

Forest Hills Neighbors for Responsible Preservation

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BY HAND DELIVERY

February 11, 2003

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

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

2003 FEB 12 AM 9:55
D.C. OFFICE OF THE ATTORNEY GENERAL

Dear Mr. Bastida:

In response to the request of the District of Columbia Zoning Commission ("the Commission") for comment on a proposed Forest Hills Tree and Slope Protection Overlay (FH/TSP) (see the December 13, 2002 *DC Register*), the Forest Hills Neighbors for Responsible Preservation (FHNRP) is pleased to submit the following comments. FHNRP was formed by Forest Hills neighbors to respond to this threat to neighborhood self-rule. Despite the offensive, personalized insinuations in the Letter to this Commission of the Forest Hills Citizens Association (the "FHCA"), paragraphs 6 and 15, dated October 7, 2002 (Exhibit 280), none of us represents a developer seeking to build houses in Forest Hills or is seeking "uninhibited financial gain".

This letter will offer detailed comments on the FH/TSP. But before providing those detailed comments, we must first register our objection to the serious disconnect between the new realities facing our City and what this Commission has been asked to do. The FH/TSP would impose a classic, personnel intensive, command and control regulatory scheme at the very time that our City is undergoing a serious budget and staffing crisis, the City has a single arborist, and the Mayor is trying to attract significant numbers of new residents.

In addition, on December 17, 2002, the City Council passed a City-wide Urban Forest Preservation Act of 2002 (the "Urban Forest Act"). The Urban Forest Act makes use of economic incentives rather than command and control regulation and applies to trees greater than 55 inches in circumference. Notably, it also makes provision for the Mayor to determine by regulation that certain undesirable species should be removable without a permit. The Commission is now asked to make final a FH/TSP designed wholly without reference to the

ZONING COMMISSION
District of Columbia

Case 02-19

Exhibit 315

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Urban Forest Act when we have seen no analysis of the policy and practical relationship between that Act and the FH/TSP nor any indication of how the City will meet the staffing and processing requirements of either.

The FH/TSP has the effect of substituting the discretion of an overworked Board of Zoning Adjustment for the predictability of the zoning code, imposing detailed requirements and expense on homeowners and the BZA and by its very intricacies laying the groundwork for litigation to challenge any BZA decision not in line with the preferences of the FH/TSP proponents. In several respects, the restrictions in the FH/TSP go well beyond those adopted by the Commission for neighborhoods with near unanimity of support. Since the removal of a single tulip tree or silver maple or the use of a side lot consistent with every other house on a block requires resort to a “special” exception from the BZA, nothing substantial can be built as of right regardless of how well it fits into the community.

Who is looking out for our City as a whole, making sense of overlapping regulatory schemes and paying attention to the burdens being placed on our residents, whom we want to keep and to serve as ambassadors to attract more? As citizens, we feel we are entitled at a minimum to expect, before we are subjected to special regulations, that our elected and appointed representatives integrate their strategies and provide the necessary staffing, funding and committed processing timetables. It is no answer for each governmental player to plead the limits of its own jurisdiction. It has been just this sort of splintered approach that in several fields has contributed to many of the chronic crises of public administration that our City continues to face. In light of all these problems, conflicts and developments, the Commission should send the FH/TSP back to the community for further review.

I. THE FH/TSP AS PUBLISHED WOULD NOT SOLVE COMMUNITY TREE OR DEVELOPMENT ISSUES

Despite its name, the FH/TSP sought by its supporters is primarily aimed at development, not conservation. It would use restrictions on cutting down trees as a back-door means to prevent the development of large houses on small lots, which is a major motivation for proponents’ support of the FH/TSP.¹ The other,

¹ See, for example, testimony of George Clark on behalf of the Forest Hills Citizens Association (June 27 transcript at 34): “. . . we've had a lot of discussion about what happens when you crowd in on trees when you build the McMansions that Mr. McGrath has talked about. I have one across the street from me where all the trees came down to put in a McMansion and when you crowd things in, that's why we talked about the side yard provision, why we talked about the front yard setback...” See also the testimony of Ms. McCarthy from the Office of Planning (June 27 transcript at 70).

largely unspoken concern in the part of Forest Hills north of Soapstone Valley is the theoretical potential for development of large parcels now owned by foreign governments.²

The provisions of the FH/TSP will in fact result in less compatible and less attractive new development in the neighborhood.

A. The Lot Coverage and Side-Yard Provisions Will Force the Sort of “Bad Development” FH/TSP Proponents Object To

A substantial percentage of the homes in the Overlay area are modest homes with floor plans that do not meet today’s needs. Until now, homeowners have been free, subject to zoning, to build out to provide larger kitchens or family gathering spaces that are more consistent with contemporary lifestyles. This kind of renovation can be expected to continue in the future, as homeowners in Forest Hills rearrange and/or maximize livable space. With respect to new homes, architects and those of us who have built homes know that homeowners and architects achieve the best and most compatible results when they have freedom within zoning constraints to address the special characteristics of the lots on which they are building. Arbitrary constraints beyond zoning requirements force aesthetically undesirable solutions.

We have no objection to reasonable front yard setbacks. With respect to minimum lot size, the area as recently as 1958 had a 5000 square foot minimum lot size. As we have noted in prior filings, we believe that a minimum higher than 7500 square foot will inappropriately alter the character of the neighborhood, making most current homes noncompliant, but it will do far less damage to the neighborhood character than side yard setbacks and impervious surface and lot coverage restrictions.

Specifically, excessive building height is a far greater threat to our neighborhood than inadequate side yard setbacks or excessive impervious surfaces or building coverage. Most existing homes in the overlay area do not reach the maximum allowable height, nor does most of the limited new construction in Forest Hills do so. Because the FH/TSP goes beyond zoning restrictions to limit the location on a lot and the amount of ground a building or addition may cover, homeowners will be forced to construct taller and narrower buildings, and new homes and additions will end up appearing more massive than they otherwise would.

To avoid this anomalous result, the FH/TSP provisions relating to side yard setbacks, impervious surfaces and lot coverage should be replaced with a

² It is our understanding that any developer of property purchased from a foreign government would almost certainly use the PUD process and thereby avoid both ordinary zoning and the FH/TSP.

provision that restricts the floor-area ratio (FAR) on lots in Forest Hills to a ratio consistent with the existing character, perhaps with a front yard setback consistent with the existing setbacks on the particular block in question. This is the approach the Commission took in connection with its July 13 and September 11, 1992 decisions in response to a petition from Wesley Heights. Determining the appropriate FAR would require a study of the immediate neighborhood by the Office of Planning and consultation with the neighborhood rather than applying another arbitrary figure. We recommend that the Commission instruct the Office of Planning to conduct such a study and delete from the FH/TSP any provisions relating to side yard setbacks and building and impervious surface coverages pending its outcome.

B. The Impervious Surface and Slope Provisions Will Make It More Difficult to Make Good Changes

Homeowners who want to re-grade their lots are now forced into an expensive quagmire. There is no reason to assume that there are unstable soils in the Forest Hills neighborhood, yet the homeowner is now forced to obtain expensive soils tests on their lots to prove that this is the case. The TSO asks that an engineer make a judgment based on a technical term -- "highly erodible" -- that is not defined in the USDA Soils Classification System, the standard for civil engineering in the United States.

Beyond the question of the stability of the soil, there is the issue of "best engineering practice," another term foreign to everyday engineering and to be applied only in the FH/TSP and nowhere else in the City. The Special Exception request could be turned down because an official rule that a generally accepted technique is not the "best." The Office of Planning's bold assertion in its testimony to the Zoning Commission that there is no such thing as an honest civil engineer would leave a homeowner to believe justifiably that the standard of "best practice" is a tool for the City to turn down projects it does not like.

If a homeowner wishes to build a retaining wall, he or she must pay for a designer to design the wall, pay a structural or civil engineer to design the structure to a rudderless standard and prepare specifications for a soils engineer, pay a soils testing service to make tests to prove that soil meets a standard not established in the Soils Classification System. The homeowner must retain a lawyer or other consultant to take this all the way through the BZA even though there is no reason to believe that there may be a soils stability problem -- no cracking foundations, sliding slopes or history of marine clays.

The inclusion of swimming pools as part of the impervious surface calculation is illogical given that the stated intent of these provisions was to control water runoff. Swimming pools do not contribute to runoff and, in fact, add a measure of control as they are collectors in themselves.

C. Conclusion

The FH/TSP prevents or makes difficult legitimate changes to property by homeowners who have no intention of building McMansions, nor of wantonly destroying trees and slopes. It has the same effect on the owners of single undeveloped lots who want to develop them responsibly.

We continue to believe that the Commission should return the FH/TSP to the community so that approaches can be developed by residents in consultations with appropriate professionals and other experts that will address real problems in the community, and not substitute new problems in their place.

II. THE FH/TSP NEEDS MAJOR REVISION

If the Commission remains determined to impose a FH/TSP on Forest Hills, it should be limited in scope and require less resort to the BZA. In general, provisions targeted at development should be addressed directly by amending zoning regulations, not under the umbrella of a tree and slope overlay. The FH/TSP supporters' concern about development in the neighborhood, specifically so-called "McMansions," is a different issue than preserving trees. If the problem is inadequate enforcement of DC Zoning regulations, a FH/TSP is not the answer. If the problem is one of aesthetics, again a FH/TSP is not the "solution." We strongly believe that, if we are not to be afforded the opportunity to deliberate as a community, the FH/TSP should make, at most, minimal zoning changes and modify the tree provisions in a way that makes them more homeowner friendly. We recommend the following changes to the operative provisions of the FH/TSP.

Section 1517: GENERAL PROVISIONS

Section 1517 presents special problems as a result of the lack integration between the FH/TSP and the Urban Forest Act. The Urban Forest Act permits the Mayor to exempt certain species from its restrictions and allows property owners to remove trees upon payment of a fee to the City (\$2625 for a tree 75 inches in circumference) and/or replanting equivalent replacement trees. With respect to the trees that it affects, the Urban Forest Act uses an approach that is largely self-administering and will not require the involvement of multiple understaffed agencies or the BZA. We recommend that its provisions take precedence over the FH/TSP and therefore recommend adding the following new provision to Section 1517:

"1517.3 The provisions of this Forest Hills Tree and Slope Overlay are not applicable to any "Special Tree" as defined in Section 102 of D.C. Council Bill 14-0307, the Urban Forest Preservation Act of

2002 or to any tree of a species that has been exempted pursuant to the provisions of that Act.”

Section 1518: GROUND COVERAGE RESTRICTIONS

Delete Section 1518, as its underlying purpose is to prevent “McMansions” and, as noted above, preventing “McMansions” should properly be done by changing DC zoning regulations generally, not by imposing the FH/TSP. Neither testimony during the three Commission hearings nor any written submissions to the Commission laid a factual basis to support the notion that the present ground coverage regulations are insufficient to protect the trees that exist in Forest Hills. In fact, photographs in the record of this proceeding demonstrate that the anecdotes of the Park Service representative do not reflect the reality of Forest Hills. If the Commission nevertheless elects to proceed, the more stringent building and impervious coverage restrictions should take into account the diversity in lot size in Forest Hills and apply only to lots larger than, perhaps, 9500 square feet and using a sliding scale for lots smaller than that. This would be similar to the approach the Commission took in connection with the building construction coverage provisions of the Chain Bridge/University Terrace Overlay. With respect to impervious surface coverage, proponents premised their support on a waiver to 11 DCMR 2117.10 to permit use of permeable materials for driveways and the like. (Exhibit 101, page 7). The FH/TSP does not include such a waiver.

Section 1519: RESTRICTIONS

The FH/TSP’s tree provisions need major revisions to make them consonant with the Urban Forest Act and to improve their effectiveness. We strongly recommend the following changes to Section 1519 (changes are in italics, and reasons for the change appear in brackets at the end of each section amended):

- “1519.1 Constructing a building, accessory building, or an addition to a building; creating any impervious surface area; subdividing any unimproved lot; or subdividing any improved lot so as to increase the number of principal structures thereupon shall only be permitted as a matter of right subject to the following tree removal limitations:
- (a) The restrictions of this Section against removing, cutting down, or fatally damaging trees apply only to trees having a circumference of *twenty-four inches (24 in) to less than fifty-five inches (55 in.)* at a height of four and one half feet (4.5 ft.) above ground, *and located in the area between the street and the building restriction line or, if there is no building restriction line, a line 25 feet from the public street. If a tree divides into branches at less than four and one half feet above ground, the trunk shall be measured*

immediately beneath the dividing point. [The intent of these changes is to focus the FH/TSP's tree provisions on those trees that provide Forest Hills with the canopy we seek to preserve – i.e., larger trees, not dogwoods or redbuds – and to eliminate from coverage trees that will be covered by the Urban Forest Act. In addition, we want to give homeowners the opportunity to improve their homes at the same time they protect trees. By limiting the tree restrictions to trees in residents' front yards, homeowners are given the flexibility they need to make their homes functional for their families at the same time the community promotes tree preservation. This is a reasonable compromise to the community dispute. In addition, the FH/TSP must give more specific guidance regarding what to do about trees with multiple trunks.]

- (b) The prohibitions of this section do not apply to the removal or cutting down of any dead or unhealthy tree or a tree that creates an unsafe condition *for persons, property or more desirable species of trees*. The need for removal of any *such* tree shall be certified by an arborist or other tree care professional. ["Such" is required to make it clear that not all tree removal needs to be certified. In addition, if an owner would like to protect the next generation of maples and oaks from a leaning tulip tree that on falling would wipe out them out, the FH/TSP affords no mechanism for obtaining permission to remove the tree unless he or she is simultaneously seeking a building permit. Yet to remove that tulip, even on professional advice, appears to be an absolute bar to later obtaining a building permit. The suggested language would provide a solution.]
- (c) *Delete* [This section should be deleted because trees of a circumference of 55 inches or more will be governed by the requirements of the Urban Forest Preservation Act.]
- (d) No more than three (3) trees *between 24 in. and 55 in.* circumference at a height of four and a half feet (4.5 ft.) above ground may be removed, cut down, or fatally damaged *within a two-year period, unless permission for such removal has been granted by the Mayor*. [This section is revised to take into account the provisions of the Urban Forest Act and to address a problem posed by the current FH/TSP: As now drafted, the FH/TSP's quotas on tree cutting exist in perpetuity and would bind all future owners of the property. This would have a decidedly negative impact on property values. A time limit is therefore necessary to ensure that future homeowners of a given property are not disadvantaged by actions, perhaps undisclosed to them, of current property owners. In addition, residents need some mechanism by

which they can obtain approval to remove a tree other than in the context of seeking a building permit. Otherwise, all flexibility to revise and improve tree cover is denied, even where all would agree that such removal and replanting will be beneficial over the long term.]

- (e) *Delete* [This section makes the FH/TSP's tree provisions unnecessarily complicated. This provision assumes that all trees are removed at one time. In fact, trees may be removed over time, new trees may be planted, trees will grow and others will fall. There is no indication of how the numerator or the denominator of this fraction will be calculated over time. It also fails to distinguish between the construction of an addition, where this provision can easily be satisfied even if it is unclear, and the construction of a house on an undeveloped lot, where satisfying this standard will be virtually impossible.]

Where removal or cutting of trees has occurred that would be prohibited by this section if a building permit were contemporaneously applied for, no building permit shall be issued for a period of *two (2) years* from such removal or cutting unless a special exception is granted by the Board of Zoning Adjustment. [The reduction in the ban on access to a building permit is reduced to something more reasonable for homeowners but still a disincentive to builders.]

- 1519.2 The minimum lot size for homes within the FH/TSP Overlay district shall be 9500 S.F. for lots subdivided after the effective date of this provision. [We see no need for this provision. Indeed, the Office of Planning, in its initial, June 17, 2002 report to the Commission recommended maintaining a 7500 square foot minimum (Exhibit 102). A larger minimum lot will change the character of Forest Hills and will be contrary to the Mayor's high priority effort to increase the City's population and tax base, but at least it would not have a direct adverse effect on current residents.]

- 1519.3 All residential buildings, accessory buildings, or additions to buildings shall have a front yard setback equal to or greater than the average setback of all structures on the same side of the street in the block where the building in question is located. The required setbacks are depicted in the map entitled "Required Front Yard Setbacks", which is part of this Overlay District and is located in the Office of Zoning and in the Zoning Division of the Department of Consumer and Regulatory Affairs. [This provision is likely to work fine for most conventional blocks. Applying it to the side

street on corner lots would be unreasonably restrictive for small corner lots].

1519.4 Delete. [The reports to the Commission of both the ANC Ad Hoc Committee and the Office of Planning regarding the proposed FH/TSP recommended adopting a sliding side-yard setback scale growing, for lots that are more than 80 feet wide at the street or on average (at the homeowner's option), from 8 feet on each side to a maximum of 32 feet for very wide lots. The Commission did not address these recommendations. Neither the Woodland/Normanstone Terrace Overlay nor the Chain Bridge/University Terrace Overlay imposes a side yard greater than 8 feet, even though the lots in those neighborhoods appear to be larger on average and more uniform than the lots being subjected to the FH/TSP. We believe residents with lots of 80 feet in width, maybe even those with lots 90 or 100 feet wide, will be alarmed to learn that 24 feet of side yard is now required. A house occupying a 9,600 square foot lot that is 80 feet wide and is subject to a 30 percent coverage limit will need to extend about 7 feet deeper into the lot (built as a rectangle) with a 24 foot side yard rather than a 16 foot side yard. The effect is even more severe on narrower lots. In a neighborhood in which a high percentage of existing homes are built to 8 and in many cases as few as 5 feet from the lot line, narrowing new houses and additions will force them deeper into their lots and will degrade the character of the neighborhood and the design quality of the homes.]

1519.5 *Delete* [No other tree and slope overlay in the District of Columbia contains this provision. The Office of Planning opposed and the Commission rejected special slope provisions in the case of the Chain Bridge/University Terrace Overlay on the grounds that existing D.C. requirements are adequate to limit erosion and water runoff. Furthermore, a structure that stabilizes a slope, such as a retaining wall or a house built within the space of a given slope, would necessarily eliminate any concern for an unstable slope to fail. The FH/TSP now requires that a homeowner obtain expensive and cumbersome tests and analysis to demonstrate that there is no problem. The term "highly-erodible soil" does not exist in any civil engineering texts or guides and is therefore an arbitrary lay term that could be argued endlessly. Slopes are not ordinarily measured in percentages, and nothing in the FH/TSP overlay specifies how large a slope (25% over a ten-foot space? over the whole width or length of the lot? what if the land rises and falls?). How are these questions to be answered and where litigated if someone does not like the planned construction? Why should the Commission's resources or those of the Office of Planning, DCRA or any other

government body, much less those of Forest Hills residents, be devoted to resolving these questions merely to impose a requirement that bears down only on a few of us in Forest Hills and no one else in the City?]

E. Section 1520: SPECIAL EXCEPTIONS

The Special Exception process is of great concern to FHNRP. Many of us are professional architects or others with long experience with the BZA process, and we believe that many of the requirements cannot be satisfied by reference to well-understood standards. We also recognize from experience that to be successful any applicant must hire a lawyer, experts to deal with each commenting agency, and often an expeditor to make his or her way through the process. The BZA process also imposes a heavy burden on overloaded DC government resources. The process is acceptable and necessary for commercial projects and multi-lot subdivisions, but will only ensure long and costly delays for ordinary homeowners pursuing simple changes to their property or seeking to build an appropriate house for the first time on a lot. To mitigate these burdens somewhat, we recommend the following changes to Section 1520 (changes are in italics):

“Any exception from the requirements of this FH/TSP Overlay, as distinct from the requirements of the underlying zoning district, shall be permitted only as a special exception, if approved by the Board of Zoning Adjustment after public hearing, under § 3104, and subject to the following requirements:

- (a) *Delete* [This requirement is unnecessary and invites litigation quarrelling with the BZA’s judgment.];
- (b) The applicant shall *describe* the specific physical characteristics of the lot that justify the exception;
- (c) The excepted building and overall site plan of the lot shall be generally consistent with the purposes of the FH/TSP Overlay District (*delete section on neighboring property*); and
- (d) The Board may impose requirements as to (*delete references to design, appearance*) tree protection practices during construction, buffering, and other requirements as it deems necessary to achieve the purposes of this section and may vary side and rear yard requirements in order to achieve the purposes of this section.

1520.2 Before taking final action on an application, the Board shall submit the application to the following agencies for review and written reports, *which must be issued within 30 days of receipt of the application* [a deadline for action is very important]:

- (a) *Delete* [There is no need to involve the D.C. Office of Planning];
- (b) *Delete* [as the action will take place on private property, there is no need to involve the District Department of Transportation, Tree Maintenance Division];
- (c) *for property abutting land administered by the D.C. Department of Parks and Recreation*, the D.C. Department of Parks and Recreation;
- (d) the D.C. Department of Consumer and Regulatory Affairs, Soil Erosion and Storm Management Branch; and
- (e) *for property abutting land administered by the National Park Service*, the National Park Service, U.S. Department of the Interior.

1520.3 An applicant for a special exception shall submit at least the following materials:

- (a) A site plan for development, including computation and illustration of total lot occupancy and impervious surface ratio, and regulated trees proposed to be removed; and
- (b) A plan and statement indicating how trees to be preserved on the lot will be protected during the construction period, including reference to proposed procedures to guard against long-term damage by such factors as soil compaction.

1520.6 Area Covered by FH/TSP

The Commission should grant the petition of vast majority of the residents south of Soapstone Valley to be exempted from the FH/TSP. With respect to the Chain Bridge/University Terrace Overlay, the Commission stated that it “concurred with the ANC that property owners who object to the inclusion of their properties should not be part of the overlay” and proceeded to exclude those lots. Order 863-A. In accordance with the wishes of 44 households representing 48 of the 62 (or approximately 77%) of the nongovernmental lots south of Soapstone Valley, the Commission should exclude the area south of Soapstone Valley, specifically contiguous squares 2049, 2231, 2232, 2238, 2239, 2244, 2245, and 2246.³ We are advised that Howard Law School is separately requesting that its property be excluded from the FH/TSP. The area proposed for exclusion abuts the boundaries of the FH/TSP, thus satisfying the standards for exclusion

³ See Submission of February 11, 2003, by Warren Watts et al.

originally set by the proponents in discussions with some of us.⁴ The characteristics of homes in that area, many of which have been built since 1980, are very different from those of the homes north of the valley. Moreover, the residents of the area south of Soapstone Valley generally do not share the concerns for their neighborhood that led the proponents to propose the FH/TSP, they were not involved in its development⁵, and a handful at most of them have ever registered support of the Overlay with the Commission.

III. CONCLUSION

FHNRP continues to urge the Zoning Commission to return the FH/TSP to the Forest Hills neighborhood so that we can develop another overlay that more directly and effectively addresses the problems some perceive to exist in the neighborhood. The FH/TSP is premature and contains the seeds of further problems for the neighborhood.

If the Commission insists that the time has come for a FH/TSP for Forest Hills, we strongly urge you to make the changes we recommend. We also ask that you place a one year sunset on the FH/TSP to assure a careful reassessment at that time.

FOREST HILLS NEIGHBORS FOR
RESPONSIBLE PRESERVATION



⁴ Oddly, the FH/TSP as publicized in the D.C. Register does not include squares 2028 and 2029, which appear to be surrounded by the FH/TSP.

⁵ A telling reminder that the FH/TSP results from a campaign orchestrated north of Soapstone Valley is the snide, and again personalized, comment in the Letter of the FHCA to this Commission dated October 7, 2002 (Exhibit 280), instructing us all that only one Metro stop serves Forest Hills residents. In fact, many who live south of Soapstone Valley are served by and often use the Metro stop at Connecticut near Porter.