

PROPERTY:

7109 44TH STREET, CHEVY CHASE
MONTGOMERY COUNTY, MARYLAND 20815

DECISION

TREE ORDINANCE BOARD
TOWN OF CHEVY CHASE

APPEAL OF 7109 44th STREET LLC/HENDRICKS
FROM DENIAL OF TREE REMOVAL PERMIT #T-07-03

SUMMARY OF CASE

1. 7109 44th Street LLC/Hendricks (the “Applicant”), represented by Mr. J. Carlos Fernandes of Chase Builders, whose offices are located at 8750 Brookville Road, Silver Spring, Maryland, is appealing the denial of a Tree Removal Permit by the Town Manager for the removal of a Siberian elm tree 32 inches in circumference located at the rear of the existing house on the property at 7109 44th Street.
2. Under the provisions of Section 29-3 of the Town Urban Forest Ordinance (the “Ordinance”), which applies to all trees on private and public property, a Canopy Tree is defined as a tree with a trunk that measures at least twenty-four (24) inches in circumference at four and one-half (4 ½) feet above ground.
3. Section 29-4 (a) of the Ordinance provides that no person shall remove or destroy, or cause the removal or destruction of a Canopy Tree, or undertake any action that will substantially impair the health or growth of a Canopy Tree without first obtaining a permit from the Town.
4. Section 29-6(a) of the Ordinance provides that the Town Manager is authorized to issue a Tree Removal Permit, if in consultation with the Town Arborist, it is found that any of the following conditions applies to the tree requested to be removed:
 - (i) the tree is dying, dead, or in danger of falling;
 - (ii) the tree constitutes a hazard to the safety of persons or property;
 - (iii) the tree is a nuisance tree on the Town’s list of undesirable tree species as adopted by the Town Council.
5. In reviewing the Applicant’s permit application, the Town arborist recommended denial because the tree did not meet any of the criteria set forth in Section 29-6(a).
6. The Town Manager denied the Applicant’s permit application based upon the recommendation of the Town arborist.

7. Pursuant to the provisions of Section 29-7 of the Ordinance, the Applicant filed a timely appeal of the Town Manager's decision to the Tree Ordinance Board (the "Appeal").

8. Section 29-9 requires the Tree Ordinance Board to consider eight factors in deciding in a public hearing whether to approve or deny a request for a Tree Removal Permit. These factors are:

- (1) The reasons cited by the applicant for wanting to remove the tree.
- (2) The applicant's intention to plant replacement trees, with consideration of the number, size and desirability of species, and with a minimum goal of replacing the tree to be removed.
- (3) The applicant's intention to retain and protect existing trees.
- (4) The facts in support or opposition presented by town residents.
- (5) Information provided by the Town Arborist.
- (6) The extent to which no alternative to tree removal exists that would allow the proposed development, construction, or land use otherwise permitted under the Town Building Code.
- (7) The desirability of preserving a tree by reason of its age, size or outstanding qualities, including uniqueness, rarity or species.
- (8) The overall effect on the tree canopy of the adjacent properties, the neighborhood and the Town.

9. Notice of the hearing in this Appeal was posted at the Town Offices and on the property and was mailed to all abutting and confronting property owners on September 6, 2006.

10. On September 14, 2006, the Tree Ordinance Board held a public hearing on the Appeal.

EVIDENCE PRESENTED

The applicant, in the person of Mr. Fernandes, submitted a completed application and accompanying letter and addressed the Board at the hearing, requesting permission to remove the subject tree based on the following reasons:

- (a) a new house is to be constructed on the property and "no matter how the new home is constructed, this tree would be in jeopardy." (applicant's letter of September 6, 2006.)
- (b) the applicant proposes to replace the tree with a minimum of 2 additional trees of 3-4 inch caliper, specifically a red maple and willow oak.

A telephone call to the Town Office supporting Chase Builder's appeal was received from Saralee Zakaroff of 7108 44th Street. No statements were received in opposition to the appeal. No members of the public made statements at the hearing.

A tree inspection report was received from the Town Arborist, Dr. Tolbert V. Feather, citing visible structural defects in the tree. "The main trunk has codominant branches, i.e. two central leaders or main branches or 'forked.'" In the future, as the tree matures and the main branches become heavier, the codominant branches are likely to split off the main trunk. The base of the codominant branches, where they attach to the trunk is a structural weakness of Siberian Elm trees." (Feather & Assoc. letter of September 13, 2006)

FINDINGS

The eight factors to be considered by the Tree Ordinance Board in deciding whether to approve or deny a request for a Tree Removal Permit for a tree that does not qualify for removal under Section 29-6 are listed in Section 29-9 of the ordinance.

The Board discussed these factors and made findings as described below:

Factor 1: The reasons cited by the applicant for wanting to remove the tree.

Mr. Fernandes states that there is no way to construct a new house without irreparably harming the subject elm tree. The Board reviewed the site plan and discussed the location of the new building and driveway as it related to both the elm tree and other plantings on the lot.

Finding: The elm tree is situated in such a location that, as the applicant states, it would be impossible to construct the house as described in the site plan without doing irreparable harm to the tree.

Factor 2: The applicant's intention to plant replacement trees, with consideration of the number, size and desirability of species, and with a minimum goal of replacing the tree to be removed.

Mr. Fernandes proposes to plant two replacement canopy trees, one in the front and one in the back of the new house. The Board reviewed the proposed location of these trees on the site plan.

Finding: Replacing this Siberian elm with two new canopy trees of a more desirable species would be a net gain in future trees for the town.

Factor 3: The applicant's intention to retain and protect existing trees.

The board discussed at length the desirability to protect a large crape myrtle in the front yard and a very large Virginia red cedar on the rear lot line. Mr. Fernandes states he will make every effort to protect the cedar and retain the crape myrtle.

Finding: Protecting the cedar in the rear and the larger of the crape myrtles in the front is important to the neighborhood appearance.

Factor 4: The facts in support or opposition presented by town residents.

No comments or testimony were received in support or opposition to the application, although one neighbor did attend briefly.

Finding: The tree is hardly noticeable above the house and evidently not of concern to the neighbors.

Factor 5: Information provided by the Town Arborist.

The arborist tree inspection report states that the Siberian Elm is a canopy tree but that it “grows rapidly and consequently has brittle branches. It is also susceptible to elm leaf beetle.” The report recommends: “The tree is of low value as a canopy or landscape tree and does have existing structural defects that could result in future failure of the tree. However it is in good health. The owner could be allowed to remove the tree and provide more suitable large canopy trees, such as oak, ash, or maple.” (Feather Associates letter of September 13, 2006)

Finding: The Siberian elm tree is of low value as a future canopy tree and could be replaced with more desirable trees that would be of more advantage to the canopy in the long run.

Factor 6: The extent to which no alternative to tree removal exists that would allow the proposed development, construction, or land use otherwise permitted under the Town Building Code.

See discussion and Finding under Factor 1.

Factor 7: The desirability of preserving a tree by reason of its age, size or outstanding qualities, including uniqueness, rarity or species.

Members of the Board agreed with the arborist’s conclusion that Siberian elms are not particularly desirable as canopy trees because of their rapid growth and brittle branches and susceptibility to elm leaf beetles.

Finding: This particular tree is not of a species or size to warrant unusual efforts to save it.

Factor 8: The overall effect on the tree canopy of the adjacent properties, the neighborhood and the Town.

Board members observed that from the street the tree is only slightly higher than the roof line and not particularly attractive in shape or foliage. While there are numerous large and stately elms in the town, the loss of this small tree would not appreciably detract from the present or future tree canopy.

Finding: Removal of the subject tree will have almost no effect on the surrounding tree canopy.

CONCLUSION

Pursuant to the provisions of Section 29-8(e) of the Ordinance, the Tree Ordinance Board may affirm the denial of a permit, or may direct the Town Manager to issue a permit upon such conditions, terms or restrictions as the Board may deem necessary to accomplish the intent and purpose of Ordinance.

Based upon the above findings, the Tree Ordinance Board believes the granting of a Tree Removal Permit is appropriate under the requirements of Section 29-9 of the Ordinance. Accordingly, the Town Manager is directed to issue the Applicant a Tree Removal Permit subject to the following conditions:

1. The subject tree shall not be removed until the applicant has obtained all necessary building permits for the construction of the new house substantially in accordance with the site plan submitted to the Board.
2. The subject tree must be removed within 12 months of the date of this approval or this Tree Removal Permit shall become void.
3. The Applicant shall plant two (2) replacement canopy trees, one in the front and one in the rear yard of the property as shown on the site plan presented to the Board. The replacement trees shall be selected from the species listed on the Town of Chevy Chase, Tree Ordinance Board: List of Acceptable Replacement Canopy Trees and be at least 3” in caliper at the time of planting.
4. The replacement trees shall be planted within 12 months of the date of this approval and at a time and location in the yard approved by the Town Arborist.
5. The Applicant shall be responsible for the maintenance and replacement of the trees required by this condition for a period of two (2) years from the time of planting (the “Warranty Period”). The Warranty Period for any tree that dies during the two (2) year period shall commence from the date of planting such replacement tree.
6. To assure that the two (2) replacement canopy trees survive and/or are replaced if they die, the Applicant shall post a performance bond with the Town Manager in such amount as determined by the Town Manager. Such performance bond shall be posted prior to the release of any Tree Removal Permit and/or any Town Building Permit. The time of planting of such tree(s) shall be certified in writing to the Town Manager by the Applicant, its successors or assigns.
7. The provisions of this decision shall be incorporated by reference into the Town Building Permit issued to the Applicant.

* * *

The foregoing Decision was adopted by the Tree Ordinance Board of the Town of Chevy Chase on October 11, 2006, with the following members voting in favor: Melanie Choukas-Bradley, Miriam Daniel, Penny Douglas, David Strom, Christopher Wright.

Within 30 days of the date of issuance of a decision of the Tree Ordinance Board any aggrieved party 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.

TOWN OF CHEVY CHASE
TREE ORDINANCE BOARD

Date: _____

Christopher Wright, Chair