

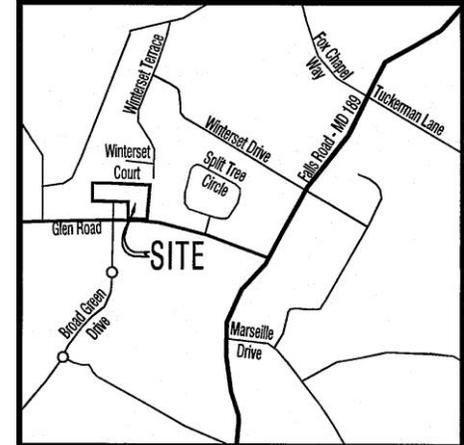


MONTGOMERY COUNTY PLANNING DEPARTMENT
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Item #
MCPB 6-23-11

MEMORANDUM

DATE: June 9, 2011
TO: Montgomery County Planning Board
VIA: John Carter, Chief, Area 3 Planning Team
JAC
FROM: Josh Penn, Senior Planner, Area 3 Planning Team
JP
REVIEW TYPE: Limited Amendment to a Preliminary Plan in response to a violation, including associated Final Forest Conservation Plan (FCP)
APPLYING FOR: A revision to the forest conservation easements and planting requirements
PLAN NAME: Winterset
PLAN NUMBER: 11996019B
PLAN TYPE: Preliminary Plan and Final Forest Conservation Plan
REVIEW BASIS: Chapter 50, Subdivision Regulations and Forest Conservation Regulations, Section 113.A.(2), Regulation No. 1-01AM (COMCOR) 18-01AM
ZONE: R-200
LOCATION: Located on Winterset Terrace and Broad Green Court, west of the intersection of Falls Road / Md-189 and Glen Road in Potomac.
APPLICANTS: T. Chorvinsky; A. and S. Heller; N.T. and M. Umamaheswaran; F. Hoyos and C. Garcia; D. and B. Marcus
HEARING DATE: June 23, 2011



STAFF RECOMMENDATION: Approval of the Limited Amendment to the Preliminary Plan and associated Final Forest Conservation Plan, subject to the following conditions:

1. Applicant must record a new record plat within nine (9) months of the mailing of the Planning Board Resolution approving the limited amendment to the Preliminary Plan. The record plat must reference the standard Category II (liber 13178 folio 421) conservation easement as recorded in the Land Records for Montgomery County, Maryland.
2. All plantings as shown on the 3/31/11 revised forest conservation plan must occur within one (1) year of the mailing date of the Planning Board Resolution approving the limited amendment to the Preliminary Plan.
3. All other conditions of Preliminary Plan and Forest Conservation Plan No. 119960190 that were not modified herein and as contained in the Planning Board's Resolution dated February 26, 1996, remain in full force and effect.

BACKGROUND

The Montgomery County Planning Board approved Preliminary Plan #119960190 “Winterset”, on February 22, 1996. That approval was for the creation of 10 lots on 6.73-acres of land in the R-200 zone and platted as the Winterset Subdivision. The forest conservation law of Montgomery County (Chapter 22A of the County Code) applied to this plan, and a forest conservation plan (FCP) was required. The Category I conservation easement was created as part of the FCP.

On April 2, 2009, the Planning Board considered another amendment within the Winterset Subdivision, Preliminary Plan No. 11996019A. This application was submitted by the owner of Lot 46, Winterset, who had received a civil citation and was in the process of trying to obtain a building permit within the area covered by the easement. The Planning Board at that time agreed to release the Category I easement conditioned on it being mitigated for 2:1 off-site and a Category II easement was placed on certain area of the lot with supplemental planting required to provide for future canopy coverage.

As a result of the citation issued to the owner of Lot 46, the remainder of the same subdivision was checked by the forest conservation inspector for compliance. It was discovered that five additional lots and an HOA parcel within the Winterset subdivision were in various states of non-compliance; the most common violation being the continued maintenance of lawn/grass in areas designated Category I. On April 21, 2009 the five lot owners and the HOA president were mailed letters notifying them of the encroachment, thereby, officially informing them of the infractions.

The homeowners and their consultant met on numerous occasions with MNCPPC staff and discussed the options available to them and ultimately decided to amend the entire plan at once rather than coming in individually at different times. These discussions led to the September 27, 2010 submission of the limited amendment, Preliminary Plan No. 11996019B. The HOA parcel was not included in the amendment because further discussions established that the parcel was in compliance with the Category I conservation easement.

SITE DESCRIPTION

The subject property is located on Winterset Terrace and Broad Green Court, west of the intersection of Falls Road / Md-189 and Glen Road in Potomac. The total area of the lots subject to this application is 2.71 acres and contains 0.74 acres of Category I conservation easement or 27% of the lot area. The lots gently slope downhill from the south to the north. There are no intermittent streams, wetlands, 100 year floodplain, or environmental buffers associated with these lots. The property is located within the Watts Branch watershed, which is a Use I designation. The Countywide Stream Protection Strategy (CSPS) rates this watershed as fair.

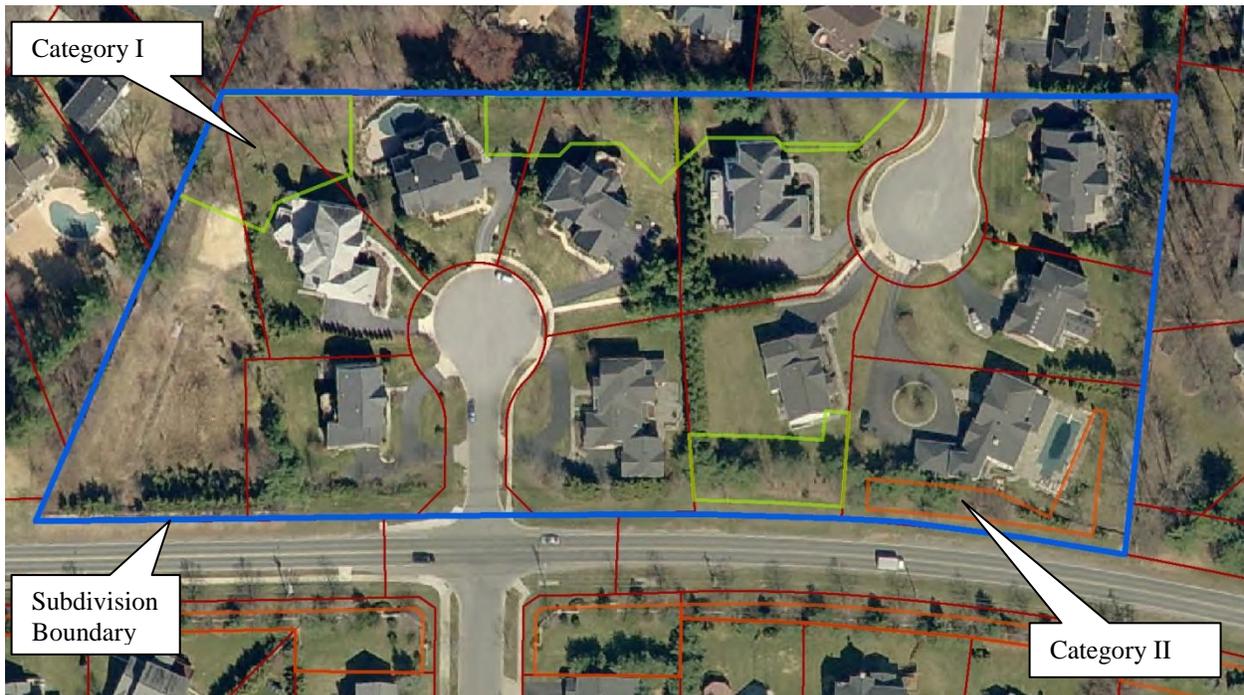


Figure 1: Winterset Neighborhood Aerial

PROPOSAL

On September 27, 2010, the applicants submitted an application to amend the Preliminary Plan of Subdivision and Forest Conservation Plan #119960190 by removing and adjusting the location of the Category I easement on Lots 23, 24, 25, 49, and 50. The applicants' mitigation plan provides 2:1 mitigation for the 0.74 acres of Category I conservation easement removed. The mitigation is in two parts:

- 1) Take 0.74 acres to an off-site mitigation bank and,
- 2) Landscaping/tree cover credit of 0.74 acres from creating an on-site Category II conservation easement where the Category I conservation easement previously was and providing supplemental planting within the easement.

Additionally, some small areas of conflict are proposed to be relocated to alternate areas within each lot adjacent to the existing easements, the total amount of easement onsite will remain at 0.74 acres.

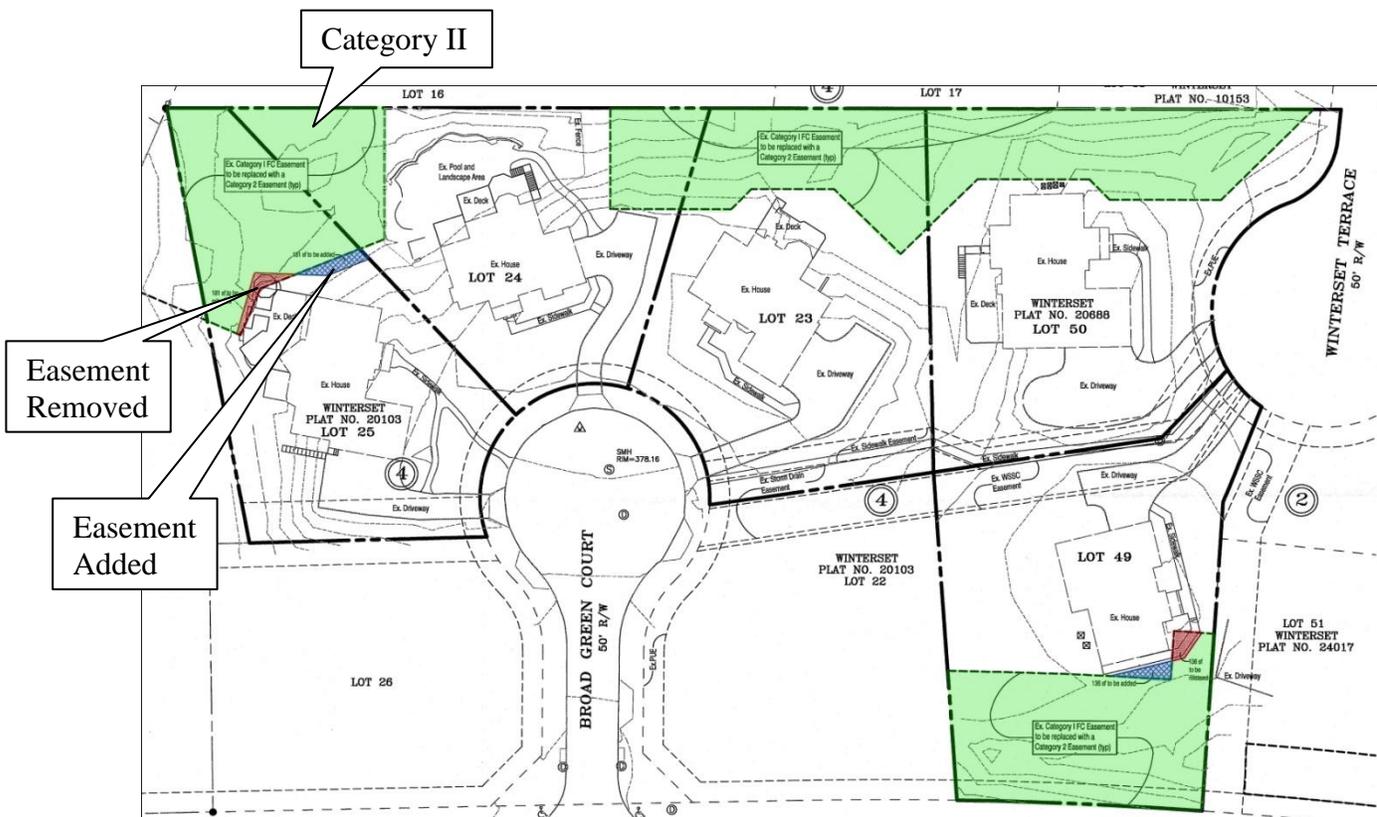


Figure 2: Rendered Plan View of Proposal

PLANNING BOARD REVIEW AUTHORITY

The Forest Conservation Regulations require Planning Board action on certain types of modifications to an approved FCP. Section 22A.00.01.13.A(1) of the Forest Conservation Regulation states:

Minor amendments which do not result in more than a total of 5000 square feet of additional forest clearing may be approved by the Planning Director on a case by case basis...

Although the total modification is below the 5000 square foot threshold, the Board has stated in other cases that the removal of, or change to, a recorded conservation easement warrants consideration in a public forum with a final decision from the Planning Board.

REVIEW

This limited amendment to the preliminary plan is in response to Staff's letter notifying the homeowners of the encroachment issues and will bring the site into compliance. The applicants have been working with staff since issuance of the April 21, 2009, letters, and have developed a supportable mitigation package that meets the statutory requirements of the forest conservation law and Planning Board policy.

The applicant proposes to meet the 2:1 mitigation requirement of 1.48 acres through a combination of landscaping/tree cover credit and off-site mitigation. To receive the landscaping/tree cover credit, the applicant proposes to replace all 0.74 acres of Category I conservation easements with Category II conservation easements. The applicant can receive credit for the entire 0.74 acres under the forest conservation law for tree cover in the Category II

conservation easement. Under Section 22A-12(d) of the forest conservation law, a "high-density residential" property may meet the afforestation requirements through tree cover. More specifically, "if the applicant demonstrates to the satisfaction of the Planning Board or Planning Director, as the case may be, that afforestation using forest cover is inappropriate for a site because of its location in an urban setting, redevelopment context, high-density residential, commercial, industrial, planned unit development, or institutional area (as defined in Section 22A-3), or similar reason, afforestation requirements may be satisfied by tree cover. In Section 22A-3 of the forest conservation law, "high-density residential" is defined as "an area zoned for densities greater than one dwelling unit per 40,000 square feet, including both existing and planned development and their associated infrastructure, such as roads, utilities, and water and sewer service". Since the property is zoned R-200, it is considered high density residential and the applicant can receive credit for afforestation through tree cover.

Section 22A.00.01.08(5) of the forest conservation regulations indicates that afforestation may be credited at 100% when tree cover is required. In this case, tree cover would be provided and protected through a Category II conservation easement. A Category II conservation easement would allow the homeowners the ability to maintain turf grass while protecting tree canopy coverage on-site. Staff believes a Category II easement is appropriate here and is acceptable as mitigation in the form of tree cover.

In addition to the 0.74 acres of Category II conservation easement, the applicants have proposed to purchase 0.74 acres of credit in an off-site forest conservation mitigation bank. The combination of the 0.74 acres of Category II conservation easement and the 0.74 acres of off-site mitigation equals a total mitigation of 1.48 acres or a 2:1 ratio of the Category I conservation easement being removed. Staff believes that the mitigation proposed fulfills the forest conservation law requirements and is consistent with Board policy.

NOTIFICATION and OUTREACH

The subject property was signed with notification of the upcoming preliminary plan amendment prior to the September 27, 2010, submission. All adjoining and confronting property owners, civic associations, and other registered interested parties will be notified of the upcoming public hearing on the proposed amendment. As of the date of this report, staff has received one letter in opposition. The June 3, 2011, letter from Dave Brown (Attachment A), on behalf of Ms. Faier an adjoining property owner, requested a postponement of the hearing until certain issues could be discussed. Some of Ms. Faier's concerns were lack of screening at the rear of Lot 50 and an off-site drainage issue.

The applicant via their consultant sent a letter to the Chair dated June 6, 2011, (Attachment B) requesting that the postponement not be granted and that they were willing to work with Ms. Faier to resolve the issues.

However, a postponement was granted until June 23, 2011, Staff spoke with the applicant's consultant and Mr. Brown and encouraged them to meet and discuss remedies prior to the new Planning Board date. As of the date of this report staff has not received and letters or emails as to the outcome of any discussions between the parties.

RECOMMENDATION

Staff recommends that the Planning Board accept the proposed mitigation and approve the limited preliminary plan amendment to revise the forest conservation plan with the conditions specified above.

LAW OFFICES OF

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DAVID W. BROWN

June 3, 2011

Via Email and Regular Mail

MCP-Chair@mncppc-mc.org

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

Re: **Limited Amendment to Preliminary Plan
and Final FCP, Plan No. 11996019B, Winterset**

Dear Chair Carrier:

This firm has very recently been retained by Margo Faier to request a postponement of the hearing on the above-referenced item until July 14, 2011. The matter is currently set for the morning of June 9, 2011, Agenda Item No. 5.

Ms. Faier and her husband, Jack Weil, own and live in the house at 6 Winterset Court. They are abutting property owners directly affected by the matters at issue before the Board. Ms. Faier supports the applicants' request to convert from Category I to Category II on the conservation easement that abuts her lot (lot 17, Block 4, Winterset).

Upon inspection of the staff report made available on line a few days ago, however, Ms. Faier discovered staff was unaware that the onsite afforestation areas as approved in 1996 had and were intended to serve dual purposes: compliance with needed afforestation **and** as a buffer to existing development to the north, including her property. Both the applicants and staff may have been unaware of this, as such matters were handled by the Board in a less formal fashion in 1996 than they are today.

Specifically, the screening issue was central to the second hearing on Preliminary Plan 1-96019, held on February 22, 1996. At that hearing Ms. Faier testified that the house planned for what is now lot 50 would tower over her yard and that she "would like the afforestation plan to include additional mixed evergreens along the rear of our property." In response, Chairman Hussman asked all the parties to work together to

Françoise M. Carrier, Chair
Montgomery County Planning Board
June 3, 2011
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accomplish this rather than make it a condition of the plan. This was agreed to by the parties and Plan 1-96019 was approved by Board Opinion shortly thereafter (Feb. 26, 1996).

In addition, staff appears to have relied on the applicants' representation that in the easement-protected area, "the only violations relate to mowing lawn area." Rodgers Consulting letter to Board Staff, p.4 (August 26, 2010). This is not accurate. Some years ago the owner of lot 50, adjacent to Ms. Faier's lot, disturbed the afforestation area on his lot with construction of a large drainage system. In contrast to substantial screening that exists in other parts of the afforestation area, the drainage construction area is today almost completely devoid of trees. A threshold question is whether construction activity prohibited by the Category I easement has rendered this area inhospitable to tree growth. Any such problem should be properly ameliorated and the evergreen screening promised 15 years ago should be a condition of approval of the conversion to Category II.

There has also been a noticeable loss of trees on the portion of lot 23 that is easement-protected, reducing the density of the buffer considerably. Whether and to what extent this should be more fully redressed at this time is another matter that ought to be resolved before the Board acts on the application.

Ms. Faier is optimistic that all these concerns can be readily addressed and the Plan approved, providing there is a brief postponement. There is no great urgency to the current hearing date and honoring this request will provide the time necessary to make it likely that the Board will have before it a consensus recommendation. Our preference would be postponement to July 14, 2011, when Ms. Faier and I are both available to appear before the Board on this matter.

Sincerely yours,



David W. Brown

cc: Joshua Penn (via email – Joshua.penn@mncppc-mc.org)

**VIA E-MAIL**

June 6, 2011

Francoise Carrier, Chair
Montgomery County Planning Board
Maryland-National Capital Park
and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Winterset Glen – 11996019B
Statement of Opposition to Postponement
Request
RCI Project No.: 401YA

Dear Ms. Carrier;

Our firm represents the group of homeowners in the Winterset Glen community whom collectively serve as the applicant for the above-referenced case. For the past 26 months, the group of homeowners have come together to proactively address the matter of Category 1 easements on their properties. We are proud that the collaboration has resulted in a Staff recommendation of approval scheduled to be heard this Thursday, June 9. Please place this letter into the record for the Limited Preliminary Plan Amendment 11996019B.

However, it has come to our attention that on Friday, June 3, 2011, a request for postponement has been made on behalf of a nearby neighbor. While we welcome and appreciate the neighbor's support for the applicant's request to convert from Category 1 to Category 2 easements, this letter is to respond to i) the concern raised, ii) object to the postponement request, and iii) to indicate that there is a solution to address the neighbor's stated concern.

On Friday, June 3, 2011 we were forwarded the letter from Mr. David Brown, representing Ms. Margo Faier ("neighbor"), which explained the neighbor's concerns and requested the postponement of the hearing. Considering the many parties involved and conflicting summer vacation schedules, including my own unavailability on July 14, 2011 for my wedding and honeymoon and since this was the first time the applicants were aware there was a concern from a neighbor, we quickly sought to address the matter.

After reviewing the letter, speaking with the owner of Lot 50, and personally visiting the property to assess the area, we understand the neighbor's concern about a visual penetration through the landscape screening. The berm separating Lots 23 and 50 from the neighbor's Lot was originally planted with a combination of evergreen and deciduous trees as required by the earlier approvals and agreements. Shortly after the planting had occurred (approximately 12 years ago) an evergreen tree planted on the berm died and was never replaced, resulting in the current gap between the properties. In addition, several evergreen trees on the rear of the neighbor's property that once contributed to the screening are dead and/or dying and provide limited screening. These two conditions combine to create a 15 – 20' visual penetration between the properties.

Approximately 7 years ago, in response to standing water in the back yard, ongoing flooding of the basement and resulting structural concerns, the owner of Lot 50 contacted the

Montgomery County Department of Permitting Services ("MCDPS") for assistance in resolving the matter. The MCDPS advised the owner of Lot 50 to install a French drain system to alleviate the flooding. The owner of Lot 50 communicated with the neighbor regarding the French drain. The French drain system was installed along the edge of the 15-20' visual penetration between the neighbor's Lot and Lot 50. Up until this point, the owner of Lot 50 was unaware of the neighbor's concerns.

In the June 3, 2011 letter, Mr. Brown states *"A threshold question is whether construction activity prohibited by the category 1 easement has rendered this area inhospitable to tree growth. Any such problem should be properly ameliorated and the evergreen screening promised 15 years ago should be a condition of approval of the conversion to Category II."* After once again personally visiting the site to specifically evaluate this particular concern, it is my professional opinion that the area in question will support the growth of properly installed and maintained trees, both evergreen and deciduous. Therefore, the applicant agrees to plant additional evergreen trees on Lot 50 adjacent to Lot 17, Block 4 (the neighbor's property) to satisfy the planting enhancement requirements for Lot 50.

The June 3, 2011 letter also states that *"there has also been a noticeable loss of trees on the portion of lot 23 that is easement-protected, reducing the density of the buffer considerably."* According to the tree survey that appears on the Plan submitted March 31, 2011 and our recent site visit to specifically review this particular issue, the easement area of Lot 23 contains mature evergreen screening species that provide nearly full screening between these properties.

We do not believe a postponement of this case is necessary to resolve this matter. The applicants are willing to plant additional trees along the common boundary with the neighbor's property to resolve the neighbor's concerns. It is my professional opinion that properly installed plant materials will succeed and will enhance the screening between these properties where it is presently insufficient. As mentioned previously, with the many homeowners involved in this matter, finding an available Planning Board date that work's for everyone's schedule can be a challenge.

We respectfully request that the hearing scheduled for June 9, 2011 move forward as scheduled. We thank you for considering our position.

Sincerely,
Rodgers Consulting, Inc.



Dusty Rood, AICP, LEED AP
Vice President / Environmental Team
Leader

Cc: Ms. Christina Sorrento
Mr. Josh Penn
Mr. David Brown (o/b/o Margo Faier)
Winterset Glen Homeowners / Applicants