ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
Z.C. ORDER NO. 02-19
Z.C. Case No. 02-19
(Forest Hills Tree and Slope Overlay District - 11 DCMR)
January 8, 2007

The Zoning Commission for the District of Columbia (the "Commission"), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Official Code § 6-641.01) (the "Act"); having held a public hearing as required by § 3 of the Act (D.C. Official Code § 6-641.03); and having referred the proposed amendments to the National Capital Planning Commission for a 30-day period of review pursuant to § 492 of the District of Columbia Charter; hereby gives notice of the adoption new §§ 1516 through 1520 of the Zoning Regulations (Title 11 DCMR).

The adopted amendments establish a new tree and slope protection overlay that is applied to certain properties in the Forest Hills area of the District of Columbia.

The Commission took final action to adopt the rulemaking at a public meeting held on January 8, 2007. This final rulemaking is effective upon its publication in the *D.C. Register*.

Existing Regulations

The Tree and Slope Protection Overlay District was established "to preserve and enhance the park-like setting of designated neighborhoods adjacent to streams or parks by regulating alteration or disturbance of terrain, destruction of trees, and ground coverage of permitted buildings and other impervious surfaces." 11 DCMR § 1516.1. The Overlay began as a 1990 petition proposing a Woodland Normanstone Overlay District intended to preserve and enhance the park-like setting of that neighborhood. The Commission decided that the proposed provisions could benefit other areas of the District and therefore adopted 11 DCMR §§ 1512 through 1515 (hereafter referred to as the "TSP Template"). Although intended to apply to other areas, the TSP Template only applies to certain Woodland Normanstone neighborhood properties[1] added through a map amendment. (Zoning Commission Order No. 713 (March 20, 1992))

[1] Those squares are Squares 2119, 2120, 2122, 2124 through 2127, 2139, 2140, 2145, and 2198 through 2200. Zoning Commission Order No. 713, p. 12 (February 10, 1992).

A second tree and slope protection overlay was created nine years later for the Chain Bridge Road/University Terrace area. Zoning Commission Order No. 863 (July 30, 1999). The Commission decided not to incorporate the TSP Template, but added new §§ 1565 through 1569. No other areas of the District have been mapped within a tree and slope protection overlay district.

Description of Text Amendment

On April 5, 2002, the Forest Hills Citizens Association petitioned to create a new tree and slope protection overlay for the Forest Hills neighborhood. As in the case of the Chain Bridge Overlay, the petitioners did not wish to incorporate the TSP Template, but instead sought a stand-alone version of the Template.

The text approved on final action differs from the TSP Template in that it:

- Requires that side yards have an aggregate width of twenty-four (24) feet, with no side yard having a width of less than eight (8) feet;
- Imposes a 9,500-square-foot minimum lot size requirement;
- Applies tree removal limitations to the subdivision of unimproved lots and, under certain circumstances, to subdivisions of improved lots; and
- Requires persons seeking permission to alter buildings or terrain on a lot with a slope steeper than twenty-five percent (25%) or with highly erodible land to certify that the alteration will follow best geo-technical, structural engineering, and arboreal practices.

The second and the third items are also in the Chain Bridge University Terrace Overlay. As to the certification provision, the Secretary of Agriculture has defined "highly erodible land" as "land that has an erodibility index of 8 or more." (7 CFR § 12.2 (2005)) An erodibility index is "a numerical value that expresses the potential erodibility of a soil in relation to its soil loss tolerance value without consideration of applied conservation practices or management." *Id.*[2]

The new overlay will apply to all lots zoned R-1-A, R-1-B, and R-2 in Squares 2030 through 2033, 2040 through 2043, 2046, 2049 [except for Lots 804 (Van Ness North), 805 (Van Ness Center), 806 (Van Ness South)], Squares 2231, 2232, 2238, 2239, 2241 through 2251, 2254 through 2256, 2258, 2262 through 2270, 2272, 2274 through 2277, and 2282. However, only Squares 2042, 2043, 2046, 2049, 2231, 2232, 2238, 2239, 2244 to 2248, 2250, 2258, 2272, and 2282 will be subject to the tree and slope protection and minimum lot size provisions of new § 1519, because these properties have the steepest slopes and are closest to park land.

[2] The actual process for determining erodibility index for a soil is set forth at 12 CFR § 12.21(a).

Relationship to the Comprehensive Plan

The amendment is not inconsistent with the Comprehensive Plan and supports several objectives and policies of the Plan.

The amendment advances the environmental protection objectives and policies set forth in Chapter 4 of the Comprehensive Plan. The amendment directly supports the policy of regulating development, "to protect natural features, prevent further soil erosion, and prohibit construction practices which produce unstable soil and hillside conditions." (10 DCMR § 405(a)) The amendment also advances the urban design objectives and policies of Chapter 7 of the Comprehensive Plan. The amendment directly supports the objective of imposing building restraints to restrict developments on severe slopes and unstable soils and in stream valleys, (10 DCMR § 704.1), and the policy of protecting the land adjacent to streams and ravines from the adverse effects of urban uses. (10 DCMR § 705.2)

Set down, Public Hearing and Proposed Action

On April 29, 2002, the Commission set the case down for public hearing and scheduled the hearing for June 27, 2003. A notice of public hearing appeared in the May 10, 2002 edition of the *D.C. Register* at 49 DCR 4337.

The Commission held public hearings on June 27, 2002, September 5, 2002, and September 30, 2002 on the petition.

At these hearings, persons and organizations testified both in favor and against the proposed rule. Those in favor, including representatives of the Forest Hills Citizens Association, the National Park Service, and ANC 3F, testified that the overlay would protect the park-like setting of the Forest Hills neighborhood by protecting steep slopes from erosion and prevent the destruction of mature trees. Those opposed to the proposed rule, including members the Forest Hills Citizens for Responsible Preservation, testified that they did not believe that the proposed overlay was well suited to the issues facing the neighborhood and that it would overly burden property owners. They requested that the Commission return the issue to the community to, with the aid of the Office of Planning, craft a new proposal tailored to the community's needs.

After these three hearings, the Commission took proposed action to approve the overlay text with some minor technical revisions at its regular public meeting held on October 28, 2002. A Notice of Proposed Rulemaking was published on December 13, 2002 at 49 DCR 11309.

After receiving comments on the proposed rulemaking, at its regular public meeting held on March 10, 2003, the Commission requested that the Office of Planning work with the community to develop an alternative approach to accomplish the goals of the proposed overlay district. The Office of Planning submitted a new proposed text, which focused primarily on the protection of the tree canopy, rather than with the safeguarding of particular trees. The Commission published

new notices of public hearing on March 12, 2004 at 51 DCR 2707 and May 21, 2004 at 51 DCR 5207. A public hearing on the alternative proposal was held on July 22, 2004.

At a decision meeting held March 14, 2005, the Commission decided against adopting the alternative approach, choosing instead to the republish the initially proposed text. However, the Commission voted to apply the tree and slope protection provisions only to those properties with the severest slope that were the closest to parkland. A Notice of Proposed Rulemaking intended to reflect this decision was published on March 31, 2006 at 53 DCR 2435. Unfortunately, the notice was published with a page missing.

On May 8, 2006, the Commission authorized the publication of a Corrected Notice of Proposed Rulemaking and the deletion of a provision requiring front yard set backs based upon a map that had never been furnished by the petitioner. The corrected notice was published on June 2, 2006 at 53 DCR 4471.

The Commission received five comments in opposition to the proposed rule. Robert Maudlin, single member representative for ANC 3F03, wrote that the Commission should not adopt a rule that had so divided the community. Mr. Maudlin also felt that the Urban Forest Preservation Act of 2002[3] sufficiently addressed many of the concerns that motivated the petition. Several other comments indicated that they believed the rule would create an excessive burden on property owners. One comment, submitted by Mark and Laura Baughman and Jim and Karen Foreit, stated that they preferred the alternative approach formulated by the Office of Planning to the proposed rule and suggested changes to the proposed text.

David Bardin wrote to make two technical comments on the proposed text. He commented that the proposed text, at § 1520.2(b), makes reference to DDOT's "Tree Maintenance Division" and at § 1520.2(d), to DCRA's "Soil Erosion and Storm Management Branch." He noted that DDOT's Tree Maintenance Division has been re-named the "Urban Forestry Division" and that the responsibilities of DCRA's Soil Erosion and Storm Management Branch were transferred to the newly created Department of the Environment.

The proposed rulemaking was also referred to the National Capital Planning Commission ("NCPC") pursuant to § 492 of the District of Columbia Charter. The NCPC Executive Director, by delegated action dated May 25, 2006, found the proposed text amendments would not affect the identified federal interests in the National Capital nor be inconsistent with the Comprehensive Plan for the National Capital.

The Office of the Attorney General determined that this rulemaking meets its standards of legal sufficiency.

[3] Effective June 12, 2003 (D.C. Law 14-309; D.C. Official Code § 8-651.01 *et seq.*).

Final Action

The Commission took final action to adopt the rulemaking at its regularly scheduled public meeting on January 8, 2007.

The Commission approved the technical revisions noted by Mr. Bardin, revised the text of § 1518.3 to clarify the side yard requirement, added greater specificity to the titles §§ 1518 and 1519, and revised the term "highly erodible soil," as used in § 1518.3, to "highly erodible land." A search of the Code of Federal Regulations and the United States Code revealed no references to "highly erodible soil," while "highly erodible land" is both defined and explained in Subtitle A, Part 12 of CFR Title 7, "Highly Erodible Land and Wetland Conservation."

In response to the comments received, the Commission, while appreciative of the efforts of the Office of Planning in formulating the alternative approach, remains convinced that the adopted text remains the best means of accomplishing the purposes set forth in § 1516.2. As to the protections afforded by the tree protection legislation enacted by the Council, the Commission notes that the law permits any tree to be cut if the permit applicant is willing to pay for the privilege. No such buy-out option exists in these rules.

With respect to the divisive nature of this rule, the Commission is well aware of the effect proposals of this kind have upon neighborhoods, but that factor alone cannot and should not prevent the Commission from taking actions it believes are in the public's overall best interest.

Lastly, these rules impose no greater burden than exists for properties subject to the Chain Bridge University Terrace ("CBUT") Overlay, other than the side yard and certification requirements before a building or terrain may be altered for properties with steep slopes or highly erodible land. Given the 9,500-square-foot minimum lot size requirement borrowed from the CBUT Overlay, there should be little difficulty in complying with an aggregate side yard requirement of twenty-four (24) feet. In addition, the Commission added the flexibility to have one side yard be as narrow as the standard eight (8) foot requirement. As for the certification requirement, the Commission believes that whatever cost or delay might result from obtaining these determinations is offset by the need to ensure that construction in such vulnerable areas will follow best geo-technical, structural engineering, and arboreal practices. Indeed, the Commission narrowed the geographic confines of the provision to just those properties with the steepest slopes adjacent to the park land.

Based on the above, the Commission finds that the proposed amendments to the Zoning Regulations are in the best interests of the District of Columbia, consistent with the purpose of the Zoning Regulations and Zoning Act, and not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth herein, the Zoning Commission hereby APPROVES the following amendments to the Zoning Regulations and Map (Title 11 DCMR):

1. Chapter 15, MISCELLANEOUS OVERLAY DISTRICTS, by adding new §§ 1516 through 1520 to read as follows:

1516 FOREST HILLS TREE AND SLOPE PROTECTION OVERLAY DISTRICT

1516.1 The Forest Hills Tree and Slope Protection (FH/TSP) Overlay District is established to preserve and enhance the park-like setting of the designated neighborhoods bounded by Connecticut Avenue and Thirty-Second Street on the west, Rock Creek Park on the east, Fort Circle National Park and Nevada Avenue, N.W. on the north, and Melvin C. Hazen Park and adjacent to streams and parks on the south, by regulating alteration or disturbance of terrain, destruction of trees, and the ground coverage of permitted buildings and other impervious surfaces. It includes Soapstone Valley Park as well as Melvin C. Hazen Park.

1516.2 The purposes of the FH/TSP Overlay District are to:

(a) Preserve the natural topography and mature trees to the maximum extent feasible in the Forest Hills neighborhoods;

(b) Prevent significant adverse impact on adjacent open space, parkland, stream beds, or other environmentally-sensitive natural areas; and

(c) Limit permitted ground coverage of new and expanded buildings and other construction, so as to encourage a general compatibility between the siting of new buildings or construction and the existing neighborhood.

1516.3 The FH/TSP Overlay District has a significant quantity of steep slopes, has stands of mature trees, is located at the edge of stream beds and public open spaces, and has undeveloped lots and parcels subject to potential terrain alteration and tree removal. Few lots are developed on a rectangular grid system.

1516.4 The FH/TSP Overlay District includes all lots zoned R-1-A, R-1-B, and R-2 on the effective date of the FH/TSP Overlay in Squares 2030 through 2033, 2040 through 2043, 2046, 2049 except for Lots 804 (Van Ness North), 805 (Van Ness Center), 806 (Van Ness South), all lots zoned R-1-A, R-1-B, and R-2 on the effective date of the FH/TSP Overlay in Squares 2231, 2232, 2238, 2239, 2241 through 2251, 2254 through 2256, 2258, 2262 through 2270, 2272, 2274 through 2277, and 2282.

1517 **GENERAL PROVISIONS (FH/TSP)**

1517.1 The FH/TSP Overlay District is mapped in combination with the underlying R-1, R-1-B, or R-2 District and not in lieu of the underlying district.

1517.2 Where there is a conflict between the FH/TSP Overlay District and an underlying zoning district, the more restrictive provisions of the FH/TSP shall govern.

1518 LOT OCCUPANCY, IMPERVIOUS SURFACE, AND SIDE YARD RESTRICTIONS (FH/TSP)

1518.1 The principal building and any accessory building on the lot shall not exceed total lot occupancy of thirty percent (30%).

1518.2 The maximum impervious surface coverage on a lot shall be fifty percent (50%); provided this subsection shall not:

(a) Preclude enlargement of a principal building in existence as the effective date of the FH/TSP overlay; or

(b) Create nonconformity of a structure as regulated by Chapter 20 of this title.

1518.3 To the extent a side yard is required in the underlying zone district, the minimum side yard requirement for all buildings, accessory buildings, or additions to buildings shall be twenty-four (24) feet in the aggregate, with no single side yard having a width of less than eight (8) feet.

1519 TREE AND SLOPE PROTECTION AND MINUMUM LOT SIZE (FH/TSP)

1519.1 The provisions of this Section shall only apply to those lots that are subject to the overlay in Squares 2042, 2043, 2046, 2049, 2231, 2232, 2238, 2239, 2244 through 2248, 2250, 2258, 2272, and 2282.

1519.2 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 twelve inches (12 in.) or greater at a height of four and one-half feet (4½ ft.) above ground;

(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. The need for

removal of any tree shall be certified by an arborist certified by the International Society of Arboriculture;

(c) No tree that has a circumference of seventy-five inches (75 in.) or more at a height of four and one-half feet (4½ ft.) above ground may be removed, cut down, or fatally damaged;

(d) No more than three (3) trees that have a circumference of more than thirty-eight inches (38 in.) at a height of four and one-half feet (4½ ft.) above ground may be removed, cut down, or fatally damaged and none of these may be located within twenty-five feet (25 ft.) of any building restriction line or lot line abutting a public street;

(e) The total circumference inches of all trees removed or cut down on a lot may not exceed twenty-five percent (25%) of the total circumference inches of all trees on the lot having a circumference greater than twelve inches (12 in.); provided, that this Section does not abrogate the right to remove or cut down up to three (3) trees as provided in paragraph (d) of this subsection; and

(f) 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 seven (7) years from such removal or cutting unless a special exception is granted by the Board of Zoning Adjustment in accordance with the provisions of § 1520.

1519.3 The minimum lot size for homes within the FH/TSP Overlay district shall be 9,500 square feet for lots subdivided after the effective date of the FH/TSP Overlay.

1519.4 To the extent that any person seeks permission for building or terrain alteration on a lot with a slope steeper than twenty-five percent (25%) or with "highly erodible land" as defined at 7 CFR 12.2 (2005), that person shall supply to the Zoning Administrator in the Department of Consumer and Regulatory Affairs a professional certification that the plans for alteration and/or construction will follow best geo-technical, structural engineering, and arboreal practices.

1520 SPECIAL EXCEPTIONS (FH/TSP)

1520.1 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) Tree removal, grading, and topographical change shall be limited to the maximum extent possible, consistent with construction of a building permitted by the standards of the FH/TSP Overlay;

(b) The applicant shall demonstrate that there are 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 and not adversely affect neighboring property; and

(d) The Board may impose requirements as 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 action on an application, the Board shall submit the application to the following agencies for review and written reports:

(a) D.C. Office of Planning;

(b) District Department of Transportation, Urban Forestry Division;

(c) D.C. Department of Parks and Recreation;

(d) D.C. Department of the Environment; and

(e) 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, 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.

2. The Zoning Map of the District of Columbia is amended by adding the following squares to the Forest Hills Tree and Slope Protection Overlay District (11 DCMR §§ 1516 though 1520):

> All lots zoned R-1-A, R-1-B, and R-2 on the effective date of 11 DCMR § 1516, in Squares 2030 through 2033, 2040 through 2043, 2046, 2049 [except for lots 804 (Van Ness North), 805 (Van Ness Center), 806 (Van Ness South)], Squares 2231, 2232, 2238, 2239, 2241 through 2251, 2254 through 2256, 2258, 2262 through 2270, 2272, 2274 through 2277, and 2282.

Vote of the Zoning Commission taken at its public meeting on March 14, 2006 to **APPROVE** the proposed rulemaking by a vote of **5-0-0** (Carol J. Mitten, Kevin Hildebrand, Anthony J. Hood, Gregory N. Jeffries, and John G. Parsons to approve).

This Order was **ADOPTED** by the Zoning Commission at its public meeting on January 8, 2007, by a vote of **4-0-1** (Carol J. Mitten, John G. Parsons, Anthony J. Hood, and Gregory N. Jeffries to adopt; Michael G. Turnbull, having not participated, not voting).

In accordance with the provisions of 11 DCMR § 3028.9, this Order shall become effective upon publication in the *D.C. Register*; that is, on _____.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
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The full text of this Zoning Commission order is published in the "Final Rulemaking" section of this edition of the *D.C. Register*.