

# **Montgomery County Planning Board**

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB No. 22-048

Site Plan Amendment No. 81996023A

*Grosvenor/Luxmanor Stream Restoration*

Date of Hearing: May 19, 2022

MAY 31 2022

## RESOLUTION

WHEREAS, under Section 59-7.1.2 of the Montgomery County Zoning Ordinance, the Montgomery County Planning Board is authorized to review site plan applications; and

WHEREAS, on December 5, 1996 by written opinion, the Planning Board approved Site Plan No. 819960230, Tuckerman Heights, for 37 single-family attached residential units on 7.45 acres of R-90/TDR9 zoned-land, located north and south of, and divided by, Tuckerman Lane approximately 1,050 feet west of the intersection with Rockville Pike, and comprising Parcels A, B, C and D of the Tuckerman Heights development ("Subject Property"), in the *North Bethesda/Garrett Park Master Plan* ("Master Plan") area; and

WHEREAS, on March 2, 2022, the Montgomery County Department of Environmental Protection ("Applicant") filed an application for approval of an amendment to the previously approved site plan(s) to disturb a Category I Forest Conservation Easement to implement a stream restoration project on the Subject Property; and

WHEREAS, Applicant's application to amend the site plan was designated Site Plan Amendment No. 81996023A, Grosvenor/Luxmanor Stream Restoration ("Site Plan," "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 May 4, 2022, setting forth its analysis and recommendation for approval of the Application, subject to certain conditions ("Staff Report"); and

WHEREAS, on May 19, 2022, the Planning Board held a public hearing on the Application and voted to approve the Application subject to conditions, on the motion of Commissioner Rubin, seconded by Commissioner Verma, with a vote of 5-0; Chair Anderson, Commissioners Cichy, Patterson, Rubin, and Verma voting in favor.

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Approved as to

Legal Sufficiency: /s/ Emily Vaias

M-NCPPC Legal Department

NOW, THEREFORE, BE IT RESOLVED that the Planning Board approves Site Plan Amendment No. 81996023A to permit disturbance of a Category I Conservation Easement to implement a stream restoration project by modifying and adding the following conditions:<sup>1</sup>

### REVISED CONDITIONS

2. A final Tree Protection Plan including special protection measures needed to reduce the impacts to the targeted individual trees to be saved along the Property boundary shall be submitted by the Applicant and approved by the Maryland-National Capital Park and Planning Commission staff prior to approval of the signature set of the Site Plan. This plan shall also detail the methods of tree protection and sequence of construction for installation of the retaining wall behind Lots 8-12 and for the driveway of Lot 17. These tree protection measures apply only to the Property north of Tuckerman Lane. Tree protection measures for the Grosvenor/Luxmanor Stream Restoration Project south of Tuckerman Lane are specified on the Amended Final Forest Conservation Plan 81996023A.
3. Tree protection fence around the forest retention areas on the portion of the Property north of Tuckerman Lane, especially adjacent to Lot 17, shall be a chain link fence buried 18" in the ground or super silt fence. Tree protection measures for the Grosvenor/Luxmanor Stream Restoration Project south of Tuckerman Lane are specified on the Amended Final Forest Conservation Plan 81996023A.

### NEW CONDITIONS

6. 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.
7. The Applicant must comply with all tree protection and tree save measures shown on the approved Amended Final Forest Conservation Plan ("FFCP"). Tree save measures not specified on the Amended Final Forest Conservation Plan may be required by the M-NCPPC Forest Conservation Inspection Staff.
8. Prior to the initial planting acceptance inspection by the M-NCPPC Forest Conservation Inspection Staff, the Applicant must install permanent conservation easement signage along the perimeter of the conservation easements as shown on the Amended FFCP, or as directed by the M-NCPPC Forest Conservation Inspection Staff.

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<sup>1</sup> For the purpose of these conditions, the term "Applicant" shall also mean the developer, the owner or any successor(s) in interest to the terms of this approval.

9. Prior to any demolition, clearing, grading or construction for this development Application, 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 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 Amended FFCP. The MMA includes invasive species management control measures. All proposed measures should be chosen with consideration of the proximity to the on-site stream and wetlands and the sensitive nature of this watershed. The use of herbicides should be avoided where possible.
10. The Applicant must install the Afforestation/Reforestation plantings, as shown on the approved Amended FFCP, in the first planting season following stabilization of the applicable disturbed area.
11. The Limits of Disturbance (“LOD”) shown on the Final Sediment and Erosion Control Plan must be consistent with the LOD shown on the approved Amended Final Forest Conservation Plan.
12. Prior to Certified Amended FFCP, please add the developer’s signature block to sheets 7, 8, 9, 10, and 11, and add the M-NCPPC signature block to sheets 10 and 11.

BE IT FURTHER RESOLVED that all other site plan conditions of approval for this project remain valid, unchanged, and in full force and effect.

BE IT FURTHER RESOLVED that all site development elements shown on the latest electronic version of Site Plan Amendment No. 81996023A, submitted via ePlans to the M-NCPPC as of the date of the Staff Report, are required, except as modified by the above conditions of approval; and

BE IT FURTHER RESOLVED that having considered 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 unless specifically set forth herein, this Amendment does not alter the intent, objectives, or requirements in the originally approved site plan, and all findings not specifically addressed remain in effect. The elements of the proposed Site Plan Amendment No. 81996023A remain consistent with the original findings, except finding 7, which is modified below to permit disturbance of a Category I Forest Conservation Easement in association with stream restoration work.

*The development satisfies the applicable requirements of Chapter 22A of the Montgomery County Code.*

a. Chapter 22A, Forest Conservation

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

The Planning Board found that Site Plan No. 819960230 was consistent with Preliminary Plan No. 119960910, met the requirements of the R-90/TDR-9 Zone; satisfied the Forest Conservation Law, and complied with other applicable regulatory requirements. The Planning Board further determined that the Project was compatible with other uses and other site plans when considering existing and proposed adjacent development.

The Amendment complies with the general requirements and development standards of the Zoning Ordinance and Subdivision Regulations, and substantially conforms with the goals and recommendations of the 1992 *North Bethesda/Garrett Park Master Plan*.

Included with the Forest Conservation Plan Amendment is a request for a tree variance for impacts and removal of subject trees. With the conditions, the Site Plan Amendment complies with the Montgomery County Environmental Guidelines and the Forest Conservation Law as described below.

a. Natural Resource Inventory/Forest Stand Delineation

Natural Resource Inventory/Forest Stand Delineation (“NRI/FSD”) No. 420201490 was approved for this Property on April 21, 2020. The NRI/FSD documents that the Property is located within the Lower Rock Creek watershed, which is classified as Use Class I-P by the State of Maryland. The Subject Property is forested and contains several trees with a diameter breast height (“DBH”) of 30 inches or more. The area includes stream buffers, wetlands, and 100-year floodplains. There are no recorded occurrences of rare, threatened, or endangered species, and no historic resources or cemeteries are known to exist on the Property.

b. Forest Conservation Plan

The Applicant submitted a Final Forest Conservation Plan (“FCP”) Amendment that satisfies the applicable requirements of the Forest Conservation Law, Montgomery County Code, Chapter 22A and is in compliance with the Montgomery County Planning Department’s approved Environmental Guidelines.

The Subject Property is zoned R-30 and is assigned a Land Use Category of High Density Residential (“HDR”) as defined in Section 22A-3 of the



Montgomery County Forest Conservation Law (“FCL”) and in the Land Use Table of the *Trees Technical Manual*. This results in an afforestation threshold of 15% and a conservation threshold of 20% of the Net Tract Area.

The tract area for forest conservation purposes includes the area within the Limits of Disturbance, and totals 0.78 acres. There is a total of 0.40 acres of existing forest on the Subject Property. For purposes of the FCL, all 0.40 acres within the Limits of Disturbance are counted as cleared, although not all trees within the forested area will be removed. The proposed forest clearing generates a reforestation requirement of 0.37 acres. The Applicant proposes to meet the planting requirement on-site by reforesting the entire 0.78-acre LOD. All of the retained and planted forest will continue to be protected in a Category I Conservation Easement.

#### Forest Conservation Variance

Section 22A-12(b)(3) of the FCL provides criteria that identify certain individual trees as high priority for retention and protection (“Protected Trees”). Any impact to these trees, including removal of the subject tree or disturbance within the 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. An applicant for a variance must provide certain written information in support of the required findings in accordance with Section 22A-21 of the FCL. The FCL requires no impact to trees that: measure 30 inches or greater DBH; are part of an historic site or designated with an historic structure; are designated as a national, State, or County champion tree; are at least 75 percent of the diameter of the current State champion tree of that species; or trees, shrubs, or plants that are designated as Federal or State rare, threatened, or endangered species.

Variance Request - The Applicant submitted a variance request in a letter dated March 29, 2022. The Applicant will impact eleven (11) trees that are 30 inches or greater DBH, that are considered high priority for retention under Section 22A-12(b)(3) of the FCL (Tables 1 & 2). Of the eleven (11) trees being impacted, variance permission is being approved to remove five (5) trees and save six (6) of these eleven (11) trees (Figure 3). The variance request notes that efforts will be made to save four out of the five trees requested for removal. The variance permission for removal is being sought now in case removal is deemed necessary by the forest inspector or certified arborist at the time of construction.

**Table 1 – Protected Trees to be impacted but saved**

Tree Number	Species	DBH Inches	% CRZ Impacts	Status and Notes
551G	Tuliptree ( <i>Liriodendron tulipifera</i> )	32"	<1%	This tree is located outside of the LOD but the CRZ is within a proposed access path. Due to the need to provide adequate access to the stream channel for restoration, these CRZ impacts cannot be avoided.
552G	Tuliptree ( <i>Liriodendron tulipifera</i> )	30.5"	3%	This tree is located outside of the LOD but the CRZ is within a proposed access path. Due to the need to provide adequate access to the stream channel for restoration, these CRZ impacts cannot be avoided.
576G	American beech ( <i>Fagus grandifolia</i> )	35.5"	21%	This tree is located outside of the LOD but the CRZ is within a proposed access path. Due to the need to provide adequate access to the stream channel for restoration, these CRZ impacts cannot be avoided.
635G	American beech ( <i>Fagus grandifolia</i> )	31.5"	21%	This tree is located outside of the LOD but the CRZ is within a proposed access path. Due to the need to provide adequate access to the stream channel for restoration, these CRZ impacts cannot be avoided.
658G	Tuliptree ( <i>Liriodendron tulipifera</i> )	32.5"	7%	This tree is located outside of the LOD but the CRZ is within a proposed access path. Due to the need to provide adequate access to the stream channel for restoration, these CRZ impacts cannot be avoided.
694G	Tuliptree ( <i>Liriodendron tulipifera</i> )	30"	10%	This tree is located outside of the LOD but the CRZ is within a staging area. Due to the need to provide adequate space for construction activities for the stream restoration, these CRZ impacts cannot be avoided.

**Table 2 – Protected Trees to be removed**

<b>Tree Number</b>	<b>Species</b>	<b>DBH Inches</b>	<b>% CRZ Impacts</b>	<b>Status and Notes</b>
511G	Tuliptree ( <i>Liriodendron tulipifera</i> )	30"	92%	Tree is located within the LOD and on the stream bank where grading is proposed. Due to the need to stabilize the stream to accomplish the project goals, removal of this tree cannot be avoided.
607G	Tuliptree ( <i>Liriodendron tulipifera</i> )	30"	67%	Save if possible. This tree is located just outside of the LOD but the CRZ is within a proposed access path. Due to the need to provide adequate access to the stream channel for restoration, these CRZ impacts cannot be avoided.
610G	Northern red oak ( <i>Quercus rubra</i> )	32"	70%	Save if possible. This tree is located just outside of the LOD but on the stream bank and the CRZ is within a proposed access path. Due to the need to provide adequate access to the stream channel for restoration, these CRZ impacts cannot be avoided.
853G	American beech ( <i>Fagus grandifolia</i> )	32"	43%	Save if possible. This tree is located outside of the LOD, but the CRZ is along the stream bank where grading is proposed. Due to the need to stabilize the stream bank to accomplish the project goals, these impacts cannot be avoided.
996G	Northern red oak ( <i>Quercus rubra</i> )	30.5"	30%	Save if possible. This tree is located outside of the LOD, but the CRZ is along the stream bank where grading is proposed. Due to the need to stabilize the stream bank to accomplish the project goals, these impacts cannot be avoided.

Unwarranted Hardship Basis

Per Section 22A-21, a variance may only be considered if the Planning Board finds that leaving the requested trees in an undisturbed state would result in unwarranted hardship, denying the Applicant reasonable and significant use of its property.

Oral and written testimony was presented during the Planning Board hearing, regarding the finding of unwarranted hardship due to an assertion that stream restorations do not contribute to meeting the County's MS4 permit requirements for reducing sediment pollution and therefore tree removal to implement the project is unjustified. However, the Planning Board finds that the testimony of a representative of the Montgomery County Department of Environmental Protection (MCDEP), confirmed that stream restorations are an important tool, among others, used by the County to reduce stream erosion and sedimentation and to meet the County's MS4 permit requirements for reducing sediment pollution.

Focusing specifically on the Grosvenor-Luxmanor stream restoration project, the MCDEP representative shared that this project has been under consideration and planning for eight years, that trees along the stream are being undermined by streambank erosion and falling into the stream, and that the neighbors in this area support the stream restoration project. The staff report noted that the original Site Plan staff report for the Tuckerman Heights development had observed that the streambanks were severely eroded at the time of that development. As a result of this testimony, the Planning Board finds that the Grosvenor-Luxmanor stream restoration is an appropriate strategy for this area.

The Forest Conservation Law requires that the proposed project or development be assessed to determine if there are site constraints or circumstances that warrant a finding of unwarranted hardship if the variance is denied. In this case, the unwarranted hardship is caused by the fixed location of the stream and the trees surrounding it, and the project goal to restore the streambanks to reduce erosion and sedimentation, and to restore stream function. This requires both creating an access route to get the necessary equipment to the stream restoration site, and the need to grade some streambanks back to reduce erosion and restore function. Two (2) of the trees for which removal permission is granted are heavily impacted by the access route. Three (3) of the trees for which removal is approved are on areas of the streambanks which will be graded to accomplish the objectives of the stream restoration. The stream restoration cannot be accomplished without impacting these trees, and the stream restoration is being planned and implemented in order to reduce erosion



and sediment pollution in response to MS4 permit requirements. Therefore, there is a sufficient unwarranted hardship to justify a variance request.

Section 22A-21 of the FCL sets forth the findings that must be made by the Planning Board or Planning Director, as appropriate, in order for a variance to be granted:

Variance Findings

1. *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. The Applicant has worked with the County Arborist to minimize removals of, and impacts to, variance trees. Granting a variance to allow disturbance and meet the objectives of the stream restoration project is not unique to this Applicant. The granting of this variance is not a special privilege that would be denied to other applicants.

2. *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 and necessary design requirements of this project.

3. *Is not based on a condition relating 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. *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 trees are within a forest that will be replanted upon completion of the project. These trees will replace water quality functions that may be

lost by the removed trees. Therefore, 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 Trees Subject to the Variance Provision

No mitigation is required for trees that are impacted but retained. Retained trees will continue to provide water quality functions as before. It has been M-NCPPC policy not to require mitigation for Protected Trees removed within forest stands since the removal of the forest is accounted for through the Forest Conservation Worksheet, and all disturbed forest will be replanted. As conditioned, the replanted forest will be protected as part of a 5-year maintenance and management agreement.

BE IT FURTHER RESOLVED that this Resolution incorporates by reference all evidence of record, including maps, drawings, memoranda, correspondence, and other information; and

BE IT FURTHER RESOLVED that this Site Plan shall remain valid as provided in Montgomery County Code § 59-7.3.4.H; and

BE IT FURTHER RESOLVED that this Resolution constitutes the written opinion of the Board in this matter, and the date of this Resolution is MAY 31 2022 (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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**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 Rubin, seconded by Commissioner Cichy, with Chair Anderson, Vice Chair Verma, and Commissioners Cichy, Patterson, and Rubin voting in favor at its regular meeting held on Thursday, May 26, 2022, in Wheaton, Maryland.



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Casey Anderson, Chair  
Montgomery County Planning Board