



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

MCPB
Item #
December 16, 2010

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Catherine Conlon, Supervisor, Development Review Division *CC*
Mark Pfefferle, Acting Chief, Environmental Planning *MP*

FROM: Richard A. Weaver, Planner Coordinator, Development Review Division *RAW*
Josh Penn, Senior Planner, Environmental Planning *JP*

DATE: November 23, 2010

PLAN NAME: Willerburn Acres

PLAN NUMBER: Forest Conservation Plan Limited Amendment to 12009040A

PLAN TYPE: Forest Conservation Variance Request

REVIEW BASIS: Chapter 22A of the County Code

ZONE: R-90

LOCATION: Located at the southeast corner of the intersection of Seven Locks Road and Gainsborough Road, in Potomac

APPLICANT: Dennis Berman

HEARING DATE: December 16, 2010

RECOMMENDATIONS

The Environmental Planning staff has reviewed the forest conservation variance request and recommends the Planning Board approve the variance.

BACKGROUND

The preliminary plan was approved by the Planning Board on April 22, 2010; this approval was for five lots. At that time a variance was granted by the Planning Board to allow the removal of one tree and impact to two others. Subsequent to that approval, the applicant recognized that two additional trees could not be saved and needed to also be removed. This amendment addresses

the request to remove these two additional trees.

PROPERTY DESCRIPTION

The Willerburn Acres property is a 3.99-acre site located at the intersection of Seven Locks Road and Gainsborough Road, in Potomac. The property is located in the Cabin John Creek watershed, a Use I-P waterway. There are no streams, wetlands, 100-year floodplain, or environmental buffer on the property.

There is no forest on-site; however, there are specimen (>30" DBH) and large trees (24" to 30" DBH) on the property. Currently, the property contains three existing single family homes.

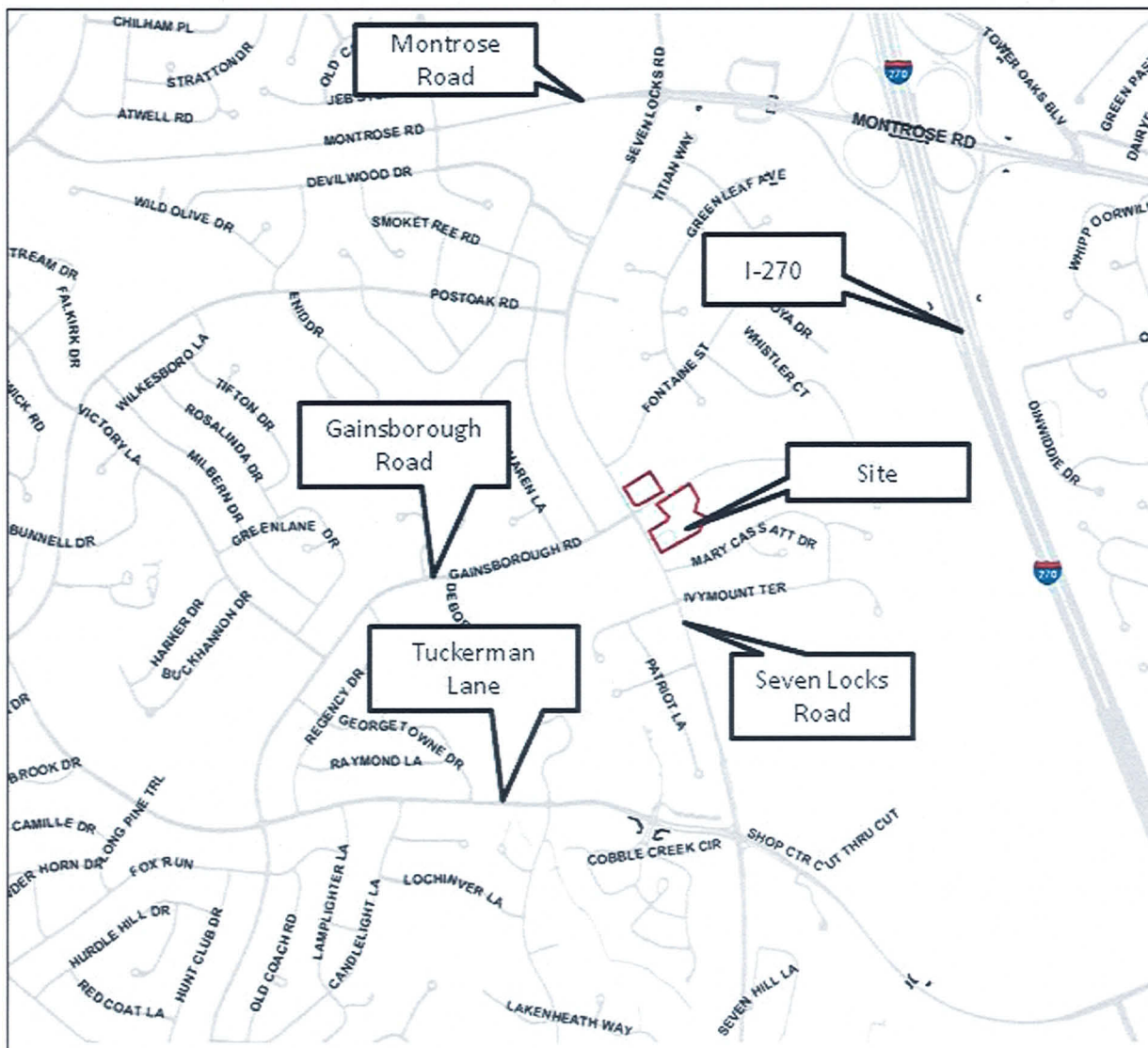


Figure 1: Vicinity Map



Figure 2: 2010 Aerial View

Forest Conservation Variance

Section 5-1607(c) of the Natural Resources Article, MD Ann. Code went into effect statewide on October 1, 2009 and affects the Montgomery County Forest Conservation law. This section requires an applicant to obtain, prior to approval of a forest conservation plan, a variance for removing or impacting trees 30 inches and greater in diameter at breast height as well as certain vegetation. Section 22A-21 of the County Code indicates that only the Planning Board has the authority to approve forest conservation variances. Once the variance is approved by the Planning Board the Planning Director, or designee, can act on the forest conservation plan.

VARIANCE REQUIREMENTS

Section 5-1607(c) of the Natural Resources Article, MD Ann. Code affects the Montgomery County Forest Conservation law by identifying the following trees, shrubs, plants, and specific areas as priority for retention and protection that should be left in an undisturbed condition unless the applicant qualifies for a variance in accordance. More specifically the vegetation to remain undisturbed includes:

- A. *Trees, shrubs, or plants determined to be rare, threatened, or endangered under:*

- (1) *The federal Endangered Species Act of 1973,*
- (2) *The Maryland Nongame and Endangered Species Conservation Act, Natural Resources Article, §§10-2A-01—10-2A-09, Annotated Code of Maryland, and*
- (3) *COMAR 08.03.08;*

B. *Trees that:*

- (1) *Are part of an historic site,*
- (2) *Are associated with an historic structure, or*
- (3) *Have been designated by the State or the Department as a national, State, or county champion tree; and*

C. *Any tree having a diameter measured at 4.5 feet above the ground of:*

- (1) *30 inches or more, or*
- (2) *75 percent or more of the diameter, measured at 4.5 feet above the ground, of the current State champion tree of that species as designated by the Department of Natural Resources.*

Under Chapter 22A-21 of the County Code a person may request in writing a variance from this Chapter if the person demonstrates that enforcement would result in unwarranted hardship to the person. The applicant for a variance must:

- (1) Describe the special conditions peculiar to the property which would cause the unwarranted hardship;
- (2) Describe how enforcement of these rules will deprive the landowner of rights commonly enjoyed by others in similar areas;
- (3) Verify that State water quality standards will not be avoided or that a measurable degradation in water quality will not occur as a result of the granting of the variance; and
- (4) Provide any other information appropriate to support the request.

In Montgomery County, before considering the variance, the Planning Board must refer a copy of each request to the County Arborist within the Montgomery County Department of Environmental Protection for a written recommendation. The County Arborist must make a recommendation on the variance request to the Planning Board within 30 days from the receipt of the request. If there is no recommendation from the County Arborist the response is presumed to be favorable.

VARIANCE REQUEST

On October 8, 2010, the applicant submitted a second variance request (Attachment A) for the proposed removal of two additional trees that are 30 inches and greater in diameter at breast height (DBH). The two onsite trees are #11, and 12. Both trees are considered to be in poor health and a hazard.

Trees 30 Inches or Greater That Are Proposed to be Removed

Tree No.	Common Name	Botanical Name	DBH	CRZ Radius	Condition	Location
11	White Pine	<i>Pinus strobus</i>	43 In.	64.5 feet	Poor/Hazard	South of pond
12	Red Maple	<i>Acer rubrum</i>	40 In.	60 feet	Poor/Hazard	Next to existing gravel road

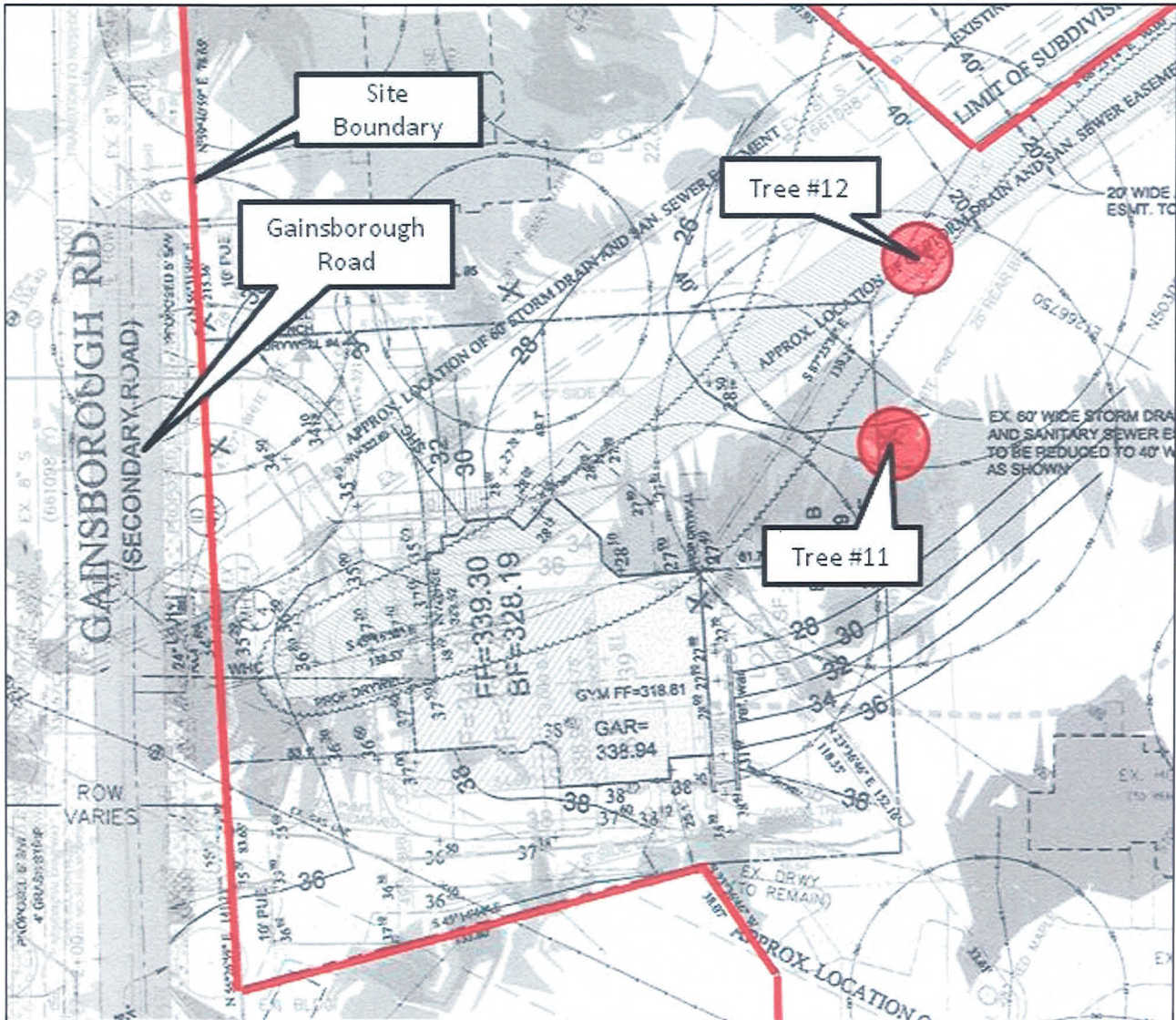


Figure 3: Trees Requiring Variance

The applicant’s October 8, 2010 letter requesting approval of the variance (Attachment A) states:

“In accordance with Section 22A-21(b) of the Forest Conservation Law, the following description of the application requirements:

- (1) Will confer on the applicant a special privilege that would be denied to other

applicants;

The requested variance will not confer on the applicant any special privileges that would be denied to other applicants. The applicant's goal is to create a compact and well designed group of homes harmonious with the rest of the neighborhood and sensitive to the required building regulations for the subject property. Reconfiguring the lots to accommodate specimen trees numbered 10 (tree variance previously approved), 11 and 12 would preclude the creation of Lot 59, depriving the owner the ability to subdivide in the manner that many other R-90 zoned properties in the neighborhood have been allowed to do. The circumstances related to this variance are not unique, nor avoidable, given the existing site features and the applicant's proposed improvements for Lot 59.

- (2) Is based on conditions or circumstances which are the result of the actions by the applicant;

The requested variance is not based on conditions or circumstances which are the result of actions by the applicant. The requested variance is the result of having to design around conditions that are peculiar to the subject property. The subject property, specifically Lots 11, 52, 58 and 59, are encumbered by existing utility easements including an easement belonging to Washington Gas and a shared easement between Montgomery County and Washington Suburban Sanitary Commission for storm drain and sanitary sewer. The development impact to Lot 59 is more severe than on the other lots as the easements create building limitation lines in addition to the building restriction lines established by conventional zoning. This has forced the applicant to design and situate the proposed dwelling in such a fashion to avoid crossing the utility easements and the building restriction lines. The Applicant's designs have honored all of these building limitations.

Additionally, Specimen Tree #11 falls within the limit of disturbance of Lot 59 and the CRZ of Specimen Tree #12 falls within the limit of disturbance of Lot 59. Proposed grading and construction of the new dwelling for Lot 59 will unavoidably impact the trunks of Specimen Trees #10 (tree variance previously approved) and #11, and the CRZ of Specimen Tree #12. It appears the remaining lots will avoid the need for tree variances.

- (3) Is based on a condition relating to land or building use, either permitted or non-conforming, on a neighboring property.;

The requested variance is a result of the required buildable envelope as well as the proposed site design and layout on the subject property, and is not a result of land or building use on a neighboring property.

- (4) Will violate State water quality standards or cause measurable degradation in water quality..

The requested variance will not violate State water quality standards or cause measurable degradation in water quality. Under Section 22A-16(d) of the County Code "The Board or Director may treat any forest clearing in a stream buffer, wetland, or special protection area as creating a rebuttable presumption that the clearing had an adverse impact on water quality." In this case, the specimen trees proposed to be removed and impacted are not located within a stream buffer, wetland, or special protection area, nor are these trees part of a contiguous forest stand. Therefore, the removal and/or impact to these trees would not result in measurable degradation to water quality.

Also, there are no current storm water quality or quantity provisions on the subject property. In conjunction with the proposed development plan of the subject property the Applicant has secured an approved storm water management concept plan which will improve water quality measures on the subject property and in the surrounding area by the use of environmental site design practices including drywells and infiltration trenches on those lots being improved with new dwellings (Lots 52, 53 and 59).

VARIANCE FINDINGS

The Planning Board must make findings that the applicant has met all requirements of Section 22A-21 of the County Code before granting the variance. Staff has made the following determination on the required findings:

1. Will confer on the applicant a special privilege that would be denied to other applicants;

Trees #11 and #12 have been declared to be in poor/hazardous condition by an International Society of Arboriculture (ISA) certified arborist. The arborist further recommends the trees should be removed (Attachment C). The removal of hazardous trees is a necessity and would be granted to any applicant and therefore does not confer a special privilege.

2. Is based on conditions or circumstances which are the result of the actions by the applicant.

The removals of trees #11 and #12 are a direct result of their poor/hazardous condition and are recommended to be removed by an ISA certified arborist. The trees proposed for removal should be removed regardless of any proposed development. The health and condition of trees #11 and #12 is not a direct result of the actions of the applicant.

3. Is based on a condition relating to land or building use, either permitted or non-conforming, on a neighboring property.

The removal of trees #11 and #12 is a direct result of their poor/hazardous condition and they are recommended to be removed by an ISA certified arborist. The health and

condition is not based condition relating to land or building use, either permitted or non-conforming, on a neighboring property.

4. Will violate State water quality standards or cause measurable degradation in water quality.

The requested variance will not violate State water quality standards or cause measurable degradation in water quality. A sediment and erosion control plan for the proposed work has been approved by Montgomery County Department of Permitting Services.

On November 2, 2010 the County Arborist provided a written statement indicating that she was electing not to review the variance request for the project (Attachment B).

MITIGATION

Staff does not recommend that compensation be required for the proposed removal of the two specimen trees, because they are in poor/hazardous condition and should be removed regardless of the proposed development.

CONCLUSION

Staff recommends the Planning Board approve the forest conservation variance request.

STATEMENT OF DENNIS L. BERMAN, APPLICANT
FOR VARIANCE IN ACCORDANCE WITH SECTION 22A-21
OF THE MONTGOMERY COUNTY CODE

WILLERBURN ACRES SUBDIVISION
(PRELIMINARY PLAN NUMBER 120090400)
MAY 18, 2010 (revised OCTOBER 8, 2010)

BACKGROUND INFORMATION:

Dennis L. Berman is the Applicant for a "limited modification" to the Preliminary Forest Conservation Plan (PFCP) and related Tree Variance approved under Preliminary Plan Number 120090400 entitled Willerburn Acres. The aforesaid approval was unanimously granted by the Montgomery County Planning Board on April 22, 2010. A limited modification to the provisions of Section 22A-21 of the Montgomery County Code is being requested because the technical application of the approved variance prohibits the intended development and use of proposed Lot 59, Willerburn Acres Subdivision. Additionally, the approved variance submitted by Mr. Berman's consultant, Dewberry and Davis LLC (Dewberry) was hastily completed in an effort to satisfy a last minute comment from the M-NCPPC Natural Resources Division for the Preliminary Plan with regard to the limit of disturbance encumbrance to the critical root zone of a 43" White Pine tree located on Lot 59, and as a result the poor physical condition and need for removal of the tree was overlooked by the consultant. In fact, Dewberry's condition and description of the 43" White Pine on the Natural Resources Inventory / Forest Stand Delineation Plan (NRI/FSD) made one year prior stated that it "...shows rot and should be removed...". This was also stated in the variance request although Dewberry failed to specifically request the removal of the tree. Evidenced by photographs taken on April 22, 2010 and on May 18, 2010 included herein, it is obvious the 43" White Pine tree is in a worsened condition than that stated on the NRI/FSD one year ago.

When reviewing this request please be aware the buildable area for Lot 59 is adversely affected by a 40' wide Washington Gas Easement, and an existing 60' wide shared Montgomery County storm drain and Washington Suburban Sanitary Commission (WSSC) sanitary sewer easement, whereby the dwelling design and location within the boundaries of Lot 59 force the physical location toward the south (or rear) of the lot. This, along with retaining the existing driveway to minimize storm water management impacts, limits the flexibility of the site design such that three specimen trees are impacted; these are Tree Numbers 10, 11 and 12 as shown on the PFCP. A tree variance approval was previously granted for Tree #10 to be removed. A variance to remove Tree Numbers 11 and 12 is being requested at this time.

APPLICANT'S PROPOSAL:

Attached are copies of the approved Preliminary Subdivision Plan (with Agency written approval pending), the approved PFCP, the approved Tree Variance, and a copy of the Applicant's proposed Site Grading Plan for Lot 59 indicating building restriction lines, buildable area, dwelling footprint, finish floor elevations, driveway locations, and the like. The Grading Plan was being designed at the time of the April 22, 2010 Preliminary Plan Hearing with the full extent of its disturbance limits unknown. Now that the Grading Plan is nearly completed and ready for submission we believe we have identified the full impact of the disturbed limits such that the resultant affect it will have on the property is now known. A Report dated October 8, 2010 recommending removal of Tree #11 and #12 by Mr. Eric Clair, a Certified Arborist with SavATree, is also attached for your review.

Specifically:

1. The existing **43" White Pine** tree identified on the PFCP as #11 is located in the rear yard of Lot 11 and its CRZ crosses into Lots 58 and 59. This tree was previously approved in the prior Tree Variance for impacts to its critical root zone (CRZ). At this time it is proposed to be removed due to the following:
 - a. it's continuing deteriorating condition;
 - b. the Applicant's concern for safety in his backyard in the event it remains and ultimately falls;
 - c. the proposed grading changes in and around its physical location;
 - d. the recommendation by a Certified Arborist to remove it.

2. The existing **40" Red Maple** tree identified as #12 is located in the rear yard of Lot 11 and is shown on the Plan to be removed. The Plan also shows a CRZ area of approximately 2,179 square feet (or 20% of the total CRZ area) that will be impacted as a result of the proposed grading on Lot 59. Recognizing this tree was listed in poor condition on the NRI/FSD and PFCP due to its hollow trunk and rotting, and from visual inspection and photographs taken on May 18, 2010 during a site visit, it is our request to remove this tree from the property. The future occupants of the existing dwelling on Lot 11 are Mr. Berman's son, daughter in law, and young grandchildren. It is imperative this tree be removed for safety reasons, not to mention its deteriorating condition. The Certified Arborist also recommended its removal.

The conditions and descriptions per the approved NRI/FSD identified as #420091890 and as listed on the PFCP are as follows:

#11 – White Pine (*Pinus strobus*): 43" trunk diameter (DBH); good/fair condition; large limbs, shows rot and should be removed; some limb loss and limb break.

#12 – Red Maple (*Acer rubrum*): 40" trunk diameter (DBH); poor condition; trunk is hollow and rot at two locations.

In summary, a variance is being requested from the strict application of Section 22A-21 for the removal of two trees, Tree #11 (a 43" White Pine) and Tree #12 (a 40" Red Maple). Be reminded that Tree #10 (a 34" White Pine) was previously approved for removal in a prior variance.

SATISFACTION OF THE CRITERIA LISTED IN SECTION 22A-21(b) OF THE MONTGOMERY COUNTY CODE:

Section 22A-21(b) of the Montgomery County Code lists criteria for granting the variance requested herein. In accordance with same, the following narrative explains how the requested variance is justified for each criterion under the circumstances described above.

1. *"Will confer on the applicant a special privilege that would be denied to other applicants."*

The requested variance will not confer on the applicant any special privileges that would be denied to other applicants. The applicant's goal is to create a compact and well designed group of homes harmonious with the rest of the neighborhood and sensitive to the required building regulations for the subject property. Reconfiguring the lots to accommodate specimen trees numbered 10 (tree variance previously approved), 11 and 12 would preclude the creation of Lot 59, depriving the owner the ability to subdivide in the manner that many other R-90 zoned properties in the neighborhood have been allowed to do. The circumstances related to this variance are not unique, nor avoidable, given the existing site features and the applicant's proposed improvements for Lot 59.

2. *"Is based on conditions or circumstances which are the result of the actions by the applicant."*

The requested variance is not based on conditions or circumstances which are the result of actions by the applicant. The requested variance is the result of having to design around conditions that are peculiar to the subject property. The subject property, specifically Lots 11, 52, 58 and 59, are encumbered by existing utility easements including an easement belonging to Washington Gas and a shared easement between Montgomery County and Washington Suburban Sanitary Commission for storm drain and sanitary sewer. The development impact to Lot 59 is more severe than on the other lots as the easements create building limitation lines in addition to the building restriction lines established by conventional zoning. This has forced the applicant to design and situate the proposed dwelling in such a fashion to avoid crossing the utility easements and the building restriction lines. The Applicant's designs have honored all of these building limitations.

Additionally, Specimen Tree #11 falls within the limit of disturbance of Lot 59 and the CRZ of Specimen Tree #12 falls within the limit of disturbance of Lot 59. Proposed grading and construction of the new dwelling for Lot 59 will unavoidably impact the trunks of Specimen Trees #10 (tree variance previously approved) and #11, and the CRZ of Specimen Tree #12. It appears the remaining lots will avoid the need for tree variances.

3. *"Arises from a condition relating to land or building use, either permitted or non-conforming, on a neighboring property."*

The requested variance is a result of the required buildable envelope as well as the proposed site design and layout on the subject property, and is not a result of land or building use on a neighboring property.

4. *"Will violate State water quality standards or cause measurable degradation in water quality."*

The requested variance will not violate State water quality standards or cause measurable degradation in water quality. Under Section 22A-16(d) of the County Code *"The Board or Director may treat any forest clearing in a stream buffer, wetland, or special protection area as creating a rebuttable presumption that the clearing had an adverse impact on water quality."* In this case, the specimen trees proposed to be removed and impacted are not located within a stream buffer, wetland, or special protection area, nor are these trees part of a contiguous forest stand. Therefore, the removal and/or impact to these trees would not result in measurable degradation to water quality.

Also, there are no current storm water quality or quantity provisions on the subject property. In conjunction with the proposed development plan of the subject property the Applicant has secured an approved storm water management concept plan which will improve water quality measures on the subject property and in the surrounding area by the use of environmental site design practices including drywells and infiltration trenches on those lots being improved with new dwellings (Lots 52, 53 and 59).

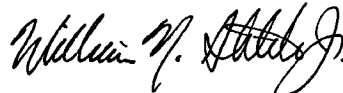
5. *"Providing any other information appropriate to support the request."*

The Applicant believes the information set forth above is adequate to justify the requested variance to remove Specimen Trees #11 and #12 on the subject property.

Thank you for your consideration in the approval of this "limited modification variance request." Should you have any questions or need additional information please do not hesitate to contact this office at (301) 816-1555.

Respectfully yours,

DENNIS L. BERMAN C/O BERMAN ENTERPRISES LP



William N. Stehle, Jr., Senior Project Manager

Enclosures List:

- Preliminary Forest Conservation Plan (PFCP)
- Tree Variance (by Dewberry)
- Tree #11 Photographs
- Tree #12 Photographs
- Natural Resources Inventory/Forest Stand Delineation (NRI/FSD)
- Preliminary Subdivision Plan
- Site Grading Plan (for Lot 59)
- Certified Arborist Report

File: Willerburn Acres Tree Variance 5.18.10 (updated 10.8.10)



The Tree and Shrub Care Company
1057 First Street, Rockville, MD 20850
Phone (301) 545-1712 • Fax (301) 545-1716
www.savatree.com • rockville@savatree.com

October 8, 2010

Chip Stehle
Senior Project Manager
Berman Enterprises, LP
5410 Edson Lane, Suite 220
Rockville, MD 20852

Re: Property 11705 Gainsborough Road Potomac, MD 20854

Dear Chip,

I have inspected the 2 trees from the Tree Conservation Plan of the above property. Tree # 11 a 43" diameter White Pine has significant decay at the base and up the main trunk along with wood boring insects and is a potential hazard which I recommend for removal. Also Tree # 12 a 40" diameter Red Maple is hollow at the base, structurally unsound and is a potential hazard which I recommend for removal.

I can be reached at 301-343-5631 should you have any further questions.

Sincerely,

Eric Clair

Eric Clair,
Maryland Licensed Tree Expert # 1223
ISA Certified Arborist #MA-0376AT





DEPARTMENT OF ENVIRONMENTAL PROTECTION

Isiah Leggett
County Executive

Robert G. Hoyt
Director

November 2, 2010

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

RE: Willerburn Acres - Revised, DAIC 120090400, NRI/FSD applied for on 4/22/2009

Dear Ms. Carrier:

Based on a review by the Maryland National Capital Park & Planning Commission (MNCPPC), the application for the above referenced request is required to comply with Chapter 22A of the Montgomery County Code. As stated in a letter to Royce Hanson from Bob Hoyt, dated October 27, 2009, the County Attorney's Office has advised me that the specific provisions pertaining to significant trees in the State's Forest Conservation Act do not apply to any application that was submitted before October 1, 2009. Since this application was submitted before this date, I will not provide a recommendation pertaining to the approval of this request for a variance.

If you have any questions, please do not hesitate to contact me directly.

Sincerely,

Laura Miller
County Arborist

cc: Robert Hoyt, Director
Walter Wilson, Associate County Attorney
Mark Pfefferle, Acting Chief