

Forest Hills Neighbors for Responsible Preservation

c/o 4835 Linnean Ave., NW, Washington, DC 20008, 202-966-7734

BY HAND DELIVERY

REFLECTING UPDATED CITATIONS

September 26, 2002

District of Columbia Zoning Commission
Room 210
441 4th Street, N.W.
Washington, D.C. 20001

Re: Forest Hills Tree and Slope Overlay District/Zoning Commission Case No. 02-19

Dear Members of the Commission:

The Forest Hills Neighbors for Responsible Preservation is an ad hoc group of approximately 30 core members who have homes that would be subject to the Forest Hills Tree and Slope Overlay (the "Overlay") proposed by the Forest Hills Citizen Association ("FHCA"). We filed a brief before the Commission on June 17. In accordance with the guidance given by the Chair at the Commission's September 5 hearing, this letter will address the modified version of the Overlay recommended by the FHCA in its letter to the Commission dated August 15, 2002 (the "August 15 Submission"). We are writing to express our continued opposition to the proposed Overlay and to urge the Commission to set it aside and return it to the affected community for an open process led by the Office of Planning.

Our Stake in Forest Hills.

Most of us and our neighbors are heavily invested, both emotionally and financially, in our homes and lots in Forest Hills. A fixed and understandable Zoning Code has helped to set our expectations and determine our property values. The flexibility left by the Code has enabled us to express our design creativity and adapt our homes and lots to our evolving needs and styles of living. Forest Hills residents have planted thousands of trees and continue to do so. Decisions by our neighbors and their predecessors--taken as a matter of right--have made the Forest Hills neighborhood a place that has a high value for its residents today. In general, we have not had to hire experts to plead for exceptions from beleaguered agencies.

Significant Opposition to the Overlay Exists.

Special restrictive legislation or regulation should be imposed on a residential neighborhood only where a consensus of residents supports that imposition. We are told by the Office of Planning that there was 95% community support for the Wesley Heights Overlay, one of the precedents FHCA repeatedly cites.

As should be clear from the letters, petitions and cards filed with this Commission by

opponents of this Overlay, there is no such consensus in this case. Prior to the Zoning Commission's September 5, 2002, hearing, 150 households located throughout the Overlay district formally registered their opposition. Contrary to the assertions in the FHCA letter to the Commission dated September 5, 2002 (Exhibit 222), this number counts each address only once and does not include pink postcards supporting the Overlay. This compares with 105 households that had formally registered their support as of September 5. In an area that includes all or parts of contiguous squares 2239, 2244, 2245 and 2246, 80% of the households have registered their opposition and asked to be exempted. The ANC Commissioners who represent 96% of the homeowners in the proposed Overlay continue to oppose it.

Why is there such widespread opposition? It is not because opponents do not love their neighborhood, respect the environment or value trees. Indeed, these are people who collectively have planted hundreds of trees and in many cases have built or remodeled their own homes. Instead, they are opposed because the Overlay would change rather than preserve the character of our neighborhood, would unnecessarily impinge on the prerogatives of homeowners and would entangle us and multiple agencies in time-consuming and expensive BZA proceedings. If the Overlay had been in place when they were built, the vast majority of our homes could not have been built without BZA approval.

Any proposal to preserve Forest Hills must take into account the dynamics of the neighborhood's settlement history and allow these dynamics to continue to operate without stifling over-regulation of the type the filing proposed. We want to maintain our neighborhood, continue to protect its environment, and allow it to continue to be an inviting and welcoming home for future residents. In our view, an elaborate command and control system as proposed only sets neighbor against neighbor.

Reduction of erosion, storm water run off and air pollution are worthy environmental goals, but they will not be achieved to any measurable extent by bearing down on residents who have not yet built patios or swimming pools or who happen to have undeveloped lots. With respect to storm water runoff, for example, the environmental signature of Forest Hills is in the developed land and land owned by institutions and foreign governments. Of the 14.19 million square feet of land in the overlay that are not owned by the United States or the District of Columbia, only three percent consists of undeveloped land owned by individuals. More trees could be planted and contribute to the long-term canopy on existing private and institutional lots, many of which the owners have kept for decades as large open lawns, than would ever be taken down in the likely course of development of private lots.

From a broader perspective, it is important to bear in mind Forest Hills is not a pristine forest, but an attractive urban residential neighborhood that spans an area from a major commercial artery to a national park. Forest Hills is also located near two Metro stops and various bus lines. It should properly bear its share of the infill development that the Mayor and urban planners believe we need to build our tax base and to reduce the social and environmental effects of long-distance auto commuting.

The Process Was Flawed.

The Overlay before this Commission is fundamentally flawed by the way in which it was

developed and proposed and the way the FHCA as petitioner has handled its interaction with the public.

The proposed Overlay covers an area far larger, far more diverse and far more dynamic than the area covered by, for example, the Woodland/Normanstone Terrace Overlay. There is enormous variation in lot size, home size, and architectural style. Forest Hills has grand lots and small lots, country manors and bungalows, traditional homes and glass and concrete contemporaries. Many large old homes are on lots with multiple canopy trees; others have few or none despite decades in which to plant them. Some newer homes have few trees and others were built around the trees to the extent practicable. Some empty lots are heavily forested and others are not.

In light of this diversity, building a consensus would require broad public exploration of alternatives before any filing was made with this Commission. Instead, a determined group built a bunker and defended it.

A review of the abbreviated chronology that brought us to this point is instructive. In July, 2001, ANC 3F formed what it called the Tree and Slope Overlay Ad Hoc Committee to conduct a study and report back to the ANC. The committee met first in October, 2001. The ANC intended that once the study and report had been completed, the ANC would launch a process of public participation.

Invoking what it called “considerable pressures for subdivision” and “subdivision activity within the last few years,” the FHCA short-circuited that process with its April 5, 2002 filing. There was in fact no “building pressure” for widespread subdivision. Indeed, based on our review of the records of the DC Office of the Surveyor, there have been only four subdivisions within the Overlay district in the last four years, producing a grand total of six additional lots and five homes on a base of more than 600.

The FHCA filed its April 5 petition on association letterhead suggesting that the filing was made on behalf of its 900 members. What it failed to note was that the FHCA President had not consulted those 900 members in making the filing. The FHCA’s Constitution provides that “[n]o vote taken shall be recorded as the will of the Association unless a quorum of the Association membership is present. A quorum shall consist of ten percent of the members [presumably 90 members]”. To our knowledge, no such meeting was ever held. Nor, to the best of our knowledge, in the several months since it filed the petition did the FHCA hold any meeting of the membership to seek such a vote. The FHCA President’s letter to the Commission dated September 5, 2002, brushes aside its lack of mandate from the members by stating that the “FHCA does not routinely take votes of its members before it takes a position.” (Exhibit 144). Maybe, but filing surely implies that the President was reflecting the “will of the Association”.¹

None of this would be of terribly great consequence in connection with social events or the like, but the matter at hand is hardly “routine”. Whether the Overlay would be good or bad public policy, it would undeniably restrict the rights of more of the Association’s members than

¹ The FHCA’s September 5 letter also represents that the filing of the petition was “ratified by the FHCA Executive Committee” on an unspecified date. At least one member of that Executive Committee was neither informed that a meeting for that purpose was being called nor invited to participate.

any other action ever taken by the Association. It is hard to imagine an action that more loudly cries out for submission to the membership.

Of course, this is not litigation about ultra vires actions by an officer of the Association, but a rulemaking proceeding launched by the Association and affecting the substantial rights of its members. Instead, in this context the crucial point is that the first and subsequent filings should not be construed as reflecting the will of the 900 members of the Association or of any other number than those that have registered their support as individuals.

In its rush to judgment, the FHCA styled its filing an “emergency” petition in the absence of any emergency. On April 15, 2002, the ANC, by a divided vote of 4-2-1 nevertheless recommended that the Zoning Commission set down the petition for a hearing. The two ANC Commissioners who, as noted above, represent 96% of the residents of the proposed Overlay district, voted in opposition. FHCA then held an introductory public meeting at the Netherlands Embassy on April 16 without conveying any sense of the impact on the neighbors of what had already been put in place.

Only after the Zoning Commission had set down the FHCA petition for a hearing was the text of the Overlay first distributed to the affected community by a mailing in late April. And it was only upon a reading of that mailing that residents beyond the organizing group began to develop a true understanding of what was being visited upon them in their names.

Once the Commission had set down the Overlay for a hearing, the FHCA--still without any mandate from its membership--had the upper hand as petitioner and would no longer explore broad alternatives. In that respect, it insisted on serving as judge and jury, entertaining only discussion of possible changes in various details. This determination to marginalize criticism was reflected in the belittling August 26, 2002, letter filed by the FHCA (Exhibit 144) opposing our procedural request to make an integrated presentation (no copy was addressed to us, and we learned of the letter only by spotting it in the Commission’s files) and in the even more dismissive letter filed on September 5. (Exhibit 222).

The FHCA apparently cannot come to terms with the fact that many neighbors who have been outsiders from beginning have genuine, good faith concerns that cannot be resolved by tinkering. To say that the affected community is deeply divided strikingly understates the point.

The Overlay Itself.

Many of the specific provisions of the Overlay have no proper place in Forest Hills and others need closer examination in any process of reconsideration.

Building Coverage Restrictions. Section 1518.1 of the Overlay would decrease the maximum permitted lot coverage for new buildings from 40% to 30%. In the context of large lots, this would make no practical difference. But many of the homes that give Forest Hills its character cover more than 30 percent of their lots, and the owners of existing homes are permitted to add additions up to the 40 percent coverage. There is no reason of policy or fairness to impose tighter restrictions on new or replacement homes.

Impervious Surface Coverage. Section 1518.2 of the Overlay would impose a new 50%

limit on the percentage of any lot that can be covered with impervious surfaces, including new buildings, patios, driveways, tennis courts, swimming pools and paved pathways (1520.5). Again, in the context of the smaller lots in Forest Hills, this limit would restrict the ability of current and future homeowners to customize the use of their lots to meet their evolving needs. Again, there is an exception for the expansion of existing homes and no fair basis for treating new or rebuilt homes differently.

Tree Removal. Section 1519.1 of the proposed Overlay would impose myriad restrictions on the removal of trees, including a complete ban on the removal of trees larger than 75” in circumference (1519.1(C)); removal of any trees greater than 38” in circumference that are located within 25’ of a building restriction line or the lot line (1519.1(D)); removal of more than three trees greater than 38” in circumference from any place on the lot (1519.1(D)); and removal of trees whose circumference inches exceed 25% of the circumference inches of all the trees on the lot (1519.1(E)). These restrictions would apply regardless of lot size, regardless of tree species, regardless of whether the lot is vacant or has an existing home, and regardless of the impact on the feasibility or design quality of a home.

The provisions specially limiting removal of trees 25 feet from a building restriction line set up a standard that has no cogent rationale. The FHCA has conceded that building restriction lines are located 15’-45’ from the street and were established at different times for reasons in many cases lost to history. Surely no one expects the District to widen the residential streets in Forest Hills, so the street should serve as the base line for any restriction.

There is no process for determining today whether a tree may be removed unless the owner is now seeking a building permit. The owner is left to guess what will happen if he or she seeks a building permit in the next seven years. It will be a rare case indeed where an owner can build on an undeveloped lot without taking down 25% by circumference of the trees.

Undeveloped lots often have large, old tulip or silver maple trees that will no longer be standing in 20 or 30 years. The denominator for calculating 25% of circumference will vary over time as trees grow or are blown down, die or are removed.

The tree provisions of the Overlay will have the effect of throwing the construction of nearly every new home into the BZA “exception” process.

Minimum Lot Site. Section 1519.2 of the Overlay would raise the minimum lot size from 7500 square feet to 12,000 square feet on R-1-A lots. The Office of Planning has opposed this increase, arguing that such a minimum would replace rather than be “mapped in combination with” the underlying zone and would be “contrary to the neighborhood character”. (Exhibit 102)

Much of Forest Hills consists of attractive, moderate-sized homes on 7500 square foot or smaller lots. Eleven percent of R-1-A lots are already nonconforming because of lot size. An additional 50% of developed lots are between 7500 square feet and the 12,000 square foot minimum that the FHCA continues to advocate. If the Overlay is imposed, then 61% of lots zoned R-1-A would be nonconforming by lot size alone.

If the perceived problem is over-sized houses on small lots, then the community, the Office of Planning and the Commission should explore appropriate and effective tools to fix this

problem, possibly including floor area ratio (“FAR”) restrictions, to combat that evil. If the perceived problem is the risk of excessive density if large institutional parcels are eventually sold and developed, those problems should also be addressed directly.

Setback. The Zoning Code imposes no setback from the street, although building restriction lines in some parts of Forest Hills have the same effect. Section 1519.3 of the Overlay would require that all new residential buildings be set back from the street at least as much as the average of all other structures on the same side of the street. As presently formulated, the provision will constrain owners even where it has no relevance to any purpose of the Overlay. It may also impose an unfair hardship on certain corner lots. To the extent that the purpose of this setback is esthetic rather than environmental, with proper exceptions developed after a further public process, a setback rule may be a constructive way to limit inappropriately sited replacement housing.

Side Yards. Section 1519.4 of the Overlay, as revised by the August 15 Submission, establishes a new minimum side yard for properties wider than 80’, using a sliding scale that rises to maximum total of 32 feet for the sum of the two side lots. In many, and perhaps most, parts of the Overlay district, homes are built to the 8’ side lot minimum now allowed by the Zoning Code. Again, the Overlay would make a large proportion of the district nonconforming. No rationale is offered as to why owners of undeveloped lots, in some cases adjacent to homes built to the 8’ line, should be subjected to a new, more restrictive standard.

Slopes. The August 15 Submission no longer advocates a ban on construction on or near slopes or highly erodible soil, but reinserts slope and soil considerations in the special exception process if an owner is forced into that process by some other provision of the Overlay. This would make its application even more discriminatory, since anyone building on a vacant lot will surely be thrown into the special exception process because of the tree removal rules.

Many homes that have established the very character of the neighborhood that we cherish were built on and into slopes greater than 25% or on highly erodible soil. In many cases, building into the slope reduced the scale of the facades and allowed the houses to be set farther back from the street. These homes enhance--not detract from--the neighborhood and reduce--not increase--erosion. A walk through Rock Creek Park reveals multiple locations where soil on parkland has not been stabilized by the equivalent of home and yard construction and is eroding naturally. This is not to criticize the National Park Service or to suggest construction in the Park, but merely to point out the fallacy of purporting to control erosion by imposing a special requirement that will affect the owners of the few privately owned unbuilt lots in the Overlay.

There are well-established techniques, recognized by regulators, builders and this Commission alike, for controlling erosion and runoff, but it seems evident that erosion control is not the real issue here. If the new professional requirement in Section 1519.5 is really needed and appropriate, it should be added on a city-wide basis. No other neighborhood in the District of Columbia is fettered with a slope restriction, and the Commission rejected proposed slope restrictions in connection with the Wesley Heights Overlay (see Commission Order 863, June 14, 1999, page 3). The Commission should likewise reject any special regulations for Forest Hills, whether as prohibitions, certifications or special considerations in a BZA process.

If the real need is to maintain basic land contours on multi-acre sites that might some day be developed on the model of suburban subdivisions, then appropriate land use regulation should be developed for and limited to those sites.

Special Exceptions. Section 1520 establishes a procedure for seeking Special Exceptions from the Board of Zoning Adjustment. The procedures include an application submitted subject to criminal penalty (1520.4), supporting materials (1520.3), referral to five District of Columbia and federal agencies (1520.2) and a public hearing.

Proponents see the special exception provision as a cure-all for the rigidities of the Overlay, envisioning that everything from tree removal decisions to front, side and back lot setbacks for individual houses will be handled by the BZA. We see a process that is onerous, time-consuming, expensive, and unpredictable, putting the burden on our citizens to hire a battery of experts ranging from soils engineers to arborists and probably lawyers and expeditors to have a fair chance in the process. The “exception” becomes the rule, and the rule becomes an exercise of discretion. Construction of the vast majority of existing homes in Forest Hills would have been forced into the BZA process.

Moreover, we are a city that struggles to deliver basic services in a timely fashion and that is under financial stress. The City will have to make cuts in important programs this year to balance its budget. In our view, it would be irresponsible to load additional duties onto already stretched agencies.

For example, the Overlay bows in the direction of allowing mitigation as a basis for allowing tree removal. Yet Washington has one arborist--one. Meanwhile, the City has an enormous problem with the ongoing loss and undermaintenance of public trees, in Forest Hills, but also throughout the rest of the City. We have a corresponding opportunity to use Casey Foundation funds wisely. Dealing creatively with these problems and opportunities is more than a full-time job.

Do we really want to impose a new regulatory scheme that will require that single arborist to review on a tree-by-tree basis the plans for development of a vacant single-family lot in Forest Hills or the construction of a pool or patio? Other City agencies are only slightly less stretched, the BZA, the DCRA and the Zoning Administrator among them.

Any mitigation alternatives should be designed in a way that is self-administering rather than consuming the time and resources of not only the owner but the BZA and the commenting agencies, which are already challenged to do their truly essential work in a timely and high quality fashion. Alternatives should, to the maximum extent possible, be self-administering. Only a minimum of very unusual matters should be processed for exemption.

The Overlay goes on at some length to spell out various competing considerations. For example, Section 1520.1(A) states that “tree removal, grading and topographic change shall be limited to the maximum extent consistent with the construction of a building permitted by the standards of this chapter.” [Emphasis added.] Does this mean that an owner has no further recourse if the BZA staff determines that some house can be built on the flat or around the trees? This is the death of a thousand cuts. The Overlay’s standards and the BZA’s obligation to take

into account the views of five agencies (and, we suspect, the ANC and the FHCA) after a hearing make the results of the process inherently uncertain and invite litigation challenging the BZA's application of the standards if any neighbor does not like the result. Any land use control system needs safety valves, but the Overlay would throw out much of the basic zoning system, with predictable effects on our right to build an individually designed homes, structures or amenities without undue restriction.

We have no problem with any of this where the neighbors band together to subject themselves to such a standard. We are deeply troubled when, as in this case, it would be imposed on a divided community.

Recommendation.

We have noted a handful of provisions that might be improved or made more reasonable. However, we do not intend by our comments to imply that making minor revisions would make the Overlay acceptable.

The tree and slope overlay template is not, we believe, the right starting point. In dealing with an area as large and diverse as the Forest Hills Overlay, can't the City and this community be creative enough to develop an approach that is largely self-administering, especially with respect to trees? Does it make sense to pass a general zoning regulation that would make the typical case a "special" exception?

The first step is for the affected neighbors to consider and agree on the goals of an overlay, so that it can be designed in a way that achieves these goals rather than imposing collateral damage on all homeowners who have the misfortune of being in its ambit. Arguments about preventing erosion, reducing air pollution and protecting parkland ring a bit hollow to many resident owners of homes and lots, even though we share these goals. To the extent that the Overlay attempts to achieve these goals through even heavy-handed regulation of incremental building on the privately owned lots in Forest Hills, it will surely fail. We believe that the greater concern of many of our neighbors is to cause newly constructed or renovated homes to be in character with the neighborhood and to have appropriate control over the use of multi-acre parcels that are largely in the hands of foreign governments.

The community needs to understand better which of the large parcels in Forest Hills is at risk of development and what role the PUD process would play in that development. We also need a better understanding of the threat that some of our neighbors see in certain infill developments. And we need to understand the dynamic on Broad Branch, whose adjacency to Rock Creek Park seems to have generated much of the heat that propelled this effort.

Would it make sense to use subdivision as a trigger for more extensive review, so that not every home or lot owner is tangled in the regulatory web? Could we develop mitigation strategies for certain types of properties that are self-administering, making the law predictable, less expensive and less subject to litigation for the vast majority of owners? Could we assure that only a minimum of very unusual matters is processed for special exceptions? How can we avoid making the BZA into the super-architect for homes in Forest Hills? Could economic incentives, rather than disincentives, play a role? Is it possible that the only long-term solution

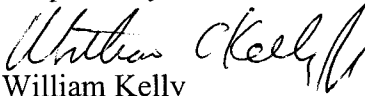
on Broad Branch is for the Park Service to buy or trade for easements to protect the Park?

Many of the zoning rules needed to protect our neighborhood are already in place. Lax and ineffective enforcement of the rules by the regulators has enabled developers to construct houses that are out of character and inconsistent with the existing community. With a common purpose and a commitment to regulate judiciously and enforce vigorously, we believe that the neighborhood can achieve these shared purposes.

The current Overlay goes a long way down the wrong path. We need to start with a different approach, and the members of the Forest Hills Neighbors for Responsible Preservation are more than willing to participate in developing an approach that addresses real, not imagined, problems. With the support the Office of Planning has offered and with access to other experts, the community and the City can clarify and narrow the perceived problems and then develop other approaches to present to the public so that we might build a consensus.

If the Commission determines to proceed with the Overlay, we request that the Commission delete squares 2239, 2244, 2245 and 2246 from the Overlay district in accordance with the wishes of the vast majority of land owners in those contiguous squares.

Respectfully submitted,


William Kelly

for the FOREST HILLS NEIGHBORS FOR
RESPONSIBLE PRESERVATION