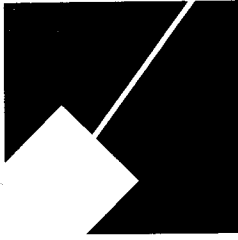


M-NCPPC



THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

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November 20, 2013

MEMORANDUM

TO: Montgomery County Planning Board

FROM: David B. Lieb, Associate General Counsel *DL*
301.495.4646

RE: Kaviani Enforcement Matter -- Resolution Correction

With this memorandum we forward for the Board's adoption the resolution for the Kaviani enforcement matter. The resolution was adopted by the Planning Board on September 19, 2013. Prior to the mailing of the resolution to the parties of record, we noticed that the resolution omitted the compliance deadline proposed by the Planning Department and accepted by the Board. The attached resolution adds an enforcement deadline on page 2.



MONTGOMERY COUNTY PLANNING BOARD
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

DEC 19 2013

MCPB No. 13-118

Respondent(s): Golozar and A. Kaviani

Date of Hearing: March 7, 2013

ORDER

WHEREAS, under Montgomery County Code Chapter 22A, the Montgomery County Planning Board is vested with the primary authority to enforce the Montgomery County Forest Conservation Law; and

WHEREAS, on January 26, 2012 and again on January 31, 2012, the Montgomery County Planning Department of the Maryland-National Capital Park and Planning Commission issued a Notice of Hearing to Golozar and A. Kaviani (Respondents), alleging that the Respondents violated the Montgomery County Forest Conservation Law by (1) disturbing approximately 7,000 square feet of land without obtaining approval of a forest conservation plan or an exemption in connection with installing two retaining walls, and (2) failing to comply with two corrective orders issued by a Planning Department inspector; and

WHEREAS, on March 6, 2012, Administrative Law Judge Richard O'Connor, of the Maryland Office of Administrative Hearings, held a hearing at 8787 Georgia Avenue, Silver Spring, Maryland 20910; and

WHEREAS, on April 3, 2012, the Administrative Law Judge filed a Recommended Order (Attachment 1) proposing that the Planning Board hold that Respondents violated the Forest Conservation Law, and order that Respondents:

1. Pay an administrative civil penalty of \$2,100.00; and
2. Take the corrective actions ordered by the Planning Department on September 30, 2011 (Attachment 2).

WHEREAS, on March 7, 2013, the Planning Board held a public hearing to review the Recommended Order; and

WHEREAS, at the March 7 hearing, the Planning Board heard arguments concerning the Recommended Order; and

WHEREAS, at the March 7 hearing, the Planning Board voted to adopt the Recommended Order, on motion of Commissioner Presley, seconded by Commissioner Wells-Harley, by a vote of 4-1 with

Commissioners Anderson, Carrier, Presley, and Wells-Harley voting in favor, and Commissioner Dreyfuss voting against.¹

NOW, THEREFORE, BE IT RESOLVED that the Planning Board adopts the Recommended Decision, under which the Respondents must pay an administrative civil penalty of \$2,100.00 and take each of the corrective actions included in the Planning Department's September 30, 2011 corrective action Order (Attachment 2) no later than 60 days after the date of this Resolution.

The Board finds that the ALJ correctly concluded that the Respondents violated the forest conservation law by causing approximately 7,000 feet of land disturbance without first obtaining approval of a forest conservation plan. The Board further finds that the \$2,100.00 penalty – the mandatory minimum allowed under state law – is justified in this case. Even if the Board had any discretion about whether to impose even this modest penalty, it would find that at least this amount was required. Considering the willfulness of the violations, the damage to tree resources, the cost of the required corrective actions, the adverse impact to water quality, evidence of the Respondents' reticent refusal to comply with the forest conservation law, and the Respondents' ability to pay, which the Board can only judge by the fact that the Respondents live in a very expensive area of the County, an even higher penalty might be justified. The Board further finds that the corrective actions recommended by the ALJ are appropriate.

The exceptions filed by the Respondents consist almost entirely of non-material factual issues that do not go to the central issues of whether the ALJ correctly concluded that Respondents violated the forest conservation law and how to correct it. For example, the Respondents asserted in their exceptions that the ALJ's recommended decision recited an incorrect date, questioned the precise dimension of the National Park property at the rear of the lot, and disputed the ALJ's conclusion that the retaining walls installed by Respondents were not properly engineered.

The only material issue to which the Respondents took written exception is the ALJ's conclusion that the Respondents disturbed approximately 7,000 square feet of their lot. This land area is significant under the law because it is the disturbance of greater than 5,000 square feet of the land that brought the Respondents under the purview of the forest conservation law. The Respondents challenged the ALJ's reliance on hearsay evidence to find that the Respondents cleared approximately 7,000 square feet. But while hearsay evidence is allowed, and while that evidence alone would have been sufficient to support the ALJ's conclusion, the finding was also supported by visual evidence demonstrating the extent of the clearing. By contrast, the ALJ noted that the Respondents had only perfunctorily asserted that they had disturbed less than 5,000 square feet. Under these circumstances, the ALJ correctly

¹ Commissioner Dreyfuss supports all aspects of this order with the exception of the requirement for the Respondents to place the unlawfully disturbed area in a conservation easement.

concluded that a preponderance of the evidence supported that the Respondents had cleared approximately 7,000 square feet.

With respect to the corrective actions, the only thing that the Respondents challenged before the Planning Board was the requirement to place the illegally disturbed area in an easement for future protection. The Respondents did not, however, contest the requirement to place the area of disturbance in an easement in their written exceptions, and, therefore, waived their ability to challenge it before the Board. The Respondents claimed that there was a constitutional basis for their opposition to placing a conservation easement on the area of disturbance. The Respondents argued that because the placement of an easement on the property, as Planning Department ordered on September 30, 2011, entails the Respondents' constitutional rights, the least restrictive means must be used to remedy the Respondents' violation. But the Board finds that requiring an easement on the property does not affect a fundamental right, and therefore does not require the use of the least restrictive means. An easement may affect a liberty interest by partially restricting the use of a small portion of the Respondents' lot. But due to the property slope, the use of this area is already substantially restricted. And, under all of the circumstances of this case, there is at least a rational basis for concluding that placing the disturbed area in an easement is appropriate. Even if the easement affected a fundamental right, under all of the facts in this case – which included evidence that the Respondent had been reticent about complying with the forest conservation law and the corrective orders of the Planning Department – placing a forest conservation easement on the disturbed area is the least restrictive means of ensuring the Respondents' compliance with the Forest Conservation Law going forward. The Respondents argued that instead of being covered by a conservation easement the Respondents' lot should simply be enforced under the terms of the Forest Conservation Law that apply to all property within the County. This argument ignores that the disturbed area is the location of a significant violation of the Forest Conservation Law, and therefore is not similarly situated to other properties.

On a procedural note, the Planning Board denied the Respondents' motion to postpone the oral argument, which was submitted on March 7, 2013 – the day of the hearing. In support of the request for an extension, the Respondents alleged that they had received insufficient notice of the hearing and that extenuating circumstances, including inclement weather the day before the hearing, prompted them to request the extension. In arguing for the extension at the hearing, the Respondents asserted for the first time that the Recommended Order raised constitutional issues. The Respondents further argued that there was no urgency to holding the hearing as scheduled, as evidenced, they alleged, by the fact that it took the Planning Board seven months to deny the Respondents' previous request for a new hearing. The Planning Board finds that the Respondents had ample notice of the hearing date, more than enough to present a 10-minute oral argument that was limited to the issues already raised in the written exceptions they had already filed, which did not include any constitutional issues. The timing of the issuance of the Board's order in response to a meritless request for a new hearing is irrelevant, because whether or not it was urgent to hold the hearing, the last-minute request to postpone the hearing was unjustified. On the other hand, it is significant that the Planning Board and the Planning Department

staff were prepared to go forward with the hearing, and that in light of this preparation it would have been unreasonable and inefficient to postpone the hearing at the very last minute.

BE IT FURTHER RESOLVED that this order incorporates by reference all evidence of record, including maps, drawings, memoranda, correspondence, and other information; and

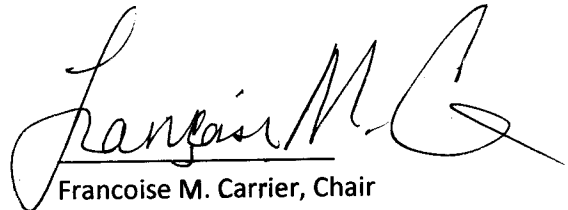
BE IT FURTHER RESOLVED that the mailing date of this order is DEC 19 2013 and

BE IT FURTHER RESOLVED that any party authorized by law to take an administrative appeal must initiate such an appeal within thirty days of the date of this Resolution, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules).

* * * * *

CERTIFICATION

This is to certify that the foregoing is a true and correct copy of a resolution adopted by the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission on motion of Vice Chair Wells-Harley, seconded by Commissioner Anderson, with Chair Carrier, Vice Chair Wells-Harley, and Commissioners Anderson and Dreyfuss present and voting in favor of the motion, and Commissioner Presley absent, at its regular meeting held on Thursday, December 5, 2013, in Silver Spring, Maryland.



Françoise M. Carrier, Chair
Montgomery County Planning Board

Corrective Action Order:

Revised September 30, 2011

RE: To Resolve 13732 Canal Vista Court Forest Conservation Law Violation and Administrative Citation No. EPD000007

1. The Natural Resources Inventory/Forest Stand Delineation (first submitted in January 2011) is to be re-labeled and submitted as a "Restoration Plan" to the Planning Department by ~~October 1, 2011~~ December 2, 2011.
2. The restoration plan must show the aerial extent of the forest area as determined in the May 2011 field meeting and per the M-NCPPC reviewer comments:
 - A. Extend the forest line of stand A to the shown canopy line in the area of the side and immediately rear of the house
 - B. Extend the forest line of stand A outward at specimen tree #14 (st-14) it should be an additional 40 feet from existing line, at the property line near specimen tree #16 (st-16) it should be extended 20 ft.
3. The restoration plan must show the planting of ten 2 inch caliper native trees within the forest disturbed area. The planting plan must consist of 3 Sycamore, 2 Chestnut Oak, 2 American Beech and 3 Black Gum trees.
4. The restoration plan must show the area of disturbed barren soil to be stabilized with a mixture of native shade grass and seasoned hardwood mulch.
5. The restoration plan must show the stabilization of the barren areas and the planting of the trees before April 1, 2012.
6. The restoration plan must show a category 1 conservation easement over the stream buffer area of the property that is below the 265 foot elevation.
7. This category 1 conservation easement shown on the Restoration Plan must be granted to M-NCPPC as part of a category 1 conservation easement agreement that will be recorded in land Records by April 1, 2012.
8. Implementation of the restoration plan must be completed by April 1, 2012.
9. The two retaining walls will need to be removed by hand unless the applicant obtains permission from the National Park Service, the Montgomery County Department of Permitting Services, and the property's Homeowners Association by ~~October 1, 2011~~ December 2, 2011. The approval letters must be sent directly to M-NCPPC. If the property is unable to obtain approval and permission to keep the two retaining walls, the retaining walls must be removed prior to a pre-planting meeting for the 10 trees and not later than March 1, 2012.