

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. S-257-A

**PETITION OF RENEWABLE NATURAL RESOURCES FOUNDATION
AND RNRF TITLE HOLDING CORPORATION
[NEW HOLDER: SOCIETY OF AMERICAN FORESTERS]**

RESOLUTION TO REINSTATE MODIFICATION

(Resolution Adopted June 19, 2013)
(Effective Date of Resolution: July 18, 2013)

Case No. S-257-A is a special exception that the Board of Appeals granted to the Renewable Natural Resources Foundation (RNRF) on November 21, 1973. The special exception was originally for a scientific society headquarters and when that special exception use was repealed, on August 16, 1978 the Board approved a modification to change the special exception to a charitable and philanthropic institution use. On March 22, 2013 the Board granted an administrative modification of the special exception. The Board received a request for a hearing on the modification, dated April 5, 2013, from Rebecca Morely, Patricia Davenport and Irene Elliott. According to Section 59-G-1.3(c)(1) of the Zoning Ordinance, the Board suspended the modification and held a hearing on June 5, 2013, making its decision on June 19, 2013.

Rebecca Morely, Patricia Davenport and Irene Elliott appeared and gave testimony in support of treating the modification as a major modification, and of a further, major modification hearing. Barbara Sears, Esquire and Philip Hummel Esquire appeared on behalf of the contract purchaser of the subject property, 5400 Grosvenor LLC ("EYA"), in support of reinstatement of the administrative modification. Ms. Sears called Jack Lester, a Senior Vice President with EYA, Chris Kabbatt, an expert in traffic and transportation and Robert Day, the Executive Director of the Renewable Natural Resources Foundation, as witnesses.

EVIDENCE PRESENTED

1. Jack Lester re-stated the elements of the modification request:

- Transfer of the special exception to the Society of American Foresters which will stay on the site; RNRD will not longer be on the site;
- Reduction of the area of the special exception subject property from 35.4 to 10.11 acres, to consist of one record lot created by subdivision of the larger property; the existing office building at 5410 Grosvenor Lane will remain on the subject property;
- Demolition of the 22,560 square-foot office building at 5430 Grosvenor Lane; resulting in a reduction from 300,000 square feet of development originally approved to 32,972 square feet;
- Preservation of the historic mansion, garage and caretaker's cottage and their 8.9 acre historical environmental setting;
- Improvements to the existing driveway from Grosvenor Lane, which the Historic Preservation Commission (HPC) has reviewed twice; addition of a secondary, emergency only access;
- Removal of one and relocation of a second existing parking lot to a location adjacent to the remaining office building at 5410 Grosvenor Lane, reducing the number of parking spaces in that lot to 69, increasing parking on the driveway serving the mansion to 26 spaces for a total of 95 spaces, consistent with the requirement of the original special exception to provide one parking space for every 400 square feet of gross floor area.

2. Mr. Lester explained that incorporating the historic setting into the modified special exception will make the three historic structures and their 8.9 acre setting subject to the Historic Area Work Permit (HAWP) process. He stated that two consultations with HPC about the proposed changes to the special exception had yielded "positive feedback." [Transcript, June 5, 2013, p. 25].

3. In response to a question Mr. Lester confirmed that the area along Fleming Avenue addressed in Ms. Morely and Ms. Davenport's testimony is not included in the modified special exception area. Regarding the area proposed to be removed from the special exception he stated, "... we have in fact filed a site plan with the County. We proposed 153 townhomes consistent with the underlying R-90 Zoning. We are seeking a variance to cluster the development so as to preserve 11.9 acres of legacy open space that the County has identified ... and we're proposing to dedicate that to the County and to preserve the 8.9 acres of the historic setting" [Transcript, p. 27], and concurred with Ms. Sears statement, "And so before you can develop any, anything on that property outside this boundary for the reduced special exception, you will have to get Park and Planning approval through the preliminary and site plan process." [Transcript, June 5, 2013, p. 28].

4. Chris Kabatt of Wells & Associates testified as an expert in traffic and transportation. Mr. Kabatt stated that comparing traffic associated with the reduced office space under the modification with current conditions, will result in

10 fewer a.m. peak trips and 8 fewer p.m. peak trips. He further stated that comparing modified traffic conditions with trips allowed under the full 300,000 square-foot development allowed under the original special exception results in 111 fewer a.m. peak hour trips and 87 fewer p.m. peak hour trips

5. In response to a question, Robert Day, Executive Director of the Renewable Natural Resources Foundation stated, "We have excess parking places every day." [Transcript, June 5, 2013, p. 56], and "We've had the standard of one parking place per every 400 square feet of office space since the buildings were constructed and that has not changed, and so that, we have had adequate parking." [Transcript, p. 57].

6. Rebecca Morley is the President of the Fleming Park Community Association. Ms. Morley stated that her community "is very concerned that the proposed modification to the special exception for this property substantially changes the nature and the character and the intensity of the special exception use." Ms. Morley expressed concern about the modification's effect on parking, the wooded views in the neighborhood, and the peaceful enjoyment of residents on Fleming Avenue and of users of Fleming Park.

7. Ms. Morley stated that part of the reason for the request for a public hearing on the modification is that "it's not clear to us at all what the boundary of the modified special exception is going to be and so therefore, we're not able to really evaluate what are the impacts on things like buffer, on things like parking on things like lighting;" [Transcript, June 6, 2013, p. 7] and further that, "Because the reduction of the special exception itself is what will negatively impact the community and I think that's where your authority lies is in judging impacts of a special exception on the community. The current special exception protects the community via this buffer." [Transcript, June 5, 2013, p. 9].

8. With respect to parking, Ms. Morely stated, "The modification changes parking but we don't know whether the changes meet all the special exception parking requirements" [Transcript, p. 10], and "...we are concerned that the townhouse development does not have sufficient parking spaces for guests and in the case of the affordable units, only one space is provided and residents are not allowed to park in their driveways.." so that residents of the townhouse community would park at the special exception property, and special exception employees will park in the neighborhood. [Transcript, p. 11].

9. With respect to the historic buildings on the site, Ms. Morely stated, "We don't have an opinion, at least that we're aware of yet, from the Historic Preservation Commission saying that it is satisfied with the development plan but we do know that the setting around the historic building has to be preserved, and this is something that can be further explored at a full hearing." [Transcript, p. 12].

10. Ms. Morely disputed the comparison of the special exception as granted with the special exception as most recently modified, stating, "I guess the other question is this 300,000 square feet that we're talking about, we're told that that has expired, that the use of that property has long expired. It's in effect for two or three years and then it goes away, so this idea that we're going down from 300,000 square feet of use to the 32,00 today I don't think is quite accurate." [Transcript, p. 38].

11. Ms. Morely summarized the request for a hearing, saying, "We would like to have a full hearing to have the full facts presented to us so that we can evaluate the impacts and ideally, that hearing should be held after the Planning Board approves the site plan so that there's greater clarity regarding the use of the property being removed from the special exception." [Transcript, p. 13].

12. Patricia Davenport stated that she lives "on Fleming Avenue directly across the street from Wild Acres, the former Gilbert Grosvenor Estate...". Ms. Davenport referred to Condition No. 8 of the Board of Appeals' November 21, 1973 opinion granting the special exception which states: "Trees along Fleming Avenue shall not be disturbed," and expressed her concern, referring to the trees between the special exception and Fleming Avenue and between the special exception and Fleming Park, that "this border of tall trees that has been in our community, has been a feature of our community for decades would probably disappear" [Transcript, p. 43].

13. Ms. Davenport expressed her belief "that the modification will substantially change the nature, character and intensity of a special exception use and it will affect the immediate neighborhood and will have major impact on nearby property owners on users of Fleming Park, and it could possibly have implications for the historic Grosvenor buildings, the remaining special exception office building and the proposed townhouse development. Therefore, I request a full public hearing be held to carefully evaluate the effects of this modification." [Transcript p. 58].

14. In addition, Ms. Davenport stated her view that a full evidentiary hearing is necessary because "[t]he exact amount of acreage to remain under the special exception and the exact boundaries are unclear", to examine "the implications of [the special exception's parking] computation for the areas outside the special exception," that "The change in the special exception will result in more cars and more daily traffic for the adjacent community because of the planned townhouse development which is referenced in the petition," and because "plans for the remaining non-special exception acreage are unclear. These plans are currently under review and revision." [Transcript, pp. 60-61].

15 Irene Elliott expressed the view that "Maybe the reduction in the special exception should not be quite so great." [Transcript, June 5, 2013, p. 74].

FINDINGS OF FACT

1. The Board finds that the traffic study [Exhibit No. 25(k)], as reiterated by Mr. Kabatt's testimony, shows that removing the 5430 Grosvenor Land office building from the special exception property will reduce the existing AM peak trips associated with the office development from 23 to 14 and the PM peak trips from 18 to 10, and thus that this modification—which proposes no new office space—will reduce the impact of this use.
2. The Board finds that members of the public had ample notice of the modification contained in the January 17, 2013 letter and accompanying plans and documents from Barbara Sears. Although neighbors may not have been aware of the modification when it was filed on January 17, 2013, the Board's Resolution granting the modification was mailed on March 22, 2013. Neighbors filed their requests for public hearing on April 5, 2013, leaving at least two months in which to read and understand the information prior to the hearing they had requested.
3. Based upon the testimony of Robert Day, the Board finds that parking for the special exception meets the required standard. The use as modified maintains the parking requirement established in the original special exception in Condition No. 5.
4. The Board finds that the special exception modification preserves the historic resource and its 8.9 acre environmental setting, and in fact provides greater protection than the original special exception by subjecting all changes beyond routine maintenance on the site to the Historic Area Work Permit Process through the Historic Preservation Commission.
5. The Board finds that the impacts of the proposed townhouse development on the area proposed to be removed from the special exception will be the subject of extensive review by the Planning Board, including public participation, but are not relevant to the Board's evaluation of the impacts of the special exception as modified.
6. The Board understands neighbors' concern about the trees on Fleming Avenue but notes that the trees in question are located on the area outside the modified special exception boundary. The Board imposed Condition No. 8 of its November 21, 1973 decision when it granted a much larger special exception whose structures could have been located closer to Fleming Avenue. Neighbors assert that the instant modification, even though it reduces the area and the traffic impacts of the special exception, changes the nature, character and intensity of the special exception use, to the extent that a full public hearing is required under Section 59-G-1.3(c)(2) to consider the modification. But the logical extension of this request is that the modification could be denied because it removes the trees that were deemed necessary to protect the neighborhood

from approved but un-built special exception office buildings. What if the special exception holder wanted to completely abandon the use? Could the Board refuse to revoke it, and require its continued operation in order to preserve the trees? The Board does not believe that this is what Section 59-G-1.3(c)(2) intends. The Board has the authority to impose conditions on a special exception use in order to mitigate the effects of that special exception use on neighboring properties; thus any conditions imposed must be related to the proposed use. If the proposed modification would increase the physical or operational impacts of the special exception on the surrounding neighborhood and its traffic, necessitating measures or features such as the trees along Fleming Avenue to buffer the neighborhood from those impacts, the Board would agree with neighbors. But here, the inverse is true: the special exception will be smaller and its impacts will be reduced. The provisions of Section 59-G-1.3 are intended to mitigate the potential impacts of changes to a special exception, but not the potential impacts of areas that are not part of a special exception.

CONCLUSIONS OF LAW

Section 59-G-1.3(c)(1) of the Montgomery County Zoning Ordinance provides that the Board of Appeals can modify a special exception without holding a public hearing,

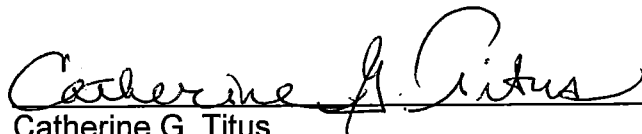
If the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood"

Rule 12.2 of the Board of Appeals Rules of Procedure [Resolution No. 12-865, October 27, 1992] provides that the transfer of a special exception is a modification under Section 59-G-1.3.


The Board finds that the administrative modification should be reinstated. The Board finds that neither the transfer of the special exception from one holder to another, nor the reduction in size of the special exception property will intensify the use or substantially change its impact on the immediate neighborhood or on traffic. The concerns raised by neighbors relate to the potential impacts of possible future uses of the area proposed to be removed from the special exception, not to impacts of the special exception as modified. The record reflects that the special exception as modified will have less traffic impact than as approved or under current conditions. The record also reflects that the modification will ensure a higher level of protection for the historic resources on the site than under existing conditions.

Therefore, based upon the foregoing, on a motion by John H. Pentecost, seconded by David K. Perdue, Vice-Chair, with Carolyn J. Shawaker, Stanley B. Boyd and Catherine G. Titus, Chair, in agreement:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Board's Resolution to Modify the special exception, dated March 22, 2013, is **reinstated**.


Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 18th day of July, 2013.


Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

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