

Doc 04-05

MEMORANDUM

TO: Zoning Commissioners

FROM: Advisory Neighborhood Commission 3F

DATE: 21 July 2004

SUBJECT: Forest Hills Tree and Slope Overlay District – ZC 02-19
OP's July 12, 2004, "Response to the Zoning Commission – Final Report"

At a duly noticed public meeting on July 19, 2004, with all seven commissioners present, ANC 3F reviewed OP's July 12, 2004, Final Report (which includes a proposed new text of 11 DCMR § 1517, at pages 13-16, followed by five accompanying maps) and voted 6-1-0 to approve this Memorandum.

The Zoning Commission (ZC) has twice decided to set the Forest Hills Tree and Slope Protection Overlay (FHTSPO) down for public hearing -- originally, on April 19, 2002, and, in slightly amended form, on December 13, 2002 (49 DCR 11309). Each time, ANC 3F submitted recommendations in the form of resolutions (Res 02-27, June 17, 2002; and Res 03-04, February 10, 2003) and testimony. Subsequently, the ZC asked the OP to explore alternatives on which it invited public comments.

Meanwhile, under the ZC's set down rule, the FHTSPO remained in effect for over two years and three months. During that period:

• ANC 3F, the ZC, and OP sought to address, and to strike a reasonable balance as to concerns about intrusions on private property rights, procedures for seeking a Special Exception from the Board of Zoning Adjustment (BZA), and inefficacy of the Department of Consumer and Regulatory Affairs (DCRA) in administering such an overlay.

• Property values in Forest Hills have continued to skyrocket.

• The BZA has not received any Forest Hills applications for Special Exceptions.

Applicant, the Forest Hills Citizens Association (FHCA), patterned its proposed FHTSPO after two earlier overlays approved by the ZC:

• the ZC's 1992 Template Overlay (now in effect for Massachusetts Avenue Heights, 11 DCMR §§ 1511-1515); and

• the ZC's 1999 Chain Bridge Road variant (now in effect for part of Palisades, 11 DCMR §§ 1565-1569).

ANC 3F's comments assumed (and ZC observations at hearings and earlier public meetings after setdown appeared to confirm) that the precedent Template was to be the point of departure.

È The Comprehensive Plan for the District of Columbia (discussed in our initial Resolution 02-27) referred to the ZC's pre-existing Template at the time of the D.C. Council's approval of the Plan in 1999. For example: The Ward 3 Element calls for establishment of a Tree and Slope Overlay for Forest Hills (§ 1403.4).

Ë ANC 3F recommended *additions* to the Template, rather than *revisions of* the Template. For example, we endorsed the recommendations to the ANC by the Ad Hoc Committee on Tree and Slope Overlay Protections including proposed guidance to the BZA to entertain mitigation proposals from a landowner (at the owner's initiative) which could include, among other things, "tree canopy conservation maintenance easement" and "a plan to preserve and protect a Jointly Owned Tree" and "a preservation and planting plan" as well as criteria for reaching "a reasonable balance between architectural and arboreal considerations."¹

OP's present interpretation of ZC concerns and curiosity have led to the pending "Alternative Proposal" -- which would dump the Template altogether.

Although ANC 3F respects OP's conscientious and creative efforts to respond to ZC issues (including OP's participation in a Single-Member-District meeting which the five commissioners who represent portions of the Overlay District sponsored on March 31, 2004) and applauds some excellent innovations proposed by OP, we cannot recommend approval of OP's Alternative Proposal for adoption in this Docket as the final form of an Overlay.

Instead, we recommend that the ZC combine several elements of the three existing overlays with new ideas in OP's Alternative Proposal.

We do agree with OP that the ZC should approve an appropriate Overlay in this Docket -- going beyond general, city-wide tree protection laws and regulations adopted by the Council of the District of Columbia and the Department of Transportation (DDOT) in which the Urban Forestry Administration (UFA) is located.

OP's innovations include provision for tree protection plans, prepared by certified landscape architects or ISA certified arborists (to accompany certain certifications as to tree canopy), as part of building permit application reviews, bringing D.C. practice in the Forest Hills Overlay District into line with suburban site plan review practices. This innovation is timely and appropriate. OP also would enlist UFA expertise in several ways.

However OP would delete vital features of the three existing overlays by a narrow focus on the word "trees" as such -- overlooking, as if unrelated, habitat without which trees will disappear.

¹ Although the FHCA endorsed these proposed provisions to guide the BZA, and although OP told the ZC that it had no objections, the ZC rejected them, Commissioner Parsons having observed that they were unnecessary because the BZA had discretion in any event to consider such mitigation proposals.

Impervious Surface

Most critically, OP sets no restriction on impervious surface, in contrast to the 50% upper limit set by each of the other overlays. Forest floors are pervious. Trees are forest creatures. Tree roots depend on oxygen and water absorbed by soil through permeable surface. Zoning regulations expected to preserve or enhance tree cover and a forest-like or park-like ambience that allow up to 100% impervious cover, as a matter of right, would fail to do the job.

No matter what other decisions the ZC makes, it should include the Template's impervious surface provision in any final overlay. As our Resolution 02-27 observed, "some development has diminished quality of life, infringed on neighborhood character, clear-cut stately trees, and *sealed up permeable ground formerly open to infiltration by rainwater and oxygen that could nourish trees* – leading many residents to believe themselves to be virtually defenseless in seeking a more reasonable balance" [emphasis added].

"Trees" Provisions: Procedures and Standards

When it comes to direct regulation of how building permits affect trees and tree canopy, the ZC should ask OP to explain fully the differences between OP's Alternative Proposal and all three existing overlays as regards:

- (a) procedures for building permits as of right,
- (b) standards for building permits as of right,
- (c) procedures for Special Exceptions from the BZA, and
- (d) standards for Special Exceptions from the BZA.

Role of ZA. At the threshold, DCRA's Zoning Administrator (ZA) will have to decide whether a building permit in the Overlay District may issue as of right or only by Special Exception from the BZA (if at all).

OP has not avoided reliance on the ZA.

OP has recommended (wisely, we believe) that the ZC itself define data that building permit applicants must supply to the ZA (i.e., the tree protection plan) in some cases. No matter what else the ZC decides, we recommend that it follow that pattern.

OP has recommended that the UFA lend its expertise to the ZA, but OP would unduly weaken that process, proposing a rigid ZC rule that UFA's silence for more than 30 days must be deemed to constitute "concurrence," which would bind the ZA.

ZA versus BZA. Under the three existing overlays, the UFA recommendations go to the independent BZA not to DCRA's ZA. The ZA's track record has been poor.²

Moreover, the BZA gives ANCs and the community timely notice of matters coming before it -- and its procedures are transparent. DCRA and the ZA have an on-again, off-again record

² So poor that in last month's Budget Support Act the D.C. Council prescribed a reorganization intended to upgrade the position and, hopefully, reverse dismal past performance. But as the ZC hears OP's Alternate Proposal in July 2004, the reorganization is not yet in effect, we can not be certain whether it will work, or whether the Mayor and D.C. Council will give the upgraded Office the resources they desperately need to do the job assigned to that Office.

even as to simple disclosure of applications on file.³ ZA procedures are anything but transparent to the community and an applicant's neighbors. The ZA's precedents are not published or even available to anyone but the development attorney or other advocate who sought them.

Adding procedural protections to overlay. We urge the ZC to require notice to ANCs and the community, real opportunity to inspect and copy any application, certification, or tree protection plan, opportunity to comment to the ZA, and opportunity to appeal to the BZA from any final action (with or without UFA's actual, written concurrence).

Substantive standards. The three existing overlays use a tree-by-tree approach and OP's Alternative Proposal uses a uniform canopy standard to be selected and set by the ZC.

The former approach tends to preserve tree canopy while allowing building permits as of right that will cause some diminution to make room for development (and later reaping, without having predicted how much, some future canopy spread of remaining trees); but it does not require tree replacements.

OP's Alternative Proposal allows building permits as of right on the basis of a professional certification that, within 10 years, tree canopy driplines will cover an applicable percentage standard set by the ZC. That could be done by preservation of existing trees, planting of new trees, or a combination. But the OP proposal would, in principle, allow building permits as of right even if all existing trees on a lot were to be removed prior to construction.

Majestically-large trees; buffer for RCP. OP would not even protect majestically-large, healthy trees that pose no hazard to people or property, in contrast to the prohibition by each of the other overlays on cutting down such a tree with a circumference of 75 or more inches (except pursuant to a BZ Special Exception).

Very large oaks and other canopy trees of species similar to the forest in adjacent Rock Creek Park give Forest Hills a unique ambience.

These trees serve as a compatible buffer to the trees in Rock Creek Park.

Grand trees deserve separate protection.

Whatever other mechanism the ZC selects, we recommend special, tree-by-tree protection to these very large trees.

Indeed, even if the ZC ultimately selects some form of canopy and replacement approach, we recommend that it do so in a combination with some form of tree-by-tree approach so as to preserve some large trees while canopy is growing.

Different canopy approaches. Rather than a uniform canopy standard (or two separate ones for larger and smaller lots) we recommend that the ZC consider a canopy approach geared to preserving most of the existing canopy on a lot. In that case the ZC – in defining which development might proceed as of right – would be setting:

³ The D.C. Council had to legislate last month, also in the Budget Support Act, to correct DCRA's new Building Code subsection (buried in January's lengthy amendments) which requires FOIA applications before DCRA will even allow inspection of applications, not to mention copying.

Ë a canopy *preservation* percentage threshold (e.g., 90% of what canopy is now there), rather than

Ë a 10-year canopy *coverage* percentage threshold, *uniform for every lot* (e.g., 32% of the lot area).

OP proposes a uniform canopy standard and goal for all of the Overlay District; in the Alternative Proposal a 25% canopy for all lots of 7,500 square feet or less and 32% (or 36%, perhaps) for larger lots. A striking feature of OP's uniform canopy approach is to seek to preserve (or replace) no more than 32% canopy even on a lot with twice or three times that coverage. In contrast, the three existing overlays seek to preserve canopy by less uniform means, tending to limit removal to what is necessary to make a lot buildable. If these two are the only choices, by adopting OP's Alternative Proposal, instead of the Template tree provisions in the existing FHTSPO as set down, the ZC probably would be choosing the option that allows *as a matter of right* the loss of more, rather than less, tree canopy in Forest Hills.

If the ZC decides to follow OP's uniform canopy coverage percentage-of-lot-area, it will have to select the uniform percentage (or percentages, if it distinguishes larger from smaller lots as would OP).

On what basis would ZC select a uniform percent?

OP has two suggestions, both problematic. First, OP looks to ideas developed by American Forests (AF) a venerable non-profit organization, and, second, OP looks to current canopy coverage data for Forest Hills or the District as a whole. We have studied neither of these criteria in depth; but the ZC should examine them very carefully,

For example, FHCA has questioned OP's arithmetic logic: OP apparently used GIS data to estimate existing tree canopy in some of the zoning Squares comprising the Overlay District, which OP has calculated to range from a low of 2.5% [Square 2266] to a high of 93.8% [Square 2282]; and OP calculated the "average of the Squares" for 30 Squares (out of 38 in the Overlay District; see "OP Data Analyzed" (table at last page, this Memo) as 36% (for "privately-owned lots). Because some Squares are much larger than others, FHCA plausibly contends that this is not really an average of anything meaningful, saying that OP's data actually calculate to a quite higher average, over 40%, for all of the areas (or weighted average) of OP's 30 Squares.⁴

A lot-by-lot array would probably show variety and range from zero to 100% canopy coverage.⁵

As to the AF materials (or OP's interpretation of same), OP states (page 5) that AF recommends the following coverage "benchmarks as a starting point for local discussion and goal setting"

⁴ OP's arithmetic may overlook other differences among actual Squares. An array of OP's Square-by-Square canopy coverage percentage calculations shows groups of nine or ten squares each with between 20 and 30%, between 40 and 50%, between 60 and 90%.

⁵ For example, the heavily-wooded Owl's Nest lot (across the street from the Church where ANC 3F holds most of its meetings), identified as one of the largest lots in the Overlay District, is in Square 2263 with only 23.4% canopy on the average.

- 40% tree canopy overall (“for the DC metropolitan region as a whole”);
- 50% for suburban residential (“e.g., McLean, Virginia”);
- 25% for urban residential (“e.g., the residential neighborhoods of the District specifically, such as Forest Hills”); and
- 15% in the central business district.

We do not understand why AF or OP would consider that the same percentage goal should apply to all residential neighborhoods of the District – both Georgetown and Forest Hills – nor why the goal for Forest Hills should be half the canopy for McLean. One size does not necessarily fit all D.C. neighborhoods.

City-wide or FH goals? OP interpreted the ZC’s goal as a tree protection approach “that could be potentially applied city-wide.” Page 2. If that is the case, then what goal-setting principle does the ZC contemplate?

For example, our national goal in the case of wetlands regulation is, “No net loss,” adopted because of the terrible losses over the course of several decades of depredations in many parts of the country.

Turning back to tree canopy in D.C., both AF and OP note a history of comparable depredations over recent decades because of misguided, unbalanced development policies.

Forest Hills is one of D.C.’s largest reservoirs (after the National Parks) of surviving tree canopy.

The Template was designed to stop or severely limit such depredations; and the Comprehensive Plan calls on this ZC to use tree overlays to that end.

At this time, we recommend that the ZC concentrate on approving a tree and slope overlay that will work well for Forest Hills, deferring modeling for a city-wide overlay to a docket which invites recommendations from the other 36 ANCs, besides ANC 3F.

Special Exceptions

OP’s Alternative Proposal has done some good work on the Special Exceptions provisions. If the ZC preserves the Template provisions as to impervious surface, we would see merit in OP’s Special Exception provisions. Otherwise, however, exceptions for “lack of adequate root space” (a troublingly-vague standard) and “other factors that may jeopardize the health of a tree” would make a mockery of the overlay since a blanket of impervious surface would trigger just such provisions.

An additional, acceptable approach might place a percentage of canopy cover concept into the Special Exception provisions (while retaining some of the tree-by-tree provisions of the Template to govern matter-of-right permits).

Other “Trees” Provisions Issues

Cutting down trees before seeking a building permit. OP appears to intend to prohibit a landowner from first cutting down the trees and then seeking building permits based on a subsequently-prepared tree protection plan that proposes to plant new trees.

However, the actual text submitted by OP does not do that.

Similarly, OP's new provision that no tree with a circumference greater than 24 inches "shall be removed without certification of compliance with this section" does not quite do the trick because it applies only to preserving or replacing canopy which existed at the time of a building permit application – not the canopy of one month or one year before.

In order to achieve OP's intent, clarifying amendment will be necessary. (See FHCA's letter dated July 15, 2004, to ZC regarding these issues.)

Preservation versus replacement. The three existing overlays seek to preserve most trees of 12 inches circumference or more and, unlike OP's proposals, do not encourage replacement. OP tries to give certain landowners choices (under guidance of certified arborists) between preservation now or replacement over a period up to 10 years. A tree management cycle realistically includes replacement. But it is unclear whether (or how well) regulatory replacement requirements would work in densely canopied parts of Forest Hills and whether the ZC should compel replacements on some lots denuded in the past. Replacement should be a potential mitigation measure for BZA consideration in a special exception case.

What species of trees? The adjacent forests in Rock Creek Park are characterized by white oak; beech; tulip poplar; black, red, and chestnut oaks; hickories; black gum; red maple; and, in the flood plains, sycamores and ash.⁶

For some purposes, OP recommends using UFA's "Recommended Street Tree List" which includes few of these species to define acceptable trees (a) for replacement planting and (b) for pre-existing canopy count.

The ZC should seek further guidance (assuming it follows OP's proposal) before relying on UFA's list.⁷

For one example: UFA has left out of its list trees which would be unsuitable for curbside planting but might be excellent for back yards, such as beech trees -- a valuable species native to our area which, among other things, spread wide and have thin bark.⁸

⁶ Gail Spilsbury, *ROCK CREEK PARK* (Baltimore, Maryland: The Johns Hopkins University Press, 2003) 53-55. Also, National Park Service, Rock Creek Park, Natural Resources, *PLANT ASSOCIATIONS - ROCK CREEK PARK* (base map 2002). (That NPS map includes Melvin Hazen, Soapstone Valley, and unnamed national parkland at the northern edge of the Overlay District where Broad Branch rises.

⁷ UFA really posts three lists on its web site, a list of short trees (under 35 feet at maturity, for planting under electric and telephone wires), a list of "medium" trees (40-60 feet tall), and a list of "large" trees (60-80 feet). See www.ddot.dc.gov/ufa/cwp/view,a,1293,q,579358.asp *et seq.* OP proposes to accept trees on UFA's "medium" and "large" lists for replacements and new canopy, but not the trees on the "short" list.

⁸ Also, OP would recognize all trees, no matter how small or short-lived as part of the existing canopy over a lot and permit any development, *as of right*, so long as it did not bring the percentage canopy cover below a uniform standard. For these purposes, OP would count all trees (and, possibly, shrubs). Developers of large lots with existing canopy of, say, twice the uniform percentage standard could remove either larger or smaller trees.

If canopy coverage were going to be under the uniform percentage standard, a developer would have to add a canopy replacement program to bring anticipated canopy up to the uniform standard within 10 years.

Some desirable trees, such as white oaks, grow extremely slowly and may, therefore, be rejected by developers' arborists striving to meet an as-of-right 10-year test.

Beeches, which grow somewhat more rapidly, are hard to transplant, so the responsible arborist would have to seek very young beeches, as likeliest to make it; but such small trees would grow into mere saplings in 10 years, contributing little to canopy.

Indeed, requiring canopy replacement within 10 years could encourage an entirely new kind of forest, consisting of relatively quick-growing trees which are on UFA's city-wide street tree list but are not native to this (Piedmont) part of the Rock Creek area (e.g., willow oaks).

The ZC should weigh potentials for unintended consequences.

Canopy management. Ideally, an innovative canopy preservation-and-maintenance program would work more flexibly than OP's Alternative Proposal. A landowner's unique plan would plant trees such as beeches and white oaks that can thrive for years in the understory and be established and ready to grow tall when older mature trees die, or are struck by lightning, or should be removed because of risk of disease.

Side Yards and Front Yards and Front Yard Trees

OP's side yard flexibility as a Special Exceptions tool, to allow the BZA to shift a side yard in order to preserve a tree, might offer a substitute for the side yard provisions of the December 13, 2002, set down overlay.

We could also support changing somewhat the two front yards provisions, regarding set backs and trees:

The existing December 13, 2002, Forest Hills overlay (unlike the other two existing overlays) requires that houses be set back at the front to a line equal to the average set back of other houses on the same side of the street in that block (at the time of a building permit application).

- This provision, which OP would delete, was very popular with Forest Hills residents.
- It offers a simple way to make room for trees in front yards without a great deal of complexity.
- So we would retain that provision, however, we would welcome limiting applicability to blocks with at least three houses on one side of a street.

On the other hand, if the ZC approved one of acceptable approaches to tree preservation, it could retain some Template features but delete extra restrictions on removing certain trees that happen to be located in front of the lot (a feature in all three existing overlays).

Other "Non-Trees" Provisions

Lot size. OP would delete the lot size provision of 9,500 square feet which the ZC set in both the December 13, 2002, Forest Hills Overlay and the Chain Bridge Road Overlay.

OP has concluded that lot size in Forest Hills generally correlates with tree canopy coverage or density.

OP's assurances that Large Tract Review and Planned Unit Development processes will "ensure" that cutting up very large lots will "proceed with oversight" do not help because if zoning regulations allow a property owner to cut up a "very large lot" into 7,500 square-foot pieces no "oversight" may compel 9,500 square foot pieces instead. (Also, experience shows that OP's seeming reliance on campus plans for Howard University's West Campus is ill-formed. And its other suggestions as to very large parcels are undocumented and beside the point.)

However, the ZC could simplify lot size provisions now in effect by directly imposing a 9,500 square foot minimum on the Office of the Surveyor (in DCRA) when it cuts up a lot in the Overlay District into two or more smaller lots, (without restricting the Surveyor's approval for combining two lots into one), and without restricting issuance of building permits on any lots by the Building and Land Regulation Administration (BLRA) in DCRA.

Certain Oddly-Zoned Land in the Midst of R-1-A Areas

Based on the Comprehensive Land Use Map and common sense, our Resolution 03-04 urged that overlay provisions be clarified or amended to apply to two R-5-D lots or and the C-1-A fraction of a hybrid R-1-A lot within the Overlay District. OP's July 12 Final Report does not address that question, understandably focusing on more general issues for now. We do adhere to those prior recommendations, but recognize, like OP, that how they should be implemented must await the ZC resolution of the major issues.

Stated Goals of the Overlay

If the ZC approves an Overlay, what should be its stated goals?

OP has proposed: "Preserve the tree canopy of FH, preserve wooded areas in FH, promote conservation practices appropriate within an urban context, and encourage replanting of trees" for its proposed FH/Tree Protection Overlay.

The FH Tree & Slope Protection Overlay, which the ZC set for hearing, states as its broad goals:

"Preserve natural topography and mature trees to the maximum extent feasible in FH.

"Prevent significant adverse impact on adjacent open space, parkland, streambed, or other environmentally sensitive areas.

"Limit permitted ground cover of new and expanded buildings and other construction (to encourage general compatibility between siting of new buildings or construction and existing neighborhood)."

The ZC has to choose and tweak its goals. We tend to prefer the FH TSPO version.

Illustrative Synthesis of Template and OP Approaches

We detect much common ground: Like houses, trees may last for many decades. Like houses, trees can be removed in hours. But unlike houses, trees take a long time to grow – one cannot plan and build a tree all in one year. So preservation of trees that have reached or come close to maturity adds value. By the same token, preservation of sickly or dying trees does not. Trees live and die and forests behave dynamically. Both the Template and OP's Alternative Proposal try to deal with dynamic facts. Neither fully succeeds. A possible outline of one combination approach follows:

Distinguish preservation of canopy from replacement or creation.

Set a goal of 60% canopy coverage or more for large lots.

If the large lot actually exceeds and will continue to exceed the goal, leave owner free to manage preservation of canopy without tree-by-tree restrictions and with only perfunctory verification of canopy as proposed by OP.

If the large lot has more than 60% canopy, but owner plans to reduce canopy below 60%, require tree protection plan with more than perfunctory review to test whether plan minimizes canopy destruction only insofar as necessary to make lot buildable.

If the large lot already has less than 60% canopy, but owner plans to cut more trees, give owner a choice between tree-by-tree Template-type review or previous bullet.

Give owner of a small lot a choice, as above, in every case.

Special Exception provisions, to overcome unbuildable lot situations, follow OP.

50% impervious surface restriction, per the Template, for all lots.

All sick and hazardous trees (including those threatening property, such as incursion into building foundation) may be removed without Overlay restrictions.

Template tree-by-tree provisions modified, as set forth above.

FH TSPO front yard set-back provisions adopted; side yard provisions dropped.

FH TSPO to limit carve-ups of larger lots to 9,500 sq. feet.

Conclusion and Designation of Commissioners to Speak for ANC 3F

Except as stated expressly above, ANC 3F adheres to its previous recommendations to the ZC.

ANC 3F has designated Commissioners Bardin, Perry, Wiss to represent it in further proceedings in this Docket.

Sincerely,

/s/ Karen Lee Perry

Karen Lee Perry, Chair

Attachment: OP Data Analyzed – Sort by % Canopy

