

Item # 9



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MEMORANDUM

DATE: February 28, 2003
TO: Montgomery County Planning Board
FROM: A. Malcolm Shaneman
Development Review Division
(301) 495-4587
SUBJECT: Informational Maps for Subdivision Items on the
Planning Board's Agenda for March 06, 2003.

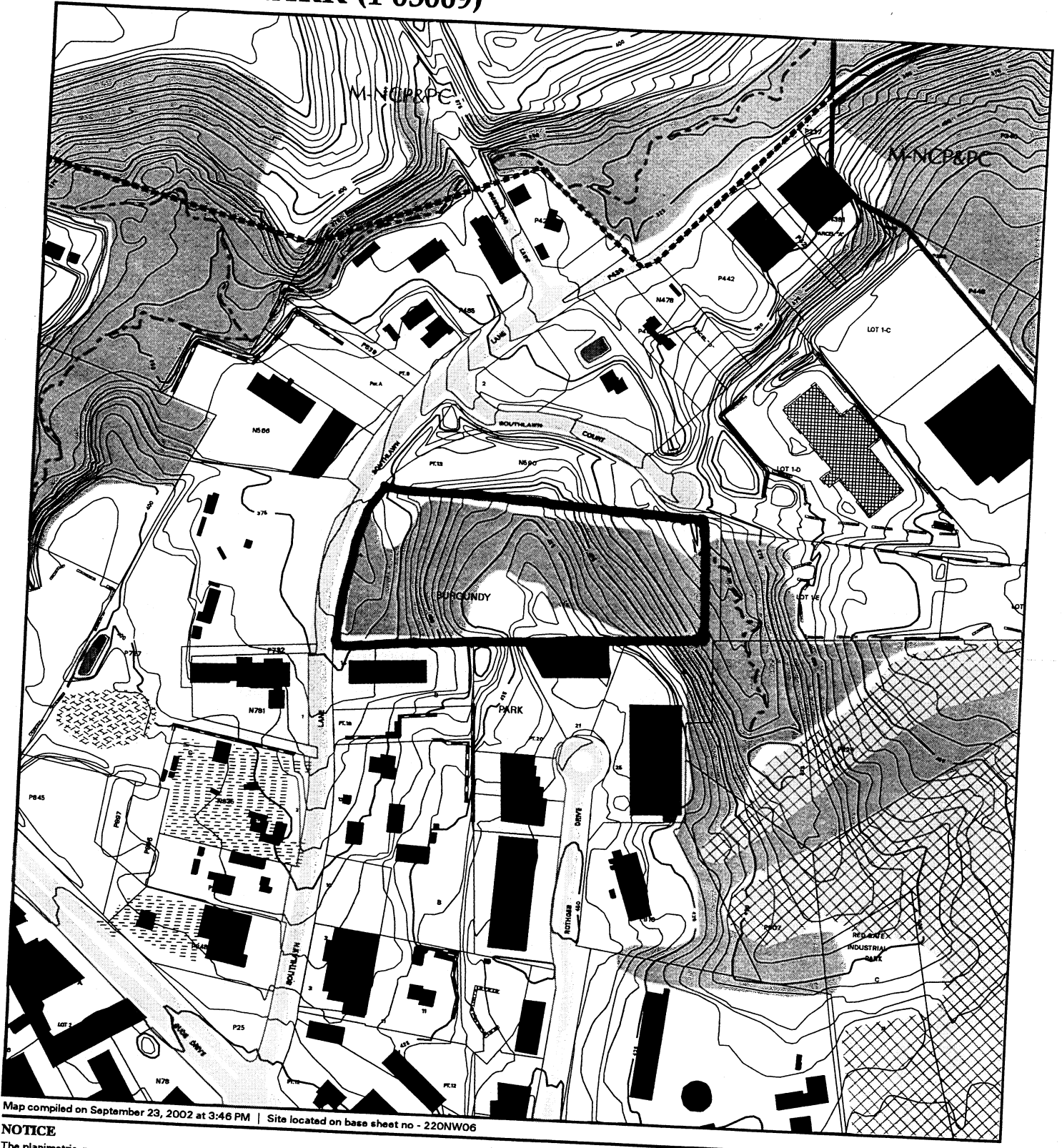
Attached are copies of plan drawings for Items #08, and #09. These subdivision items are scheduled for Planning Board consideration on March 06, 2003. The items are further identified as follows:

Agenda Item #08 - Preliminary Plan 1-03038
Veals Property

Agenda Item #09 - Preliminary Plan 1-03009
Burgundy Park

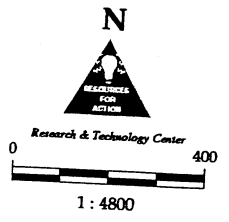
Attachment

VICINITY MAP FOR
BURGUNDY PARK (1-03009)



Map compiled on September 23, 2002 at 3:46 PM | Site located on base sheet no - 22ONW06

NOTICE
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VICINITY MAP FOR
BURGUNDY PARK (1-03009)



Map compiled on February 11, 2003 at 12:45 PM | Site located on base sheet no - 220NW06

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Key Map



1 : 4800

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3-6-03

February 27, 2003

The Honorable Derick Berlage, Chairman
The Montgomery County Planning Board
The Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Preliminary Plan Application No. 1-03009, Burgundy Park

Dear Chairman Berlage:

On February 17, 1989, the Montgomery County Soil Conservation District issued a Forest Harvest Operations Permit to Farid Srour. As authorized by that permit, a tree harvesting operation was conducted in February 1989, within the property that is now the subject of Preliminary Plan Application No. 1-03009 filed by F.D.R. Srour Partnership. On behalf of F.D.R. Srour Partnership and Robert Srour, we urge the Planning Board to reject the imposition of a \$30,000.00 "penalty" for harvesting those trees that we are informed will be recommended by the Environmental Planning Division (the "EPD") as a condition of Subdivision approval. On November 15, 2002 we requested the Office of General Counsel to look into this question and we were informed verbally on Tuesday of this week that the General Counsel agreed with EDP's position. As of yet we have not received a formal written response to our November 15, 2002 inquiry.

The recommended "penalty" is apparently viewed by the EPD as a continuing obligation under a "Contribution Agreement" tied to the approval of a preliminary plan in 1990, which the Development Review Division has concluded is expired. It is our position that if the 1990 Preliminary Plan expired and Mr. Srour has been required to submit a new plan in compliance with current regulations, there is no basis for concluding that the expired Preliminary Plan remains valid for the sole purpose of exacting a payment which was intended in 1990 to be a voluntary contribution.

In addition, there is no factual basis for the imposition of a penalty in 2003 to compensate the county for a lawful tree harvesting operation that occurred prior to the enactment of the State Forest Conservation Act in 1991 and the 1992 enactment of the County Forest Conservation Law. Further, the 1990 "Contribution Agreement" provided for a *maximum* \$30,000 contribution to reforest the stream buffer on the Subject Property. Over the last 13 years, that stream buffer has *naturally* reforested (See Photo Enclosed).

The 1990 Preliminary Plan and the current Preliminary Plan applications both relate to approval of industrial development on I-2 zoned land. As indicated above, in April, 2002, Mr. Srour's engineer, Phil Wilk, was advised by A. Malcolm Shaneman that the Adequate Public Facilities ("APF") approval for the Subject Property had expired, and that even though the 1990

Preliminary Plan was followed by the approval and recordation of a Final Record Plat, a new Preliminary Plan application was required because M-NCPPC considered the approved 1990 Preliminary Plan as expired. Shortly after Mr. Wilk met with Mr. Shaneman, the current application was filed in accordance with the DRD direction.

At the Development Review Committee meeting on this Preliminary Plan Application, the Environmental Planning Division characterized the \$30,000 contribution as a "penalty," and now seeks enforcement of that "penalty" by the Planning Commission. Nowhere in the 1990 "Contribution Agreement" is the *voluntary* contribution referred to as a penalty. The minutes of the October 7, 2002 DRC meeting reflect that the Environmental Planning Division requested that the pending Preliminary Plan not be scheduled for Planning Board action until the "penalty" is paid.

There is no evidence that the M-NCPPC in fact imposed a penalty in 1990 under any law, regulation, adopted guideline or procedures then applicable. The voluntary character of the 1990 Contribution Agreement and that Agreement's current invalidity are consistent with the provisions of the Montgomery County Code, which were applicable in February 1989 when the Soil Conservation District issued a Forest Harvest Operations Permit allowing the trees to be harvested. Even if one were to assume, hypothetically, that the submission of a subdivision application after a lawful tree harvest was a matter within the jurisdiction of the M-NCPPC in 1989-90, the M-NCPPC did not, in 1989 or 1990, have the power to impose a penalty for pre subdivision tree harvesting.

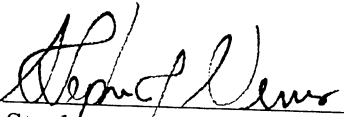
In addition to the fact that the tree harvest on the Subject Property was conducted under a valid permit, in 1990 The Maryland-National Capital Park & Planning Commission lacked the requisite statutory authority to impose a penalty for any allegedly improper tree clearing. In a legal opinion to the "Tree Ordinance Drafting Group" dated April 9, 1990, the County Attorney for Montgomery County opined that: "M-NCPPC lacks the power to issue citations or otherwise call immediate attention to a violation of the Tree Ordinance." The County Attorney further opined that an amendment to the Regional District Act was then required to authorize M-NCPPC to take such action. The Regional District Act was amended in 1992 to include such power. Chapter 643 Laws of Maryland 1992. (See Art. 28 §7-116 (h)(5)).

The Forest Harvest activities were undertaken pursuant to a valid permit. The Contribution Agreement reflecting the applicant's willingness to make a voluntary payment was specifically dependant on a Preliminary Plan of Subdivision which M-NCPPC has declared to be void, requiring submission and approval of a new application. We request that the Planning Board approve Preliminary Plan 1-03009 and reject the proposed condition imposing a \$30,000.00 penalty.

The Honorable Derick Berlage, Chairman
February , 2003
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Very truly yours,

DUFOUR & KOHLHOSS, CHTD.

By: 
Stephen J. Orens

Encl

cc: Mr. Robert Srour
Mr. Phil Wilk
Mr. A. Malcolm Shaneman ✓
Ms. Michele Rosenfeld, Esq.

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