

CITY OF TAKOMA PARK TREE COMMISSION

IN THE MATTER OF: *

Appeals from Preliminary Approval of a * Case No.: TC 2020-02

Tree Protection Plan and Preliminary *

Approval of a Tree Removal Permit *

of 14 Regulated Trees at 430, 432 & 434 *

Ethan Allen Avenue, Takoma Park *

Marcello Nucci c/o Burger Properties, LLC *

Applicant *

* * * * *

DECISION AND ORDER

This matter came before the City of Takoma Park Tree Commission (“the Commission”) on appeals of preliminary approval of a Tree Protection Plan (“Protection Plan”) and a Tree Removal Permit (“Removal Permit”) at the properties known as 430, 432 and 434 Ethan Allen Avenue (collectively, “the Property”). For the reasons set forth below, the Tree Commission affirms the approval of the Protection Plan and conditionally affirms approval of the Removal Permit. Approval of the Removal Permit is conditioned upon the Applicant 1) successfully obtaining approval of its Stormwater Management Plan and 2) posting a bond in the amount of \$18,000. The Commission also recognizes that the Applicant must, in accordance with its sworn testimony, continue to incorporate stormwater measures into its development of the Property in collaboration with neighbors, including the Appellants.

I. INTRODUCTION.

The owner/applicant is Marcello Nucci c/o Burger Properties, LLC (“the Applicant”). The Appellants are Sydney Katz of 427 Boyd Avenue; Lesley Hunter and Emanuel Wagner of 429 Boyd Avenue; and Lael Parish and Danny Katz of 501 Lincoln Avenue (collectively “the Appellants”).¹ The Appellants, the Applicant (as an interested party), and the City participated in a virtual hearing before the Commission on December 15, 2020.

From the testimony and evidence provided at the hearing it is apparent that the Appellants have been historically subjected to property damage as a result of runoff from the Property. The Appellants’ principal concern as it relates to the jurisdiction of the Tree Commission is whether approval of the Removal Permit will exacerbate the runoff problem. It is apparent that this facet of the runoff problem is but one element of a larger problem, best exemplified by the fact that even with the trees currently in place, the Appellants continue to experience significant problems associated with runoff.

The Applicant demonstrated that it has been working to mitigate runoff through its Stormwater Management Plan. The Applicant testified that further refinement of that plan is ongoing; and further, testified that the process of refinement will be undertaken within the framework of a dialogue with the neighbors, which includes the Appellants. The Tree Commission expects that the Applicant will abide by its sworn testimony.

The Property is a slightly trapezoidal shaped collection of 5 lots. The Property is bounded to the south by Ethan Allen Avenue (Md. Rte. 410).² Lots 1 and 5 are improved with 1 existing

¹ Appellant Lesly Hunter did not participate in the hearing.

² The Property is not on a true north-south axis, and is, instead, oriented to the north-east on its northern most border. For the sake of simplicity and consistency with the testimony at the hearing, this Decision and Order will refer to the borders as North, South, East and West most closely reflecting the border’s orientation.

house on each lot, both fronting Ethan Allen Avenue. Those existing houses on Lots 1 and 5 will remain after development. The Applicant intends to build one house apiece on Lots 2, 3 and 4.³ The new houses will be served by a shared driveway off Ethan Allen Avenue through an existing easement between Lots 1 and 5. Plans call for utility services for the new homes to be placed under the driveway.

The Applicant seeks to remove 21 trees of which 7 were deemed either hazardous, dead or dying by the City of Takoma Park Urban Forest Manager Marty Frye (“UFM” or, at times, “Mr. Frye”), leaving 14 trees as the subject matter of the appeal of the Removal Permit. The preliminary approval for removal of the subject 14 trees is contingent upon the Applicant’s agreement to the replanting requirement of 38 trees. The Applicant has submitted plans indicating its intent to exceed the replanting requirement by replanting 48 trees.⁴

The newly improved Lots share a boundary with the residences of the Appellants, which consist of 3 single family homes at 427 Boyd Avenue, 429 Boyd Avenue and 501 Lincoln Avenue. The shared boundary lines constitute the entire northern boundary of the Property and cover all of the respective southern boundaries of the lots upon which Appellants’ homes are situated.

According to testimony during the hearing, and as illustrated by the Applicant’s Tree Removal Regulated Final Grading and Paving Plan, a copy of which is attached hereto as Exhibit A, the Property generally slopes downward from south to north; *i.e.*, with the high side abutting

³ Lots 1 through 5 correspond in sequence with the identification of Lots 69 through 73 as identified in the course of discussion about the Stormwater Management Plan during the hearing.

⁴ The Applicant had received preliminary approval of a Protection Plan and Removal Permit in 2018. However, the 2018 preliminary approval expired prior to any work being performed. The Applicant submitted renewed applications on or about September 3, 2020. The preliminary approval of the Protection Plan issued on October 6, 2020, with notices of that approval sent to all neighbors on October 12, 2020. The preliminary approval of the Removal Permit issued on October 27, 2020 and the Property was posted the same day.

Ethan Allen Avenue and with the low side abutting the Appellants' boundary lines. The downward slope is similar but not exactly uniform across the Property. *Id.* The largest elevation differential falls between the southwest corner of the Property to the northeast corner, and appears to be approximately 34 feet (260 to 226). *Id.*

The Appellants' properties have historically been subjected to significant surface water runoff from the Property, with attendant negative effects to their properties and including in one case, causing water intrusion inside one of the homes. While supportive of the development of the Property, the Appellants are concerned that removal of trees will exacerbate the water runoff problem. The Appellants also express concern over the loss of canopy and the effect on wildlife if the designated trees are removed.

II. ISSUES RAISED BY THE APPELLANTS.

The appeals came in 2 forms. The first appeal, dated October 26, 2020 ("the First Appeal"), and joined by all of the Appellants listed above, was labeled as an appeal from approval of the Protection Plan. The second appeal, dated November 11, 2020 ("the Second Appeal"), was labeled as an appeal from the Removal Permit and was sent by Mr. Wagner only. Copies of the appeals are attached hereto as Exhibits B and C, respectively.

The substance of Appellants' concerns in both appeals is the effect removal of the trees will have on surface water drainage where that water flows onto their respective properties, negatively affecting their yards, and in one instance, causing an intrusion of water through the foundation into those Appellants' residence. In Appellants' words:

We are concerned because the tree permit proposes the removal of 21 trees, 13 of which are healthy, desirable trees, some of significant size. As our properties are already suffering from significant water runoff from that property, we are concerned that waterflow will increase without countermeasures, especially if all trees are to be removed, with three new structures and an impermeable driveway built.

We already are experiencing flooding coming from uphill that damages our landscapes and at times, floods the basements of one of our households. More water runoff will directly translate into costs for us related to water management and mitigation measures as well as property damage from flooding, which some of us already experience. Removal of these trees will also contribute to habitat loss for the several animal species that currently reside or take occasional refuge on the property.

Exhibit B, First Appeal, page 1.

Appellants articulated several concerns over the course of the hearing. Appellant Emmanuel Wagner (“Mr. Wagner”) testified that the chief concern was the water runoff causing damage to the Appellants’ respective yards and to “some degree,” their homes. *See* Hearing Recording, a copy of which is attached hereto as Exhibit D, at 18:52.⁵ Mr. Wagner voiced the opinion that “right now” is a time to address the problem. HR 18:59. Mr. Wagner stated that in addition to concern about removal of the trees, the removal and replacement of the existing undergrowth with lawns will increase runoff. HR 19:00.

Mr. Wagner also expressed concern that removal of the trees was contrary to the City’s goals expressed in the tree canopy assessment as well as the City’s emergency climate change resolution both dating from March of 2019. HR 19:02. Mr. Wagner noted that the plans provided as part of this process varied from the plans previously provided. HR 19:03. Mr. Wagner questioned whether the tree planting plan was accurate, particularly where it showed trees to be planted on the norther boundary where there are already existing trees. HR 19:05.

Mr. Wagner requested that the City revisit the approval of the tree protection plan in order to reduce the removal of mature healthy trees with the intent of satisfying the City’s overall goals

⁵ In the interest of brevity, citations to the Hearing Recording at Exhibit C will be hereinafter be abbreviated to “HR” followed by a reference to the approximate time stamp for the testimony or documentary evidence from the time appearing in the lower right hand corner of the video.

for maintaining the canopy and to reduce the amount of runoff the Property neighbors are experiencing. HR 19:07. Specifically, Mr. Wagner requested that the placement of the driveway and an adjacent bioswale be revised in order to reduce the need to remove mature trees. HR 19:08. Mr. Wagner suggested that the hardship factor for the developer in revising the plans might have been avoided had the Applicant reached out to the neighbors sooner. HR 19:00.

Appellant Sydney Katz (“Ms. Katz”) stated that she echoed Mr. Wagner’s concerns. HR 19:11. Ms. Katz also does not oppose the development. HR 19:11, Ms. Katz expressed disappointment in the process which has left her feeling “outside the process.” HR 19:12. Ms. Katz joined Mr. Wagner’s sentiment that many issues might have been avoided by earlier outreach. HR 19:12. Ms. Katz expressed the desire to be “kept in the loop” going forward as the project relates to trees and water issues. HR 19:12. Over the course of the hearing, Ms. Katz also requested that Applicant consider adjusting the location of underground utilities to increase the use of permeable pavement. 20:11. Ms. Katz also stated that the Appellants would appreciate the opportunity to be involved in the further refinement of the stormwater management plan. HR 20:11.

Ms. Lael Parish (“Ms. Parish”) spoke on her behalf as well as on behalf of Appellant Danny Katz (“Mr. Katz”). HR 19:13. Ms. Parish and Mr. Katz reside at 501 Lincoln Avenue. HR 19:13. Ms. Parish stated that their video accurately reflected the torrent of muddy water they experienced that day and that they have experienced similar flooding conditions from lesser storms than the one that occurred the day the video was taken. HR 19:14. Ms. Parish joined in the concerns expressed by Mr. Wagner and Ms. Katz. HR 19:15. Ms. Parish expressed the concern that removal of the trees would exacerbate a “very difficult” drainage situation. 19:15.

At the conclusion of direct testimony and cross-examinations, Mr. Wagner reiterated the request that there be consideration of moving the driveway far enough to preserve some of the trees and his view that the addition of shrubbery to the plan would be helpful. HR 20:57.

III. SUMMARY OF MATERIAL FACTS.

A. Direct Testimony of the Appellants.

The Appellants provided videos from their respective properties each showing water cascading onto their properties from the Property. The videos show water running down over retaining walls in a waterfall like fashion, forming streams and pooling in various places, including sometimes at or near foundations, and, in one instance, overwhelming a drain box at the 427 Boyd property. HR 18:53-18:58 (in the order shown - Appellants' Exhibits 9, 6, 7 & 8). Mr. Wagner testified that the water problem occurs not only in unusual downpours but also occurs when storms involve persistent rain. Mr. Wagner has resided at 429 Boyd Avenue since 2018. HR 18:59. He learned about the development of the Property in 2018 and shared his concerns about runoff with his Councilmember and City staff. HR 19:00. Mr. Wagner did not know whether the Applicant reached out to the affected neighbors to address their concerns or solicit feedback between 2018 and the time of this appeal process. HR 19:00.

Appellant Sydney Katz resides at 427 Boyd Avenue. HR 19:11. Ms. Katz also does not oppose the development. HR 19:11. Ms. Katz adopted Mr. Wagner's opening statements. HR 19:12.

Ms. Parish stated that their video accurately reflected the torrent of muddy water they experienced that day and that they have experienced similar conditions from lesser storms. HR 19:14. Ms. Parish testified that on September 10 [of 2019], they experienced flooding into their basement. HR 19:14. Ms. Parish testified that water has been a "huge problem" throughout the 15-

year period during which they have lived in the home. HR. 19:14. Ms. Parish testified that they have catch basins in their yard, but that 4 or 5 times per year the catch basins are overwhelmed, causing damage to their yard and to their house. HR 19:15.

B. Direct Testimony of the UFM.

Mr. Frye testified in his capacity as UFM. Mr. Frye noted for the record that his initial assessment at the Property occurred while he was serving the City in a contractual position before he assumed employment as UFM. HR 19:17. Of the 21 trees planned to be removed from the site, 7 were deemed dead, dying and hazardous, a determination that is not subject to appeal.⁶ HR 19:19. Of the remaining 14 trees, 2 were of undesirable species, including a Bradford pear and a mulberry tree. HR 19:19. Mr. Frye testified that he considered a tree diameter of 20 inches as a factor contributing towards an “exceptional” rating. HR. 19:19. Mr. Frye noted that of the 12 remaining trees, 10 were below the 20 inch threshold used as a contributing factor towards an exceptional rating. HR 19:19. Mr. Frye also noted that 3 white pines in the remaining group were situated under power lines and had already been topped and/or otherwise trimmed, circumstances which carried negative implications for the longevity and quality of those trees. 19:21.

Of the 2 trees over 20 inches in diameter, the tree identified as tree number 103, a silver maple, had been given the lowest tree replacement rating of 1%. HR 19:22. The relatively low rating arose from factors including heavy ivy growing on the trunk, a thin crown crowded by nearby trees, decaying bark on the lower trunk and a notable fungal infection at the base of the trunk. HR 19:22.

⁶ See Section 12.12.080(B)(1) & (2) of the prior version of the Tree Ordinance. The Tree Ordinance underwent revisions by operation of Ordinance 2020-22, effective October 27, 2020. As the project and the applications predate the effective date of the revisions, all references to the Tree Ordinance are to the prior version of the Code, unless otherwise noted. These appeals are resolved under the language and authority as provided in the prior version of the Tree Ordinance.

The remaining tree, tree number 102, is a pin oak of 25.6 inches diameter, rated by Mr. Frye at a 3% replacement rating. HR 19:23. The only negative Mr. Frye noted as to the condition of the tree was that it was growing in a compacted soil area and showed some mechanical damage at the base. HR 19:14. Mr. Frye noted that the tree would normally be saved should there be a reasonable requirement for redesign. HR 19:24. Ultimately, Mr. Frye made a determination that redesign to save tree number 102 was not reasonable given the size of the site, its proximity to the proposed driveway and in light of the number of trees being saved outside of the planned limit of disturbance (“LOD”). HR 19:26.

As to criteria for tree removal decisions, Mr. Frye testified as follows, again generally without going tree by tree.⁷ As to the health of the trees, Mr. Frye noted his prior evaluation of the dead or dying trees. HR 19:27. As to preserving a tree by reason of its age, species or other outstanding quality, Mr. Frye noted that removal must also be balanced with the extent to which the trees to be removed have special or exceptional characteristics, especially as to size. HR. 19:27. Mr. Frye noted that as to the factor of potential environmental degradation, that the size of the tree is again a significant factor, and that planned removal of smaller trees has lesser weight than removal of larger trees. HR 19:28. Mr. Frye noted that the criteria of whether a tree is located near

⁷ At this juncture, Mr. Frye discussed the criteria in the order expressed in the newly revised Chapter 12:12, Urban Forest of the Code, effective October 27, 2020, which Ordinance operates prospectively. As mentioned above, given that this process began in 2018 and the specific applications were received on or about September 3, 2020, the applications and the instant appeal are subject to the Code in its prior form. The distinction is immaterial to this appeal. While the criteria have been rearranged in order, they remain the same in substance with 2 exceptions which do not have an effect here. The former 12.12.120(B)(8), regarding “[t]he desirability of the trees species as a permanent part of the City’s urban forest” appears now in substance in 12.12.080(A)(1)(b) referencing “species.” The former 12:12.120(B)(2), referencing “[t]he number and type of replacement trees and, if appropriate, any reforestation plan proposed as mitigation for the tree or trees to be removed[,] has been taken out of the criteria in the new version of the ordinance. However, the reforestation plan of the instant site was discussed at some length in the hearing including that the Applicant intended to replant 48 trees.

to potential targets was not really a factor in his evaluation as the area is essentially open land presently. HR 19:29. As to the criteria of the trees relationship to existing or planned utilities or structures, Mr. Frye noted that this factor weighed in favor of removal particularly as to the pines already negatively affected by their proximity to the power lines on Ethan Allen Avenue. HR 19:29. As to the criteria of any compelling reason for removal that the applicant has demonstrated, including hardship, Mr. Frye testified that his evaluation was that redesign at this stage did not seem reasonable. HR 19:30. As to the criteria of the extent to which removal was necessary to achieve the proposed development, Mr. Frye testified that his evaluation was that the driveway onto the property was necessary and that the LOD for the driveway would negatively impact the health of the trees by damage to the root systems, even were the driveway to be moved between 5, 6, 7, or 8 feet. HR 19:31.

C. Direct Testimony of the Applicant.

Ms. Karen Carpenter and Mr. Michael Swanson offered testimony on behalf of the Applicant. Also speaking on behalf of the Applicant was its counsel, Ms. Soo Lee-Cho.

The Applicant offered Ms. Carpenter as an expert in landscape architectural design, tree protections, and preservation management. HR 19:35.⁸ After a brief overview of the project, Ms. Carpenter used Applicant's "Tree Removal Regulated Final Grading & Paving," (Exhibit A) to point out certain characteristics of the plan. Ms. Carpenter testified as to her agreement that 7 trees are either dead or dying, and the circumstance that the pines under the utility wires were negatively affected by the trimming necessary to keep them away from the utility lines. HR 19:40.

⁸ Ms. Carpenter's resume was offered as Applicant's Exhibit 5. There were no objections to her qualifications as an expert.

As to tree number 103, the large silver maple, Ms. Carpenter agreed that it had heavy ivy growth on the trunk, testified that it had numerous dead limbs, and that the tree leans. HR 19:41. Ms. Carpenter noted that it grows within very close proximity (“within 1 foot”) to the trees numbered 104a and 104b. HR. 19:41.

Ms. Carpenter testified that tree number 102, the large pin oak, would be subject to disturbance of 39% of its critical root zone during installation of the driveway.⁹ HR 19:42. Ms. Carpenter testified that the driveway has to meet emergency access requirements as it will serve 3 or more lots. HR 19.42. Ms. Carpenter testified that the plans call for water and sewer lines for each new house to be located under the driveway in trenches that will be around 6 feet deep. HR 19:43.

Ms. Carpenter addressed a suggestion by the Appellants that the planned driveway and adjacent bioswale be shifted to the east. HR 19:44. Ms. Carpenter noted the existing driveway and retaining wall on Lot 5, and stated that the maximum shift that might occur without taking out the existing driveway and retaining wall would be approximately 5 feet; and further, that such a move would not alleviate the negative impact on the critical root zone of tree number 102. HR. 19:43. Ms. Carpenter also testified that shifting the driveway and bioswale to the east could negatively impact the critical root zones of existing trees on lot 5 as well as on 2 other lots adjacent to the Property to the east. HR 19:45.

Ms. Carpenter identified additional aspects of the plan sensitive to protection of the trees which will remain. These include removal of an existing gravel driveway by hand so as to not further compact the soil and the use of flexible pavement instead of concrete to replace the

⁹ The critical root zones of significant trees appear on Exhibit A as circular broken lines around the trees.

sidewalk adjacent to Ethan Allen Avenue in front of Lot 1. HR 19:40. Ms. Carpenter testified that while the replanting plan did not show existing trees that Mr. Wagner testified are present, that the replanting plan does reflect new trees to be planted in the area of concern. HR 19:50. Ms. Carpenter testified that the trees to be planted are all native species, are disease and pest resistant and have been selected and located to increase diversity and coverage of the lot. HR 19:52.

In response to a question from Applicant's counsel about potential grass plantings, Ms. Carpenter stated that there was no current plan for such plantings to increase stabilization of the slopes, but that it was something that can be proposed and that shrubbery probably would be helpful. HR 19:52.

The Applicant offered Mr. Swanson as an expert in site development stormwater management.¹⁰ HR 19:52. Mr. Swanson offered his opinion that removal of individual trees does not significantly affect runoff from the Property. HR 19:54. Mr. Swanson indicated that the amount of water shown in Appellant's videos seemed greater than what he would have expected just from the Property. HR 19:15.

Mr. Swanson testified that the stormwater management plan met the threshold requirement satisfying the Stormwater Management Act of 2009 for provision of environmental site designs ("ESDs") sufficient to capture a calculated amount of runoff from the site. HR 19:55. Mr. Swanson testified that the plan as originally prepared with 4 drywells and a bioswale met those requirements. HR 19:55. Mr. Swanson testified that there presently is no stormwater management on the site. HR 19:56. Mr. Swanson testified that the current plan adds 3 additional dry wells for a total of 7.

¹⁰ Mr. Swanson's resume was provided as Applicant's Exhibit 6. There was no objection to his qualifications as an expert witness.

HR 19:57. A copy of the current Stormwater Management Plan, provided as Applicant's Exhibit 4, is attached hereto as Exhibit E.

Mr. Swanson testified that the review of stormwater management is ongoing. HR 19:58. Mr. Swanson testified that further improvements in the ESDs should be able to occur within the LOD. HR 19:58. Mr. Swanson testified that permeable pavers are under consideration for the driveway. HR 20:00. Mr. Swanson testified that discussions with the City engineer are ongoing and that the goal of the final plan is to deal with the existing conditions runoff. HR 20:00.

C. Material Facts Developed Through Cross Examination and Questions from the Commissioners.

Mr. Swanson testified that the dry wells under the redesign are intended to capture 2.6 inches. HR 20:02. Mr. Swanson testified that vigorous ground cover is the most effective means for reducing water runoff, with trees having only slightly more effect than a grassy field or meadow. HR 20:04.

Ms. Katz testified that prior to the site being cleared in or around 2010 or 2012, there had been few problems with runoff. HR 20:06. When the site was cleared, the runoff became intense. HR 20:07. The reappearance of undergrowth mitigated that effect gradually, however runoff remained a problem beyond what they had experienced prior to the site being cleared. HR 20:07. Ms. Katz took issue with any implication that the runoff came from sources other than the Property, noting that Ethan Allen Avenue is served by connections to the storm water system of its own. HR 20:07.

Mr. Swanson testified that there had been percolation tests performed on the property with good results on Lots 72 and 73, but not on Lot 71, all lots which will be improved with houses. HR 20:10. The drywells on Lot 71 are intended to assist with the poor percolation there. HR 20:10. Mr. Swanson stated that the addition of ESDs beyond those shown in the revised plan could impact

the extent of the LOD, thereby potentially expanding the negative impact on the existing trees. HR 20:10. Mr. Swanson also stated that there had been at least one good percolation test in the area of the driveway. HR 20:11. In response to questions about the bioswale, Mr. Swanson indicated that reconfiguring the plan as it relates to overflow from the bioswale was something he may revisit with the City engineer. HR 20:17.

Ms. Carpenter testified that approximately 1/3 of the replanted trees will be outside of the LOD. HR 20:17. Ms. Carpenter identified the trees intended to be replanted as a mix of larger deciduous trees, evergreens and flowering trees. HR 20:18. Ms. Carpenter testified that the trees replacing the pines along the power lines will be columnar red maples. HR 20:19. Ms. Carpenter testified that the LOD to the rear of the new houses was intended to provide some relatively flat space for backyard activity. HR 20:20

In response to a question from Commissioner Cohen regarding any formal or informal involvement of the Property neighbors in the planning of the development, Mr. Frye was unable to speak to any early involvement of the Appellants in the process. HR 20:23. Mr. Frye and Commission Chair Hotton noted that a process does exist under the new version of the ordinance. HR 20:23. Mr. Frye testified that consideration of runoff is, in a general sense, a factor in the evaluation of preservation, but that the stormwater interception was not something that was immediately apparent to him as to this particular site. HR 20:24. Mr. Frye testified that, at the time of his consideration of the Removal Permit, he was aware of the slope but not aware of the specifics of the water runoff problem Appellants were experiencing. HR 20:24.

In response to a question from Commissioner Cohen as to what conversation might occur with the Appellants as the Applicant's efforts went forward, Ms. Lee-Cho stated that the appeals before the Commission were one process, and the stormwater management plan approval is a

separate process. HR 20:28. Ms. Lee-Cho stated the staff working on the development is now well aware of Appellants' concerns. HR 20:28. Ms. Lee-Cho stated that the Applicant would continue to work with both the City and the Appellants to implement a plan that results in improvement of runoff control by the installation of stormwater management measures. HR 20:28. Ms. Lee-Cho affirmed under oath that there will be a process and that the Applicant will be engaging with the neighbors. HR 20:29.

In response to a question by Commissioner Sheard, Ms. Carpenter testified that the width of the driveway was as narrow as could be and remain in compliance requirements for access for emergency service vehicles. HR 20:44. Ms. Carpenter testified that the driveway had to be slightly wider at the entrance to allow for the turning radius of emergency service vehicles. HR 20:44.

Mr. Katz testified that the City has had knowledge of the runoff problem going back "several years" as members of the Department of Public Works had witnessed the water runoff problems during the installation of a new sidewalk on Lincoln Avenue. HR 20:50.

Ms. Carpenter revisited the issue of intended new plantings on the northern boundary of the Property and stated that the new trees would be approximately 10 feet uphill from the existing trees. HR 20:55. Ms. Lee-Cho stated that the Applicant was "on board" with consideration of additional plantings of the understory type to help mitigate the runoff problems. HR 21:01.

III. ANALYSIS AND FINDINGS.

A. Preliminary Issues.

Preliminarily, the Commission addresses several sub-issues raised over the course of the hearing in order to clarify the Commission's views of those issues. The Commission notes that the runoff problem is occurring with the existing trees in place and that the problem has a history extending back for a period of at least 15 years. The Commission notes that there are presently no

ESDs on the Property. The Commission notes the Appellants' general support for the development. The question on tree removal then becomes whether leaving the trees in place would add a significant benefit, following development and implementation of the Applicant's stormwater management plan. The Commission is sympathetic to the demonstrated problem generated by the runoff, but notes that a comprehensive solution to that problem extends beyond the jurisdiction of the Commission, and beyond the Commission's ability to cure the entire problem.

As to whether the runoff experienced by Appellants is attributable to areas outside of the Property, the Commission notes the following: 1) the only substantial testimony in this regard was that the Property is bordered to the south by Ethan Allen Avenue and that the road has been engineered to have its own stormwater management system; 2) as to other neighbors to the east or west of the Property or of the Appellants' properties, there was no testimony nor any documentary evidence from which the conclusion might be drawn that those properties had any significant contribution towards the runoff problem; 3) Ms. Katz testified that a notable increase in the problem occurred when the Property was cleared some years ago, a fact that is indicative that the runoff problem is primarily generated by storm water flowing off the Property. Thus, the Commission concludes that the runoff problem is primarily generated from water flowing off of the Property.

There was some discussion about the relative value of trees as compared to other types of plants in retaining water and mitigating runoff. The Commission rejects the notion that the contribution of trees is insignificant. The value of trees in this regard was affirmed by Ms. Lee-Cho's acknowledgment, on behalf of the Applicant, that it is beyond dispute trees add positive value in the stormwater management plan. It is apparent, however, that retaining the existing trees alone would not constitute a solution to the runoff problem.

B. Approval of the Tree Protection Plan is Affirmed.

As to the question before the Commission of whether approval of the Protection Plan should issue, pursuant to 12.12.010(K), the Commission is tasked with applying the 8 criteria found in 12.12.080(C)(3), which include:

- a) Protection of roots from heavy equipment;
- b) Prevention of soil compaction;
- c) Prevention of silt runoff onto roots;
- d) Prevention of grade changes;
- e) Prevention of root damage by requiring proper root pruning or tunneling under roots;
- f) Creation of a tree protection zone;
- g) Fertilization and watering requirements; and
- h) Protection of tree trunks.

The essential substance of Appellants' concerns was whether removal of the trees identified in the Applicant's Removal Permit would exacerbate runoff. While implicitly concerned with grade changes, those concerns were not raised in conjunction with any testimony or evidence that the Protection Plan was inadequate, specifically as it relates to protection for the trees intended to remain on the Property after development according to the current plans.

The Applicant did provide testimony that steps were being taken to protect the trees remaining after development by avoiding compaction of soil and avoidance of root damage by, for example, by removing an existing gravel driveway by hand.

There being no direct challenge to the Protection Plan, and no substantial evidence provided as to any deficiency in the Protection Plan, approval of the Protection Plan is affirmed.

C. Approval of the Tree Removal Permit is Affirmed with the Condition that the Applicant Successfully Obtains Approval of a Stormwater Management Plan.

As to the question before the Tree Commission of whether the preliminary approval of the Tree Removal Permit should issue, the Tree Commission is tasked with applying nine (9) factors

set forth in Section 12.12.120(B) of the Code, where those factors are pertinent in light of the facts in the record. There is a rebuttable presumption that the decision of the City Manager with respect to a permit application is correct. 12.12.110(D). The Commission's findings are as follows:

1. The extent to which tree clearing is necessary to achieve proposed development or land use, and, when appropriate, the potential ameliorating effects of any tree protection plan that has been submitted or approved.

This factor weighs in favor of the Applicant. The affected trees are within the LOD are so near it that they will not survive. There was testimony that the size of the driveway is dictated by the requirements related to emergency service vehicle access. There was testimony that the maximum movement of the driveway without creating further disturbance or harm to trees to the east was about 5 feet. There was testimony that movement of 5 feet would still result in fatal damage to the critical root zone of tree number 102, the largest healthiest tree outside the LOD.

2. The number and type of replacement trees and, if appropriate, any reforestation plan proposed as mitigation for the tree or trees to be removed.

This factor weighs in favor of the Applicant. The Applicant intends to exceed the replanting requirement by 10 trees or 25%. There was substantial evidence that the replacement trees were selected to provide a mix of large deciduous trees, pine trees, and flowering trees, to be disease and pest resistant, and to all be native species. Although not a direct factor contributing to the evaluation of this criterion, the Commission views favorably the Applicant's representation under oath that it would be investigating additional plantings of undergrowth to mitigate the runoff problem.

3. Any hardship which the applicant will suffer from a modification or rejection of the Permit application.

This factor weighs in favor of the Applicant. The project has been pending at least since 2018. There is general support for development from the Appellants, albeit with the obvious

concern of the significant runoff problem. There was testimony from Ms. Carpenter that the design of the project was undertaken with the intent of limiting the LOD in order to lower the impact of existing trees on site. There was testimony the possibilities for redesign of the driveway are limited in parameter such that minimal movement available would still have a negative impact on one or more trees outside the line of disturbance; and, that more than minimal movement would negatively impact existing trees on adjacent properties.

There was also testimony that the Applicant's efforts at having an effective stormwater management plan are ongoing, a circumstance the Commission views favorably.

4. The desirability of preserving any tree by reason of its age, size, or outstanding quality.

This factor weighs in favor of the Applicant with the exception of tree number 102 which is of substantial size and reasonably good health. Tree number 103, which is also of significant size, according to the evidence presented, has a number of limiting factors such as dead and dying limbs, decaying bark, and a heavy ivy growth. As to the 3 pine trees under the utility lines, there was evidence of the existing negative impact on those trees in the form of topping and trimming. As to the remainder of the trees, there was no evidence presented by the Appellants as to their age, size or outstanding qualities, which would overcome the presumption that the City was correct in its determination that removal was justified. While tree number 102 should be preserved if possible under this criterion, the remainder of the evidence was in favor of affirmance on this factor.

5. The extent to which the area would be subject to environmental degradation due to removal of the tree or trees.

This factor is neutral in light of the substantial replanting plans. There is no question that removal of the mature canopy will lessen the positive effects of the canopy on the environment in the near future. Nevertheless, the applicant is committed to raising the total number of trees on the

property by 25%, a circumstance which should, at some point, result in a net gain in positive environmental effects.

6. The impact of the reduction in tree cover on adjacent properties, the surrounding neighborhood and the property on which the tree or trees are located.

It is this criterion which the Commission views as most problematic given the established existence of the runoff problem and the likely near term negative effect that tree removal will have on the overall ability of the Property to retain water. In enacting the Urban Forest Chapter, the City Council found that “[t]he City’s urban forest is part of the watershed of Long Branch, Takoma Branch, and Sligo Creeks and, as such, plays an important role in controlling stormwater run-off and supports the biologic and hydrologic integrity of downstream watersheds[.]” Section 12.12.010.¹¹ Given this, the Tree Commission has an interest in stormwater control insofar as trees are involved in any stormwater control plan. Nevertheless, approval of stormwater management plans is outside the boundaries of the Tree Commission’s authority. Thus, the Tree Commission’s task in this instance is evaluating the effects of denial of removal with resolution of the larger problem impacting the Appellants. The concern over removal must be balanced with the circumstance that there are presently no ESDs on site and with the Applicant’s representation under oath that not only will it continue to work on improving the stormwater management plan, it will do so while engaging in a dialogue with neighbors, which includes by definition, the Appellants. Ultimately, it is the hope of the Commission that replanting of an increased number of trees, along with installation of ESDs on the Property, and any additional stormwater management planning, such as developing a plan for undergrowth planting on the slopes above the Appellants’ properties, will have a net positive effect on resolving the runoff problem. Therefore, the

¹¹ Effective October 27, 2020, this passage is now located at 12.12.010(E), without change.

Commission places the condition on approval of the Removal Permit of the Applicant's success in obtaining a stormwater management plan intended to provide significant relief or mitigation of the runoff problem effecting the Appellants.

7. The general health and condition of the tree or trees.

Similar to criterion number 4, the evidence of this criteria was largely limited to the evaluation and determination performed by the UFM, and thus, presumably correct.

8. The desirability of the tree species as a permanent part of the City's urban forest.

Other than references to the tree species, there was little or no evidence or argument presented on this criterion, and thus, the UFM's evaluation and determination is presumed to be correct.

9. The placement of the tree or trees in relation to utilities, structures and the use of the property.

With the exception of the location of the pine trees under the utility wires, which circumstance weighs in favor of removal, this criterion was a neutral factor.

IV. CONCLUSION AND DECISION.

For the reasons set forth above, the preliminary approval of the Tree Protection Plan is affirmed; and, preliminary approval of the Tree Removal Permit is affirmed but under the two conditions: The first condition is that the City approves the Applicant's Stormwater Management Plan before the Tree Removal Permit issues. The second condition is that the Applicant shall post a bond in the amount of \$18,000.00, which bond shall be released upon a 1-year post-planting warranty inspection indicating that all 48 trees are in good condition

Given the scale and history of the water runoff problem related to the Property, it is the Commission's expectation that the Applicant will abide by its sworn testimony and continue to

incorporate additional stormwater management measures into its plan in collaboration with its neighbors, including the Appellants.

V. ORDER.

UPON CONSIDERATION of the foregoing, it is this 14th day of January 2021, by the City of Takoma Park Tree Commission, hereby

ORDERED, that the approval of the Tree Protection Plan is affirmed;

ORDERED, that preliminary approval of the Tree Removal Permit Application is affirmed with the conditions that

1. The Applicant must obtain approval of its stormwater management plan before the Tree Removal Permit will issue; and,

2. The Applicant shall post a bond in the amount of \$18,000.00, which bond shall be released upon a 1-year post-planting warranty inspection indicating that all 48 trees are in good condition.

For the Tree Commission:

 /s/ Carol Hotton
Carol Hotton, Commission Chair

 /s/ Nancy Cohen
Nancy Cohen, Commission Secretary

 /s/ Bart Sheard
Bart Sheard, Commissioner

 /s/ James Woodworth
James Woodworth, Commissioner

NOTICE OF APPEAL RIGHTS

Section 12.12.110(L) of the former Takoma Park Code, recodified without substantive change at 12.12.087(F), provides that a person who was a party to the proceedings before the Tree Commission and who is aggrieved by the decision may seek judicial review of the decision by filing a petition for judicial review in accordance with Title 7, Chapter 200, Judicial Review of Administrative Agency Decisions, of the Maryland Rules of Procedure.