



Forest Hills Citizens Association

Dedicated to the enhancement, maintenance, protection, and promotion of
a positive community spirit in the Forest Hills neighborhood.

October 7, 2002

VIA HAND DELIVERY

Mr. Alberto P. Bastida, AICP
Secretary to the Zoning Commission
Office of Zoning
Suite 210
441 4th Street, N.W.
Washington, DC 20001

ZONING COMMISSION
District of Columbia
Case 02-19
Exhibit 280

10-7-02 11:30 AM

Re: In Re: Forest Hills Tree and Slope Overlay District
Case No. 02-19

Dear Mr. Bastida:

This filing is made pursuant to the order of the Zoning Commission on September 30, 2002 and 11 DCMR § 3024.4. It is responsive to the September 26, 2002 filing by the Forest Hills Neighbors for Responsible Preservation ("FHNRP") (a self-described "ad hoc group of approximately 30 core members") and the presentation made by it on September 30, 2002. This letter will not repeat or reargue the previous presentations that have been made in favor of the Overlay.

Despite the guidance from the Chair of the Zoning Commission on September 5 that the opponents discuss the Overlay provisions they could accept, first among themselves and then with the proponents, the opponents have instead adhered to their strategy of asking that the matter be dismissed and referred to the community for further discussion, without offering any inkling of what they think the parameters of that discussion should be. That suggestion does not work for several reasons.

1. Dismissal would completely undermine the purposes of the Overlay. Under 11 DCMR § 3029.4, "[n]o application or petition essentially the same as that denied following a hearing shall be accepted for filing within one (1) year after denial." What this appears to mean is that if the Commission were to dismiss the pending rule-making, and then another overlay was proposed that contained the template provisions or those in the current proposal, it could not be considered by the Commission for at least a year. In the meantime, we

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can be assured that more lots will be clear cut as developers accelerate their pace in Forest Hills. By the time a new petition could be considered, much destruction of the neighborhood would have occurred. This means that such a dismissal is the worst alternative for protecting trees, streams, and slopes.

The opponents know this. One of their leaders, ANC Commissioner Phil Kogan, who has sounded this trumpet the loudest, has been through similar cases. And as ANC Commissioner Kogan stated in response to Commissioner May's question on September 30, many of the opponents believe that "no overlay" is the only acceptable solution.

2. The opponents believe that Forest Hills is inappropriate for an overlay. Many of the opponent witnesses on September 30 frankly admitted that they thought there was no need for any overlay in Forest Hills and that none could be justified. There would be little use in a further dialogue with these persons.

Both commissioners Maudlin and Kogan have told this Commission in writing that in their view "the proposed overlay area is inappropriate for the Forest Hills neighborhood and should be rejected by the Zoning Commission." Minority Report at p. 3 (Docket Exhibit 82). They claim that the geography, topography, and other characteristics of Forest Hills are unsuited for an overlay. It would be impossible to reach agreement on any overlay from this declared starting point of the opponents. And they oppose every single provision in the overlay template as unjustified or unworkable, despite the years of experience to the contrary in the other two Tree and Slope overlays in the City.¹

Even more remarkable is Commissioner Maudlin's written testimony that admits that "I do not believe there is opposition in the community" to "the general purpose of the" overlay. How does he reconcile this with his view that an overlay is not appropriate under any circumstances?

3. What do the opponents oppose? Only a small handful of those counted as opponents by FHNRP have stated what they oppose. Over 90 percent of those whom FHNRP claims are opposed have done nothing more than sign a petition or send in a "pink postcard," without saying what they are against. It is impossible to tell from those postcards whether they are opposed to the overlay, inaccurately and misleadingly described in the "pink sheets" that accompanied them, the actual proposed overlay or something else. Moreover, because the terms

¹ Opponents continually mischaracterize or misquote our testimony on this point. We have never characterized Forest Hills as "rural" – "forested" or "parklike," but not "rural." Similarly, the Wesley Heights Overlay is not "one of the precedents FHCA repeatedly cites" (Opponents' Submission, Tab 3, p. 1). The precedents we have cited are the Woodland/Normanstone Overlay and the Chain Bridge/University Terrace Overlay. They also make simple mistakes on well-known neighborhood facts, such as Mr. Kelly's claim that Forest Hills is served by more than one Metro stop (page 2 of his statement).

of the overlay have changed materially since the postcards were returned and the petitions signed, it is impossible to tell whether any real or perceived problems have been addressed. This is explained more fully in FHCA's September 5, 2002 filing.

Moreover, the lists of opponents and proponents attached to Commissioner Maudlin's testimony are grossly inaccurate. Many of the names that appear on the opponents' list belong on the proponents' list; other names in opposition should be excluded because they do not live in the overlay. In addition, a large number of letters from supporters are omitted entirely from Mr. Maudlin's list of proponents.²

Other opponents have cast aspersions on the actions of Commissioners Wiss and Bardin, saying that they have "exempted" their own constituents from the overlay. You heard this view on September 30 from Mr. Magher, the author of the scare-tactic "pink sheets" that resulted in the "pink postcards."

But this allegation is particularly offensive in light of the fact that Commissioner Maudlin sat on the ANC Committee that developed the boundaries for the Overlay. He knows, although he did not tell this Commission, that the allegations of Mr. Magher are clearly false. The topography and other physical characteristics in Mr. Bardin's single member district are simply not as appropriate for the overlay, although some residents have requested inclusion. The area of Commissioner Wiss is even less appropriate for an overlay.³

4. The opponents deliberately have not participated in the Overlay process. Although the opponents argue that the Overlay process was flawed and not open, they chose not to participate. The first public meeting on April 16, 2002 was held at the Netherlands Embassy, in the heart of the opponents' territory. Over 160 persons attended, and everyone in the overlay area received notice both by mail and hand delivery.⁴

Of the 150 "opponents" listed by FHNRP, fewer than 10 attended that meeting, even though it was only steps from their stronghold on Lenore Lane. The same small number appeared at the next public meeting on May 13. Commissioner Kogan vehemently opposed holding a special ANC meeting on the Overlay (the June 17 meeting was regular one), claiming that the overlay had been discussed so many times at so many public meetings, that

² It should also be recalled that Mr. Gary Stevens, President of the Forest Hills Neighborhood Alliance, a 400-member group, also testified in support of the Overlay.

³ Mr. Maudlin is also incorrect when at page 2 of his testimony he claims that certain objections raised on March 20 to the overlay (by a non-resident) were not addressed. The March 20 e-mail in response (on which Mr. Maudlin was copied) is attached as an Exhibit. As that e-mail explains, the objections raised were to the template provisions.

⁴ Despite Mr. Maudlin's statement that the terms of the overlay were not available until late April, they were handed out that night and were mailed out shortly thereafter.

only 15 minutes a side was needed for debate, shortcutting the process he now wants extended at the expense of the trees in Forest Hills.

5. Are the opponents even willing to discuss an overlay? We know what the opponents told this Commission on September 30, but what did they tell FHCA on September 26 and 27? We did not see a copy of FHNRP's filing until September 30 because they refused to make it available to the proponents (claiming it was too "complicated" to "just burn another copy," even at our effort and expense) and it was unavailable from the Commission until that day. We need not speculate long about what that refusal would bode for a joint effort to draft an overlay. It also means that we had no chance to say anything about it before the September 30 hearing.

6. The opponents lack candor about who they are.. The FHNRP slideshow called for "leaders, not lawyers." Mr. Kelly, who then testified as the FHNRP 5-minute witness, is a real estate development lawyer. Just as Mr. Kelly did not identify his own occupation, his law partner and head of the firm's real estate department, Mr. Zax, referred to himself as an urban planner. While we see no issue with any lawyers being involved in this matter, the opponents' criticism is disingenuous at best.

The hard core group of 30 that is FHNRP is made up largely of development lawyers, architects, builders or retired builders, real estate agents and several persons who want to develop lots bordering Rock Creek Park, D.C. parks, or other large, protected parcels.

7. The opponents have no suggestions for the terms of an overlay. Despite pleas from the proponents for many months and from this Commission on September 5, 2002, the opponents have offered only one specific suggestion for a Forest Hills Overlay. During the September 30 hearing, FHNRP stated that large numbers of homes in the neighborhood should be torn down as having outlived their useful lives, and replaced with new housing. In the course of that discussion FHNRP attacked as ready for "tear down" a 1930s "Sears" house that had outlived its useful life. That house was built in 1890 and has been carefully restored and renovated.

This also demonstrates one of the principal differences between the proponents and the opponents. The proponents have shown several properties that have been stripped of trees, with construction filling lots with no trees or room for trees. This is what the Overlay is designed to protect against. The proponents have not criticized any architecture, and in fact have praised the varied architecture as one of the reasons for living in Forest Hills.

The opponents, on the other hand, have decided which houses need to be torn down and replaced with mini-mansions appropriate for two-acre sites in Potomac because much of the existing housing, in their view as expressed on September 30, is "unsuitable for modern family living."

The opponents have not revealed their position on redeveloping Forest Hills to the community in any of their expensive mailings. We doubt that many Forest Hills residents would agree with FHNRP on the need to tear down houses in a neighborhood with some of the highest property values in the City and replace them with Potomac mini-mansions. The solution is not to move Potomac into Forest Hills. The opponents' position shows that they have a very specific anti-tree, pro-development agenda.

8. The views of the dissenting ANC commissioners are entitled to no weight. The opponents have attempted to turn the statutory mandate of giving the views of the ANC "great weight" on its head by arguing that the two dissenting commissioners represent most of the overlay area. They attempt to imply that the constituents are in agreement with the dissenting commissioners, without offering any proof of that. On September 30, they had to admit that they are expressing their own views, and not those of their constituents. They have not surveyed their constituents as they admitted in response to a question from Commissioner Hood, but oppose the overlay even though they agree most residents want one.⁵

We had thought that Commissioner Kogan would also mention his "lame duck" status as an ANC Commissioner on September 30, but he did not. He is not running for reelection to the ANC and thus will have no official standing as of January 1. Even if he were running, his new district would no longer include any of the property in the overlay. Commissioner Maudlin is being challenged because of his opposition to the overlay.⁶

9. A new set of overlay provisions would make enforcement more difficult. In continually attacking the template provisions as an unworkable bureaucratic maze, the opponents have failed to consider several critical facts, two of which will be mentioned here.

First, the two existing Tree and Slope overlays give us over fifteen years of experience with this alleged burdensomeness. As far as we are aware, the only special exception case has been brought by a developer who violated the provisions of the overlay. It seems that none of the other provisions has presented any particular problem for the residents.

Second, the enforcement of zoning laws is already problematic in the District. If two different, widely varying types of tree and slope overlays are established, those enforcement problems will only multiply.

⁵ The opponents are also wrong in stating that single member district meetings are not the practice in ANC 3F. Both Commissioners Wiss and Perry have held constituent meetings in the last two years.

⁶ As his opponent Poul Arendal told the Northwest Current (Oct. 2, 2002, page 29), if the overlay comes back to the neighborhood without its provisions in place and under a time limit for discussion, "it's going to be filibustered to death."

10. The larger lot size is needed to guard against aggregation. The 12,000 square foot minimum lot size also helps protect against aggregation of smaller lots and resubdivision into a greater number of lots. A simple example will suffice. Let us say that two of the houses targeted for tear down by FHNRP are adjacent, and are on lots 10,500 and 12,000 square feet in size. With a 7,500 square foot minimum, neither is subdividable. But if those houses are torn down as advocated by FHNRP and the lots rejoined, that 22,500 square feet can be subdivided into three lots, or one more than there was before. Under the 12,000 square foot proposal, this cannot take place. There is economic motivation to do this. Very large houses are being built on 7,500 square foot lots in Forest Hills.

11. The neighbors should not have the burden of halting overdevelopment. FHCA already pointed out numerous recent issues with respect to neighborhood development in its July 29, 2002 filing. There are many more examples, including the Peruvian Embassy grounds, 3107 Fessenden Street (that ended up with one house instead of several because of neighbors' pleas), and Audubon Terrace (where a generous neighbor bought a property to keep it out of a large development). But Forest Hills cannot count on such fortuities forever to rescue it from tree-destroying, intrusive development.

Too many times individual neighbors have had to rally against development that negatively impacts on the environment in Forest Hills, or to persuade developers not to overbuild. Moreover, even when those efforts have been successful, by either negotiation or litigation, oftentimes the trees have already been destroyed and are irreplaceable.

This was true at 4512 28th Street, which was discussed at the September 30 hearing. Mr. Sloame was simply incorrect when he stated that the overlay would not have prevented the abuses that took place at that property. First, three trees greater than 75 inches in circumference were felled before construction began. Under the overlay either better planning to preserve the trees or a special exception would have been needed. Part of that planning would have been to make sure that the tree Mr. Sloame talked about (which was not one of the 3) would have been preserved.

12. The overlay will not encourage tree cutting. Simply put, you cannot protect trees without placing some restrictions on cutting them down. The opponents argue that any restriction will encourage property owners to remove trees before they "get too big" in "anticipation of getting a building permit." This "argument" proves too much because it means that any overlay would lead to this result. But, then again, maybe the opponents do believe that there should not be any restrictions on tree cutting in their kind of overlay. We do not know because they have never offered any proposal.⁷

⁷ We have heard, however, that at least one opponent has touted the Takoma Park, Maryland, tree ordinance as a model. That ordinance is far more restrictive than the overlay, requiring a permit to trim any tree or even to take down a dead one. But it does

13. The non-conforming "concern" is a non-issue. Mr. Kelly says that a change in minimum lot size means that properties of less than 12,000 square feet "would have to battle their way through the extensive quasi-juricial [sic] review process and public hearings of a special exception process." Those owners of R-1-A lots smaller than 7,500 in Forest Hills (FHNRP says that is 11% of lots) do not need special exceptions for building permits today and nothing in the Overlay would require that. While zoning lawyers tell FHCA that lots under 12,000 would not be non-conforming, the way to ease everyone's mind is to add a provision for lot size not creating nonconformity as there is in section 1518.2(B) for ground coverage.

14. The opponents represent a vocal minority in a small, isolated area. The largest proportion of the opponents lives south of Soapstone Valley. Although that area is particularly appropriate for an overlay, it is physically separate from the rest of Forest Hills, and has been developed only relatively recently (other opponents are scattered, primarily in two small enclaves on dead end streets bordering Rock Creek Park or large Embassy grounds). Not even the small group around Lenore Lane was unanimous in opposition to the overlay. This group should not be allowed to control what happens in the remaining 95 percent of Forest Hills.

15. This overlay is not only about development. As the Office of Planning has found, the area meets the classic test for an overlay to protect, trees, slopes, and streams. The opponents have brushed off all of these concerns by saying they "ring hollow" next to their interest in uninhibited financial gain at the expense of the environment of Forest Hills.

But this Commission is charged with looking at what is best for the land and the environment of Forest Hills and the City as a whole, not the alleged impact on the pocketbooks of individual landowners. We urge you to approve this Overlay.

Respectfully submitted,

FOREST HILLS CITIZENS
ASSOCIATION

By Barbara M. Simons
Barbara M. Simons
President

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make the point (See Virginia Worthington's letter of September 30, 2002) that the surrounding jurisdictions all have tree protection ordinances.

AD HOC COMMITTEE ON FOREST
HILLS TREE AND SLOPE OVERLAY

By George R. Clark
George R. Clark
Co-Chair

Clark, George R.

From: Bardin, David J. [BardinD@arentfox.com]
Sent: Wednesday, March 20, 2002 5:38 PM
To: 'Slotkin.Ron@epamail.epa.gov'; Clark, George R.
Cc: Bardin, David J.; Joan Benesch; Matt Berres; Dennis Blumer; Emily Baker; Clark, George; Guetta Mezzettii; George Clark; Gary Stevens; Robert Maudlin; Ginger Worthington; Tansy Blumer; Peter Halle; Cathy Wiss; Stephen Stern
Subject: RE: March 25 meeting...my thoughts on the matter.

Ron:

Thanks for taking the time to put down your thoughts. I will study them carefully, and am sure other committee members will do the same. At the outset, however, your e-mail starts from a misconception, that I apparently failed to clear up for you at our last meeting. Namely, the draft Overlay Regulation I have prepared for Committee consideration and discussion does not (to the best of my knowledge and intent) contain "changes to the city template" as you write (with the single exception of adding a minimum lot size -- a provision with which you appear to agree). Specifically, the provisions regarding tree sizes, sick trees, opinions of arborists or other professionals, lot occupancy by buildings and total impervious surface cover ALL COME DIRECTLY FROM THE CITY TEMPLATE -- not from our drafting. So, if any of these provisions is objectionable in and of itself or needs clarification, it is, I believe, the CITY TEMPLATE that needs attention.

I will study the specific points you make and hope to go over them with you over the telephone before our March 25 meeting.

David

-----Original Message-----

From: Slotkin.Ron@epamail.epa.gov [mailto:Slotkin.Ron@epamail.epa.gov]
Sent: Wednesday, March 20, 2002 1:36 PM
To: Clark, George R.
Cc: David Bardin; Joan Benesch; Matt Berres; Dennis Blumer; Emily Baker; Clark, George; Guetta Mezzettii; George Clark; Gary Stevens; Robert Maudlin; Ginger Worthington; Tansy Blumer; Peter Halle; Cathy Wiss; Stephen Stern
Subject: Re: March 25 meeting...my thoughts on the matter.

03.020.02

Note to the Tree and Slope Protection Committee (TSP)

My schedule will prevent me from attending the meeting on the 25th, so I am providing my thoughts in this manner. You have to know that I believe in the values of the TSP committee and applaud the effort to date. I hope that you see my contributions as useful. However I now believe that moving to a public meeting at this time with the draft overlay is premature. As creative and all encompassing as the draft now is, its present construction is a danger to the very purposes for which the committee was created to do.

General Comments

The changes to the city template, to put it bluntly, form an unreasonable collection of prohibitions that limit the viability of new development of any kind on large treed parcels including the building or rebuilding of large(r) houses on smaller lots with trees or not. Either the group's purposes have shifted or I misunderstand what tree protection is all about. In either case, the overlay will not be realized because the many landholders of undeveloped and under-developed parcels will see their return on investment diminished. They will remove themselves quickly from this process, making Swiss cheese out of the overlay. The current effort will have accomplished an unintended purpose, making new champions for the City's Tree Bill in the process.

We had the opportunity during the few months of fact finding to hear knowledgeable individuals, even the first Tree Bill had lessons to offer as does the current draft but I see none of that knowledge reflected here. The added restrictive provisions are not based on sound scientific principles, fact-finding, ground survey, or even that of good forest management practices. Wanting to protect trees doesn't mean just preventing them from being cut down or pulling numbers out of your hat to cover as many trees as you can. We never identified what trees are worth protecting or what size shouldn't be cut. Or how many trees make Forest Hills look and feel like Forest Hills. Or what to do with tree-clumps (trees growing so close together that the legal taking of one requires the taking of many, just for reasons of aesthetics), or multi-stemmed trees, softwoods or hardwoods, for example. I would bet that the majority of the trees on private property in Forest Hills were planted by the landowners at some time or another. Did we determine that they are all in the best places and that the best species were planted? And regarding the benefits trees may yield or the problem they can cause a simple provision for replanting would be a vast improvement. Such a provision must be added to keep the larger parcel owners in the game, unless the purpose of the overlay is to stop development.

I cannot see City Planning positively sponsoring the current proposal because it is unenforceable and would cause excess administrative burdens on the city. Forget calling it an overlay it's an association covenant and of the

worse kind which doesn't belong in its current form overlaying existing development. I've seen worse and have written better. Better would be based on facts other than that a few parcels have been denuded. In at least one on Chesterfield, the owner would have had clear and undeniable hardship. Even if he were told to leave the perimeter trees as part of his special exception, an arborist would have been hard pressed to save the majority of them for a number of reasons. Here again is a perfect case for replanting provisions.

I would vote for the City Tree Bill first, only because it takes a more rational approach to tree protection.

Specific Comments

Here are my other thoughts on the Overlay's construction.

1. Time Element

There appears to be no time element. Does the tree cutting restriction mean forever on that parcel no matter how many times the construction happens on the property or changes ownership? It cannot and the result each time a permit is construction permit is requested or the land sold more trees can be removed and not replaced. Even within the proposed legal limit, this does not help the purposes of maintaining "Forest" Hills community character.

2. Tree Replacement

Regarding the provision to allow an owner to remove an unhealthy or unsafe tree, why ignore planting replacements? Here the overlay is silent. If what was said at the last meeting, by David and Barbara " the adoption of the overlay would preclude the effect of an adopted City Tree Bill in Forest Hills." then certainly a replanting provision would make great sense. But then some of the proposed restrictions would have to be eased or eliminated.

3. Unsafe Condition and Other Tree Care Professionals

There is too much left for interpretation regarding the term "unsafe condition" and "or other tree care professional." Trees, that are growing on steep slopes with poor, unstable soils are subject to undermining, insulted by lawn care management professionals practices and de-icing salt runoff, would be considered unsafe and unworthy of keeping as compare to another better located and well cared for tree. And how does one keep track of all the trees that an arborist or other tree care professionals deem a necessity

to remove? And if the arborist says the landowner your tree(s), four or five of them, will last another tens years more or less. Is that cause to allow the landowner the right to remove them? Or should the adjacent landowner get a second opinion before reporting his neighbor to the code officer. The overlay does not help here either. Again without a replanting provision the arborist can make a good bit of money either way. And as for those tree care professionals, don't forget about the ones that work for the power or cable company. They are very skilled in removing obstructions.

4. Tree Removal

Item (e) in section 1514 makes no sense as written in the last draft. Even if it was written clearly, item (d) and (e) together set up great confusion as to just how many inches can be cut? I would remove Item (e) because if I read this correctly far more trees can be removed because someone made a mistake in addition or caliper measurement. Here again the issue of compliance is lost to field interpretation. The overlay should also do well to pit neighbor against neighbor on these restrictions alone.

5. Ground Coverage

The ground coverage restriction in and of itself can be useful but rather than lot coverage alone it should also be concerned with grading, erosion control, what is planted, the amount of lawn vs. other runoff restraining groundcover. Coverage restrictions are good but not together with tree cutting limitations. Add a replacement provision together with the coverage restriction and you will accomplish great results.

6. Provision for Non Residential Land Uses

The original overlay as adopted was designed for residential land uses. What happens with other land uses that are allowed by right in residential areas, such as institutional uses? The impervious surface coverage is too restrictive to accommodate uses by right. That is another reason the Planning Department should or likely would refuse support.

7. Lot Size

Larger parcels have the opportunity to detain water runoff, certainly lot coverage and water detention/retention go together, no mention of this in the overlay.

The 10K lot size is acceptable, but what happens if the large parcel holder proposes a PUD (on a former embassy property perhaps), one that uses

zero lot
line separation and common spaces. Certainly lot coverage would not be
'an
issue but far more than three trees would disappear. The overlay is
absent on
this one. A PUD would be the best thing for the large parcels. At least
here
the city would have a greater degree of control and the community can
maximize the forest coverage and minimize community impacts.

8. Purpose Statement

The purpose statement "Preserve the natural topography and mature trees
to
the maximum extent feasible in residential Forest Hills neighborhoods;"
is
inconsistent with the 4" caliper threshold for tree protection. I know I
said
that the smaller stock represents the mature trees of tomorrow, but
these are
also the ones most easily removed and replaced elsewhere with
encouragement.
I know Barbara would agree with this.

9. Exclusive Development Trigger

Finally, this is all still tied to development. For example, even if I
plan
no construction, I may just want sunlight to make my grass grow and the
trees
exposed root systems have made the yard impossible to safely run my lawn
mower. So I have seven or more trees removed. Two of them greater than
the
magic number, I needed no permit, no permission, and could not be
hindered.
The reason I cannot be stopped is because I have no plans to build (the
same
issue exists with the City Tree Bill, except it is place great belief in
education and educated action). Five years later, my lawn is beautiful
and
yes the neighbors complain every so often that the runoff from my
property
causes problems, I sell for a great price, the new owner has nothing in
his
way of subdividing and building.

I am sure I have not caught all the holes, but it is a start.

As I mentioned, I will be on travel March 25th for the week and again
the end
of the following month. I am still hoping to get the enlarged area
parcel
map before I leave. I will try to catch up when I get back.

I've come to realize that change is good when it is planned and people
work
together. This overlay, as proposed, is not good for Forest Hills and
will
put good people at odds with each other. That is not what community is
all
about.

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