



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

MCPB
Item #
November 4, 2010

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Mark Pfefferle, Acting Chief, Environmental Planning *mp*

FROM: Josh Penn, Senior Planner, Environmental Planning *J.P.*

DATE: October 22, 2010

PLAN NAME: Potomac View, Lot 32

PLAN NUMBER: SC2010015

PLAN TYPE: Forest Conservation Variance Request

REVIEW BASIS: Chapter 22A of the County Code

ZONE: RE-2

LOCATION: on Riverwood Drive 850 feet north of River Road

APPLICANT: Justin and Golru Greene

HEARING DATE: November 4, 2010

RECOMMENDATIONS

The Environmental Planning staff has reviewed the forest conservation variance request and Staff recommends the Planning Board approve the variance with the proposed mitigation.

BACKGROUND

The applicant is requesting to construct a new house on the previously undeveloped Lot 32 on Riverwood Drive in Potomac. The site is 3.08 acres in size and is mostly forested. There are no streams, wetlands, or environmental buffers within the site.

The construction of this house requires the applicant to obtain a sediment control permit from the Montgomery County Department of Permitting Services. Under Chapter 22A of the County code any property that is required to obtain a sediment control permit and is greater than 40,000 square feet is required to comply with the forest conservation law. The property is 3.08 acres or 134,164 square feet in size and therefore subject to Chapter 22A.

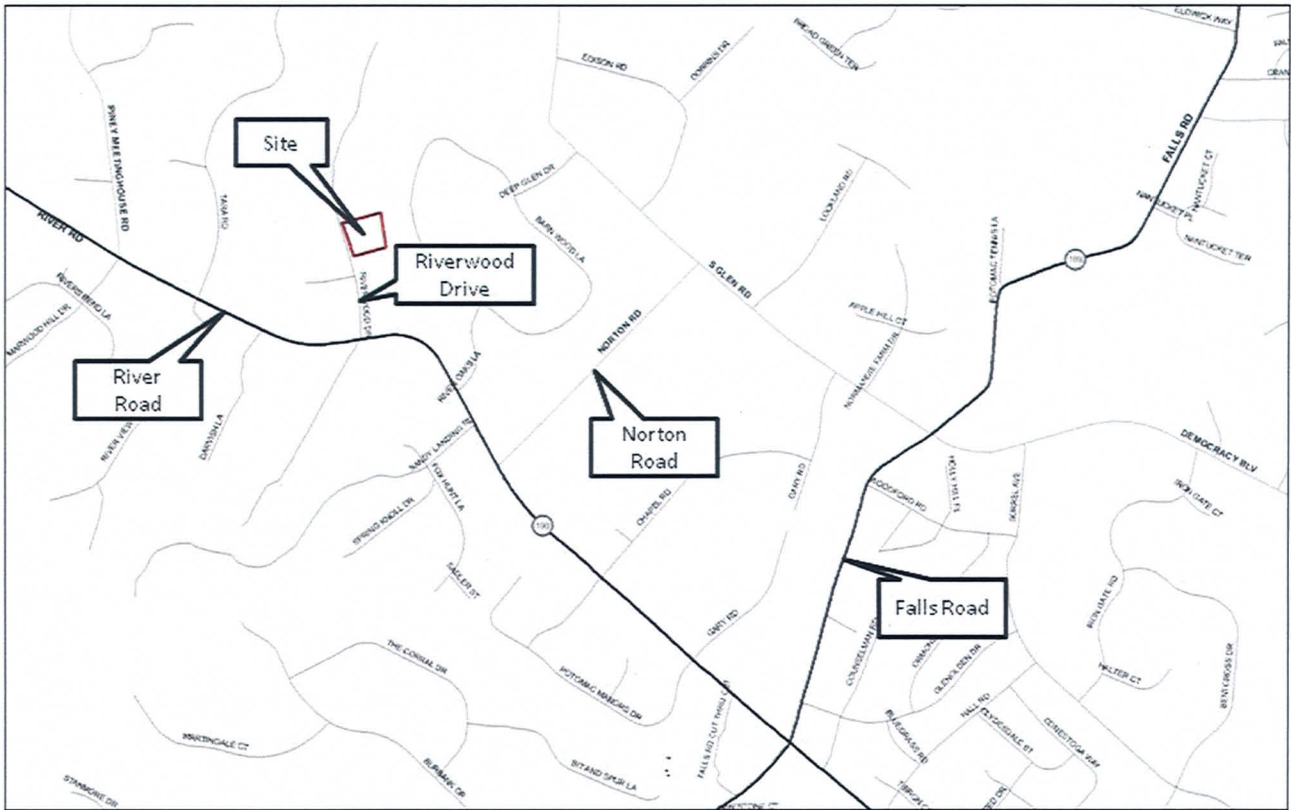


Figure 1: Vicinity Map

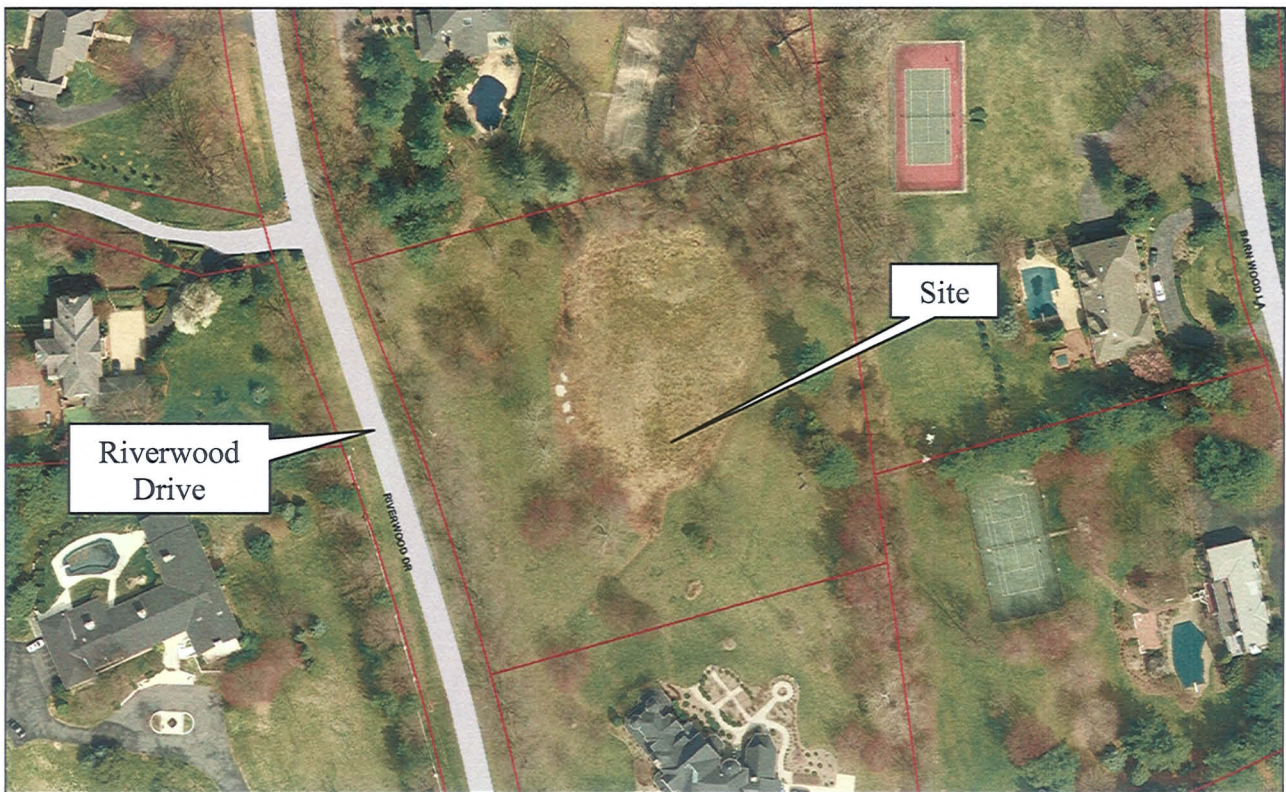


Figure 2: 2008 Aerial View

The activity is required to obtain approval of a forest conservation plan because the activity does

not qualify for an exemption from submitting a forest conservation plan. Under the forest conservation law, recorded single lots are eligible to be exempt from submitting a forest conservation plan if the activity removes less than 20,000 square feet of forest and does not remove any forest in a Stream Valley Buffer (SVB). The applicant is proposing to remove 6,098 square feet of forest within the SVB and therefore must submit and obtain approval of a forest conservation plan before any land disturbing activities occur on the subject property.

Since the property is a single lot recorded in 1977 the forest conservation plan is reviewed and approved by the Planning Director, or designee. Section 22A-11(d) of the County Code gives the Planning Director the authority to approve forest conservation plans associated with sediment control permits.

Since October 1, 2009, Section 1607(c) of the Natural Resources Article, MD Ann. Code went into effect statewide and affects the Montgomery County Forest Conservation law. This section requires an applicant to obtain approval of a variance for the removal or impact of trees 30 inches and greater in diameter at breast height and certain vegetation prior to the forest conservation plan. Section 22A-21 of the County Code indicates that only the Planning Board has the authority to approve forest conservation variances. Therefore, the Planning Board is only asked to rule on the variance and not the forest conservation plan. Once the variance is approved by the Planning Board the Planning Director, or designee, can act on the forest conservation plan.

VARIANCE REQUIREMENTS

Section 1607(c) of the Natural Resources Article, MD Ann. Code affects the Montgomery County Forest Conservation law by identifying the following trees, shrubs, plants, and specific areas as priority for retention and protection and shall be left in an undisturbed condition unless the applicant qualifies for a variance in accordance. More specifically the vegetation to remain undisturbed includes:

- A. *Trees, shrubs, or plants determined to be rare, threatened, or endangered under:*
 - (1) *The federal Endangered Species Act of 1973,*
 - (2) *The Maryland Nongame and Endangered Species Conservation Act, Natural Resources Article, §§10-2A-01—10-2A-09, Annotated Code of Maryland, and*
 - (3) *COMAR 08.03.08;*

- B. *Trees that:*
 - (1) *Are part of an historic site,*
 - (2) *Are associated with an historic structure, or*
 - (3) *Have been designated by the State or the Department as a national, State, or county champion tree; and*

- C. *Any tree having a diameter measured at 4.5 feet above the ground of:*
 - (1) *30 inches or more, or*
 - (2) *75 percent or more of the diameter, measured at 4.5 feet above the ground, of the current State champion tree of that species as designated by the Department of Natural Resources.*

Under Chapter 22A-21 of the County Code a person may request in writing a variance from

this Chapter if the person demonstrates that enforcement would result in unwarranted hardship to the person. The applicant for a variance must:

- (1) Describe the special conditions peculiar to the property which would cause the unwarranted hardship;
- (2) Describe how enforcement of these rules will deprive the landowner of rights commonly enjoyed by others in similar areas;
- (3) Verify that State water quality standards will not be avoided or that a measurable degradation in water quality will not occur as a result of the granting of the variance; and
- (4) Provide any other information appropriate to support the request.

In Montgomery County before considering the variance the Planning Board must refer a copy of each request to the County Arborist within the Montgomery County Department of Environmental Protection for a written recommendation. The County Arborist must make a recommendation on the variance request to the Planning Board within 30 days from the receipt of the request. If there is no recommendation from the County Arborist the response is presumed to be favorable.

VARIANCE REQUEST

On August 11, 2010 the applicant requested a variance for the removal of two trees and the impact to two additional trees 30-inches and greater (Attachment A). The two trees proposed for removal are # 4, and 16. Tree 16 is within existing forest.

Specimen Trees to be Removed

Tree No.	Common Name	Botanical Name	D.B.H.	C.R.Z. Radius	Condition	Location
4	Silver Maple	<i>Acer saccharinum</i>	30.0/18 In.	45.0 feet	Good (twin stem)	Driveway
16	Tulip Poplar	<i>Liriodendron tulipifera</i>	39.0 In.	58.5feet	Good	Embankment (Ex. Forest)

Specimen Trees to be Impacted

Tree No.	Common Name	Botanical Name	D.B.H.	C.R.Z. Impacted	Condition	Location
5	Silver Maple	<i>Acer saccharinum</i>	34.6 In.	41%	Good	Driveway
6	Silver Maple	<i>Acer saccharinum</i>	34.5 In.	25%	Good	Embankment (Ex. Forest)

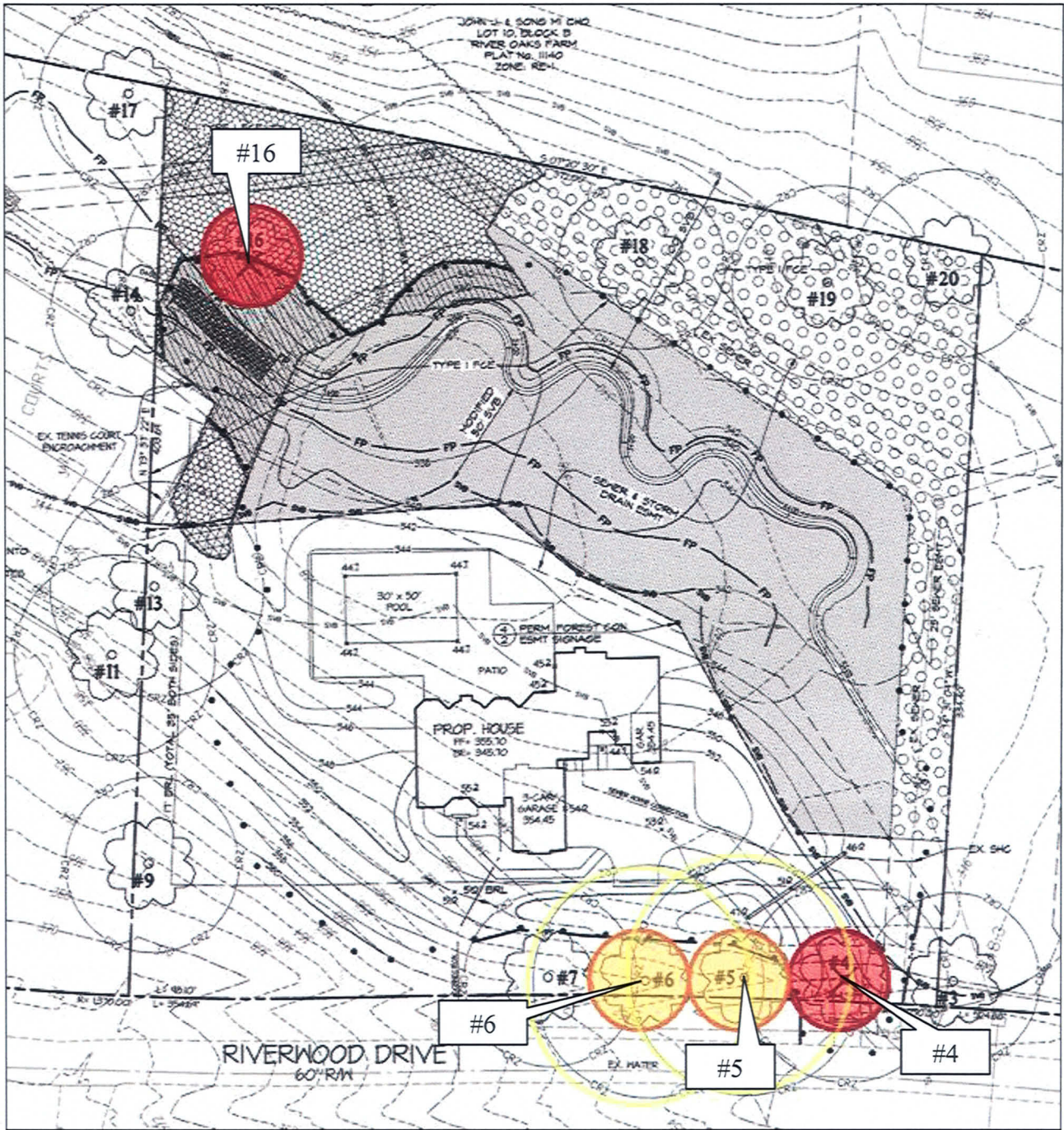


Figure 3: Trees Requiring Variance

The applicant's August 10, 2010 letter requesting approval of the variance states:

In accordance with Section 22A-21(b) of the Forest Conservation Law, the following is a description of the application requirements:

1. Describe the special conditions peculiar to the property which would cause the unwarranted hardship.

Not granting the variance would cause undue hardship on the applicants because without

breeching the dam, and reconfiguration of the pond area back into a natural stream channel, there would be very limited buildable area on the property, and without addressing the existing pond conditions, sediment control and stormwater management permits will not be issued for new development on the property, and therefore deny the applicants ability to use the property. At the time of the original preliminary plan and record plat approval by the Planning Board, there was some expectation by the Planning Board that this lot was buildable. Granting of the variance will ultimately fulfill that expectation. Having a virtually unbuildable recorded lot is an unwarranted hardship to the applicants and by enforcement of this chapter will deprive the landowner the rights to build a residence and enjoy the use of his property.

2. *Describe how enforcement of these rules will deprive the landowner of rights commonly enjoyed by others in similar areas.*

The variance to remove the tulip poplar, silver maple, and impact other silver maples will not confer on the applicant a special privilege that would be denied other applicants. Many other farm ponds are required to be removed in many other locations in Montgomery County, and other landowners have the opportunity to build a residence on a safe and usable lot.

3. *Verify that State water quality standards will not be avoided or that a measurable degradation in water quality will not occur as a result of the granting of the variance.*

The variance will not violate state water quality standards or cause measurable degradation in water quality. All proposed land development activities including the dam breach and stream channel restoration will require sediment control and or storm water management plan approvals by Montgomery County, and will not violate any state water quality standards.

4. *Provide any other information appropriate to support the request.*

Mitigation has been proposed by the applicant to compensate for the removal of two specimen trees, and impacts to two other specimen trees. To quantify the mitigation based on a definable element, the applicant has proposed mitigation based on Critical Root Zone (CRZ) area impact. The applicant proposes mitigation, in addition to the normal requirements, in the form of reforestation at the rate of 1.5 times the impacted critical root zone area. For Lot 32, the area of specimen tree critical root zone to be removed or impacted is 11,582 S.F. and the mitigation will be $11,582 \times 1.5 = 17,372$ S.F. This rate of mitigation/reforestation will more than adequately compensate for the loss of specimen trees or impacts to specimen tree, and provide greater tree canopy and forest cover to increase water quality in Montgomery County by planting an additional 80 trees. In addition to the proposed mitigation, areas on the eastern portion of the site separated from the house site by the stream channel and sewer easement will also be placed in a conservation easement. The standard forest conservation threshold for an RE-2 zoned property is 25%. The total area of the lot proposed to be covered by existing forest, reforestation, and natural regeneration areas is ± 1.66 Ac or 53% of the lot.

VARIANCE FINDINGS

The Planning Board must make findings that the applicant has met all requirements of section 22A-21 of the County Code before granting the variance. Staff has made the following determination on the required findings:

1. *Will confer on the applicant a special privilege that would be denied to other applicants;*

Granting the variance will not confer a special privilege as the removal and/or disturbance of the specimen trees noted above are the minimum necessary in order to develop the property as illustrated on the plan provided. Furthermore, the loss of certain trees and the need for a variance is often necessary and unavoidable in order to develop property for the use and enjoyment of its owner. The development of this lot is consistent with the development of the surrounding areas. The specimen tree removals for this lot are for access and dam stabilization these are reasonable impacts and would be a privilege extended to any applicant in a similar situation.

2. *Is 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 of the applicant. The variance is based upon the RE-2 zoning, proposed site development, required stormwater management best management practices, and the need for a useable and enjoyable yard/lawn area. Additionally, the house was sited near the front Building Restriction Line, used front loaded driveways, and tried to minimize impacts to the stream valley buffer.

3. *Is 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 proposed development and not a result of land or building use on a neighboring property.

4. *Will violate State water quality standards or cause measurable degradation in water quality.*

The requested variance will not violate State water quality standards or cause measurable degradation in water quality. A Stormwater Management Plan will be approved by Montgomery County.

On September 28, 2010 the County Arborist provided a written statement indicating that she was electing not to review the variance request for the project (Attachment B).

MITIGATION

Tree 16 is being removed from within existing forest will be compensated for as part of the forest conservation plan in accordance with Chapter 22A of the County code. Staff is not requesting any mitigation for the removal specimen tree 16.

Specimen tree 4, 5, and 6 are adjacent to a public road and at the driveway access point. Environmental Planning believes the impacts to specimen trees 4, 5, and 6 while not unavoidable are reasonable due to access point to the site and the existing topography. If the applicant were to try and avoid impact/removal of trees 4, 5, and 6 it would create excessive grading for the driveway and push the proposed house further back on the site increasing permanent impacts to the stream valley buffer. Staff believes mitigation for the removal of tree 4 and the impacts to trees 5 and 6 is more beneficial than permanent SVB impacts.

The applicant has proffered mitigation in the form of 1.5 times the CRZ areas impacted for trees 4, 5, 6, and 16. The total area of CRZ impact of specimen trees is 11,582 square feet (0.27 acres) and the applicant has proposed 17,372 square feet (0.40 acres) of on-site planting as mitigation.

In this particular case staff believes the mitigation as proffered by the applicant mitigates for the impact to the specimen trees.

CONCLUSION

Staff recommends the Planning Board approve the forest conservation variance request with the proposed mitigation.

GLWGUTSCHICK, LITTLE & WEBER, P.A.

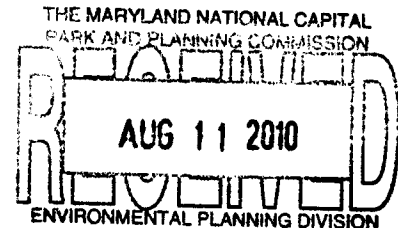
CIVIL ENGINEERS, LAND SURVEYORS, LAND PLANNERS, LANDSCAPE ARCHITECTS

Attachment A:

August 10, 2010

Mr. Mark Pfefferle
Forest Conservation Program Manager
Environmental Planning Section
Maryland National Park & Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Potomac View, Lot 32
Variance Request



Dear Mr. Pfefferle:

On behalf of my clients Dr. Justin Greene (contract purchaser) and Mr. Ken O'Brian (property owner) we are requesting a variance of Section 5-1607.(c).(2).(III) Natural Resources of the Maryland State Code.

5-1607.(c)

(2) *The following trees, shrubs, plants and specific areas shall be considered priority for retention and protection, and they shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the state or local authority, that reasonable effects have been made to protect them and the plan cannot be reasonably altered. The applicant qualifies for a variance under Section 5-1611 of this subsection.*

(III) *Trees having a diameter measured 4.5 feet above the ground of*

- (1) *30 inches, or*
- (2) *75 % of the diameter measured 4.5' above the ground, of the current state champion tree of that species as designated by the Department.*

Section 5-1611 of the Maryland State Code grants the authority to Montgomery County (local authority) for approval of the variances, and Section 22A-21 Variance, of the Montgomery County Code establishes the criteria to grant a variance.

The applicants are requesting a variance to remove a 39" diameter tulip poplar, a 30 " diameter Silver Maplw, and impact the critical root zones of a 34.6" and 34.5"diameter Silver maples. The subject property, Potomac View Estates, Lot 32 is located on Riverwood Drive in Potomac Maryland. The 3.08 acre lot is vacant and contains mostly open grass fields, the remains of an old farm pond, and a small forested area. The proposed development on the property will be one (1) single-family detached dwelling.

The first major issue related to the variance request is the existing farm pond. Any new development proposal in Montgomery County that contains an existing pond built prior to modern dam safety requirements will be required by the Department of Environmental Protection to either rebuild the pond embankment to modern standards, or the preferred alternative, breach the embankment and recreate a natural stream channel ecosystem. The breech option is usually chosen because existing in-

stream ponds create elevated water temperature in the down stream environment, and this has a negative affect on the stream ecosystem.

In this case the 39" tulip poplar proposed to be removed is located on the dam down slope near the center of the pond. Either option of breaching the dam or re-building the dam will require removal of the 39" poplar. The alternative of doing nothing and leaving the existing dam in place allows the continuing safety issue of an undocumented dam, and future maintenance problem for the public in general and specifically the landowners down stream if there were ever a catastrophic dam failure. Breaching the dam and recreating a natural stream condition is in the public interest and is a benefit to the environment.

Not granting the variance would cause undue hardship on the applicants because without breaching the dam, and reconfiguration of the pond area back into a natural stream channel, there would be very limited buildable area on the property, and without addressing the existing pond conditions, sediment control and stormwater management permits will not be issued for new development on the property, and therefore deny the applicants ability to use the property. At the time of the original preliminary plan and record plat approval by the Planning Board, there was some expectation by the Planning Board that this lot was buildable. Granting of the variance will ultimately fulfill that expectation. Having a virtually unbuildable recorded lot is an unwarranted hardship to the applicants and by enforcement of this chapter will deprive the landowner the rights to build a residence and enjoy the use of his property.

The proposed dam breach and tree removal will not be detrimental to water quality, and in fact the recreation of a natural stream system will be a benefit to the water quality in Montgomery County.

The other remaining tree to be removed, a silver maples, and two other Silver Maples to be impacted are located along the frontage of Lot 32, near the right-of-way of Riverwood Drive in the southwestern portion of the site. The trees were planted on an artificially large berm used to create the roadside channel along Riverwood Drive at the time of the original road construction. The trees are also located in the 10' area parallel to a public right of way usually reserved for public utilities. Given the existing steep site topography in the northwest corner of the site, the southwestern corner of the site (silver maple location) is the only location practical to create an access point for a single-family residence on Lot 32. The existing silver maple's location on the site, on an artificially high berm, and in the area usually reserved for utilities, creates an undue hardship on the property owner if they were to remain by eliminating practical access to the lot, and compromise the ability to grading the site for a single family residence. A minimum driveway width of 12' has been proposed, and the grading has been limited to only remove one Silver Maple.

The existing silver maples, while a native species, are usually not considered a valuable landscape tree and are not usually recommended near houses due to their weak wooded characteristics that occur with age. These trees are not grand examples of the species, and it is ironic that we're asking for a variance to remove trees that would not normally be planted in a yard near a house, or as a street tree.

The variance to remove the tulip poplar, silver maple, and impact other silver maples will not confer on the applicant a special privilege that would be denied other applicants. Many other farm ponds are required to be removed in many other locations in Montgomery County, and other landowners have the opportunity to build a residence on a safe and usable lot.

The variance requested is not based on conditions or circumstances which result from the actions of the applicant. The applicant didn't build the farm pond, create the road channel grading, or plant the silver maples. All of this has existed for many years prior to the applicant buying the property.

The variation is not based on a condition relating to land or building use, either permitted or nonconforming on a neighboring property. All of the conditions discussed above exist on Lot 32.

The variance will not violate state water quality standards or cause measurable degradation in water quality. All proposed land development activities including the dam breach and stream channel restoration will require sediment control and or storm water management plan approvals by Montgomery County, and will not violate any state water quality standards.

Mitigation has been proposed by the applicant to compensate for the removal of two specimen trees, and impacts to two other specimen trees. To quantify the mitigation based on a definable element, the applicant has proposed mitigation based on Critical Root Zone (CRZ) area impact. The applicant proposes mitigation, or in this case reforestation at the rate of 1.5 X the impacted critical root zone area. For Lot 32, the area of specimen tree critical root zone to be removed or impacted is 11,582 S.F. and the mitigation will be $11,582 \times 1.5 = 17,372$ S.F. This rate of mitigation/reforestation will more than adequately compensate for the loss of specimen trees or impacts to specimen tree, and provide greater tree canopy and forest cover to increase water quality in Montgomery County by planting an additional 80 trees. In addition to the proposed mitigation, areas on the eastern portion of the site separated from the house site by the stream channel and sewer easement will also be placed in a conservation easement. The standard forest conservation threshold for an RE-2 zoned property is 25%. The total area of the lot proposed to be covered by existing forest, reforestation, and natural regeneration areas is ± 1.66 Ac or 53% of the lot.

If you have any further questions or concerns, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin A. Foster". The signature is stylized with a large, looped "K" and "F".

Kevin A. Foster, ASLA, AICP
Principal

KAF/admin

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Attachment B:

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Isiah Leggett
County Executive

Robert G. Hoyt
Director

September 28, 2010

Françoise Carrier, Chair
Montgomery County Planning Board
Maryland National Capital Park & Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

RE: Potomac View Estates Lot 32, SC2010015, NRI/FSD applied for on 6/9/2008

Dear Ms. Carrier:

Based on a review by the Maryland National Capital Park & Planning Commission (MNCPPC), the application for the above referenced request is required to comply with Chapter 22A of the Montgomery County Code. As stated in a letter to Royce Hanson from Bob Hoyt, dated October 27, 2009, the County Attorney's Office has advised me that the specific provisions pertaining to significant trees in the State's Forest Conservation Act do not apply to any application required by Chapter 22A submitted before October 1, 2009. Since this application was submitted before this date, I will not provide a recommendation pertaining to the approval of this request for variance. However, I will provide a recommendation for mitigation that may be required should the Planning Board approve this variance request.

Tree #16, a yellow-poplar with a 39" diameter at breast height located on the Potomac View Estates Lot 32, is growing on the embankment of a pond and must be removed. Section 26.17.04.05(A)(3)(b)(vii) of the Code of Maryland Regulations requires that dams must be maintained free of brushy growth and the Maryland Department of the Environment Maryland *Dam Safety Manual*, 1996 Edition, states that trees and brush should not be permitted to grow on embankment surfaces. The removal of this particular tree arises from requirements of state law rather than development activity or other activity by the applicant. The tree would need to be removed even if no other disturbance occurred on the tract.

Based on a discussion on March 19, 2010, with representatives of the Maryland Department of Natural Resources Forest Service and the MNCPPC, the removal of trees to comply with Maryland dam safety laws is an example of when granting the variance is not based, in any way, on conditions or circumstances which could be interpreted as the result of actions of by applicants. The removal of tree #16 on the Potomac View Estates Lot 32 does fully

Françoise Carrier
September 28, 2010
Page 2

comply with the minimum criteria in Chapter 22A-21(d) and can be granted without mitigating the resources lost when this tree is removed. Therefore, the area of square feet of the critical root zone for this tree should be removed from the forest conservation worksheet and mitigation calculations. This does not apply to any other removals or disturbance to large trees on this tract.

If you have any questions, please do not hesitate to contact me directly.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura Miller". The signature is fluid and cursive, with a large initial "L" and "M".

Laura Miller
County Arborist

cc: Robert Hoyt, Director
Walter Wilson, Associate County Attorney
Mark Pfefferle, Acting Chief