



**MEMORANDUM**

**DATE:** September 23, 2005

**TO:** Montgomery County Planning Board

**VIA:** Jeffrey Zyontz, Chief *JZ*  
County-wide Planning Division

**FROM:** Candy Bunnag, Planner Coordinator (301) 495-4543 *CB*  
Environmental Planning Section,  
County-wide Planning Division

**REVIEW TYPE:** Forest Conservation Plan Review

**APPLYING FOR:** Amendment to Final Forest Conservation Plan -- Proposal to Demolish Existing House, Construct New House, and Protect a 61" Specimen Ash Tree (Existing Category II Conservation Easement) on Lot 21, Block 7, North Glen Hills Subdivision; 12925 Circle Drive

**FOREST CONSERVATION PLAN NAME:** North Glen Hills

**FOREST CONSERVATION PLAN #:** 1-98050 (Same as preliminary subdivision plan)

**REVIEW BASIS:** Section 22A-11(a)(2) of the Montgomery County Forest Conservation Law

**ZONE:** RE-1

**LOCATION:** Located on north side of Circle Drive, east of Glen Mill Road

**MASTER PLAN:** Potomac

**APPLICANT:** Mr. Kevin Smart

**ENGINEER:** Macris, Hendricks, and Glascock, P.A.

**ATTORNEY:** Linowes and Blocher

**FILING DATE:** December 27, 2004

**HEARING DATE:** September 29, 2005

**STAFF RECOMMENDATION:** Approval of the proposed Final Forest Conservation Plan Amendment, dated 9/14/05, pursuant to Section 22A-11(a)(2) of the Montgomery County Forest Conservation Law, and subject to the following conditions:

1. Applicant shall provide written documentation that Montgomery County Department of Permitting Services (DPS) has approved the locations for the proposed septic line and initial septic field as shown on the Forest Conservation Plan Amendment.
2. Prior to release of the DPS demolition permit for the existing house, applicant must submit a detailed tree protection plan for the demolition work ("Demolition Tree Protection Plan") for M-NCPPC staff review. M-NCPPC staff approval of the Demolition Tree Protection Plan is required prior to the release of the DPS demolition permit. The Demolition Tree Protection Plan shall contain specific measures to protect the 61" ash ("Ash"), including measures to avoid or minimize root damage and to provide stress reduction to the Ash. The Demolition Tree Protection Plan will also include measures to remove the adjacent ash tree without harming the Ash. The Demolition Tree Protection Plan must be prepared, signed, and stamped by an International Society of Arboriculture (ISA) Board Certified Master Arborist or equivalent ("Arborist").
3. Prior to start of demolition work, a meeting must be held at the site among M-NCPPC inspector, DPS sediment control inspector, applicant or applicant's representative, Arborist, and demolition contractor. M-NCPPC inspector to verify the approved limits of disturbance and other measures shown on the approved Demolition Tree Protection Plan.
4. Arborist must be present during the demolition work and must certify that all measures in the approved Demolition Tree Protection Plan are correctly implemented. Applicant shall submit written certification to M-NCPPC staff prior to issuance of building permit for new house.
5. After demolition work, Arborist will evaluate the condition of the Ash and shall develop tree protection measures that must be applied to the location and design of the proposed house. Evaluation to include identifying the root system of the Ash and recommendations for the construction of the proposed house and for care of the tree after construction is completed to maximize the long-term viability of the Ash. Measures for care of the Ash should cover at least five years after the completion of construction. Applicant shall submit the Arborist's plans for house design, site construction, and post-construction care of the Ash ("Arborist's Plans") to M-NCPPC staff for its review. M-NCPPC staff approval of the Arborist's Plans is required prior to release of DPS sediment control permit.

6. Plan submitted by applicant with building permit application shall include house design measures recommended in approved Arborist's Plans.
7. Pre-construction meeting must be held among M-NCPPC inspector, DPS sediment control inspector, applicant or applicant's representative, Arborist, and construction contractor. M-NCPPC inspector shall verify the approved limits of disturbance and other measures shown on the approved Arborist's Plans.
8. Arborist must be present during construction, as necessary, to ensure that all measures in the approved Arborist's Plans are correctly implemented. Arborist shall certify, at such intervals specified in the Arborist's Plans, that the required measures have been correctly implemented. Applicant shall submit such certification to M-NCPPC staff.
9. Arborist shall certify that post-construction care of the Ash is correctly implemented. Applicant shall submit such certification to M-NCPPC staff on the anniversary of the DPS issuance of final inspection for five years after the DPS issuance of final inspection.
10. Applicant must provide a financial security instrument to M-NCPPC to ensure that the tree protection measures are implemented in accordance with the approved Demolition Tree Protection Plan and Arborist's Plans. The amount of the financial security instrument shall be based on the value of the Ash and the cost to replace the tree, as determined by the Arborist using ISA guidelines (as verified by M-NCPPC staff). The financial security instrument must be approved by M-NCPPC and shall be in place prior to start of demolition work and must remain in place for five years after completion of construction.
11. Applicant shall install permanent signs, fence, or other M-NCPPC staff-approved visible markers along the boundary of the existing Category I conservation easement on Lot 21.

## **BACKGROUND AND SITE DESCRIPTION**

An approved Forest Conservation Plan covers a two-lot, residential single-family subdivision. The subdivision is located on the north side of Circle Drive, east of Glen Mill Road (Attachment A). It covers 2.54 acres of land in the RE-1 zone. The Preliminary Plan and the Preliminary Forest Conservation Plan were approved with conditions by the Planning Board on April 30, 1998 (Preliminary Plan and Preliminary Forest Conservation Plan no. 1-98050). A copy of the Planning Board opinion is included as Attachment B. The Final Forest Conservation Plan, approved on June 11, 1998, is included as Attachment C.

The approved Final Forest Conservation Plan shows 0.3 acre of forest retention, 0.5 acre of reforestation, and protection of a 59" specimen ash tree ("Ash"). The forest retention and reforestation areas are located on both lots and are covered by Category I conservation easements. The Ash is located on the northern lot (Lot 21) and is covered by a Category II conservation easement. The Forest Conservation Plan shows a proposed new house on the southern lot (Lot 20). On Lot 21, the Ash is protected since the Final Forest Conservation Plan shows the existing house adjacent to the ash to remain in place. The only land disturbance proposed within the Ash's critical root zone is for a small area on the western edge of the critical root zone for construction of a driveway.

The Category I conservation easements are delineated on the record plat (Attachment D). The Category II conservation easement is identified on the record plat as part of a note:

"5. The property shown hereon is subject to the requirements of the Montgomery County Forest Conservation Law of 1992, including approval of a Final Forest Conservation Plan and appropriate agreements prior to issuance of a sediment control permit. ADDENDUM TO NOTE 5: And also: On Lot 21, Block 7, including the preservation of the 59" White Ash (*Fraxinus Americana*) enforced through a Category II Conservation Easement (L.13178 F.421)."

Currently, the southern lot (Lot 20) is improved and a house that existed prior to the subdivision remains on the northern lot (Lot 21). Both lots are served by public (WSSC) water and septic systems. The Ash is now larger, with a 61" diameter at breast height (dbh). The Ash was characterized in good condition during the 1997/1998 reviews of the Preliminary Plan and Forest Conservation Plan. An updated evaluation by the applicant's arborist in November 2004 characterizes the Ash as being in fair to good condition. The trunk of the Ash almost touches a part of the existing house on Lot 21. A major branch of about 24 inches in diameter rubs against the house at about 10 feet off of the ground. Other branches hang over the existing house. A smaller ash (35" dbh) stands near the Ash at the northeastern corner of the house. The smaller ash is in poor health and has poor form.

## **PROJECT DESCRIPTION**

This is an application to amend the Final Forest Conservation Plan. The amendment would involve construction and land disturbance on Lot 21 only. (No revisions of the Final Forest Conservation Plan are proposed for Lot 20.) The applicant proposes to demolish the existing house on Lot 21 and construct a new house. The applicant proposes to retain and protect the Ash. The applicant does *not* propose to eliminate or modify any conservation easements covered by the Final Forest Conservation Plan. He has retained the services of a certified arborist to recommend protection and stress reduction measures for the Ash during the demolition of the existing house, the construction of the new house, and for post-construction tree care. The proposed Forest Conservation Plan Amendment and arborist's report are found in Attachments E and F.

## **PLANNING BOARD REVIEW AUTHORITY**

The Montgomery County Forest Conservation Law (Chapter 22A of the Montgomery County Code) requires Planning Board action for certain types of modifications to an approved Forest Conservation Plan. Section 22A-11(2) of the Forest Conservation Law states:

“(2) Modification to an approved plan. The Planning Director may approve modifications to an approved forest conservation plan that are consistent with this Chapter if:

- (A) field inspections or other evaluation reveals minor inadequacies of the plan; or,
- (B) each modification is minor and does not impact any forest in a priority area (such as substituting an on-site conservation area for an equal or greater on-site area of similar character, or substituting a marginal on-site conservation area for equal or greater amount of off-site priority area); or
- (C) action is otherwise required in an emergency situation.

Any other modification must be approved by the agency that approved the forest conservation plan.”

Protection of the Ash is a significant component of the approved Forest Conservation Plan. The Forest Conservation Plan allows 37.5 percent of the subdivision’s reforestation requirement (0.3 acre out of a total of 0.8 acre of reforestation) to be met by retaining and protecting the Ash. Originally, the applicant proposed the removal of the Ash and the Category II conservation easement to construct a new house on Lot 21. The applicant has since revised his plan to show retention and protection of the specimen tree, along with new house construction.

## **DISCUSSION**

The applicant first submitted the proposed construction on Lot 21 as an application for a forest conservation plan exemption. Staff researched the history of the property and found that the lot was covered under an approved Forest Conservation Plan. The applicant initially submitted a plan proposing the construction of a new house and protection of the Ash. The plan included a certified arborist’s report that recommended protection measures for the Ash during the demolition of the existing house, construction of the new house, and care for the Ash after the completion of construction.

Subsequently, the applicant submitted a revised plan that suggested the Ash could not be retained, not because of the demolition work or house construction, but because the proposed septic field for the new house would be too close to the Ash.

Staff then discussed with staff of the Montgomery County Department of Permitting Services (DPS) Well and Septic Division possible alternatives to locating a new septic field near the Ash. DPS indicated that there was some flexibility in locating the septic field and verbally agreed that the field could be located in a part of the septic easement that is either on the edges or outside the critical root zone of the ash tree.

The applicant then re-submitted a plan that includes a revised arborist's report (Attachments E and F). The plan proposes protection of the Ash in conjunction with construction of a new house. The proposed septic field is shown to be located outside the critical root zone of the Ash.

### **Citizen Correspondence**

Correspondence from citizens has been received for this proposed project. These are included in Attachment G. Most of the correspondence raises concerns about the removal of the Ash and Category II conservation easement. The correspondence was in reaction to a proposal at an earlier stage of the review process when the applicant showed a plan that could not protect the Ash because of the proximity of the proposed septic field.

The currently proposed plan now shows the Ash to be protected and the conservation easement to remain. Staff believes the applicant's current plan, in combination with staff's recommended conditions, addresses the concerns raised in citizens' correspondence related to removal of the conservation easement and the Ash.

Another concern that had been raised was for land disturbing activities that had occurred on the subject site. The applicant had hired a contractor to uncover the existing septic tank and to cap off the water line house connection. This work involved some excavation of earth within the critical root zone of the Ash. The applicant did not notify or obtain approval from M-NCPPC staff prior to the work being done. Approval from M-NCPPC to excavate in an area of a Category II conservation easement is required. The work, therefore, violated the terms of the easement.

The Category II conservation easement includes the following restrictions:

"The following activities may not occur without prior written consent from the Planning Director:

- a. Construction (including roadways, private drives, paths and trails), excavation, grading or retaining walls.
- b. Erection of any buildings or structural improvements on or above ground, including (but not limited to) sheds, dog pens, play equipment and retaining walls.
- c. Activities which in any way could alter or interfere with soil or slope stability or drainage (including alteration of stream channels, stream currents or stream flow).

The Planning Director may approve these activities upon a finding that the proposed activity will not interfere with the purposes stated above, and in particular with tree preservation; screening existing and proposed development from adjacent and abutting landowners; maintenance of tree cover; and preservation of open space. This approval exception shall be narrowly interpreted, and the Director is under no obligation to authorize any of these activities when approval is requested.”

After M-NCPPC staff was alerted to the excavation work, staff visited the site. Staff also contacted the applicant and his firm to convey to them that the work should not have occurred without prior approval from M-NCPPC because of the Category II conservation easement. Staff indicated that no further work could be done on the site until the Planning Board acted on the proposed Forest Conservation Plan Amendment. The applicant’s firm agreed not to do any more work on the site and submitted a letter (see Attachment H).

Subsequently, M-NCPPC inspection staff issued a citation and \$1000 civil fine to the applicant for violation of the terms of the Category II conservation easement. The due date for payment of the fine is October 1, 2005. Staff evaluated the disturbed area and determined that there was probably minimal damage to the Ash. Staff required the applicant to fill in the excavated area at the existing septic tank by hand using the excavated soil.

An email received on September 23, 2005 objects to the proposed Forest Conservation Plan Amendment. The two citizens do not believe that the plan, even with restrictions or conditions, will be followed.

### **Staff Analysis of the Applicant’s Proposed Tree Protection Measures**

The applicant’s currently proposed plan includes an arborist’s recommendations for protection measures, such as root pruning and tree protection fence along the limits of disturbance for the septic line and field. The new house will also be located about 15 feet away from the Ash. The new house would be further away from the Ash than the existing house. Some of these protection measures are necessary.

However, staff believes there is not enough detail in the arborist’s report for some aspects of the proposed work. For example, the arborist includes language that the demolition of the existing house must be done with great care to avoid damage to the tree. Use of an air spade is recommended to locate tree roots near the existing house foundation and to cut roots only if necessary. However, there is no discussion of what criteria should be applied to determine when root cutting is necessary. How will it be determined that a root can be cut without significant and irreversible damage to the tree?

Staff also believes that the arborist’s report does not adequately evaluate the proposed house design to determine if the tree may be protected. Staff is concerned that the tree may have significant roots that extend under the existing house and that the

proposed new foundation may require the removal of some or all of these roots. Staff is also concerned that the design of the new house may require the removal of multiple large branches that currently extend over the existing house. The removal of large roots and branches may significantly stress or damage the tree. There is no detailed evaluation in the current proposal to address these concerns.

Staff believes it is possible to demolish the existing house, construct a new house and protect the Ash. However, because the Ash currently grows immediately next to the existing house, very specific and careful measures need to be taken to ensure protection and survival of the tree during and after demolition and construction work. The applicant's proposal provides a conceptual plan and framework to protect the specimen tree. But staff recommends that more comprehensive and detailed plans be developed to address location and design of the new house, specific measures for demolition and removal of the existing house, construction of the new house, and post- construction measures to ensure the maximum viability of the tree. Staff believes two sets of plans should be prepared sequentially. One plan should be developed for the demolition of the existing house. The second plan or set of plans should be developed after the existing house is removed and the root system of the tree under the house can be assessed. This second plan or set of plans may involve a redesign of the new house so as to ensure that stress to the tree due to excessive cutting of roots or branches is minimized. Because clearing and grading will occur near the tree, staff believes these plans should be prepared by an arborist that has advanced and thorough knowledge of tree protection measures on construction sites and is highly experienced in the practical aspects of construction-related measures. To ensure that an arborist that has advanced skills and experience will prepare and implement the plans, staff recommends that such an arborist be a Master Arborist, as certified by the Board of the International Society of Arboriculture (ISA).

In addition, staff recommends that some form of permanent, visible markers (e.g., split-rail fence, signs, etc.) be placed along the Category I conservation easement boundary on Lot 21 so that this boundary is easily identified by current and future owners of the lot. The conservation easement has a relatively odd shape, and markers would make it easier to identify where clearing, grading, and mowing may not occur on the lot.

Therefore, staff recommends approval of the Amendment to the Final Forest Conservation Plan, dated 9/19/05, with the specified conditions.

#### **Attachments**

- Attachment A -- Vicinity Map
- Attachment B -- Planning Board Opinion for Preliminary Plan No. 1-98050
- Attachment C -- Approved Final Forest Conservation Plan No. 1-98050
- Attachment D -- Record Plat
- Attachment E -- Proposed Amendment to Final Forest Conservation Plan
- Attachment F -- Arborist's Report as Part of Proposed Amendment to Final Forest Conservation Plan



Attachment G -- Citizens' Correspondence

Attachment H -- 8/11/2005 Letter from Smart Development/Premiere Homes