MCPB No. 12-113
Item No. 3
Date: 10-11-12

Preliminary Plan Amendment 12002073A in Response to a Violation - Yetley Property, Lot 46

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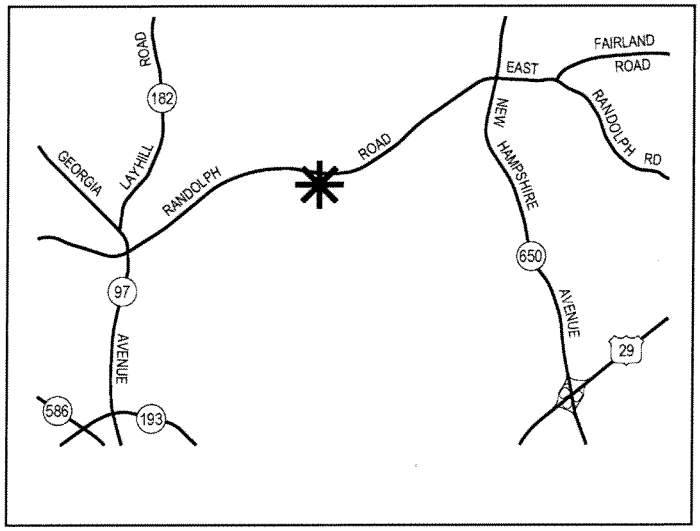
Mark Pfefferle, Chief, DARC, Mark.Pfefferle@montgomeryplanning.org, 301-495-4730

Completed: 9-28-12

Description

Limited Amendment, Preliminary Plan No. 12002073A, Yetley Property, Lot 46 Block 1

R-200 zone; 0.51 acres; one existing lot containing a single-family residential dwelling; request to remove a portion of the existing Category I conservation easement; located at 12802 Timber View Court, 1600 feet east of the intersection with Randolph Road & Kemp Mill Road in Silver Spring; White Oak Master Plan.



Summary

- Staff Recommendation: Approval with Conditions
- Application submitted pursuant to Planning Board Order dated March 27, 2012.
- Proposal to remove 2,700 square feet of Category I Conservation Easement.
- Proposal to purchase 2:1 mitigation credits at an off-site forest conservation bank.

STAFF RECOMMENDATION: Approval of the limited amendment to the Preliminary Plan and associated Forest Conservation Plan, subject to the following conditions:

1. Applicant must submit a complete record plat application within three (3) months of the mailing date of the Planning Board Resolution approving the limited amendment to the Preliminary Plan that delineates the revised conservation easement. The existing easement remains in full force and effect until the new record plat is recorded.

2. Prior to Planning Board approval of the record plat, the Applicant must submit a certificate of compliance to use an offsite forest conservation mitigation bank. The certificate of compliance must provide mitigation credits for onsite easement removal at a rate of 2:1.

3. Applicant must install supplemental plantings within the remaining Category I conservation easement, as shown in the September 19, 2012 submitted final forest conservation plan. Planting must occur during the first planting season after the Planning Board Resolution is mailed. Supplemental plantings must include at a minimum; four (4) native understory shrubs, four (4) native tall shade trees, and two (2) native evergreen trees.

4. Applicant must delineate the Category I conservation easement boundary along the existing wood line with permanent easement markers or split rail fence, and appropriate signage within three (3) months of the mailing date of the Planning Board Resolution.

5. All other conditions of Preliminary Plan No. 120020730 that were not modified herein, as contained in the Planning Board's Resolution mailed August 2, 2002, remain in full force and effect.

BACKGROUND

The Montgomery County Planning Board approved Preliminary Plan No. 120020730 "Yetley Property", on July 11, 2002 and issued a written opinion on August 2, 2002. That approval was for five (5) lots on 4.83-acres of land in the R-200 zone. The subdivision was subject to the Forest Conservation Law (Chapter 22A of the County Code) and a Forest Conservation Plan (FCP) was required. The Preliminary Plan of subdivision and the FCP show Category I conservation easements on 4 of the 5 lots. The Preliminary Plan opinion required that the Category I conservation easement to be shown on the record plat and they are shown on Plat No. 22584.

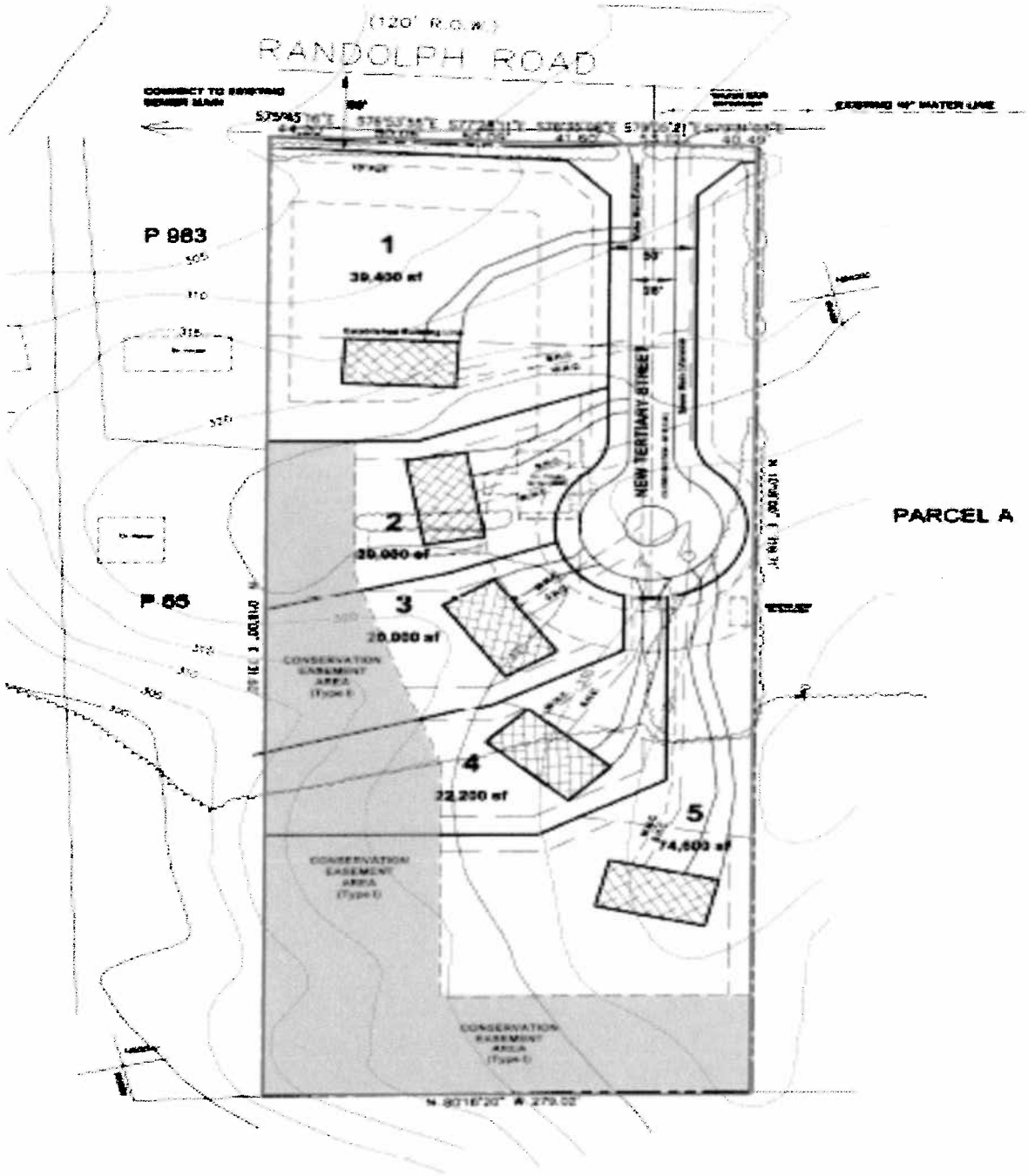


Figure 1: Yetley Property Subdivision
(lot numbers shown are not the actual lot numbers recorded by record plat)

An onsite easement inspection occurred in June 2010 by Staff, revealing violations of the conservation easement. The Applicant was issued a Notice of Violation (NOV) for violating the terms of the easement agreement. A violation hearing was held by an Administrative Law Judge designated by the Planning Board. On March 2, 2011 the Administrative Law Judge issued a Recommended Decision containing its

findings and suggested remedial actions (Attachment 1). On June 16, 2011, the Planning Board adopted the Administrative Law Judge's Recommended Decision subject to modifications, and specified two alternatives for remedial action. One option was to submit an application to the Planning Department for a limited Preliminary Plan amendment and propose changes to the size of the conservation easement area, which is the subject of this action. The June 16, 2011 Planning Board Order, MCPB No. 11-52, is enclosed (Attachment 2).

SITE DESCRIPTION

The subject property is located at 12802 Timber View Court, lot 46, Block 1. The lot is approximately 22,030 square feet in size and encumbered by 6,856 square feet of Category I conservation easement. The conservation easement comprises 31% of the total lot area. The lot gently slopes downhill from the southeast to the northwest. There are no streams, wetlands, floodplain, or environmental buffers on the lot. The property is located within the Northwest Branch watershed, which has a Use IV designation. The Countywide Stream Protection Strategy (CSPS) rates this watershed as fair. A qualified professional rated the forest on the property as moderate priority.

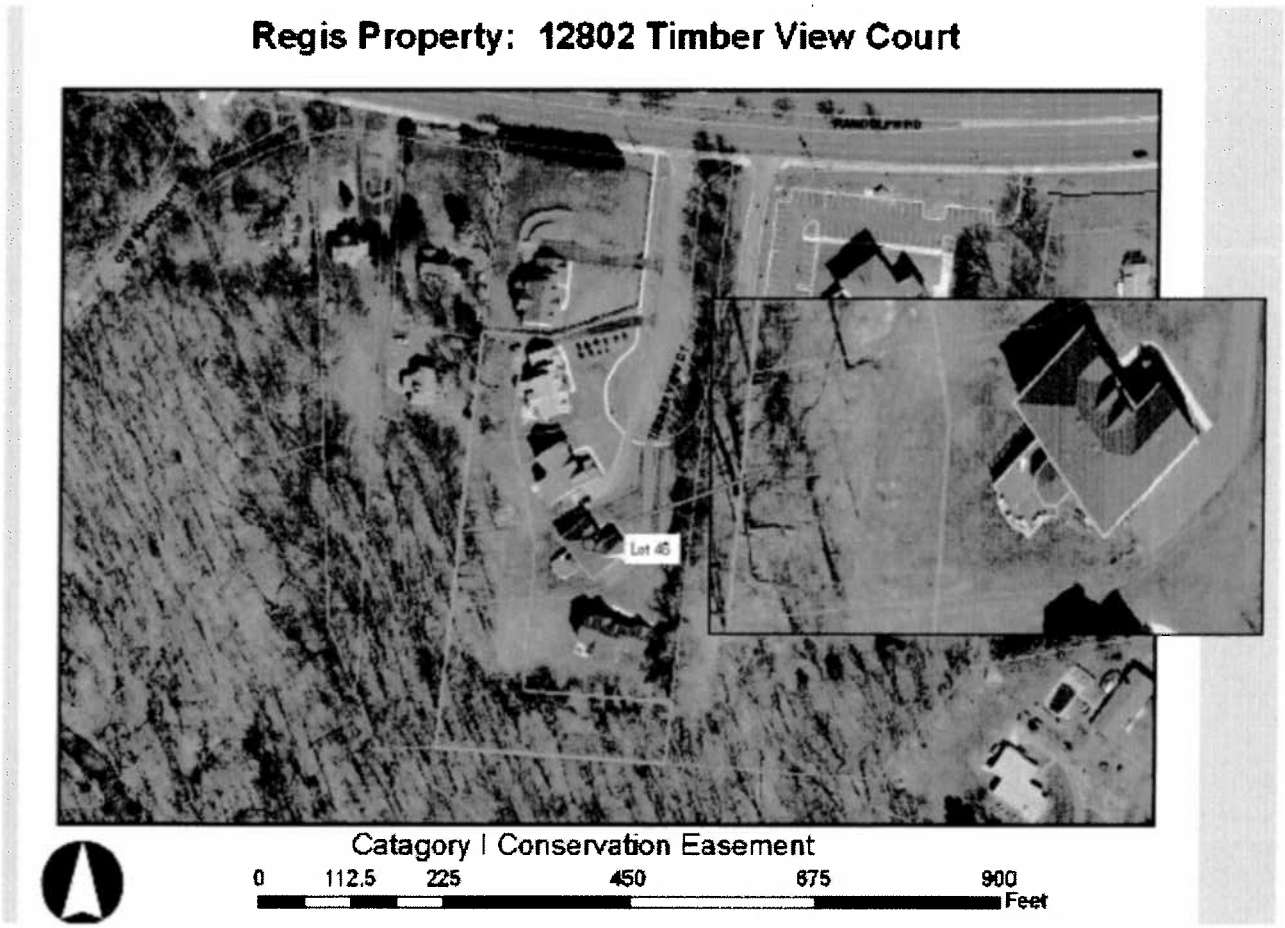


Figure 2: Yetley Property Subdivision, Lot 46, Block 1

PROPOSAL

On June 7, 2012, the Applicant submitted an amendment to Preliminary Plan of subdivision 120020730 to modify the Category I conservation easement on their lot. The initial request was to remove the Category I conservation easement on lot 46 in its entirety. Staff did not support this request and asked the Applicant to modify his proposal to permanently remove approximately 2700 square feet of turf grass out of the Category I conservation easement, while leaving the forested area within the Category I easement. The Applicant decided to submit a forest conservation plan as suggested, but at the public hearing will propose the remainder of the easement be re-recorded as Category II.

The Applicant proposes to mitigate for the area of easement removed by purchasing credits at an offsite forest conservation bank at a 2:1 ratio.

PLANNING BOARD REVIEW AUTHORITY

The Forest Conservation Regulations and adopted Commission policy require Planning Board action when affecting or changing conservation easements granted by a grantor during the subdivision approval process, under Section 22A.00.01.15 Long-Term Protective Agreements.

Long-term protective agreements may include, but are not limited to: a) Covenants running with the land; (b) Deed restrictions; c) Conservation easements; and d) Land trusts.

STAFF REVIEW

This limited amendment to the Preliminary Plan is in response to a forest conservation violation. The Planning Board Order allows the Applicant the option to modify the conservation easement.

Lot 46 has no environmentally sensitive areas within this conservation easement; the easement shown on the original forest conservation plan was created to meet the developer's forest conservation requirements and to protect forest within the Northwest Branch watershed.

The Applicant proposed to remove the entire conservation easement from the property. Staff does not support the removal of the Category I easement or changing it to a Category II easement for the following reasons: 1) the existing forest on the subject property is part of a larger high priority contiguous forest that extends off the lot and subdivision, into the adjoining lots, parcels, and parkland; 2) the adjoining Category I conservation easements to both the north and south of the subject property would be bifurcated; 3) extinguishing the Category I easement gives the current and future property owners the ability to remove the forest stand at any time; 4) a Category II easement allows current and future property owners the ability to remove any tree less than 6 inches in diameter within the easement, at any time, and maintain the ground cover as lawn, thereby prohibiting natural regeneration of the forest. In fact, without the protection of the understory problems such as erosion, non-native invasive plant growth, and long-term tree canopy loss can result; 5) a recent Planning Board decision regarding the replacement of a Category I conservation easement with a Category II easement was denied by the Planning Board on September 13, 2012 in the Kaufman case, Preliminary Plan amendment 11998096B.

Staff does support the removal of approximately 2,700 square foot grassy area within the Category I conservation easement, while keeping the remainder of the Category I over the existing trees and forest. This still leaves a forest stand that is 50 feet wide thereby meeting the minimum standard required by the Forest Conservation Law. The amended FCP is enclosed (Attachment 3). The easement area on Lot 46 is a portion of a larger easement within the entire subdivision. When the easement areas are added together for the Yetley property subdivision, the forest stand is greater than the 10,000 square feet minimum required by the Forest Conservation Law.

Staff believes that the proposed 2:1 purchase of credits in an off-site approved forest conservation bank is appropriate mitigation for the amount of easement requested to be removed and complies with the Planning Board's mitigation Order.

NOTIFICATION and OUTREACH

The subject property was properly signed with notification of the upcoming Preliminary Plan amendment prior to the June 7, 2012 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 no inquiries. Any comments received hereafter will be forwarded to the Board.

RECOMMENDATION

Staff recommends that the Planning Board approve this limited Preliminary Plan of subdivision to revise the Forest Conservation Plan with the conditions specified above.

ATTACHMENTS

1. Administrative Law Judge Findings and Recommended Decision
2. MCPB Order 11-52
3. Amended Forest Conservation Plan

" Attachment 1 "

MONTGOMERY COUNTY PLANNING DEPARTMENT	*	BEFORE WAYNE A. BROOKS,
	*	AN ADMINISTRATIVE LAW JUDGE
THE MARYLAND NATIONAL CAPITAL PARK AND PLANNING COMMISSION	*	OF THE MARYLAND OFFICE
	*	OF ADMINISTRATIVE HEARINGS
v.	*	VIOLATION OF FOREST CONSERVATION
PETER AND GWENDOLYN REGIS,	*	PLAN # 120020730
RESPONDENTS		

* * * * * * * * * * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On November 19, 2010, the Montgomery County Planning Department (MCPD) of the Maryland National Capital Park and Planning Commission (MNCPPC or Agency) issued a Notice of Hearing to Peter and Gwendolyn Regis (Respondents). The notice alleged that the Respondents violated the Montgomery County Forest Conservation Law[1] as a result of continual grass cutting in a Category I Conservation Easement, clearing of understory in a Category I Conservation Easement, and maintaining a garden in a Category I Conservation Easement that is located on property owned by the Respondents, and failing to pay an Administrative Citation and complete remedial action as directed.

[1] Montgomery County, Md., Code Chapter 22A.

I held a hearing on February 1, 2011 at the MNCPPC offices located at 8787 Georgia Avenue, Silver Spring, Maryland 20910. Christina Sorrento, Office of General Counsel, MNCPPC, represented the Agency. The Respondents represented themselves.

The contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Office of Administrative Hearings, the Montgomery County Planning Board Enforcement Rules (June 22, 2010) and the Rules for Hearings and Appeals of the Montgomery County Code govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); COMAR 28.02.01; Montgomery County Planning Board Enforcement Rules, Chapters 1 through 4 (June 22, 2010) and Code of Montgomery County Regulations (COMCOR) 22A.

ISSUES

1. Did the Respondents violate the Montgomery County Forest Conservation Law?
2. If the Respondents violated the Montgomery County Forest Conservation Law, should they be assessed an administrative penalty; and if so, in what amount?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Agency:

MCPD #1 Notice of Hearing from Mark Pfefferle, Acting Chief of Environmental Planning, to the Respondents, dated November 19, 2010;

MCPD#2 Montgomery County Planning Board Opinion, Preliminary Plan 1-2002073, dated August 2, 2002;

MCPD#3 Final Forest Conservation Plan, dated June 25, 2003;

MCPD#4 Subdivision Record Plat for Lots 43 – 47 Block 1, filed June 5, 2003;

MCPD#5 Conservation Easement Agreement, recorded December 30, 1994 among the land records of Montgomery County at Liber 13178, Folio 412;

MCPD#6 Deed for 12802 Timber View Court, Silver Spring, Maryland 20904, dated September 5, 2003, filed March 11, 2004;

MCPD#7 House Location Survey, dated February 6, 2004;

MCPD#8 Notice of Violation, dated June 1, 2010;

MCPD#9 Administrative Citation signed by Josh Kaye, MNCPPC, to Respondents, dated September 14, 2010;

MCPD#10 Photograph showing planted fruit trees in a fenced area in yard of 12802 Timber View Court, taken 6/3/10;

MCPD#11 Photograph showing understory collected in yard of 12802 Timber View Court, taken 6/3/10;

MCPD#12 Photograph showing cut grass in conservation area in yard of 12802 Timber View Court, taken 6/3/10;

MCPD#13 Photograph showing planted garden in conservation area in yard of 12802 Timber View Court, taken 6/3/10; and

MCPD#14 Geographic Information System (GIS) aerial image of 12802 Timber View Court, taken in 2008.

I admitted the following exhibits on behalf of the Respondents:

Resp. Ex. # 1 Expanded Geographic Information System (GIS) aerial images of 12802 Timber View Court, taken in 2008, 2006, 2004, and 2002;

Resp. Ex. # 2 Twelve photographs showing various planted material, trees, and understory in the area in and around the yard of 12802 Timber View Court, taken on January 31, 2011; and

Resp. Ex. # 3 Written Statement of Respondents.

Testimony

Joshua (Josh) Kaye, Forest Conservation Inspector, MCPD, and Mark Pfefferle, Forest Conservation Program Manager, Supervisor of Enforcement Staff, and Acting Chief of Development Applications and Regulatory Coordination, MCPD, testified on behalf of the Agency.

The Respondents testified on their own behalf.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. The Respondents are the owners of Lot 46 in Block 1, located in the subdivision known as Victoria Forest, Springwood, in Montgomery County, Maryland. It is also known as 12802 Timber View Court, Silver Spring, Maryland 20904 (the Property).
2. On December 30, 1994, the MNCPPC recorded in the land records of Montgomery County a Category I Conservation Easement Agreement; it was recorded in Liber13178 at Folio 412.
3. The Category I Conservation Easement Agreement prohibits, among other things, the removal of plant materials except in accordance with an approved forest management plan, mowing, agricultural activities, and cultivation.
4. On November 14, 2001, Marvin J. and E.A. Yetley submitted an application for approval of a plan to subdivide property they owned and create five lots (including the Property), designated as Preliminary Plan 1-02073 (also known as 120020730).
5. On August 2, 2002, the Montgomery County Planning Board approved the Preliminary Plan subject to a number of conditions, including compliance with the conditions of approval for a preliminary forest conservation plan and a record plat showing delineation of a Category I conservation easement on the Property.
6. On June 5, 2003, the Yetleys filed a subdivision record plat for Lots 43 through 47 in Block 1, Springwood, Montgomery County, Maryland. The subdivision record plat shows the conservation easement area and states that the easements are granted in accordance with the Conservation Easement Agreement recorded in Liber13178 at Folio 412.
7. On June 25, 2003, the MNCPPC approved the Yetleys' Final Forest Conservation Plan for Lots 43 through 47 in Block 1, Springwood. The Forest Conservation Plan shows the

conservation easement area on lots 44 through 47. In particular, the plan shows that the easement area on the Property was to be reforested and marked with a forest conservation fence and signs.

8. The conservation easement area on the Property covers the rear portion of the lot up to the surrounding property lines of the neighboring lots.

9. On September 5, 2003, the Yetleys sold the Property to the Respondents. The deed states that it is subject to covenants, easements, and restrictions of record. The deed was recorded in the land records of Montgomery County on March 11, 2004.

10. At the time of transfer in September 2003, the Property was unimproved land; no house existed at the time.

11. Sometime after purchasing the Property, the Respondents began constructing a house on it. A surveyor's certificate dated December 11, 2003 shows the position of the house under construction on the Property and the conservation easement area.

12. In December 2009, Josh Kaye, Forest Conservation Inspector, was investigating a complaint regarding another property and observed encroachments into the conservation easement area on the Property.

13. In December 2009, the following encroachments into the conservation easement area existed on the Property: almost the entire easement area consisted of cut grass; a garden area including plants and trees encircled by flexible fencing material was within the easement area, and the clearing of understory in the easement area. The encroachments into the conservation easement area cover 4,750 square feet of the 8,500 square feet of conservation easement area on the Property, which is a 56% encroachment on the easement area.

14. On June 1, 2010, the MCPD sent the Respondents a Notice of Violation (NOV).

15. The NOV cited the Respondents for failing to comply with the approved forest conservation plan and easement agreement. The Respondents were directed to stop continual grass cutting, add wood chips or native ground cover, install six two-inch caliper shade trees and four one-inch caliper deciduous trees within the easement, and attend a meeting with staff to determine the appropriate corrective action to be performed by a date certain. Failure to comply with the NOV by June 30, 2010 and to complete the corrective action by the date assigned could result in the issuance of a citation, Stop Work Order, and/or Notice of Hearing to appear before the Planning Board for appropriate Administrative Action. The Respondents were to call the MCPD inspector when the corrective action was complete.
16. On or about July 7, 2010, Mr. Kaye met with the Respondents and explained what needed to be done to correct the encroachments into the easement.
17. The Respondents did not correct the encroachments into the easement area after meeting with Mr. Kaye.
18. On September 14, 2010, Mr. Kaye delivered an Administrative Citation to the Respondents for failure to complete the remedial actions described in the NOV. To correct the violation, the Respondents were to cease continual cutting of the grass, remove the grass and replace it with wood chips. In addition, six two-inch caliper shade trees and four one-inch caliper deciduous trees were to be planted within the easement. The Administrative Citation also fined the Respondents $500 and granted the Respondents until October 15, 2010 to complete the remedial action.
19. The Respondents did not correct the encroachments into the easement by October 15, 2010.
20. As of the date of the hearing in this matter, the Respondents have not completed the corrective actions.

DISCUSSION

Violation of the Forest Conservation Law

The Agency has the burden of proof to establish by a preponderance of the evidence that the Respondents committed the violations charged in the Notice of Hearing sent on November 19, 2010. Montgomery County Planning Board Enforcement Rule 3.11 (June 22, 2010).

In enacting the Montgomery County Forest Conservation Law, the Montgomery County Council found that trees and forest cover constitute an important natural resource and that tree loss as a result of development is a serious problem in the county. Montgomery County, Md., Code Chapter 22A-2(a). The purpose of the Montgomery County Forest Conservation Law is to:

> (1) save, maintain, and plant trees and forested areas for the benefit of County residents and future generations;
>
> (2) establish procedures, standards, and requirements to minimize tree loss as a result of development and to protect trees and forests during and after construction or other land disturbing activities;
>
> (3) establish procedures, standards, and requirements for afforestation and reforestation of land subject to an application for development approval or a sediment control permit;
>
> (4) establish a fund for future tree conservation projects, including afforestation and reforestation; and
>
> (5) provide a focused and coordinated approach for County forest conservation activities. (1992 L.M.C., ch. 4, § 1)

Montgomery County, Md., Code Chapter 22A-2(b).

On December 30, 1994, the MNCPPC recorded a Category I Conservation Easement Agreement in the land records of Montgomery County which applied to real property subject to a plan approval conditioned on compliance with a Forest Conservation Plan or a conservation easement agreement. The purpose of the easement is to protect existing and future forest cover, trees, and other natural features. The Category I Conservation Easement runs with the land in perpetuity and is binding on all subsequent owners. On August 2, 2002, the Montgomery

County Planning Board approved the Yetleys' plan to subdivide their property into five lots subject to a number of conditions, including compliance with the conditions of approval for a preliminary forest conservation plan and a record plat showing delineation of a Category I conservation easement on the property. On June 5, 2003, the Yetleys filed a subdivision record plat for the Property and four neighboring lots that shows the conservation easement area and refers to the December 30, 1994 Conservation Easement Agreement. The Respondents in this case purchased the unimproved land from the Yetleys on September 5, 2003. Thus, the Property was subject to the Category I Conservation Easement Agreement prior to the Respondents' purchase of the Property.

The Category I Conservation Easement Agreement prohibits, among other things, the removal of plant materials except in accordance with an approved forest management plan, mowing, agricultural activities, and cultivation. In December 2009, Mr. Kaye observed the following encroachments into the conservation easement area on the Property: almost the entire easement area consisted of cut grass; a garden area including plants and trees encircled by flexible fencing material was within the easement area; and the clearing of understory in the easement area. Mr. Kaye observed those same encroachments on June 3, 2010. Mr. Kaye testified that the encroachments into the conservation easement area cover 4,750 square feet of the 8,500 square feet of conservation easement area on the Property, which is a 56% encroachment on the easement area.

The Respondents testified that they were misled about the easement area by the builder, Maryland Custom Builders. They contended that the builder constructed a silt fence, as required by the county, and the builder advised them that the silt fence defined the easement area. The Respondents also noted that the builder planted the grass in the area of the easement cited in the NOV. However, they conceded that they started the garden and planted the fruit trees. Finally,

they contested the charge that they cleared understory. They indicated that they simply took down and cleared trees and branches that had died.

The December 30, 1994 Conservation Easement Agreement requires a property owner to make specific reference to the easement in any deed, sales contract, or other legal instrument by which any interest in a property subject to the agreement is conveyed. The September 5, 2003 deed by which the Yetleys sold the Property to the Respondents states that it is "SUBJECT to covenants, easements, and restrictions of record." MCPD Ex. # 6. Whether this statement is sufficiently specific is not an issue to be decided by me in the context of this case. However, it is clear that the onus was on the Yetleys, or the builder, not Montgomery County or any government entity, to notify the Respondents of the easement when conveying the property.

In addition, the specific location of the easement on the Property was shown on the subdivision record plat filed by the Yetleys in Montgomery County on June 5, 2003. A proper title search would have revealed the easement. Further, the Respondents should have noticed the easement and its location during the construction of their home. A surveyor's certificate dated December 11, 2003 shows the position of their house on the Property and the location of the conservation easement area. If there was a concern about the scope of the easement, the surveyor's location survey should have triggered a response from the Respondents at the time it was created.

It is unlikely (though possible) that the Respondents never looked at the surveyor's location survey, the record plat, or any other document that showed the location of the house under construction and its relation to the location of the easement; instead simply relying upon the alleged description by the builder. Thus, the Respondents, as well as their neighbors, may have been misled by the builder, intentionally or unintentionally, as to the exact boundaries of the easement. However, any misrepresentation by the sellers or the builder does not change the

fact that the easement exists or its location or the fact that the easement existed prior to the Respondents' purchase of the Property. The Respondents have not presented any evidence to show that the easement does not exist or that its location is different than that identified in MCPD's exhibits.

In any event, the Respondents had actual knowledge of the easement on their property when they were issued the NOV on June 1, 2010. In addition, Mr. Kaye met with the Respondents on July 7, 2010 and explained what needed to be done to correct the encroachments into the easement. The Respondents did not take the corrective action specified in the NOV by the compliance date of June 30, 2010. On September 14, 2010, Mr. Kaye issued to the Respondents an Administrative Citation assessing a $500.00 fine and directing them to take remedial action by October 15, 2010; however, they failed to do so. Whether the Respondents initially created the encroachments into the easement is irrelevant. Even if the Respondents did not personally install the grass within the easement, they are still responsible, as the owners of the Property, for any continued encroachment in the easement area. "Each day a violation is not corrected is a separate violation" and a violator is subject to an administrative penalty. Montgomery County, Md., Code Chapter 22A-16(d)(1). The Respondents had the opportunity to take corrective action and comply with the NOV from June 1, 2010 to June 30, 2010 without any administrative penalty. They had an additional opportunity to comply by October 15, 2010, with only a $500.00 fine. As of the date of the hearing, although the Respondents had stopped gardening and cutting the grass as of the fall, they had not removed all of the encroachments into the easement. Thus, I find that the Agency has met its burden of proof and established by a preponderance of the evidence that there is a Category I conservation easement on the Property and that encroachments into the easement have existed since at least June 1, 2010, and that the Respondents have failed to pay the fine and complete the remedial action as directed. Therefore,

I conclude the Respondents committed the violations charged in the November 19, 2010 Notice of Hearing, with the exception of clearing the understory. Based upon the evidence, more particularly the pictures and the credible testimony of the Respondents, the alleged removal of understory was actually the removal of dead branches.

Remedies

Based on the Respondents' violations, the Agency is seeking both corrective actions, Montgomery County, Md., Code Chapter 22A-17, and administrative civil penalties, Montgomery County, Md., Code Chapter 22A-16(d).

Chapter 22A-17(a) states that a violator may be required to take one or more of the following actions:

(1) stop the violation;

(2) stabilize the site to comply with a reforestation plan;

(3) stop all work at the site;

(4) restore or reforest unlawfully cleared areas;

(5) submit a forest conservation plan for the property;

(6) place forested or reforested land under long-term protection by a conservation easement, deed restriction, covenant, or other appropriate legal instrument; or

(7) submit a written report or plan concerning the violation.

Mr. Pfefferle recommended the following corrective actions be made on the Property. One, the Respondents have a professional survey conducted at their expense showing the boundaries of the Category I Conservation Easement on the Property. Two, the Respondents install 6x6 corner posts and signage marking the easement boundaries. Three, the Respondents remove the grass and garden in the easement and replace them with wood mulch. Four, the

Respondents plant six two-inch caliper native trees and four one-inch caliper deciduous trees in the easement. Five, payment of the outstanding administrative penalty.

I find that all of the recommended corrective actions fall under subsections (1), (2) and/or (4). The Final Forest Conservation Plan approved on June 25, 2003 shows that the easement area on the Property was to be reforested and marked with a forest conservation fence and signs. Thus, requiring a professional survey and some sort of visible marking of those boundaries would comply with the reforestation plan. Removing the grass and garden areas would stop the continuing violation and comply with the reforestation plan. Installing mulch and planting six two-inch caliper native trees and four one-inch caliper deciduous trees would facilitate reforesting the area that the Respondents have unlawfully kept clear by continual mowing. Mr. Pfefferle testified that continual mowing prevents natural forest regeneration. Thus, I conclude that the Agency's recommended corrective actions fall within its statutory authority. Montgomery County, Md., Code Chapter 22A-17.

Any violation of the Forest Conservation Law or its regulations is a civil violation subject to a civil fine. Montgomery County, Md., Code Chapter 22A-16(a). The maximum civil fine is $1,000.00. *Id.* "Each day a violation continues may be treated as a separate violation." *Id.* In the Administrative Citation, the Agency assessed a $500.00 fine against the Respondents. As of the date of the hearing, the Respondents had not complied with the Administrative Citation; thus, they must pay the $500.00 fine.

A person who violates the Forest Conservation Law, its regulations, a forest conservation plan, or any agreement or restriction is liable for an administrative civil penalty. Montgomery County, Md., Code Chapter 22A-16(d)(1). The penalty must not exceed the rate set by the County Council. The maximum penalty is $9.55 per square foot, as established by Montgomery County Council Resolution 15-1271. The penalty must not be less than the rate set in section 5-

1608(c) of the Natural Resources Article, which is $0.30 per square foot. Montgomery County, Md., Code Chapter 22A-16(d)(1); Md. Code Ann., Nat. Res. § 5-1608 (2005).

In determining the amount of the administrative civil penalty the following factors must be considered. Montgomery County, Md., Code Chapter 22A-17(d)(2). They are:

(A) the willfulness of the violations;

(B) the damage or injury to tree resources;

(C) the cost of corrective action or restoration;

(D) any adverse impact on water quality;

(E) the extent to which the current violation is part of a recurrent pattern of the same or similar type of violation committed by the violator;

(F) any economic benefit that accrued to the violator or any other person as a result of the violation;

(G) the violator's ability to pay; and

(H) any other relevant factors.

Regarding willfulness, the Respondents were issued the Notice of Violation in June 2010 and told to stop mowing and stop clearing understory. Although the Respondents chose instead to ignore those directives as to grass cutting, it does appear that the alleged clearing of understory was only the removal of dead branches. The Respondents' actions deliberately disregarded the law. Regarding damage or injury to tree resources, Mr. Pfefferle explained that continual mowing prevented natural forest regeneration. Regarding the adverse impact on water quality, Mr. Pfefferle testified that, without trees, less water is absorbed which adversely affects water quality. Regarding the extent to which the current violation is part of a recurrent pattern of violations, Mr. Pfefferle noted the Respondents' continual mowing but no other recurrent

violations. Mr. Pfefferle did not provide any specific testimony regarding any accrued economic benefit, the Respondents' ability to pay, or any other factor.

After explaining his consideration of these factors, Mr. Pfefferle recommended a penalty of $0.52 per square foot, which includes a credit for the cost of corrective action. Mr. Pfefferle testified that 4,750 square feet were impacted; thus, he recommended a total penalty of $2,470.00 The Respondents did not present any evidence to contradict the basis of the recommended penalty. Therefore, I find the recommended penalty is appropriate.

CONCLUSIONS OF LAW

I conclude, as a matter of law, that the Respondents violated the Category I Forest Conservation Easement located on the Property. Montgomery County, Md., Code Chapter 22A.

I further conclude that as a result of the violations, the Respondents are subject to an administrative civil penalty in the amount of $2,470.00. Montgomery County, Md., Code Chapter 22A-16(d).

I further conclude that as a result of the violations, the Respondent is subject to an administrative civil fine in the amount of $500.00. Montgomery County, Md., Code Chapter 22A-16(a).

I further conclude that as a result of the violations, the Respondents must take the corrective actions specified by the Agency. Montgomery County, Md., Code Chapter 22A-17.

RECOMMENDED ORDER

I PROPOSE that the Montgomery County Planning Board of the Montgomery County Planning Department, Maryland National Capital Park and Planning Commission:

ORDER that the Respondents are in violation of a Category I Conservation Easement;

ORDER that the Respondent pay an administrative civil fine of $500.00;

ORDER that the Respondents pay an administrative civil penalty of $2,470.00;

ORDER that the Respondents take corrective actions, including having a professional survey conducted at their expense showing the boundaries of the Category I Conservation Easement on the Property, installing 6x6 corner posts and signage marking the easement boundaries, removing the grass and garden in the easement and replacing them with wood mulch, and planting six two-inch caliper native trees and four one-inch caliper deciduous trees in the easement; and

ORDER that the records and publications of the Montgomery County Planning Department of the Maryland National Capital Park and Planning Commission reflect this decision.

March 1, 2011
Date Decision Mailed

Wayne A. Brooks
Administrative Law Judge

WAB/kkc
#120445

RIGHT TO FILE EXCEPTIONS

Upon mailing of this recommended decision, affected parties have fourteen (14) days to file exceptions with the Montgomery County Planning Board. Montgomery County Planning Board Enforcement Rules 4.1, 4.2. Each exception must contain a concise statement of the issues presented, specific objections to one or more findings of fact and conclusions of law in the recommended decision and order; and arguments that present clearly the points of law and facts relied on in support of the position taken on each issue. Montgomery County Planning Board Enforcement Rule 4.3. A party may file an answer opposing any exception within fourteen days after the exceptions are served. Montgomery County Planning Board Enforcement Rule 4.4. Written exceptions should be addressed to the Chair of the Montgomery County Planning Board, 8787 Georgia Avenue, Silver Spring, Maryland 20904. The Office of Administrative Hearings is not a party to any review process.

Copies Mailed To:

Christina Sorrento, Office of General Counsel
Montgomery County Planning Department
Montgomery National Capital
Park and Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Carol S. Rubin, Office of General Counsel
Montgomery County Planning Department
Montgomery National Capital
Park and Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Mark Pfefferle
Acting Chief of Environmental Planning
Montgomery County Planning Department
8787 Georgia Avenue
Silver Spring, MD 20910

Peter and Gwendolyn Regis
12802 Timber View Court
Silver Spring, MD 20904

" Attachment 2 "

MAR 27 2012

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

MCPB No. 11-52
Respondents: Peter and Gwendolyn Regis
Date of Hearing: June 16, 2011

ORDER

WHEREAS Montgomery County Code Chapter 22A vests the Montgomery County Planning Board with primary enforcement authority for the Montgomery County Forest Conservation Law; and

WHEREAS, on November 19, 2010, the Montgomery County Planning Department of the Maryland-National Capital Park and Planning Commission issued a Notice of Hearing to Peter and Gwendolyn Regis ("Respondents"), alleging that the Respondents violated the Montgomery County Forest Conservation Law as a result of continual grass cutting in a Category I Forest Conservation Easement, clearing of understory in a Category I Conservation Easement, and maintaining a garden in a Category I Conservation Easement, and by failing to pay an Administrative Citation and complete remedial action as directed; and

WHEREAS, on February 1, 2011 Administrative Law Judge Wayne A. Brooks, of the Maryland Office of Administrative Hearings, held a hearing at 8787 Georgia Avenue, Silver Spring, Maryland 20910; and

WHEREAS, on March 1, 2011, the Administrative Law Judge filed a Recommended Order, attached hereto, proposing that the Planning Board hold that Respondents violated a Category I Conservation Easement and order that:

1. Respondents pay an administrative civil fine of $500.00;
2. Respondents pay an administrative civil penalty of $2,470.00;
3. Respondents take corrective actions, including having a professional survey conducted at their expense showing the boundaries of the Category I Conservation Easement on the Property, installing 6-inch x 6-inch corner posts and signage marking the easement boundaries, removing the grass and garden in the easement and replacing it with wood mulch, and planting six two-inch caliper native trees and four one-inch caliper deciduous trees in the easement; and

Approved for legal sufficiency
M-NCPPC Office of General Counsel

4. The records and publications of The Montgomery County Planning Department and the Maryland-National Capital Park and Planning Commission reflect this decision; and

WHEREAS, following review and analysis of the Recommended Order by Planning Board staff and the staff of other governmental agencies, on June 16, 2011 the Planning Board held a public hearing ("the Hearing") to review the Recommended Order; and

WHEREAS, at the Hearing, the Planning Board heard arguments concerning the Recommended Order; and

WHEREAS, on June 16, 2011 the Planning Board adopted the Recommended Order, subject to certain modifications, on motion of Commissioner Presley; seconded by Commissioner Wells-Harley; with Commissioners Carrier, Dreyfuss, Presley, and Wells-Harley voting in favor;

NOW, THEREFORE, BE IT RESOLVED that, pursuant to the relevant provisions of Montgomery County Code Chapter 22A, the Planning Board hereby orders Respondents to comply with one of the following two alternatives:

1. Alternative One:
    a. Respondents must comply with the recommendations of the Recommended Order except for the following modifications:
        i. The $500 administrative fine is waived;
        ii. The requirement to conduct a professional survey is waived;
    b. No later than 60 days from the mailing date of this resolution, Respondents must pay an administrative civil penalty of $2,470.00, install 6-inch x 6-inch corner posts and signage marking the easement boundaries, remove the grass and garden in the easement and replace it with wood mulch; and
    c. Respondent must plant six two-inch caliper native trees and four one-inch caliper deciduous trees in the easement during the next planting period from the date of this Order, which is between October 1, 2012 and November 15, 2012.
2. Alternative Two:
    a. Not later than 60 days from the mailing date of this order, Respondents must pay an administrative civil penalty of $2,470.00.
    b. Not later than 60 days from the mailing date of this order, Respondents must file an application for a limited preliminary plan

amendment removing all or part of the Category I Forest Conservation Easement on their property providing for offsite planting at a 2:1 ratio of offsite planting to Category I easement being removed, with offsite planting subject to a Category I Easement at an appropriate forestation mitigation bank;

c. Not later than six months from the mailing date of this order, Respondents must obtain Board approval of the limited preliminary plan amendment.

BE IT FURTHER RESOLVED, that in the event Respondents choose Alternative Two but fail to comply with the requirements of Alternative Two, Respondents must comply with Alternative One no later than 60 days from the date of compliance with the requirements of Alternative Two, provided that the planting requirements must be met in the next planting period.

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 the mailing date of this Resolution is MAR 27 2021; 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).

* * * * * * * * * * *

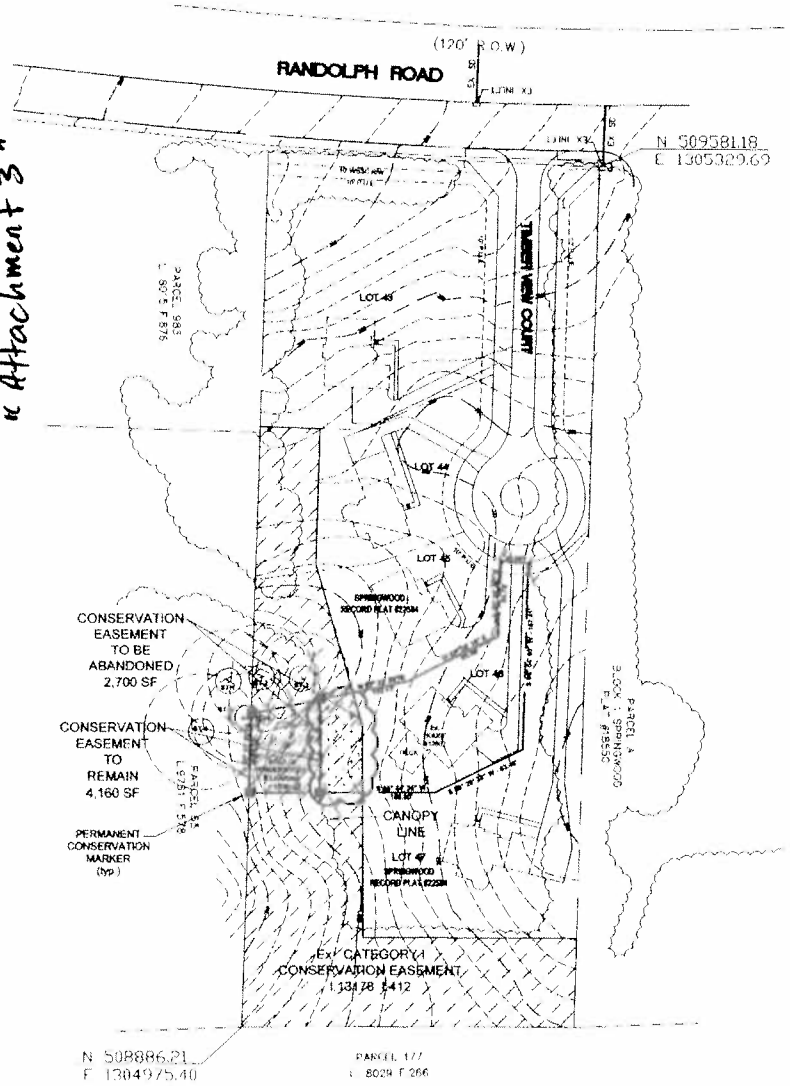
CERTIFICATION

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 Anderson, seconded by Commissioner Dreyfuss, with Chair Carrier, Vice Chair Wells-Harley, and Commissioners Anderson and Dreyfuss voting in favor of the motion, and with

Commissioner Presley absent, at its regular meeting held on Thursday, March 22, 2012, in Silver Spring, Maryland.

Françoise M. Carrier, Chair
Montgomery County Planning Board

« Attachment # 3 »



Scale: 1" = 50'

0' 50' 100' 200'

NOTES:

1. AREA OF PROPERTY - 22,030 SF
2. EXISTING ZONING - R-200
3. SITE IS SERVED BY PUBLIC SEWER AND WATER
4. EXISTING SEWER & WATER SERVICE CATEGORIES: S-1, W-1
5. LOCATED IN THE NORTHWEST BRANCH WATERSHED
6. PROPERTY LOCATED ON TAX MAP JQ33; WSSC SHEET 216NW01
7. UTILITIES (as available): Washington Gas, Verizon, PEPCO

ZONING STANDARDS.

ZONE R-200	Req	Prov
Lot Size	20,000 sf	22,030 sf
Front Setback	40 min. or Established Building Line	42'±
Sideyards	12 min. 25 total	12' or greater
Rearyard	30' min.	45' or greater
Building Height	40' Max.	40' or less
Lot Coverage	35% max.	28% or less (11.9% allowed)
Lot Width @ Building Line	100' min.	100'
Street Frontage	25' min.	25'

LEGEND:

PROPERTY LINE

CANOPY COVER / FOREST

EX. BUILDING

EX. CONSERVATION EASEMENT

CONSERVATION EASEMENT TO BE ABANDONED

SIGNIFICANT SPECIMEN TREE

AREA OF UNDERSTORY CLEARING

PERMANENT CONSERVATION EASEMENT SIGN

LIST OF AMENDMENT ITEMS:

1.THIS PLAN PROPOSES THE REMOVAL OF 2,700 SQUARE FEET OF THE EXISTING CONSERVATION EASEMENT LOCATED ON LOT 46. 4,160 SQUARE FEET OF EASEMENT IS PROPOSED TO REMAIN ON THE LOT.

FINAL FOREST CONSERVATION PLAN NOTES:

1. EXISTING CATEGORY I CONSERVATION EASEMENT ON PROPERTY TO BE REMOVED: 2,700 SQUARE FEET

2. EXISTING CATEGORY I CONSERVATION EASEMENT TO REMAIN: 4,160 SQUARE FEET.

3. MITIGATION FOR REMOVAL OF THE CONSERVATION EASEMENT TO BE SATISFIED BY PURCHASING CREDITS FROM THE MDR-SHILOH PROPERTY FOREST BANK AT A 4:1 RATIO.

4. NO ADDITIONAL TREE CLEARING OR CONSTRUCTION IS PROPOSED UNDER THIS APPLICATION.

SIGNIFICANT TREE CHART

TREE NUMBER	BOTANICAL NAME	COMMON NAME	SIZE(D.B.H.)	TREE CONDITION	COMMENTS	STATUS
ST-1	Liriodendron tulipifera	Tulip Poplar	29"/29"	Moderate	Off site, multi-trunked, w/ deadwood, dieback	To Remain
ST-2*	Liriodendron tulipifera	Tulip Poplar	30"	Moderate	Off site, w/ deadwood, dieback	To Remain
ST-3	Liriodendron tulipifera	Tulip Poplar	29"	Moderate	Off site, w/ deadwood, dieback	To Remain
ST-4*	Liriodendron tulipifera	Tulip Poplar	32"	Moderate	Off site, mid-canopy growth, dieback	To Remain
ST-5	Liriodendron tulipifera	Tulip Poplar	30"	Moderate	Off site, dieback	To Remain
ST-6	Liriodendron tulipifera	Tulip Poplar	30"	Moderate	Off site, small amount of decay at base, dieback	To Remain

* Indicates specimens for the species

NOTE:

TREE SPECIES, SIZES AND CONDITIONS ARE FROM A SITE VISIT BY PATRICK PERRY ON 8/7/12.

PLANT SCHEDULE - RECOMMENDED SPECIES LIST

6 Trees 4 Shrubs

QUANTITY	SIZE	SCIENTIFIC NAME	COMMON NAME	SPACING	COMMENTS
TREES 6					
2	5-6'	ILEX OPACA	AMERICAN HOLLY	20' o.c.	B&B
2	1" Caliper	LIRIODENDRA TULIPIFERA	TULIP POPLAR	20' o.c.	B&B
2	1" Caliper	[illegible]	WHITE OAK	20' o.c.	B&B
SHRUBS 4					
4	18"-24" HEIGHT	LINDERA BENZOIN	SPICEBUSH	12' o.c.	Container Grown

PLANTING NOTE:

1. PROPOSED PLANTING ON THIS PLAN IS MITIGATION FOR THE UNDERSTORY CLEARING IN THE EXISTING CONSERVATION EASEMENT.

2. EXACT PLANTING LOCATIONS FOR PROPOSED PLANTS SHOULD BE WITHIN THE REMAINING CONSERVATION EASEMENT AREA AND DETERMINED AT ONSITE PRE-PLANTING MEETING WITH MNCPPC FOREST CONSERVATION INSPECTOR.

DEVELOPER'S CERTIFICATE

The Undersigned agrees to execute all the features of the Approved Final Forest Conservation Plan No. 12002073A including, financial bonding, forest planting, maintenance, and all other applicable agreements.

Developer's Name: _____ Printed Company Name: _____

Contact Person or Owner: PETER & GWENDOLYN REGIS Printed Name

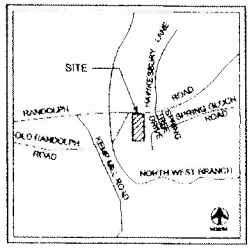
Address: 12802 TIMBER VIEW COURT Silver Spring, MD 20904

Phone and Email: 301-455-4897

Signature: _____

VICINITY MAP

SCALE: 1" = 2,000'



PREPARED FOR:
Peter & Gwendolyn Regis
12802 Timber View Court
Silver Spring, MD 20904
301-455-4897

Sheet 1 of 2

Revisions

5.17.12

date: 05/21/12

scale: 1" = 50'

Benning & Associates, Inc.
Land Planning Consultants
8933 Shady Grove Court
Gaithersburg, MD 20877
(301) 948-0240

FINAL FOREST CONSERVATION PLAN (AMENDED)

YETLEY PROPERTY

Lot 46, Springwood

Montgomery County, Maryland

Sequence of Events for Property Owners Required to Comply With Forest Conservation and/ or Tree-Save Plans

Pre-Construction

1. An on-site pre-construction meeting is required after the limits of disturbance have been staked and flagged, but before any clearing or grading begins. The property owner shall contact the Montgomery County Planning Department inspection staff before construction to verify the limits of disturbance and discuss tree protection and tree care measures. The developer's representative, construction superintendent, ISA certified arborist or MD license tree expert that will implement the tree protection measures, forest conservation inspector, and Department of Permitting Services (DPS) sediment control inspector should attend this pre construction meeting.

2. No clearing or grading shall begin before stress-reduction measures have been implemented. Appropriate measures may include, but are not limited to:
   a. Root pruning
   b. Crown Reduction or pruning
   c. Watering
   d. Fertilizing
   e. Vertical mulching
   f. Root aeration matting

Measures not specified on the forest conservation plan may be required as determined by the M NCPPC inspector in coordination with the arborist.

3. A Maryland licensed tree expert or an International Society of Arboriculture certified arborist must perform all stress reduction measures. Documentation of stress reduction measures must be either observed by the forest conservation inspector or sent to the inspector at 8787 Georgia Avenue, Silver Spring, MD 20910. The forest conservation inspector will determine the exact method to convey the stress reductions measures during the pre-construction meeting.

4. Temporary tree protection devices shall be installed per the Forest Conservation Plan/Tree Save Plan and prior to any construction activities. Tree protection fencing locations should be staked prior to the pre-construction meeting. The forest conservation inspector, in coordination with the DPS sediment control inspector, may make field adjustments to increase the survivability of trees and forest shown as saved on the approved plan. Temporary tree protect devices may include:
   a. Chain link fence (four feet high)
   b. Super silt fence with wire strung between the support poles (minimum 4 feet high) with high visibility flagging.
   c. 14 gauge 2 inch x 4 inch welded wire fencing supported by steel T-bar posts (minimum 4 feet high) with high visibility flagging.

5. Temporary protection devices shall be maintained and installed by the contractor for the duration of construction project and must not be altered without prior approval from the forest conservation inspector. No equipment, trucks, materials, or debris may be stored within the tree protection fence areas during the entire construction project. No vehicle or equipment access to the fenced area will be permitted. Tree protection shall not be removed without prior approval of the forest conservation inspector.

6. Forest retention area signs shall be installed as required by the forest conservation inspector, or as shown approved plan.

7. Long term protection devices will be installed per the Forest Conservation Plan/Tree Save Plan and attached details. Installation will occur at the appropriate time during the construction project. Refer to the plan drawing for long-term protection measures to be installed.

During Construction

8. Periodic inspections by the forest conservation inspector will occur during the construction project. Corrections and repairs to all tree protection devices, as determined by the forest conservation inspector, must be made within the timeframe established by the inspector.

Post-Construction

9. After construction is completed, an inspection shall be requested. Corrective measures may include:
   a. Removal and replacement of dead and dying trees
   b. Pruning of dead or declining limbs
   c. Soil aeration
   d. Fertilization
   e. Watering
   f. Mound repair
   g. Clean up of retention areas

10. After inspection and completion of corrective measures have been undertaken, all temporary protection devices shall be removed from the site. No additional grading, sodding, or burial may take place.

Inspections.

All field inspections must be requested by the applicant. Inspections must be conducted as follows:

Tree Save Plans and Forest Conservation Plans without Planting Requirements

1) After the limits of disturbance have been staked and flagged, but before any clearing or grading begins.
2) After necessary stress reduction measures have been completed and the protection measures have been installed, but before any clearing or grading begin.
3) After completion of all construction activities to determine the level of compliance with the provisions of the forest conservation plan.

Additional Requirements for Plans with Planting Requirements

4) Before the start of any required reforestation and afforestation planting.
5) After required reforestation and afforestation planting has been completed to verify that the planting is acceptable and prior to the start of the maintenance.
6) At the end of the maintenance period to determine the level of compliance with the provisions of the planting plan and, if appropriate, release of the performance bond.

DEVELOPER'S CERTIFICATE

The Undersigned agrees to execute all the features of the Approved Final Forest Conservation Plan No. 120020130, including, financial bonding, forest planting, maintenance, and all other application agreements.

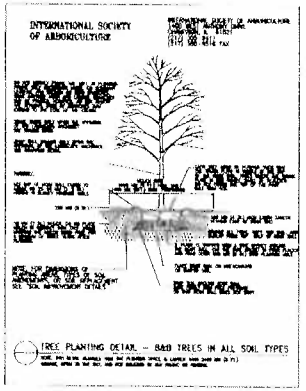
Developer's Name: _____
Printed Name & Company Name

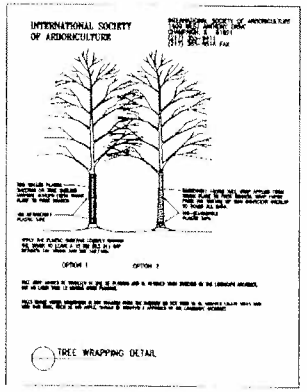
Contact Person or Owner: PETER & GWENDOLYN REGIS

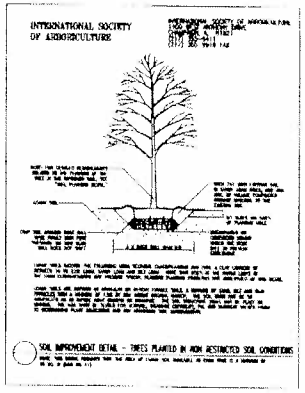
Address: 12802 TIMBER VIEW COURT, Silver Spring, MD 20904

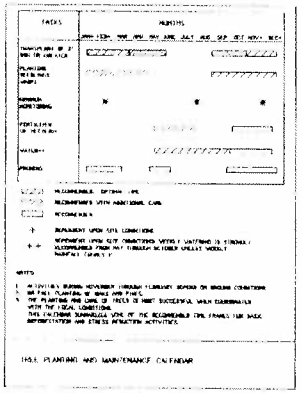
Phone and Email: 301-455-4897

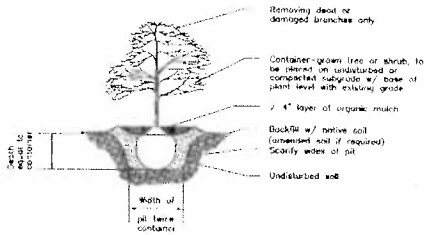
Signature: _____



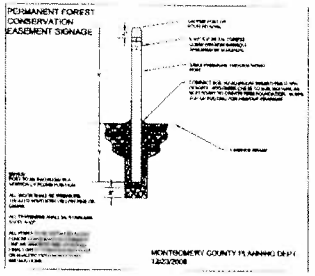








PLANTING DETAIL - SHRUB
Container Grown



Sheet 2 of 2
Revisions
9.17.12

date: 05/21/12
scale:

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B&A

FINAL FOREST CONSERVATION PLAN (AMENDED)
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