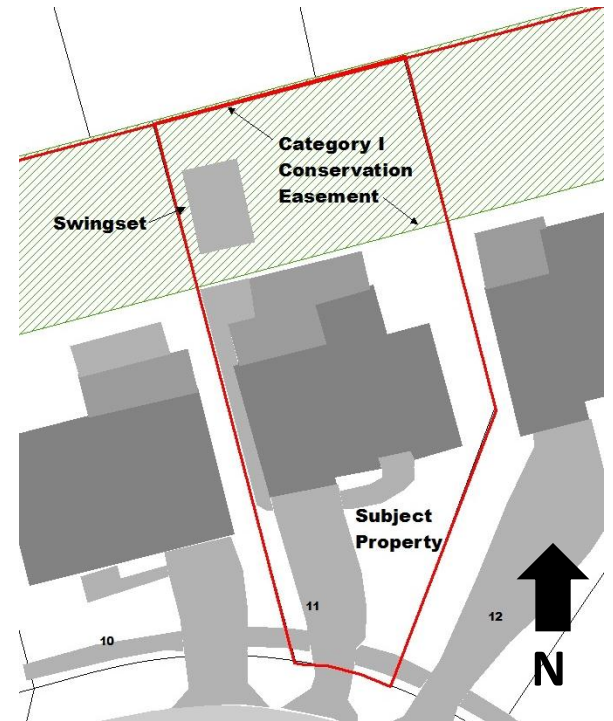


Figure 3-- Subject Property with conservation easement area in the rear

Regulatory History

- May 11, 1998 – Preliminary Plan No. 119980960 filed by Elm Street Development.
- December 10, 1998 and December 17, 1998 - Planning Board Hearing on the Preliminary Plan, staff recommended Preliminary FCP with modified Category II Conservation Easements. After substantial testimony from the public, the Planning Board required Category I Conservation Easements to ensure compatibility and preserve environmental quality. Preliminary Plan and Preliminary FCP approved with conditions. (Attachment 1 – Preliminary FCP, Attachment 2 – Opinion)
- June 22, 1999 – Preliminary FCP revised at the staff level to reflect Planning Board’s conditions, with Category I Conservation Easements placed on the plan. (Attachment 3 – Revised Preliminary FCP)
- September 28, 1999 –Planning Board Hearing in response to reconsideration request. The specific issue involved a traffic signal but the hearing was broadened to reconsider all issues. The Planning Board reconfirmed the use of Category I Conservation Easements. (Attachment 4 – Opinion, Attachment 5 – Minutes)
- April 21, 2000 – Staff approved Final FCP. (Attachment 6 – Final FCP)
- March 21, 2001 – Record plats recorded with Category I Forest Conservation Easements clearly shown. (Attachment 7 – Record plat for Lot 11, Block A)
- October 12, 2001 – Applicant bought the Subject Property.
- March 7, 2002 – Elm Street Development sent letter to the HOA and all homeowners, informing owners of easements. (Attachment 8 – Letter to Applicant from Elm Street)
- September 3, 2002 – Montgomery County Department of Permitting Services issued a permit to the Applicant to build a deck on rear of home, outside of the Category I Conservation Easement, constraining the usable yard area. (Attachment 9 – Approved deck plans)

- June 16, 2003 – The Subdivision Home Owners Association (Sherbrooke HOA) wrote letter to Planning Department inquiring about changing Category I Conservation Easements to Category II Conservation Easements. (Attachment 10 – Letter from Sherbrooke HOA)
- July 17, 2003 - Staff responded with explanation of process, but stated staff opposition due to the history of the easements. (Attachment 11 – Letter from staff to Sherbrooke HOA)
- August 7, 2008 – The Planning Department received a complaint from a neighboring property owner about clearing of understory and grading that occurred within the Category I Conservation Easement on the Subject Property.
- August 7, 2008 – Planning Department inspection staff visited the Subject Property to verify the complaint. Additionally, staff observed a 15'x20' patch of ground marked by 6x6 timber box frame installed in the easement area. Staff issued a \$500 administrative citation to the Applicant for removing the understory, grading, and planting and maintaining grass in the easement area, with remedial action to be completed by September 26, 2008 to satisfy the violation.
- August 7, 2008 – Inspection staff advised the Applicant not to install a swing-set. (Attachment 12 – Administrative citation)
- February 17, 2010 – On a follow-up site visit to check remedial action, inspection staff noted that a swing-set was installed inside the timber box frame.
- February 19, 2010 – Inspection staff issued a Notice of Violation (NOV) to the Applicant with a compliance date of March, 31, 2010 to remove the encroachments. (Attachment 13 – Notice of Violation)
- April 6, 2010 – Staff met with the Applicant to discuss the violation and remedial action.
- May 26, 2010 – Staff issued another administrative citation to the Applicant for failing to comply with NOV remedial action requirements, with a compliance date of June 25, 2010. (Attachment 14 – Administrative citation)
- October 5, 2010 – The Planning Department issued a formal Notice of Hearing to the Applicant to be held on November 3, 2010. The Applicant requested a postponement due to a scheduling conflict.
- November 16, 2010 – The Planning Department issued a formal Notice of Hearing to the Applicant to be held on December 8, 2010.
- December 8, 2010 – Hearing held by Maryland Office of Administrative Hearings.
- The Administrative Law Judge found that a violation did occur and ordered an administrative civil penalty of \$2,697.50 and directed the Applicant to take corrective actions, which included: removing the swing set and associated timbers; replacing grass with wildflower mix or mulch;



Figure 4 --Swing-set installed within the Category I Conservation Easement Area

and planting of ten native shrubs. (Attachment 15 – Administrative Law Judge Recommended Order)

- March 10, 2011 – Planning Board Hearing to review the Recommended Order. The Planning Board reviewed the Administrative Law Judge’s recommendations and heard presentations from the M-NCPPC Legal Counsel and the Applicant and their legal representative, as well as testimony from a neighboring property owner. The Applicant argued that changing the Category I Conservation Easement to a Category II Conservation Easement would be an appropriate remedy. Testimony from a neighboring property owner alleged an increase in stormwater runoff on their property because of the removal of forest understory, and supported the Hearing Examiner’s recommendations. While the Planning Board and Planning staff recognized the Applicant’s right to submit an Amendment to the Preliminary Plan, there was extensive conversation signifying that such an application would be considered on its own merit, and that submission of such an application did not guarantee, or favor, approval or support. (Attachment 16 – Opinion, Attachment 17 – Transcript of discussion).
- On September 30, 2011, the Applicant submitted an application to amend the Preliminary Plan of Subdivision and Forest Conservation Plan No. 11998096 by removing 0.086 acres of Category I Conservation Easement and replacing it with a Category II Conservation Easement over the same area. The Applicant proposed to mitigate the removal of Category I Conservation Easement by buying credits in an off-site forest conservation bank. (Attachment 18 – Submitted Amended FFCP)

Analysis

After reviewing the history, regulatory implications, and environmental issues, staff does not support the applicant’s request to change the Category I Conservation Easement to a Category II Conservation Easement for the following reasons.

1. *The Planning Board deliberately placed a Category I Conservation Easement on the Subject Property and other lots in the Subdivision. There has been no change in the issues and consideration that formed the basis for the Board’s decision to place Category I Conservation Easements on the subject property and the Subdivision to justify the requested modification.*

The Planning Board placed the Category I Conservation Easements on properties in the Subdivision after considerable testimony and discussion. Staff had initially recommended a modified Category II Easement on the north side of the Subdivision (which includes the Subject Property) due to site-specific conditions including the zoning; Master Plan recommendations; the proposed use; and the location, configuration, age and character of on-site forest and tree stands. However, after significant public testimony, the Planning Board decided that a Category I Conservation Easement was more appropriate for compatibility purposes, and to balance the needs of existing development against the requirements of new development. The elevation difference between the new development and existing communities was a major factor. The Category I Conservation Easements on the 12 residential lots are uniformly 50 feet deep for compatibility reasons, in excess of the minimum depth of 35 feet required for forest conservation purposes at the time. (Chapter 22A was amended in 2001 to increase the minimum easement depth to 50 feet.) The designation of the forested and planted areas as protected in a Category I Conservation Easement was reconfirmed in a subsequent reconsideration hearing. None of these conditions and considerations have changed since the

Board originally placed Category I Easement on the Subdivision; consequently, there is no justification to change the Category I Conservation Easement.

- 2. The conservation easement on the Subject Property is part of a larger, contiguous protected area. Changing the designation to a Category II Conservation Easement on the Subject Property would undermine the goal of creating and preserving a naturally regenerating forest through a continuous Category I Conservation Easement around this edge of the Subdivision.*

The Category I Conservation Easement on the Subject Property is part of a contiguous easement that crosses 12 residential lots and one HOA parcel. The Category I Conservation Easements on the 12 residential lots are uniformly 50 feet deep. Changing the easement on the Subject Property would create an inequitable solution without regard to the Category I Conservation Easement's function. Essentially, the Applicant would be rewarded for violating the terms of the easement.

The change in this one easement would also make it easier for the other property owners and the HOA to request easement changes on their properties. While some property owners may prefer the Category II Conservation Easements, others might prefer to retain a Category I Conservation Easement. The net effect would be a community with no uniformity in easement application, and the areas retained in Category I Conservation Easement would no longer meet the definition of forest due to size requirements (minimum 10,000 square feet).

- 3. The Category I Conservation Easement provides environmental compatibility that a Category II Conservation Easement does not.*

A Category I Conservation Easement protects forest and is intended to maintain a naturally regenerating forest while a Category II Conservation Easement protects only the tree cover on a property and does not ensure canopy regeneration since any tree less than 6 inches in diameter can be removed. Forest provides more environmental benefits than tree cover, such as improved air quality, stormwater runoff reduction, improved soil quality, erosion reduction, wildlife habitat, carbon sequestration, and groundwater recharge.

The Planning Board specified the Category I Conservation Easements due to the steep hill to the north and east of the Subdivision. These slopes exceed 36% in the area directly adjacent to the Subject Property. While the slope is primarily on the adjoining properties, the conversion from forest to tree cover on the Subject Property has a substantial effect on the slope due to an increase in stormwater runoff. The Subject Property slopes to the north and east, directing the runoff down the slope. While tree cover (over grass lawn areas) does decrease the amount of runoff, forest does a much better job of decreasing the runoff because the understory and forest floor both intercept and retain water. The addition of impervious area combined with the clearing of understory and brush on the subject property has apparently increased runoff causing erosion and damage on the adjoining properties. (Attachment 19 – Correspondence)

Mitigation

The Applicant has proposed to mitigate for the permanent removal of the Category I Conservation Easement by purchasing credits in an off-site forest mitigation bank at a ratio of 2:1, and convert the Category I Conservation Easement to a Category II Conservation Easement. The 2:1 mitigation proffered meets the Planning Board's mitigation policy, as articulated on October 30, 2008 and supported by numerous Planning Board cases. If the Planning Board were to approve this Amendment to the Preliminary Plan, the proposed mitigation would be acceptable.

Notification and Outreach

The Subject Property was properly signed with notification of the proposed Preliminary Plan amendment prior to the September 30, 2011 submission. All adjoining and confronting property owners, civic associations, and other registered interested parties have been notified of the public hearing on the proposed amendment. All correspondence received is attached and addressed. (Attachment 19 – Correspondence)

Conclusion

Based on a review of the history of this development, the specific purpose and siting of the Category I Conservation Easement on the Subject Property, and the analyses contained in this report, staff recommends:

1. Denial of this application; and
2. Implementation of the recommendations of the Administrative Law Judge (Attachment 15 – Administrative Law Judge Recommended Order).

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List of Attachments

Attachment 1 –Preliminary FCP (12/10/98 & 12/17/98 Planning Board Hearing)

Attachment 2 – Planning Board Opinion (12/10/98 & 12/17/98)

Attachment 3 – Revised Preliminary FCP (6/22/99)

Attachment 4 – Planning Board Opinion (9/28/99 Reconsideration Hearing)

Attachment 5 – Planning Board Minutes (9/28/99 Reconsideration Hearing)

Attachment 6 – Final FCP (4/21/00)

Attachment 7 – Record plat for Lot 11, Block A

Attachment 8 – Elm Street letter to Applicant

Attachment 9 – Approved deck plans

Attachment 10 – Sherbrooke HOA letter

Attachment 11 – Staff response letter to Sherbrooke HOA

Attachment 12 – Administrative citation (8/07/08)

Attachment 13 – Notice of Violation

Attachment 14 – Administrative citation (5/26/10)

Attachment 15 – Administrative Law Judge Recommended Order

Attachment 16 – Planning Board Opinion (3/10/11)

Attachment 17 –Transcript of discussion

Attachment 18 – Amended FFCP submitted for Lot 11, Block A

Attachment 19 – Correspondence