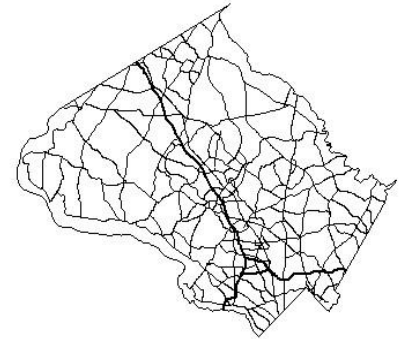




**MONTGOMERY COUNTY PLANNING DEPARTMENT**  
 THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

**MCPB**  
**Item # 8**  
**April 21, 2011**



**MEMORANDUM**

**DATE:** April 8, 2011

**TO:** Montgomery County Planning Board

**VIA:** John Carter, Chief  
Area 3

**FROM:** Joshua Penn, Senior Planner (301) 495-4546  
Area 3

**REVIEW TYPE:** Preliminary Plan of Subdivision

**APPLYING FOR:** One (1) lot for one (1), one-family detached dwelling unit

**PROJECT NAME:** Weaver Property  
**CASE #:** 120090160  
**REVIEW BASIS:** Chapter 50, Montgomery County Subdivision Regulations

**ZONE:** RE-2  
**LOCATION:** On the north side of Esworthy Road at the terminus of Cervanties Avenue

**MASTER PLAN:** Potomac

**APPLICANT:** Christopher Weaver  
**ENGINEER:** Benning & Associates

**FILING DATE:** December 23, 2008  
**HEARING DATE:** April 21, 2011

Approval signatures

<i>JP</i>	<i>JAC</i>			
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## RECOMMENDATION

Staff recommends Approval of the Preliminary Plan and the Forest Conservation Plan subject to the following conditions. Staff also recommends Denial of the Tree Variance.

- 1) Approval under this Preliminary Plan is limited to one (1) residential lot.
- 2) The proposed development must comply with the following conditions of the Preliminary Forest Conservation Plan. The applicant must satisfy all conditions prior to recording of plat(s) or Montgomery County Department of Permitting Services (MCDPS) issuance of sediment and erosion control permits, as appropriate.
  - a) Revise the preliminary Forest Conservation Plan to:

Show all remnant forest areas as cleared on the forest conservation worksheet and provide mitigation for forest loss using off-site options, including offsite planting and forest mitigation banks, but excluding fee-in-lieu. On-site afforestation is also allowed.

Or

Show all remnant forest areas as saved on the forest conservation worksheet and plant all of these areas up to the minimum standard of 50 feet wide and 10,000 square feet.
  - b) The Tree Variance is not necessary with the approval of the above conditions for the Preliminary Forest Conservation Plan.
- 3) The applicant must comply with the Montgomery County Department of Permitting Services stormwater management approval dated February 17, 2009. Stormwater management will be addressed at the time of building permit.
- 4) Liber and folio references for the existing driveway ingress/egress easement for the proposed lot to be shown on the record plat.
- 5) The applicant must comply with the conditions of the MCDOT letter dated February 23, 2009. These conditions may be amended by MCDOT provided the amendments do not conflict with other conditions of the preliminary plan approval.
- 6) Other necessary easements must be shown on the record plat.

## DISCUSSION

### Previous Actions

The Planning Board reviewed the Preliminary Forest Conservation Plan at a prior hearing on November 5, 2009. At that time, a revision to the Preliminary Forest Conservation Plan was required so that the plan would comply with the Forest Conservation Law. The Preliminary Forest Conservation Plan sought to protect a narrow strip of trees on the southwestern border of the Property suggesting that these edge trees were *part* of a forest on the adjacent property (Potter property). Staff did not accept this request because there was no assurance that the abutting forest on the Potter property would be saved in perpetuity.

The Applicant argued that the edge trees were not to be disturbed by any future clearing or grading on the Weaver Property and that if the edge trees were allowed to be counted as “saved,” they could be applied toward the forest thresholds on the Property, and it would have eliminated any need to afforest either on or off-site. As prescribed by the Forest Conservation Law, the edge trees cannot be shown as “saved forest” because they do not constitute forest due to the width and mass of the strip. The result of the Staff position is that 0.64 acres of forest will need to be mitigated at the Applicant’s cost.

At the Hearing, Legal Counsel and the Planning Board agreed that Staff had applied the Forest Conservation Law correctly. The Planning Board was troubled by the inflexibility of the Law, and suggested that the Applicant file a Tree Variance that would allow the trees to be shown as saved. The Applicant requested a deferral and has since filed such a Tree Variance request.

For reasons more fully stated in the Environmental Section of this report, the requested Tree Variance *will not confer on the applicant a special privilege that would be denied to other applicants*. The Staff finding is that the proposed Preliminary Forest Conservation Plan does not meet the minimum standards of Chapter 22A. Staff does not find that this situation is unique to this Property, and that it would apply to other properties that have similar circumstances. Staff recommends that the Planning Board deny the Tree Variance, but continue to recommend conditional approval of the plan. The Applicant should accept one of two actions with the Preliminary Forest Conservation Plan Condition NO. 1 as follows:

- 1) Show the strip of trees as cleared and provide off-site mitigation
- 2) Show the strip of trees as saved and add forest next to them on the Weaver Property so that it will meet the definition of forest.

The validity period of the Preliminary Plan approval will be 60 months from the Initiation Date in which time the Applicant may withhold platting of the property and await purchase of the Potter Property as a conservation park. At this time, a staff level amendment to the Preliminary Forest Conservation Plan could be approved, and the plat would be recorded showing Category I easements on the strip of trees.

### **Site Description**

The property is a 7.56 acre parcel, zoned RE-2, and created by a deed recorded in the 1960’s. The parcel is located on the north side of Esworthy Road near the terminus of Cervantes Avenue. There is an existing one family house on the Property that was constructed in 1946. The parcel has no frontage on a public road but has access to Esworthy Road via a deeded ingress and egress easement across a neighboring parcel. Montgomery County (Parks) owns the property to the east of the property. The properties to the north, south and west are in private ownership, and they are also zoned RE-2.

The property is currently served by a well and septic system. A new septic reserve area has been approved by the Montgomery County Department of Permitting Services. The parcel has no sensitive environmental features other than forest. Since no clearing or grading is proposed on

the Property at this time, none of the 1.90 acres of forest will be physically removed. The site is located within the Muddy Branch watershed (Use Class I/I-P).

### Project Description (Figure A)

The Applicant proposes to plat the existing parcel in its current configuration. The house on the property will remain, but by platting the parcel a building permit can be issued for repair, addition or replacement of the house. The parcel has no frontage on a public street, and a finding of safe and adequate access for a lot with no frontage has been requested by the Applicant, and it is supported by staff.

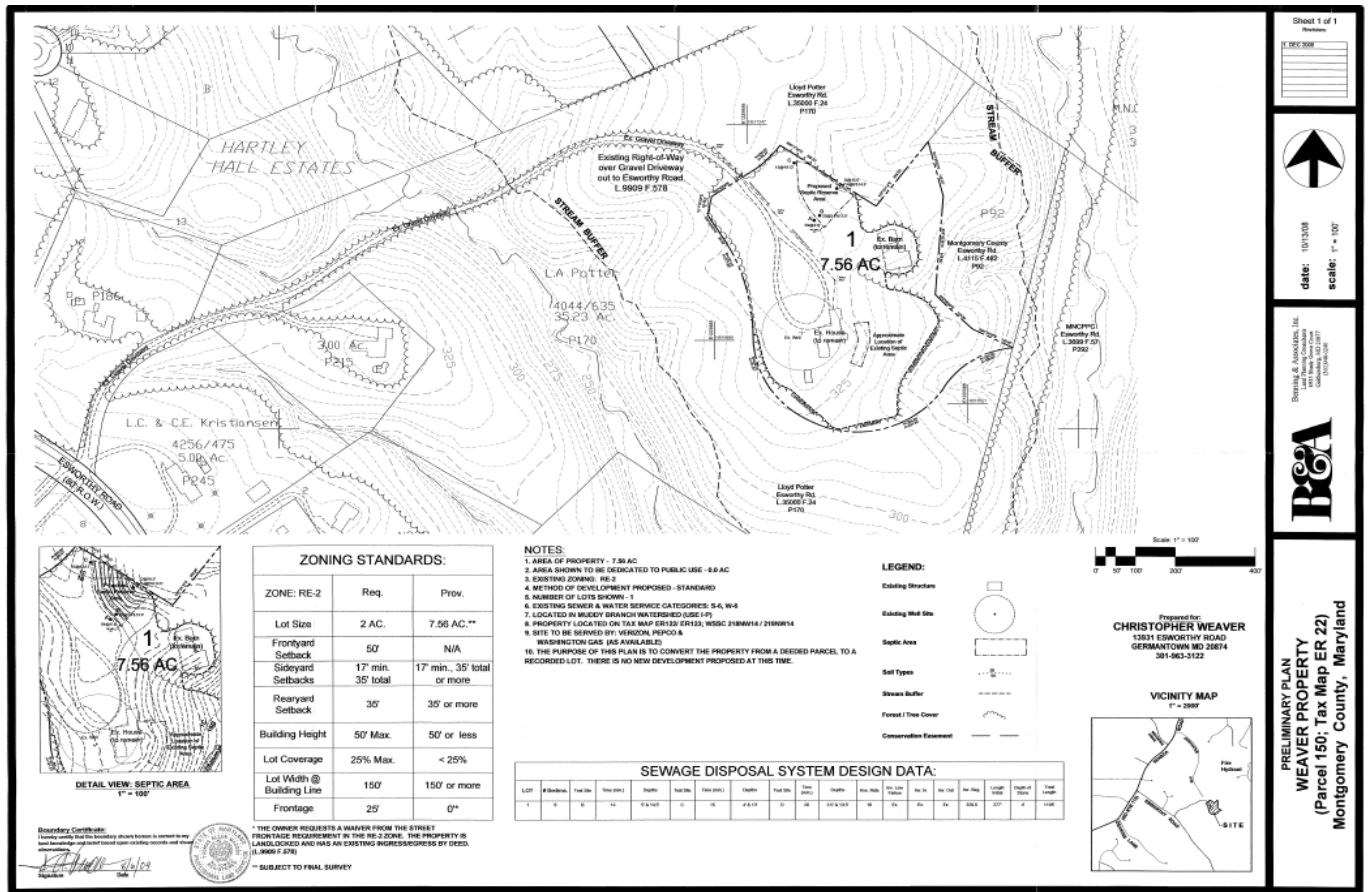


Figure A: Property

## **ANALYSIS AND FINDINGS**

### **Master Plan Conformance**

The proposed application is in conformance with the recommendations in the Potomac Master Plan. The proposed application is a permitted use in the RE-2 Zone as proposed the Master Plan. This Preliminary Plan of Subdivision will not result in any significant changes to the neighborhood since the house will remain. If approved, the resulting plat will allow for a building permit to be issued on the property to either improve or replace the one family residential structure.

### **Public Facilities**

**Roads and Transportation Facilities** - The proposed lot does not generate 30 or more vehicle trips during the morning or evening peak-hours, and the application is not subject to Local Area Transportation Review. In addition, staff determined that the application is not subject to Policy Area Mobility Review because it is in the Rural Policy Area. For this single lot, the proposed vehicular and pedestrian access for the subdivision will be safe and adequate.

**Other Public Facilities and Services** - Other public facilities and services are available and will be adequate to serve the dwelling unit. The application meets the Montgomery County Fire and Rescue Service requirements for fire and rescue vehicle access. The existing dwelling unit is not subject to a schools test, however, area schools are operating at adequate levels. Other public facilities and services, such as police stations, firehouses and health services, are operating within the standards set by the Growth Policy Resolution currently in effect. Electrical and telecommunications services are also available to serve the lots.

### **Environmental Guidelines**

The proposed subdivision is in compliance with the Environmental Guidelines. Staff approved a Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) (#420082310) on July 22, 2008. There are no streams, environmental buffers, steep slopes or highly erodible soils on the Property. The site is mostly open yard with 1.9-acre forest mostly on the east side of the site. The property is within the Muddy Branch watershed; a Use I-P watershed. The Countywide Stream Protection Strategy (CSPS) rates this watershed as good.

### **Forest Conservation**

Staff's finding is that the currently proposed Preliminary Forest Conservation Plan does not meet the minimum standards of Chapter 22A, and that compliance with the conditions recommended above is necessary. Staff finds that compliance with the conditions of approval for the Preliminary FCP will bring this plan into conformance with Chapter 22A.

The Preliminary Forest Conservation Plan contains three areas of forest remnants which do not meet the minimum size or composition standards, as defined in Chapter 22A of the Montgomery County Forest Conservation Law. Section 22A-3 defines forest as: a biological community

dominated by trees and other woody plants (including plant communities, the understory, and forest floor) covering a land area which is 10,000 square feet or greater and is at least 50 feet wide. The on-site remnants are contiguous to on-site forest or off-site forest on the adjacent Potter property, but they are too narrow as stand-alone forest to be saved and credited. The Applicant has requested that the Planning Board approve a Tree Variance.

The most notable of the three remnants is the strip of forest edge along the southern boundary of the Property where it is contiguous to the Potter property. The forest shown on the Property is an extension of the forest on the Potter property. The strip cannot qualify as forest save unless it is protected with the larger forest on the Potter property. Since the Potter property is under private ownership and has not been subdivided, the forest is not protected. Although the Potter property is within the Park desire line for the Muddy Branch Stream Valley Park, the *potential* for public acquisition is not a guarantee of permanent protection of the forest resource. A potential exists for this forest to be cleared as part of a subdivision of the Potter property. Staff does not recommend placing a permanent Category I easement on the forested strip on the Weaver Property because it is not part of a larger, protected off-site forest. If the adjacent forest on the Potter property were removed, the remnant on the Weaver Property would not meet the requirements of the Forest Conservation Law.

The other two remnant areas are located adjacent to the existing barn on the Property. To the immediate south of the barn, the forest becomes too narrow to be included in the saved area. To the north of the barn, a finger of forest becomes less than 50 feet wide. Without protected forest on the adjacent Potter property, it also cannot be counted as saved.

**Forest Conservation Variance** - 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
- (4) Provide any other information appropriate to support the request

The applicant has requested a variance from the definition of forest in section 22A-3 of the Montgomery County Forest Conservation Law and section 22A.00.01.08 D (1) of the forest conservation regulations. Staff believes that the minimum standards within the law and the regulations are the absolute minimum size and shape requirements necessary to maintain forest. When a forest stand is less than 50 feet wide, the edge effects upon that stand can be severely detrimental including an increase in invasive species. Because the off-site area is not protected, and the adjoining property has development potential, serious concerns remain over the edge forest stand on the Weaver Property. The potential exists for a Category I conservation easement with a width (between 10' and 40') of edge forest along the western edge of the Weaver Property. Category I conservation easements are used as long term protective measures to

ensure that forest can continue being forest, and since these are permanent easements we need to look at the long term viability of each easement we accept.

The Planning Board must make findings that the applicant has met all the requirements of Chapter 22A-21 before granting a Tree Variance. The Staff recommends denial of the Tree Variance.

**Variance Findings** - Staff has made the following determination based on the required findings:

1. *Will not confer on the applicant a special privilege that would be denied to other applicants.*  
Staff cannot make a finding that this Variance would not convey special privilege to this applicant and recommends the Planning Board deny the variance request. Granting this Variance will convey to the applicant a special privilege that has not been extended to others in a similar situation. Staff is applying the forest conservation law and forest conservation regulations in this case the same that it has done for every other applicant. Granting a Variance to allow the project to place forest into easement that does not meet the minimum standards as defined in the law and regulations would be a special privilege.
2. *Is not based on conditions or circumstances which are the result of the actions by the applicant.*  
The request for a Variance is not the direct result of actions by the applicant. The applicant needs to secure the ability to get building permits for the property; since the Property is an un-platted parcel a Preliminary Plan of Subdivision is required. The subdivision generated the need for a Forest Conservation Plan and the subsequent variance request.
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 proposed subdivision, and it is not 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.*  
The requested variance will not violate State water quality standards or cause measurable degradation in water quality. A Stormwater Management Concept Plan has been approved by the Montgomery County Department of Permitting Services.

**County Arborist's Recommendation on the Variance** - In accordance with Montgomery County Code Section 22A-21(c), the Planning Department is required to refer a copy of the variance request to the County Arborist in the Montgomery County Department of Environmental Protection for a recommendation prior to acting on the request. The request was forwarded to the County Arborist on September 23, 2010. On October 21, 2010 the County

Arborist issued her recommendations on the variance request and recommended the variance be approved with no mitigation.

**Variance Recommendation** - Staff recommends that the variance not be granted since finding #1 “Will not confer on the applicant a special privilege that would be denied to other applicants” could not be made. However, condition #2 above would allow for the Preliminary Plan of Subdivision to approved, since if the plan complies with the condition no variance is required.

### **Stormwater Management**

A stormwater management concept is not required by MCDPS at this time because no development is proposed on the property. Staff finds that the application complies with Chapter 50, Section 50-24(j) which requires that stormwater management be addressed prior to consideration by the Planning Board.

### **Lots Without Frontage**

Section 50-29(a)(2) of the Subdivision Regulations requires that ...”every lot shall abut on a street or road which has been dedicated to public use or which has acquired the status of a public road. In exceptional circumstances, the Planning Board may approve not more than two (2) lots on a private driveway or private right-of-way; provided that proper showing is made that such access is adequate to serve the lots for emergency vehicles, and for installation of public utilities, is accessible for other public services, and is not detrimental to future subdivision of adjacent lands.”

Because the existing circumstance has existed without conflict since the 1960’s, the Property can continue to be safely and adequately served by the existing driveway, and the ingress and egress easement that exists on the driveway provides assurances for the continuation of that access. Fire and Rescue Services has found that emergency equipment can adequately access the property and access by other public services is not hindered by the private driveway. Utilities are already in place and are not required to be altered by this application. The Planning Board approval of this lot without frontage would not hinder future development of adjacent lands. Staff recommends the approval of a lot without frontage.

### **Compliance with the Subdivision Regulations and Zoning Ordinance**

This application meets the development standards in the Montgomery County Code, Chapter 50, the Subdivision Regulations. The application meets all applicable sections, including the requirements for resubdivision as discussed below. The proposed size, width, shape and orientation of the lot is appropriate. The lot was also reviewed for compliance with the dimensional requirements for the RE-2 zone as specified in the Zoning Ordinance. The proposed lot will meet all the dimensional requirements for area, frontage, width, and setbacks in that zone. A summary of this review is included in attached Table 1. All of the applicable county agencies have recommended approval of the plan.



## **CITIZEN CORRESPONDENCE AND ISSUES**

After proper notification of the proposed plan submission to adjacent and confronting property owners and civic associations, a pre-submission meeting was held on August 5, 2008. Issues raised by attendees included questions about the need for improvements to the private driveway and fire access, and concerns about the Forest Conservation Plan and the accuracy of the tree survey.

Improvements to the existing driveway are not required. Fire and Rescue Services has recommended approval of the Preliminary Plan with the existing driveway configuration. With respect to tree locations, the NRI/FSD was prepared by a qualified arborist who has attested to its accuracy. Staff has approved the NRI/FSD.

## **CONCLUSION**

The proposed lot meets all requirements established in the Subdivision Regulations and the Zoning Ordinance and it is in conformance with the recommendations of the Potomac Master Plan. Access and public facilities will be adequate to serve the proposed lots, and the application has been reviewed by applicable county agencies, all of whom have recommended approval of the plan. Approval of the application for the Preliminary Plan and the Preliminary Forest Conservation Plan with the conditions specified above is recommended. The Tree Variance is recommended for Denial.

Table 1: Preliminary Plan Data Table and Checklist

<b>Plan Name: Weaver Property</b>				
<b>Plan Number: 120090160</b>				
<b>Zoning: RE-2</b>				
<b># of Lots: 1</b>				
<b># of Outlots: 0</b>				
<b>Dev. Type: Standard, Residential</b>				
<b>PLAN DATA</b>	<b>Zoning Ordinance Development Standard</b>	<b>Proposed for Approval by the Preliminary Plan</b>	<b>Verified</b>	<b>Date</b>
Minimum Lot Area	87,120 sq. ft (2.0 acres).	7.56 acres. proposed	JP	4/8/11
Lot Width	150 ft.	250 ft. is min. width of lot at any location	JP	4/8/11
Lot Frontage	25 ft.	0 ft. with finding by Board	JP	4/8/11
Setbacks				4/8/11
Front	50 ft. Min.	Must meet minimum <sup>1</sup>	JP	4/8/11
Side	17 ft. Min./35 ft. total	Must meet minimum <sup>1</sup>	JP	4/8/11
Rear	35 ft. Min.	Must meet minimum <sup>1</sup>	JP	4/8/11
Height	50 ft. Max.	May not exceed maximum <sup>1</sup>	JP	4/8/11
Max Resid'l d.u. or Comm'l s.f. per Zoning	3 dwelling units	1 (existing) dwelling units	JP	4/8/11
MPDUs	No		JP	4/8/11
TDRs	No		JP	4/8/11
Site Plan Req'd?	No		JP	4/8/11
<b>FINDINGS</b>				
<i>SUBDIVISION</i>				
Lot frontage on Public Street		No	JP	4/8/11
Road dedication and frontage improvements		N/a	JP	4/8/11
Environmental Guidelines		Yes	Staff memo	10/6/09
Forest Conservation		Yes	Staff memo	10/6/09
Master Plan Compliance		Yes	JP	4/8/11
Other (i.e., parks, historic preservation)				
<i>ADEQUATE PUBLIC FACILITIES</i>				
Stormwater Management		No	Agency letter	2/17/09
Water and Sewer (WSSC)		N/a	Agency comments	2/17/09
10-yr Water and Sewer Plan Compliance		Yes	Agency comments	2/17/09
Well and Septic		Yes	Agency Comments	8/5/09
Local Area Traffic Review		N/a	JP	4/8/11
Policy Area Mobility Review		N/a	JP	4/8/11
Transportation Management Agreement?		N/a	JP	4/8/11
School Cluster in Moratorium?		No	JP	4/8/11
School Facilities Payment?		No	JP	4/8/11
Fire and Rescue		Yes	Agency letter	5/11/09
Other (i.e., schools)				

<sup>1</sup> As determined by MCDPS at the time of building permit.