



**MONTGOMERY COUNTY PLANNING BOARD**  
 THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB No. 16-077  
 Preliminary Plan No. 120061120  
 Glen Echo Heights  
 Date of Hearing: February 25, 2016

AUG - 3 2016

**RESOLUTION**

WHEREAS, under Montgomery County Code Chapter 50, the Montgomery County Planning Board is authorized to review preliminary plan applications; and

WHEREAS, on May 4, 2006, Alidad Hakimi ("Applicant") filed an application for approval of a preliminary plan to resubdivide two existing improved residential lots into three on 0.84 acres of land in the R-90 zone, located on the east side of Walhonding Road 800 feet west of the intersection with Wiscasset Road ("Subject Property"), in the Bethesda/Chevy Chase Policy Area and Bethesda – Chevy Chase Master Plan ("Master Plan") area; and

WHEREAS Applicant's preliminary plan application was designated Preliminary Plan No. 120061120, Glen Echo Heights ("Preliminary Plan" or "Application"); and

WHEREAS, following review and analysis of the Application by Planning Board staff ("Staff") and other governmental agencies, Staff issued a memorandum to the Planning Board, dated February 12, 2016, setting forth its analysis and recommendation for denial of the Application ("Staff Report"); and

WHEREAS, on February 25, 2016, the Planning Board held a public hearing on the Application at which it heard testimony and received evidence submitted for the record on the Application; and

WHEREAS, on February 25, 2016, the Planning Board voted to deny the Application on motion of Commissioner Wells-Harley, seconded by Commissioner Fani-Gonzalez, by a vote of 3-1, Commissioners Anderson, Fani-Gonzalez, and Wells-Harley voting in favor, Commissioner Dreyfuss voting against, and Commissioner Presley absent;

NOW, THEREFORE, BE IT RESOLVED that the Planning Board DENIES Preliminary Plan No. 120061120.

BE IT FURTHER RESOLVED that having considered the recommendations and findings of its Staff as presented at the hearing and as set forth in the Staff Report, which

Approved as to  
 Legal Sufficiency:

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the Board hereby adopts and incorporates by reference (except as modified herein), and upon consideration of the entire record, the Planning Board must deny the Application for three reasons:

1. *The Preliminary Plan does not substantially conform to the Master Plan.*

Under Section 50-35(l) of the subdivision code, “[a] preliminary plan must substantially conform to the applicable master plan, sector plan, or urban renewal plan, including maps and text.” If a preliminary plan does not substantially conform to the master plan, the Planning Board must deny it.<sup>1</sup> Moreover, under Section 50-29(a)(1), the Planning Board may approve a proposed subdivision only if it finds that the “[l]ot size, width, shape and orientation” are “appropriate for the location of the subdivision taking into account the recommendations included in the applicable master plan, and for the type of development or use contemplated.” Here, the Planning Board must deny the Application because it conflicts with key Master Plan recommendations.

The Subject Property consists of two side-by-side lots that, like many of the surrounding lots, are narrow but deep and improved with houses located on gently sloped terrain close to the street. Behind the existing houses, the land slopes steeply upward and is largely tree-covered. In order to fit three buildable lots into this space, the Applicant proposes to create one shallow lot hugging the street and two pipe-stemmed lots with the buildable portion toward the rear of the Subject Property. This approach requires extensive tree removal and grading of steep slopes, and in doing so conflicts with both the environmental and neighborhood character recommendations of the Master Plan.

The Master Plan strongly emphasizes protection of the environment and neighborhood character, often in ways that are mutually reinforcing. Some of these recommendations apply generally throughout the Master Plan area, and others apply specifically to the Palisades. The Master Plan observes that

**[t]he Bethesda-Chevy Chase area has many desirable characteristics which are critical to the continued stability of the area and which make B-CC one of the strongest communities in the County. These include well established residential neighborhoods, a combination of open space and wooded areas, employment and shopping opportunities, and a high level of transportation service. A major goal of this Master Plan is to perpetuate and enhance the high quality of life to which citizens of Bethesda-Chevy Chase are accustomed.**

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<sup>1</sup> Under Section 50-35(l), the Planning Board is authorized to approve a preliminary plan that does not substantially conform to the master plan only if it “finds that events have occurred to render the relevant master plan, sector plan, or urban renewal plan recommendation no longer appropriate.” In this case, there was a dispute as to whether certain master plan recommendations applied to the Subject Property, but not about whether they had been rendered inappropriate.

Moreover, the Master Plan recognizes that within the Bethesda-Chevy Chase area, “[t]he high quality of life ...derives from ... a combination of woodlands and open spaces throughout this area.” The Master Plan further states that “[t]he major goal of the Master Plan is to protect the high quality of life, the residential character, and the natural environment throughout the area,” and in order to fulfill this goal recommends to “[p]reserve and protect sensitive environmental features.” Further, “[i]n the Palisades, the [Master] Plan endorses protection of the environment, character, and cultural resources of the area.”

Drawing a connection between environmental and quality of life goals, the Master Plan defines as an area-wide goal “to protect the natural resources and environmental qualities which are important to the quality of life for Bethesda-Chevy Chase.” Elaborating on this general goal, the Master Plan identifies the environmental features that are of concern throughout Bethesda-Chevy Chase and highlights issues of special concern within the Palisades:

Steeply sloped and heavily wooded areas are distinctive features of the Palisades area and portions of the Chevy Chase area. Throughout B-CC, residential areas are heavily wooded. Environmental concerns within the area include loss of mature woodlands, stream quality, and highway noise.

In light of these goals, the Master Plan recommends to “[p]reserve wetlands, steeply-sloping areas and, where possible, extensively wooded areas....”

The Master Plan describes existing residential lots in the Palisades as generally being larger than may be required by zoning, and which in their size “have allowed for less intrusion on the steeply sloped and wooded topography characteristic of” the Palisades.” The desire to protect this steep, wooded topography was so strong that the Master Plan recommended the downzoning of this area from R-60 to R-90 to relieve some amount of development pressure.

Beyond downzoning, the Master Plan recommended other measures to protect steep slopes:

**This Plan recommends preservation of steeply sloped areas of 25 percent and greater by strict adherence to the criteria established in the “Staff Guidelines for the Protection of Slopes and Stream Valleys,” prepared by the Montgomery County Planning Department staff (April 1983). Due to the sensitive topography in the Palisades, it is critical to protect these steep slopes from disturbance.**

Of particular relevance to the Application, under the Guidelines for Protection of Slopes and Stream Valleys (now part of the Environmental Guidelines), development on slopes of 15 percent or greater containing highly erodible soils is restricted.

Given the Applicant's insistence that the protection measures recommended in the Master Plan do not apply to their lot and that in any event measures would be taken to stabilize the site after the steep slopes are graded and excavated, it is noteworthy that the Master Plan describes unfavorably development similar to what the Applicant proposes:

With development pressure mounting, slopes which were once considered "unbuildable" are now being developed. In many instances, these slopes are being cleared of vegetation and excavated, leading to further erosion and runoff.

"To minimize this destruction" the Master Plan recommends that guidelines restricting development on steep slopes "be strictly applied to preliminary plans of subdivision for this area." The Master Plan further recommends the permanent measure of a conservation easement to protect steep slopes where new lots are approved. Given the extent of disturbance to steep slopes that the Applicant proposes, such an easement would be of little value here. But the Master Plan's recommendation for such protective measures highlights the degree of concern for steep slopes.

The Master Plan chapter devoted to environmental resources further emphasizes the importance of protecting steep slopes and reinforces the connection between protecting such environmental resources and quality of life:

A major goal of this Plan is to protect the natural resources and environmental qualities which are important to the quality of life for Bethesda-Chevy Chase.

Steeply sloped and heavily wooded areas are distinctive features of the Palisades and portions of the Chevy Chase area. Throughout B-CC, residential areas are heavily treed. Environmental concerns within the area include loss of mature woodlands, stream quality, and highway noise.

Among the handful of "[o]bjectives to protect the natural resources of B-CC" the Master Plan lists protection of "wetlands, steep slopes, and wooded areas."

Noting the "rolling and hilly topography" that characterize the Master Plan area, that "[s]ome areas have moderately steep (15 to 25 percent grade) to extremely steep (over 25 percent) slopes," and that "[t]he steepest topography is concentrated in the southwestern portion of the Planning Area known as the Potomac Palisades," the Master Plan

[s]upports the preservation, wherever possible, of wetlands and steeply sloping area (25 percent and greater slopes) that may lie outside floodplains

or stream buffers as defined by existing regulations and guidelines. This recommendation will prevent extensive hillside erosion which can result in large amounts of sediment washoff into streams.

With regard to quality of life, the Master Plan notes that "large land users, combined with the stream valley park system and low density wooded hillsides, create a strong sense of openness that adds to the special character of the community," and that "this land use fabric is viewed as contributing to a very high quality living environment." Consistent with this statement, the Planning Director explained at the public hearing that protecting the Palisades' character of residences interspersed with tree-covered slopes, was an important objective of the Master Plan.

The Application does not substantially conform with either the environmental or neighborhood character recommendations of the Master Plan because it calls for extensive tree-clearing and grading of slopes as high as 25 percent to accommodate the proposed driveway and building sites at the rear of the Subject Property. Further, it does not satisfy the Environmental Guidelines because the site contains highly erodible soils on areas sloped at 15 percent or higher and where significant disturbance would occur. Existing houses in the neighborhood are primarily built on the gentler slopes closer to the street, on lots with mature trees. The wooded areas behind them that this pattern allows are a critical component of the fabric of the community. The Application would alter this character to the detriment of the high quality of life that the Master Plan calls to protect.

Foremost among the Applicant's arguments for why the Master Plan does not prevent the proposed resubdivision is that the Subject Property is outside the area of the Palisades to which the Master Plan's environmental recommendations apply. The Applicant contends this area is limited to the narrow band of cliffs immediately adjacent to the Potomac River, which the Subject Property lies beyond. But the Master Plan definitively contradicts this assertion, both in how it describes the Palisades and where it identifies there being environmental concerns. The Master Plan describes the "Palisades-Western B-CC" area as "bounded on the north by River Road, on the south by the Potomac River, on the east by the District of Columbia, and on the west by I-495," an area that includes the Subject Property. The land use plan map published with the Master Plan labels the same area as the "Palisades" with the word Palisades sitting almost directly on top of the Subject Property. Making clear that concerns about steep slopes extend throughout the Palisades, the Master Plan called "[a]s the first and foremost means of preserving this environmentally sensitive area" to downzone "the area from Massachusetts Avenue to the Potomac River and west of Sangamore Road to Goldsboro Road."

The Applicant asserts that the Planning Board's approval of the Brooke Park preliminary plan in 2010 supports their extremely narrow view of what constitutes the Palisades. But the Board did not conclude in Brooke Park that the Palisades is restricted to this area. The Applicant's contention that it did appears to be based on a selective

reading of the Board's decision. Moreover, as detailed in the Staff Report, since the adoption of the Master Plan, the Planning Board has denied at least one other proposed subdivision based on the failure to follow the Master Plan's recommendations for protecting the Palisades, one that was located further from the Potomac River than this one. Thus, contrary to the Applicant's contentions, this denial is by no means unprecedented.

The Applicant seeks to minimize environmental concerns on the Subject Property by arguing that the environmental recommendations in the Master Plan are, after all, restricted to "environmentally sensitive areas," which do not, in their view, include the Subject Property. For the reasons discussed above, the Master Plan in no way supports such a narrow reading of what constitutes an environmentally sensitive area.

The Applicant further seeks to downplay the impact of the proposed development by claiming that the extensive excavation and grading necessary to build driveways and houses in the proposed resubdivision would not cause any environmental harm because the property will be stabilized after construction is complete. But as noted above the Master Plan could hardly be clearer in recommending that steep slopes be protected, not excavated and graded. The Applicant similarly argues that the proposal is to add just one lot, obscuring that the Application calls for a complete redesign of two existing lots in a manner that requires placing two houses and the driveway access to them in areas that the Master Plan calls to protect and the Environmental Guidelines prohibit. Absent the proposed resubdivision, the Applicant argues, he can build new improvements that would equally disturb the steeply sloped portions of the Subject Property. But the Application would necessitate such disturbance. Moreover, the Board is required to examine the Application before it, not speculate as to what might occur if the Application is denied. Finally, that other nearby lots may be configured similarly to what the Applicant proposes in no way supports a conclusion that the Application conforms to the environmental and neighborhood character goals of the Master Plan. As the Planning Department explained at the public hearing, any such lots predate the current Master Plan, and would appear to be just the type of development that the Master Plan had in mind when it discussed the negative impact of development on steep slopes.

The Applicant's contention that the Subject Property contains no erodible soils, or that they do not pose an obstacle to the Application, is also incorrect. The Montgomery County Soil Survey, on which the Planning Department and Board commonly rely to determine the presence of erodible soils, indicate the presence of erodible soils on the Subject Property. The Applicant's own tests of soils on the property confirms the presence of erodible soils, including in areas with slopes in excess of 15 percent. The Applicant and Planning Department took different positions on the significance of the countywide soil survey relative to the Applicant's site-specific testing. In this case, however, there is no need to give credence to one over the other, because both show the presence of highly erodible soils on the Subject Property. The Applicant contends that because the site-specific survey showed the highly erodible soils below the surface they

do not pose a concern. The Applicant strongly objected to the Planning Department's characterization of the Subject Property as being "overlain" with highly erodible soils, but the Planning Department clarified at the hearing that its use of the term "overlain" was not intended to suggest that the highly erodible soils are exposed on the surface. In the final analysis, that the highly erodible soils may lie below the surface is not a material distinction because the Applicant proposes to excavate and/or grade in areas containing highly erodible soils. The Applicant's assertion that they would engineer solutions where they encountered unstable soils and would ultimately stabilize the site satisfies neither goals of the Environmental Guidelines or the Master Plan.

*2. Section 50-32 of the Subdivision Code restricts the Application.*

Section 50-32 of the subdivision code addresses "special controls for environmentally sensitive areas." As relevant here, Section 50-32(b) mandates that the Planning Board "restrict the subdivision of any land which it finds to be unsafe for development because of possible flooding or erosive stream action, soils with structural limitations, unstabilized slope or fill, or similar environmental or topographical conditions." Moreover, under Section 50-32(c), the Board "may restrict the subdivision of land to achieve the objectives of Chapter 22A relating to conservation of tree and forest resources and to protect environmentally sensitive areas," which include "slopes over 25% or over 15% with highly erodible soils," both of which are present on the Subject Property. Given the presence of such structurally limited soils, the Board must deny the proposed subdivision. Denial is particularly justified in light of the extensive grading and tree-clearing proposed and the goals of the Master Plan.

*3. The Application fails to comply the forest retention priorities or variance requirements of the Forest Conservation Law.*

Section 22A-12(b)(1)(b) of the Forest Conservation Law highlights the importance of retention and identifies areas where retention is most critical:

*(b) Retention.*

- (1) The primary objective of the forest conservation plan should be to retain existing forest and trees and avoid reforestation in accordance with this Chapter. The forest conservation plan must retain certain vegetation and specific areas in an undisturbed condition unless the Planning Director finds that:
  - (A) the development would make maximum use of any available planning and zoning options that would result in the greatest possible forest retention;
  - (B) reasonable efforts have been made to protect the specific areas and vegetation listed in the plan; and
  - (C) the development proposal cannot be reasonably altered.
- (2) In general, areas protected under this subsection include:

- (A) floodplains, stream buffers, steep slopes, and critical habitats;
- (B) contiguous forests;
- (C) rare, threatened, and endangered species;
- (D) trees connected to an historic site;
- (E) champion trees and other exceptionally large trees; and
- (F) areas designated as priority save areas in a master plan or functional plan.

The presence of any of these conditions on the Subject Property would warrant disapproval of the Applicant's forest conservation plan. But the Subject Property contains several, including steep slopes, contiguous forests, exceptionally large trees, and area designated as a priority for protection in the Master Plan.

Section 22A-12(b)(3) of the Forest Conservation Law identifies certain individual trees as high priority for retention and protection. Any impact to these protected trees, including removal or any disturbance within a protected tree's critical root zone, requires a variance under Section 22A-12(b)(3). Without a variance, such trees must be left in an undisturbed condition.

This Application proposed the removal or critical root zone impact to up to 16 protected trees. The Applicant requested a Variance, but the Board does not agree that the Applicant would suffer unwarranted hardship (i.e. denied reasonable and significant use of the Subject Property) without approval of the Variance, which is the threshold consideration for considering a variance request.

The Application excessively encroaches into environmentally sensitive areas comprised of mature trees and forested steep slopes associated with highly erodible soils, in conflict with the forest conservation law and variance provisions, the Environmental Guidelines, Master Plan recommendations, and the Subdivision Regulations. It proposes extensive clearing and disturbance of a mature forest area within the Palisades, containing large trees. In some instances, the mature forest and large trees are associated with steep slopes and highly erodible soils. The destruction of the environmentally sensitive resources would, among other things, have an adverse effect on water quality and conflict with the Master Plan recommendations for protecting for protecting steep slopes and community character. Under these circumstances, the Board cannot conclude that denial of the variance would result in an unwarranted hardship. Granting the variance would almost by definition confer on the Applicant a benefit that would be denied to other applicants.

Both Planning Department staff and the County Arborist recommended denial of the variance. The Applicant asserts that the County Arborist's recommendation was tainted because there were communications between the Arborist and Planning Department staff regarding the Application, and that the County Arborist is supposed to reach her recommendation independently. The Board disagrees that the Arborist is



prohibited from communicating about a project with other officials. Interagency communication is a routine part of the development review process, and the language of the code does not suggest it is prohibited in this context. Further, the Board has no reason to believe that the Arborist's recommendation of denial in this case was based on anything but her best independent judgment.

The Applicant further contends that the Arborist should be deemed to have recommended approval based on the time that lapsed between when the Applicant submitted a revised variance request and when the Arborist issued her recommendation. But the timing of the Arborist's recommendation was consistent with the requirements of the law based on when the Planning Department transmitted the revised variance to her. The Applicant's complaint appears to be more with when the Planning Department transmitted the variance, an action for which there is no statutory time limit and which was perfectly consistent with the Arborist making a recommendation in time for this matter to proceed. In any event, the Applicant's complaints about the process by which the Arborist made her recommendation are somewhat overblown given that the Arborist's judgment is but one factor in the Board's consideration of whether a variance is justified. And here, the Arborist's recommendation notwithstanding, there is ample basis for the Board to conclude that it is not.<sup>2</sup>

BE IT FURTHER RESOLVED that this Resolution constitutes the written opinion of the Board in this matter, and the date of this Resolution is AUG - 3 2016 (which is the date that this Resolution is mailed to all parties of record); and

BE IT FURTHER RESOLVED that any party authorized by law to take an administrative appeal must initiate such an appeal within thirty days of the date of this Resolution, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules).


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<sup>2</sup> The Board notes the Applicant made a misdirected attempt to undermine the thorough Planning Department report and recommendation in the context of the requested variance. Specifically, in a written submission to the Board the Applicant noted that the Staff Report discussed the original variance request filed by the Applicant, which apparently contained inconsistencies. The Applicant describes the reference to the original request as an "error" that "causes the Applicant to question the extent to which the Planning Area One Division Staff considered the Amended Documents submitted in October 2015." The Applicant's questioning of whether the staff reviewed their revised documents is ironic and unjustified given that the Staff Report mentioned the original variance request in describing the history of the Application, and went on to discuss the amended variance request, a fact that the Applicant appears to have overlooked.

**CERTIFICATION**

This is to certify that the foregoing is a true and correct copy of a resolution adopted by the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission on motion of Commissioner Presley, seconded by Vice Chair Wells-Harley, with Chair Anderson, Vice Chair Wells-Harley, and Commissioners Dreyfuss, Presley, and Fani-González voting in favor at its regular meeting held on Thursday, July 21, 2016, in Silver Spring, Maryland.

  
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Casey Anderson, Chair  
Montgomery County Planning Board