

Montgomery County Planning Board

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Date Mailed:

July 30, 2024

MCPB No. 24-076
Forest Conservation Plan No. F20240590
Old Farm Creek Tributary Stream Restoration
Date of Hearing: July 25, 2024

RESOLUTION

WHEREAS, under Montgomery County Code Chapter 22A, the Montgomery County Planning Board is authorized to review forest conservation plan applications; and

WHEREAS, on October 11, 2007, the Planning Board approved Mandatory Referral No. MR2007203, including the associated Forest Conservation Plan No. MR2007203 (the “Forest Conservation Plan”), for the construction of an addition to the existing Luxmanor Elementary School, with supporting infrastructure, on approximately 12.99 acres of R-200-zoned land, located at 6201 Tilden Lane (“Subject Property”), in the 1992 *North Bethesda/Garret Park Master Plan* (“Master Plan”) area; and

WHEREAS, on June 24, 2008, the Planning Director approved an administrative amendment to the Forest Conservation Plan to allow minor changes to the limits of disturbance; and

WHEREAS, on November 5, 2012, the Planning Director approved an administrative amendment to the Forest Conservation Plan to allow the installation of a sewer extension and require mitigation for the related forest clearing; and

WHEREAS, on April 18, 2018, the Planning Board approved an amendment to the Forest Conservation Plan to demolish two wings of the school building and build a new three-story wing and associated circulation and stormwater management facilities; and

WHEREAS, on May 22, 2024, Montgomery County Department of Environmental Protection (“Applicant”) filed an application for approval of an amendment to the Forest Conservation Plan to permit disturbance of a Category I Forest Conservation Easement area in association with stream restoration on the Subject Property; and

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Approved as to
Legal Sufficiency: /s/ Allison Myers
M-NCPPC Legal Department

WHEREAS, the Applicant's forest conservation plan amendment application was designated Forest Conservation Plan No. F20240590, Old Farm Creek Tributary Stream Restoration ("Forest Conservation Plan Amendment," "Amendment," 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 July 15, 2024, providing its analysis and recommendation for approval of the Application, subject to certain conditions ("Staff Report"); and

WHEREAS, on July 25, 2024, the Planning Board held a public hearing on the Application and approved the Application subject to certain conditions, by the vote certified below.

NOW, THEREFORE, BE IT RESOLVED that the Planning Board APPROVES Forest Conservation Plan No. F20240590, to amend Forest Conservation Plan No. MR2007203 to allow impacts and require mitigation related to stream restoration on the Subject Property, subject to the following additional conditions:¹

8. The Applicant must schedule the required site inspections by M-NCPPC Forest Conservation Inspection Staff per Section 22A.00.01.10 of the Forest Conservation Regulations.
9. The Applicant must comply with all tree protection and tree save measures shown on the approved Final Forest Conservation Plan. Tree save measures not specified on the Forest Conservation Plan may be required by the M-NCPPC Forest Conservation Inspection Staff.
10. Within the first planting season following the stabilization of the applicable disturbed area inside of the limits of disturbance ("LOD"), or as directed by the M-NCPPC Forest Conservation Inspection Staff, the applicant must install afforestation/reforestation plantings as shown on the approved FCP.
11. Within the first planting season following the stabilization of the applicable disturbed area inside of the LOD, or as directed by the M-NCPPC Forest Conservation Inspection Staff, the Applicant must install the variance tree mitigation plantings on the Subject Property as shown on the approved FCP. Each variance mitigation tree must be a minimum size of three caliper inches, with a total of nine caliper inches installed on the Property. Adjustments to the planting locations of these trees is permitted with the approval of the M-NCPPC Forest Conservation Inspection Staff.

¹ For the purpose of these conditions, the term "Applicant" shall also mean the developer, the owner, or any successor in interest to the terms of this approval.

12. Before the start of any demolition, clearing, grading, or construction for this stream restoration project, whichever comes first, the Applicant must execute a five-year Maintenance and Management Agreement (“MMA”) in a form approved by the M-NCPPC Office of the General Counsel. The MMA is required for all forest planting areas, mitigation tree plantings, including variance tree mitigation plantings, and landscape plantings credited toward meeting the requirements of the FCP. The MMA includes invasive species management control measures as deemed necessary by the M-NCPPC Forest Conservation Inspection Staff.
13. Prior to certification of the Forest Conservation Plan, the Applicant must make the following changes, subject to Staff approval:
 - a. Add Forest Conservation Data table.
 - b. Add Blackline Sheets for Sheet 3, 4, and 5.
 - c. Remove the area shown as planting from Parks maintenance road and make necessary adjustments to worksheets.
 - d. Demonstrate compliance with the additional reforestation requirement from Condition No. 13c through additional planting, subject to Planning Staff review and approval. If the Applicant cannot address the requirement by identifying an appropriate location for planting on nearby parkland, the Applicant must submit a forest conservation fee-in-lieu payment to the M-NCPPC Planning Department for the remaining reforestation requirement before the start of any demolition, clearing, grading, or construction, whichever comes first.

BE IT FURTHER RESOLVED that all other conditions of approval for this Forest Conservation Plan remain valid, unchanged, and in full force and effect.

BE IT FURTHER RESOLVED that having given full consideration to the recommendations of its Staff as presented at the hearing and/or as set forth in the Staff Report, which the Board hereby adopts and incorporates by reference (except as modified herein), and upon consideration of the entire record, the Planning Board FINDS, with the conditions of approval, that:

1. *The Application satisfies all the applicable requirements of the Forest Conservation Law, Montgomery County Code Chapter 22A, and ensures the protection of environmentally sensitive features.*

A. Forest Conservation

The Board finds that as conditioned, the Forest Conservation Plan Amendment complies with the requirements of the Forest Conservation Law. The Application

amends Forest Conservation Plan No. MR2007203 to modify the limits of disturbance (“LOD”) and allow access and construction activities on the Property related to the Old Farm Creek restoration. The Applicant proposes to use an existing Montgomery Parks maintenance road to access the stream. A portion of the access road is within the Category I Conservation Easement in the southwest corner of the Property. Trees will be impacted within the conservation easement, but tree protection will be employed, and no forest or variance trees will be removed within the easement area.

With this Amendment, 0.38 acres within the LOD are counted as cleared, with 2.95 acres of forest being retained. The proposed project generates a reforestation requirement of 0.64 acres. The Applicant will satisfy the planting requirement with onsite reforestation or by paying a fee-in-lieu if the reforestation requirement cannot be met onsite or at a nearby park. All the retained and planted forest onsite remains protected either in an existing Category I Forest Conservation Easement on Montgomery County Public Schools property or on property owned by Montgomery Parks.

B. Forest Conservation Variance

Section 22A-12(b)(3) of the Forest Conservation Law identifies certain individual trees as a high priority for retention and protection (“Protected Trees”). Any impact to these Protected Trees, including removal or any disturbance within a Protected Tree’s critical root zone (“CRZ”), requires a variance under Section 22A-12(b)(3) (“Variance”). Otherwise, such resources must be left in an undisturbed condition.

This Application will require the removal of one (1) Protected Tree and CRZ impact to thirteen (13) Protected Trees as identified below:

Tree Number	Species	DBH Inches	% CRZ Impacts	Status	Notes
32	Southern Red Oak (<i>Quercus falcata</i>)	37.5"	19%	Save	Construction Access
34	Southern Red Oak (<i>Quercus falcata</i>)	36.5"	15%	Save	Construction Access
36	Southern Red Oak (<i>Quercus falcata</i>)	37"	20%	Save	Construction Access
40	Southern Red Oak (<i>Quercus falcata</i>)	35.5"	6%	Save	Construction Access
52	Southern Red Oak (<i>Quercus falcata</i>)	52"	15%	Save	Construction Access
81	Pin Oak (<i>Quercus palustris</i>)	31"	18%	Save	Construction Access
90	Tuliptree (<i>Liriodendron tulipifera</i>)	33"	18%	Save	Construction Access
99	Tuliptree (<i>Liriodendron tulipifera</i>)	45"	18%	Save	Construction Access
1061	Tuliptree (<i>Liriodendron tulipifera</i>)	43"	16%	Save	Construction Access
1035	Tuliptree (<i>Liriodendron tulipifera</i>)	32"	2%	Save	Construction Access
1043	Tuliptree (<i>Liriodendron tulipifera</i>)	30"	17%	Save	Construction Access
203	Red Maple (<i>Acer rubrum</i>)	41.5"	22%	Save	Construction Access
217	Tuliptree (<i>Liriodendron tulipifera</i>)	33"	23%	Save	Construction Access

Table 1 – Protected Tree to be removed

Tree Number	Species	DBH Inches	% CRZ Impacts	Status	Notes
279	Red Maple (<i>Acer rubrum</i>)	35"	55%	Remove	Construction Access – attempt to save this tree.

Table 2 – Protected Trees to be impacted but saved

In accordance with Section 22A-21(a), the Applicant requested a Variance, and the Board agrees that the Applicant would suffer unwarranted hardship by being denied reasonable and significant use of the Subject Property without the Variance. In this case, the unwarranted hardship is caused by the fixed location of the stream, access road, and the trees surrounding it, as well as the project goal to restore the streambanks to reduce erosion and sedimentation and to restore stream function. The stream restoration project relies on an existing access route to move the necessary equipment to the stream restoration site, and the Applicant's use of the access road will require the removal of one (1) Protected Tree. The restoration project also requires grading of some streambanks to reduce erosion and restore function. The stream restoration cannot be accomplished without impacting Protected Trees in these areas. The Applicant's proposal to complete the stream restoration project in conformance with the requirements of the County's MS4 permit constitutes a reasonable and significant use of the Property. Therefore, the Board finds that there is sufficient unwarranted hardship to justify a variance request to accomplish the stream restoration project.

The Board makes the following findings necessary to grant the Variance:

1. *Granting the Variance will not confer on the Applicant a special privilege that would be denied to other applicants.*

Granting the variance will not confer a special privilege on the Applicant as the removal and disturbance to the specified trees are due to the project objectives to reduce sediment pollution, the fixed location of the stream that is to be restored, and the location of the trees around the stream. Granting a variance to allow disturbance and meet the objectives of the stream restoration project is not unique to this Applicant. The Board finds that the granting of this variance is not a special privilege that would be denied to other applicants.

2. *The need for the Variance is not based on conditions or circumstances which are the result of the actions by the Applicant.*

The requested variance is not based on conditions or circumstances which are the result of actions by the Applicant. The requested variance is based upon the existing site conditions, such as the location of the stream and access road, as well as the objectives of project, as described above. Although accessing and remediating the stream requires impacts to trees in the stream buffer area, the Applicant has minimized removals of, and impacts to, variance trees by using an existing access road for the purpose of moving equipment to the site and by employing tree protection methods.

3. *The need for the Variance is not based on a condition related to land or building use, either permitted or non-conforming, on a neighboring property.*

The requested variance is a result of the existing conditions and the proposed project design, not as a result of land or building use on a neighboring property.

4. *Granting the Variance will not violate State water quality standards or cause measurable degradation in water quality.*

In this case, the purpose of the project is to remediate degraded water quality. The Protected Tree to be removed is within a forest that will be replanted upon completion of the project. The mitigation trees will replace water quality functions that may be lost by the removed tree. Therefore, the Planning Board concurs that the Application will not violate State water quality standards or cause measurable degradation in water quality. In time, between the stream restoration and the forest replanting, water quality should ultimately be improved over current conditions.

Mitigation for the variance is at a rate that approximates the form and function of the Protected Tree removed. The Board approves the replacement of Protected Trees at a ratio of approximately 1 inch replaced for every four (4) inches removed using three-inch (3 in.) caliper plantings. The one (1) Protected Tree being removed is a 35-inch Red Maple and will be mitigated with three-inch (3 in.) caliper plantings totaling nine (9) caliper inches. As conditioned, the replanted forest and mitigation trees will be protected as part of a five-year maintenance and management agreement. No mitigation is required for Protected Trees that are impacted but retained.

BE IT FURTHER RESOLVED that this Resolution constitutes the written opinion of the Planning Board in this matter, and the date of this Resolution is

July 30, 2024

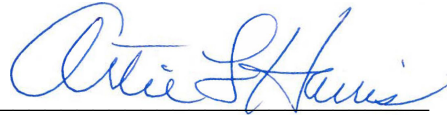
(which is the date that this Resolution is mailed to all parties of record); and

BE IT FURTHER RESOLVED that any party authorized by law to take an administrative appeal must initiate such an appeal consistent with the Maryland Rules for the judicial review of administrative agency decisions.

* * * * *

CERTIFICATION

This is to certify that the foregoing is a true and correct copy of a resolution approved and adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission on motion of Commissioner Hedrick, seconded by Commissioner Linden, with a vote of **4-0**; Chair Harris, and Commissioners Bartley, Hedrick, and Linden, voting in favor of the motion, Vice Chair Pedoeem necessarily absent, at its regular meeting held on Thursday, July 25, 2024, in Wheaton, Maryland and via video conference.



Artie L. Harris, Chair
Montgomery County Planning Board