

CORRECTED RECOMMENDED DECISION mailed 2/25/11:
(pg. 2 – added exhibit that had been inadvertently left off the list)

MONTGOMERY COUNTY PLANNING
DEPARTMENT

* BEFORE LORRAINE E. MONTGOMERY
* AN ADMINISTRATIVE LAW JUDGE

THE MARYLAND NATIONAL
CAPITAL PARK AND PLANNING
COMMISSION

* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS

v.

* VIOLATION OF FOREST CONSERVATION

JOHN JOHNSON,

* PLAN # 120020730

RESPONDENT

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On November 19, 2010, the Montgomery County Planning Department (MCPD) of the Maryland National Capital Park and Planning Commission (MNCPPC or Agency) issued a Notice of Hearing to John Johnson (Respondent). The notice alleged that the Respondent violated the Montgomery County Forest Conservation Law¹ as a result of continual grass cutting in a Category I Conservation Easement that is located on property owned by the Respondent and for failing to pay an Administrative Citation and complete remedial action as directed.

I held a hearing on January 11, 2011 at the MNCPPC offices located at 8787 Georgia Avenue, Silver Spring, Maryland 20910. Christina Sorrento, Office of General Counsel, MNCPPC, represented the Agency. The Respondent represented himself.

¹ Montgomery County, Md., Code Chapter 22A.

The contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Office of Administrative Hearings, the Montgomery County Planning Board Enforcement Rules (June 22, 2010) and the Rules for Hearings and Appeals of the Montgomery County Code govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); COMAR 28.02.01; Montgomery County Planning Board Enforcement Rules, Chapters 1 through 4 (June 22, 2010) and Code of Montgomery County Regulations (COMCOR) 22A.

ISSUES

1. Did the Respondent violate the Montgomery County Forest Conservation Law?
2. If the Respondent violated the Montgomery County Forest Conservation Law, should he be assessed an administrative penalty; and if so, in what amount?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Agency:

MCPD #1 Notice of Hearing from Mark Pfefferle, Acting Chief of Environmental Planning, to the Respondent, dated November 19, 2010

MCPD#2 Montgomery County Planning Board Opinion, Preliminary Plan 1-2002073, dated August 2, 2002

MCPD#3 Final Forest Conservation Plan, dated June 25, 2003

MCPD#4 Subdivision Record Plat for Lots 43 – 47 Block 1, filed June 5, 2003

MCPD#5 Conservation Easement Agreement, recorded December 30, 1994 among the land records of Montgomery County at Liber 13178, Folio 412

MCPD#6 Deed for 12800 Timber View Court, Silver Spring, Maryland 20904, dated December 16, 2003, filed February 17, 2004

MCPD#7 House Location Survey, dated December 20, 2003

MCPD#8 Notice of Violation, dated June 1, 2010

MCPD#9 Administrative Citation # 000057, dated September 14, 2010

MCPD#10 Photograph showing grassy area in backyard of 12800 Timber View Court, taken 6/3/10

MCPD#11 Photograph showing grassy area in backyard of 12800 Timber View Court, taken 6/3/10

MCPD#12 Geographic Information System (GIS) aerial image of 12800 Timber View Court, taken in 2008

The Respondent did not offer any exhibits into evidence.

Testimony

Joshua Kaye, Forest Conservation Inspector, MCPD, and Mark Pfefferle, Forest Conservation Program Manager, Supervisor of Enforcement Staff, and Acting Chief of Development Applications and Regulatory Coordination, MCPD, testified on behalf of the Agency.

The Respondent testified on his own behalf.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. The Respondent is the owner of Lot 47 in Block 1, located in the subdivision known as Victoria Forest, Springwood, in Montgomery County, Maryland. It is also known as 12800 Timber View Court, Silver Spring, Maryland 20904 (the Property).
2. On December 30, 1994, the MNCPPC recorded in the land records of Montgomery County a Category I Conservation Easement Agreement; it was recorded in Liber13178 at Folio 412.
3. The Category I Conservation Easement Agreement prohibits, among other things, the removal of plant materials except in accordance with an approved forest management plan,

mowing, agricultural activities, and cultivation.

4. On November 14, 2001, Marvin J. and E.A. Yetley submitted an application for approval of a plan to subdivide property they owned and create five lots (including the Property), designated as Preliminary Plan 1-02073 (also known as 120020730).
5. On August 2, 2002, the Montgomery County Planning Board approved the Preliminary Plan subject to a number of conditions, including compliance with the conditions of approval for a preliminary forest conservation plan and a record plat showing delineation of a Category I conservation easement on the Property.
6. On June 5, 2003, the Yetleys filed a subdivision record plat for Lots 43 through 47 in Block 1, Springwood, Montgomery County, Maryland. The subdivision record plat shows the conservation easement area and states that the easements are granted in accordance with the Conservation Easement Agreement recorded in Liber13178 at Folio 412.
7. On June 25, 2003, the MNCPPC approved the Yetleys' Final Forest Conservation Plan for Lots 43 through 47 in Block 1, Springwood. The Forest Conservation Plan shows the conservation easement area on lots 44 through 47. In particular, the plan shows that the easement area on the Property was to remain forested and marked with a forest conservation fence and signs. It also shows the maximum area allowed to be cleared.
8. The conservation easement area on the Property is an L shape that covers the rear portion of the lot on the southern and western sides up to the surrounding property lines.
9. On December 16, 2003, the Yetleys sold the Property to the Respondent. The deed states that it is subject to covenants, easements, and restrictions of record. The deed was recorded in the land records of Montgomery County on February 17, 2004.
10. At the time of transfer in December 2003, the Property was unimproved land; no house

existed at the time.

11. Sometime after purchasing the Property, the Respondent began constructing a house on it. A surveyor's certificate dated December 20, 2003 shows the position of the house under construction on the Property and the conservation easement area.
12. On June 1, 2010, Josh Kaye, Forest Conservation Inspector, was investigating conservation easement area encroachments on a neighboring property and observed an encroachment on the Property.
13. On June 1, 2010, the following encroachment into the conservation easement area existed on the Property: there was cut grass within the easement area, an area that was to remain forested. The encroachment into the conservation easement area covered 6,155 square feet of the 31,500 square feet of conservation easement area on the Property, which is a 20% encroachment on the easement area.
14. On June 1, 2010, the MCPD sent the Respondent a Notice of Violation via certified mail, which was returned as unclaimed. Mr. Kaye then hand delivered the Notice of Violation to the Respondent's home on the Property.
15. The Notice of Violation cited the Respondent for failing to comply with the approved forest conservation plan and easement agreement. The Respondent was directed to remove the grass from the easement area and stop continual grass cutting, add wood chips or native ground cover, install two two-inch caliper shade trees and one one-inch caliper deciduous tree within the easement, and attend a meeting with staff to determine the appropriate corrective action to be performed by a date certain. Failure to comply with the Notice of Violation by June 30, 2010 and to complete the corrective action by the date assigned could result in the issuance of a citation, Stop Work Order, and/or Notice of Hearing to appear

before the Planning Board for appropriate Administrative Action. The Respondent was to call the MCPD inspector when the corrective action was complete.

16. On July 7, 2010, Mr. Kaye met with the Respondent and the neighboring homeowners and explained what needed to be done to correct the encroachments into the easement.
17. The Respondent did not correct the encroachment into the easement by June 30, 2010 or after meeting with Mr. Kaye.
18. On September 14, 2010, Mr. Kaye issued an Administrative Citation to the Respondent charging that he had failed to complete the remedial action by June 30, 2010. The Respondent was directed to pay a fine of \$250.00 and to cease continual grass cutting and/or remove the grass from the easement area and add natural ground cover such as wood chips, and to plant two two-inch caliper native shade trees and one one-inch caliper native deciduous tree within the easement. The Respondent was to pay the fine and complete the remedial action by October 15, 2010. Mr. Kaye hand delivered the Administrative Citation to the Respondent's home on the Property and handed it to the ten and twelve year old children who answered the door.
19. The Respondent did not correct the encroachment into the easement by October 15, 2010.
20. As of the date of the hearing in this matter, the Respondent had not completed the corrective action.

DISCUSSION

Violation of the Forest Conservation Law

The Agency has the burden of proof to establish by a preponderance of the evidence that the Respondent committed the violations charged in the Notice of Hearing sent on November 19, 2010. Montgomery County Planning Board Enforcement Rule 3.11 (June 22, 2010).

In enacting the Montgomery County Forest Conservation Law, the Montgomery County Council found that trees and forest cover constitute an important natural resource and that tree loss as a result of development is a serious problem in the county. Montgomery County, Md., Code Chapter 22A-2(a). The purpose of the Montgomery County Forest Conservation Law is to:

- (1) save, maintain, and plant trees and forested areas for the benefit of County residents and future generations;
- (2) establish procedures, standards, and requirements to minimize tree loss as a result of development and to protect trees and forests during and after construction or other land disturbing activities;
- (3) establish procedures, standards, and requirements for afforestation and reforestation of land subject to an application for development approval or a sediment control permit;
- (4) establish a fund for future tree conservation projects, including afforestation and reforestation; and
- (5) provide a focused and coordinated approach for County forest conservation activities. (1992 L.M.C., ch. 4, § 1)

Montgomery County, Md., Code Chapter 22A-2(b).

On December 30, 1994, the MNCPPC recorded a Category I Conservation Easement Agreement in the land records of Montgomery County which applied to real property subject to a plan approval conditioned on compliance with a Forest Conservation Plan or a conservation easement agreement. The purpose of the easement is to protect existing and future forest cover, trees, and other natural features. The Category I Conservation Easement runs with the land in perpetuity and is binding on all subsequent owners. On August 2, 2002, the Montgomery County Planning Board approved the Yetleys' plan to subdivide their property into five lots subject to a number of conditions, including compliance with the conditions of approval for a preliminary forest conservation plan and a record plat showing delineation of a Category I conservation easement on the property. On June 5, 2003, the Yetleys filed a subdivision record

plat for the Property and four neighboring lots that shows the conservation easement area and refers to the December 30, 1994 Conservation Easement Agreement. The Respondent in this case purchased the unimproved land from the Yetleys on December 16, 2003. Thus, the Property was subject to the Category I Conservation Easement Agreement prior to the Respondent's purchase of the Property.

The Category I Conservation Easement Agreement prohibits, among other things, the removal of plant materials except in accordance with an approved forest management plan, mowing, agricultural activities, and cultivation. On June 1, 2010, Mr. Kaye observed cut grass in the conservation easement area on the Property, an area that was to remain forested under the Forest Conservation Plan. Mr. Kaye photographed the same encroachment on June 3, 2010. Mr. Kaye testified that the encroachment into the conservation easement area covers 6,155 square feet of the 31,500 square feet of conservation easement area on the Property, which is a 20% encroachment on the easement area.

The Respondent testified that the builder told him that the silt fence was located along the boundaries of the easement. He stated that he has only maintained the Property following the delivery of his house. He explained that the builder placed sod within the boundaries of the easement, which he has maintained. He stated that he has not changed the area since he took occupancy of the Property. He also argued that there was no proof that he had knowledge of the easement or its boundaries. He asserted that the Agency and the Permit Office should make sure homeowners are aware of the property lines. He said that the builder planted trees and those plantings were inspected by the Agency. He stated that he was never told that the builder had violated the conservation easement. He asserted that seven years later it is unfair to place the burden on the homeowners to pay penalties and fines and to plant trees. He questioned the

accuracy of the GIS aerial image of the Property taken in 2008. He claimed that he did not willingly violate the law. He also claimed that he did not receive the Notice of Violation, the Administrative Citation, or the Notice of Hearing.

During the hearing, Mr. Kaye testified that the Respondent refused to accept the certified mail sent to him. As a result, Mr. Kaye hand delivered the Notice of Violation and Administrative Citation. I found that the Respondent clearly had actual notice of the hearing on January 11, 2011 because he was present. I also found that the Respondent had actual notice of the Notice of Violation and the Administrative Citation. The Respondent discussed the Notice of Violation with Mr. Kaye on July 7, 2010. In addition, he was aware that the Administrative Citation had been given to his children. Moreover, it was clear during the hearing that the Respondent was aware of the Agency's actions and he was able to fully participate in the hearing. For all these reasons, I conclude the Respondent had actual notice of the Notice of Violation, the Administrative Citation, and the Notice of Hearing despite his attempts to avoid service.

The December 30, 1994 Conservation Easement Agreement requires a property owner to make specific reference to the easement in any deed, sales contract, or other legal instrument by which any interest in a property subject to the agreement is conveyed. The December 16, 2003 deed by which the Yetleys sold the Property to the Respondent states that it is "SUBJECT to covenants, easements, and restrictions of record." MCPD Ex. # 6. Whether this statement is sufficiently specific is not an issue to be decided by me in the context of this case. However, it is clear that the onus was on the Yetleys, not Montgomery County or any government entity, to notify the Respondent of the easement when conveying the Property.

In addition, the specific location of the easement on the Property was shown on the subdivision record plat filed by the Yetleys in Montgomery County on June 5, 2003. On cross examination the Respondent admitted that he brokered the deal to sell the Property and the neighboring lots among the Yetleys, the builder (Maryland Custom Homes), and the current homeowners. He also admitted that he saw the closing documents and the record plat with the easements. Thus, he admits that he had actual knowledge of the existence of the easement. The Respondent explained that he relied on the builder's representation that the easement was defined by the silt fence installed prior to construction. Thus, the Respondent, as well as his neighbors, may have been misled by the builder, intentionally or unintentionally, as to the exact boundaries of the easement. However, any misrepresentation by the sellers or the builder does not change the fact that the easement exists or its location or the fact that the easement existed prior to the Respondent's purchase of the property. The Respondent has not presented any evidence to show that the easement's location is different than that identified in MCPD's exhibits. Simply questioning the accuracy of the Agency's identification of the easement boundaries without any evidence in support is insufficient.

In any event, the Respondent was notified of the easement and its location on the Property when he was issued the Notice of Violation on June 1, 2010. The Respondent did not take the corrective action specified in the Notice of Violation by the compliance date of June 30, 2010. In addition, Mr. Kaye met with the Respondent on July 7, 2010 and explained what needed to be done to correct the encroachment into the easement. Thus, I find the Respondent had actual knowledge of the easement and its location and of the Notice of Violation at least as of July 7, 2010. On September 14, 2010, Mr. Kaye issued to the Respondent an Administrative Citation assessing a \$250.00 fine and directing him to take remedial action by October 15, 2010;

however, he failed to do so. Whether the Respondent initially created the encroachment into the easement is irrelevant. Assuming the builder caused the initial encroachment by removing trees from or planting grass within the easement area, the Respondent is still responsible, as the owner of the Property, for the continued encroachment in the easement area. "Each day a violation is not corrected is a separate violation" and a violator is subject to an administrative penalty.

Montgomery County, Md., Code Chapter 22A-16(d)(1). The Respondent had the opportunity to take corrective action and comply with the Notice of Violation from June 1, 2010 to June 30, 2010 without any fine or administrative penalty. He had an additional opportunity to comply by October 15, 2010, with only a \$250.00 fine. As of the date of the hearing, the Respondent had not removed the encroachment into the easement or paid the fine. Thus, I find that the Agency has met its burden of proof and established by a preponderance of the evidence that there is a Category I conservation easement on the Property, that an encroachment into the easement has existed since at least June 1, 2010, and that the Respondent has failed to pay the fine and complete the remedial action as directed. Therefore, I conclude the Respondent committed the violations charged in the November 19, 2010 Notice of Hearing.

Remedies

Based on the Respondent's violations, the Agency is seeking the following: corrective actions, Montgomery County, Md., Code Chapter 22A-17, an administrative fine, Montgomery County, Md., Code Chapter 22A-16(a), and administrative civil penalties, Montgomery County, Md., Code Chapter 22A-16(d).

Chapter 22A-17(a) states that a violator may be required to take one or more of the following actions:

- (1) stop the violation;
- (2) stabilize the site to comply with a reforestation plan;
- (3) stop all work at the site;
- (4) restore or reforest unlawfully cleared areas;
- (5) submit a forest conservation plan for the property;
- (6) place forested or reforested land under long-term protection by a conservation easement, deed restriction, covenant, or other appropriate legal instrument; or
- (7) submit a written report or plan concerning the violation.

Mr. Pfefferle recommended the following corrective actions be made on the Property.

One, the Respondent have a professional survey conducted at his expense showing the boundaries of the Category I Conservation Easement on the Property. Two, the Respondent install 6x6 corner posts and signage marking the easement boundaries. Three, the Respondent remove the grass in the easement and replace it with wood mulch. Four, the Respondent plant three ¾ inch to one inch caliper native canopy trees and ten native shrubs in the easement.

I find that all of the recommended corrective actions fall under subsections (1), (2) and/or (4). The Final Forest Conservation Plan approved on June 25, 2003 shows that the easement area on the Property was to remain forested and marked with a forest conservation fence and signs. Thus, requiring a professional survey and some sort of visible marking of those boundaries would comply with the conservation plan. Removing the grass would stop the continuing violation and comply with the conservation plan. Installing mulch and planting three ¾ inch to one inch caliper native canopy trees and ten native shrubs would facilitate reforesting the area that was unlawfully cleared and that the Respondent has unlawfully kept clear by continual mowing. Mr. Pfefferle testified that continual mowing prevents natural forest regeneration. He testified further that there should be eight to ten foot trees growing in the

easement by now. Thus, I conclude that the Agency's recommended corrective actions fall within its statutory authority. Montgomery County, Md., Code Chapter 22A-17.

Any violation of the Forest Conservation Law or its regulations is a civil violation subject to a civil fine. Montgomery County, Md., Code Chapter 22A-16(a). The maximum civil fine is \$1,000.00. *Id.* "Each day a violation continues may be treated as a separate violation." *Id.* In the Administrative Citation, the Agency assessed a \$250.00 fine against the Respondent. As of the date of the hearing, the Respondent had not complied with the Administrative Citation; thus, he must pay the \$250.00 fine.

A person who violates the Forest Conservation Law, its regulations, a forest conservation plan, or any agreement or restriction is liable for an administrative civil penalty. Montgomery County, Md., Code Chapter 22A-16(d)(1). The penalty must not exceed the rate set by the County Council. The maximum penalty is \$9.55 per square foot, as established by Montgomery County Council Resolution 15-1271. The penalty must not be less than the rate set in section 5-1608(c) of the Natural Resources Article, which is \$0.30 per square foot. Montgomery County, Md., Code Chapter 22A-16(d)(1); Md. Code Ann., Nat. Res. § 5-1608 (2005).

In determining the amount of the administrative civil penalty the following factors must be considered. Montgomery County, Md., Code Chapter 22A-17(d)(2). They are:

- (A) the willfulness of the violations;
- (B) the damage or injury to tree resources;
- (C) the cost of corrective action or restoration;
- (D) any adverse impact on water quality;

(E) the extent to which the current violation is part of a recurrent pattern of the same or similar type of violation committed by the violator;

(F) any economic benefit that accrued to the violator or any other person as a result of the violation;

(G) the violator's ability to pay; and

(H) any other relevant factors.

Regarding willfulness, the Respondent was issued the Notice of Violation on June 1, 2010 and told to stop mowing. The Respondent chose instead to ignore that directive. The Respondent's actions deliberately disregarded the law. Regarding damage or injury to tree resources, Mr. Pfefferle explained that continual mowing prevented natural forest regeneration. He stated that eight to ten foot trees should be growing within the easement by now. Regarding the cost of corrective action or restoration, Mr. Pfefferle recommended a credit of \$0.30 per square foot. Regarding the adverse impact on water quality, Mr. Pfefferle testified that, without trees, less water is absorbed which adversely affects water quality. Regarding the extent to which the current violation is part of a recurrent pattern of violations, Mr. Pfefferle noted the Respondent's continual mowing but no other recurrent violations. Mr. Pfefferle did not provide any specific testimony regarding any accrued economic benefit, the Respondent's ability to pay, or any other factor.

After explaining his consideration of these factors, Mr. Pfefferle recommended a penalty of \$0.32 per square foot, which includes the credit for the cost of corrective action. Mr. Pfefferle testified that 6,150 square feet were impacted; thus, he recommended a total penalty of \$1,968.00. The Respondent did not present any evidence to contradict the basis of the recommended penalty. Therefore, I find the recommended penalty is appropriate.

CONCLUSIONS OF LAW

I conclude, as a matter of law, that the Respondent violated the Category I Forest Conservation Easement located on the Property. Montgomery County, Md., Code Chapter 22A.

I further conclude that as a result of the violations, the Respondent is subject to an administrative civil fine in the amount of \$250.00. Montgomery County, Md., Code Chapter 22A-16(a).

I further conclude that as a result of the violations, the Respondent is subject to an administrative civil penalty in the amount of \$1,968.00. Montgomery County, Md., Code Chapter 22A-16(d).

I further conclude that as a result of the violations, the Respondent must take the corrective actions specified by the Agency. Montgomery County, Md., Code Chapter 22A-17.

RECOMMENDED ORDER

I PROPOSE that the Montgomery County Planning Board of the Montgomery County Planning Department, Maryland National Capital Park and Planning Commission:

ORDER that the Respondent is in violation of a Category I Conservation Easement;

ORDER that the Respondent pay an administrative civil fine of \$250.00;

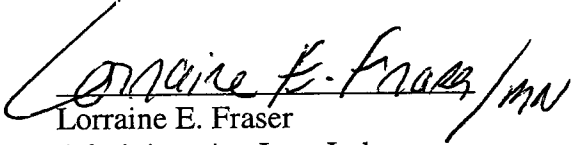
ORDER that the Respondent pay an administrative civil penalty of \$1,968.00;

ORDER that the Respondent take corrective actions, including having a professional survey conducted at his expense showing the boundaries of the Category I Conservation Easement on the Property, installing 6x6 corner posts and signage marking the easement boundaries, removing the grass in the easement and replacing it with wood

mulch, and planting four two-inch caliper native trees; and three ¾ inch to one inch caliper native canopy trees and ten native shrubs; and

ORDER that the records and publications of the Montgomery County Planning Department of the Maryland National Capital Park and Planning Commission reflect this decision.

February 8, 2011
Date Decision Mailed


Lorraine E. Fraser
Administrative Law Judge

LEF/
#120188

RIGHT TO FILE EXCEPTIONS

Upon mailing of this recommended decision, affected parties have fourteen (14) days to file exceptions with the Montgomery County Planning Board. Montgomery County Planning Board Enforcement Rules 4.1, 4.2. Each exception must contain a concise statement of the issues presented, specific objections to one or more findings of fact and conclusions of law in the recommended decision and order; and arguments that present clearly the points of law and facts relied on in support of the position taken on each issue. Montgomery County Planning Board Enforcement Rule 4.3. A party may file an answer opposing any exception within fourteen days after the exceptions are served. Montgomery County Planning Board Enforcement Rule 4.4. Written exceptions should be addressed to the Chair of the Montgomery County Planning Board, 8787 Georgia Avenue, Silver Spring, Maryland 20904. The Office of Administrative Hearings is not a party to any review process.

Copies Mailed To:

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MONTGOMERY COUNTY PLANNING DEPARTMENT

THE MARYLAND NATIONAL CAPITAL PARK AND PLANNING COMMISSION

v.

JOHN JOHNSON,

RESPONDENT

* BEFORE LORRAINE E. FRASER,
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* VIOLATION OF FOREST CONSERVATION
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EXHIBITS

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