MCPB No. 19-105
Respondent: Christopher J. Erb
Date of Hearing: January 17, 2019

AUG 07 2019

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 December 29, 2017, the Montgomery County Planning Department of the Maryland-National Capital Park and Planning Commission issued a Notice of Hearing to Christopher J. Erb (Respondent), alleging that the Respondent violated the Montgomery County Forest Conservation Law on 9323 Kendale Road, Potomac, MD "Subject Property" by (1) cutting and clearing more than 9,600 square feet of forest, including forest in a stream buffer, without obtaining approval of a forest conservation plan, and (2) failing to pay the fines and complete the remedial actions as directed in Administrative Citation No. EPD 000332; and

WHEREAS, on February 13, 2018, 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 March 5, 2018, the Administrative Law Judge filed a Recommended Order (Attachment 1) proposing that the Planning Board hold that Respondent violated the Forest Conservation Law, and order that Respondent:

1. Pay an administrative civil penalty of $6,552.00; and
2. Take the corrective actions including restoration of the damaged area, submission of a forest conservation plan, and placing a conservation easement on the forested and stream buffer areas of his Property; and

WHEREAS, on January 17, 2019, the Planning Board held a public hearing to review the Recommended Order; and

WHEREAS, at the January 17th hearing, the Planning Board heard arguments concerning the Recommended Order; and

Approved for legal sufficiency
M-NCPPC Office of the General Counsel

WHEREAS, at the January 17, 2019 hearing, the Planning Board voted to adopt the Recommended Order in its entirety, on motion of Commissioner Fani-Gonzalez, seconded by Commissioner Cichy, by a vote of 3-0, with Commissioners Anderson, Cichy and Fani-Gonzalez voting in favor, Commissioners Dreyfuss and Patterson being absent.

NOW, THEREFORE, BE IT RESOLVED that the Planning Board adopts the Recommended Decision, under which the Respondent be found in violation of the Forest Conservation Law. The Respondent must pay an administrative civil penalty of $6,552.00 and take each of the corrective actions including restoration of the damaged area, submission of a forest conservation plan, and placing a Category I Conservation Easement on the forested and stream buffer areas of the Subject Property no later than 60 days after the date of this Resolution.

The Board finds that the Administrative Law Judge correctly concluded that the Respondent violated the forest conservation law by causing approximately 9,600 square feet of land disturbance without first obtaining approval of a forest conservation plan. The Board further finds that the $6,552.00 penalty is justified in this case. Due to the extent of the violations, the damage to tree resources, the cost of the required corrective actions, the adverse impact to water quality, the Board finds the corrective actions recommended by the ALJ are appropriate.

Respondent took written exception to the Administrative Law Judge's conclusion that the Respondent disturbed approximately 9,600 square feet of his 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 Respondent under the purview of the forest conservation law. The Respondent challenged the Administrative Law Judge's reliance on the Conservation Inspector's testimonial evidence that he measured 9,600 square feet of disturbance. During the hearing, the Respondent failed to submit any evidence to the contrary. Based upon the evidence before it, the Planning Board found that the Administrative Law Judge correctly concluded that a preponderance of the evidence supported that the Respondent had cleared approximately 9,600 square feet.

The Respondent challenged before the Planning Board the requirements to pay a civil administrative penalty of $6552.00 and to place the disturbed area in an easement for future protection. The Respondent acknowledged that he violated the Forest Conservation Law by not first seeking permission to remove the subject trees. Respondent also acknowledged that the citation warned of the potential of an

administrative civil penalty and further corrective measures but argued he was not informed of the nature of the potential civil penalty and conservation easement requirement. Respondent argued that because he had good intentions, didn't cut the trees for profit, and would not be a repeat offender, the need for the administrative penalty and conservation easement were unnecessary. Section 22A-16, of the Montgomery County Code establishes the authority of the Planning Board to impose an administrative civil penalty, which must not exceed the rate set by the County Council and must not be below the amount set by Section 5-1608(c) of the Natural Resources Article of the Maryland Code. Section 5-1608(c) of the Natural Resources Article of the Maryland Code further requires that a penalty be assessed against any person found to be in violation of the Forest Conservation Law.

In determining the amount of the administrative civil penalty, the Planning Board or Director must consider:

(1) The willfulness of the violations
(2) The damage or injury to tree resources;
(3) The cost of corrective action or restoration
(4) Any adverse impact on water quality
(5) The extent to which the current violation is part of a recurrent patter of the same or similar type of violation committed by the violator
(6) Any economic benefit that accrued to the violator or any other person as a result of the violation
(7) Ability to pay; and
(8) Any other relevant factors.

At the hearing the Planning Department offered testimony regarding the calculation of the administrative civil penalty. To determine the amount of the administrative civil penalty the following items are considered: the willfulness of the violation, the damage or injury to the tree resources, any adverse impact on water quality, 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 and any economic benefit that accrued to the violator or any other person as a result of the violation. The estimated cost of corrective actions and the ability to pay are considered separately. The Planning Department used the dollar amount for the five categories to determine the average dollar amount per square foot to impose as a penalty for the violation. This amount was added to the fine attached to the initial citation which combined determines the total liability amount. The cost of corrective actions is subtracted from the total liability amount and the result is the administrative civil penalty.

The willfulness of the violations – The Planning Department assessed $2.00 per square foot for this category because the violation was not accidental. At the hearing with the Administrative Law Judge, the Respondent did not dispute the fact that trees were cut without seeking prior permission from the Planning Department. Furthermore, Respondent admitted to authorizing his agent to cut trees within the protected area. This act is in direct violation to Forest Conservation Law.

The damage or injury to tree resources – The Planning Department assessed $5.00 per square foot, considering the trees that were cut, damage to the understory, forest floor and tree roots. During the hearing with the Administrative Law Judge, the Planning Department supplied documentation including photos of the bobcat located in the tree buffer and testimony regarding the damage to the understory, forest floor and tree roots caused by the felling of the trees.

Any adverse impact on water quality – The Planning Department assessed $3.00 per square foot for this category. Section 22A-16(2) of the Montgomery County Code allows for the Board or Director to treat any forest clearing in a stream buffer, wetland, or special protection area as creating a rebuttable presumption that the clearing had an adverse impact on water quality. At the hearing the Respondent offered no evidence to contradict this presumption. Respondent acknowledged that a bobcat was taken into the stream buffer. Respondent did not offer any expert testimony or independent testing results to assess the impact of this action on the water quality.

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 – The statutory minimum of $.30 per square foot was used as this factor was not present since the Respondent does not have a history of violations.

Any economic benefit that accrued to the violator or any other person as a result of the violation - The statutory minimum of $.30 per square foot was used as this factor was not present since there was no evidence showing that the Respondent accrued an economic benefit from the violation.

The Montgomery County Planning Department's Forest Conservation Inspector testified that he calculated 9600 sq. ft. of forest clearing had occurred. The Inspector also provided photographic evidence showing, cut trees, cleared forest, the bobcat parked within restricted area and the bobcat tire tracks throughout the restricted area. Respondent disputed this amount indicating that the Forest Conservation Inspector did

not count the number of trees prior to the Respondent having trees cut on his property. Respondent, however, did not present any evidence to the contrary and also admitted that he did not count the number of trees prior to having the trees removed.

In the instant matter, the Planning Department used the following categories to compute the total liability: the willfulness of the violations, the damage or injury to the tree resources, adverse impact to the water quality, is the violation part of a recurrent pattern and any economic benefit to the violator as a result of the violation. Using the amounts identified above, the Planning Board used the average valuation of $2.12 per sq. ft. for the 9600 sq. ft. of forest clearing which totaled $20,352.00. In light of the explanation of administrative penalty valuation and the testimony and evidence presented, the Administrative Law Judge accepted the Planning Department's calculations of the penalty as $20,352.00 plus $1000.00 for the assessed fine as provided in citation EPD000332 for a total liability of $21,352.00.

Cost of corrective action - Pursuant to Section 22A-17(a) of the Montgomery County Code, the Planning Director may issue one or more corrective actions to be performed by the Respondent, including but not limited to requiring the Respondent to restore or reforest unlawfully cleared areas and the placement of the forested or reforested land into a conservation easement. The Planning Department required the reforesting of the unlawfully cleared area. Planning Department testimony established the estimated cost to reforest the disturbed area as $14,800.00. The breakdown of that fee is as follows:

$1,400.00 in application fees;
$4,000.00 to hire qualified professionals to prepare a forest conservation plan;
$4,400.00 to plant twenty-two trees at $200.00 per tree; and
$5,000 to survey the area to be placed under easement.

The $14,800.00 amount of the reforestation was deducted from the total liability amount of $21,352.00, leaving an administrative civil penalty amount of $6,552.00.

Respondent's ability to pay- The Planning Board had the opportunity to review the evidence supplied by the Planning Department at the hearing with the Administrative Law Judge. To support its contention that the Respondent had the ability to pay the administrative penalty, the Planning Department submitted the Respondent's Deed of Trust in the amount of 652,000.00 for the purchase of the property and $310,000.00 for a home equity line of credit which demonstrated the Respondent's ability to pay the $6,552.00 administrative civil penalty amount.

The Planning Board found that the placement of a forest conservation easement over the disturbed area is appropriate in this case to prevent further disturbance of an environmentally sensitive area. The disturbed area is within a stream buffer and requires additional protection as required in the Forest Conservation Law. Furthermore, the Forest Conservation Law and the Planning Board's Environmental Guidelines both restrict the construction of structures within stream buffers. Therefore, the use of the disturbed area is already limited due to the environmental features and the easement is necessary to ensure the continued protection of the unlawfully cleared areas.

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 AUG 07 2019; 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 Commissioner Fani-González, seconded by Vice Chair Dreyfuss, with Chair Anderson, Vice Chair Dreyfuss, and Commissioners Fani-González, Cichy, and Patterson voting in favor at its regular meeting held on Thursday, July 25, 2019, in Silver Spring, Maryland.

Casey Anderson, Chair
Montgomery County Planning Board

ATTACHMENT 1

MONTGOMERY COUNTY	*	BEFORE RICHARD O'CONNOR,
PLANNING DEPARTMENT	*	ADMINISTRATIVE LAW JUDGE,
THE MARYLAND-NATIONAL	*	THE MARYLAND OFFICE
CAPITAL PARK AND PLANNING	*	OF ADMINISTRATIVE HEARINGS
COMMISSION	*	VIOLATION OF FOREST
v.	*	CONSERVATION LAW
CHRISTOPHER J. ERB,	*	ADMINISTRATIVE CITATION No.
RESPONDENT	*	EPD 000332

* * * * * * * * * * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On December 29, 2017, the Montgomery County Planning Department (MCPD) of the Maryland-National Capital Park and Planning Commission (MNCPPC or Agency) issued a Notice of Hearing to Christopher J. Erb (Respondent). The notice alleged that the Respondent violated the Montgomery County Forest Conservation Law[1] by cutting and clearing approximately 9,600 square feet of forest on property owned by the Respondent without prior approval of a forest conservation plan and by failing to pay fines and complete remedial action as required in administrative citation number EPD 000332, issued on October 2, 2017.

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

Sitting as a Hearing Examiner for the MCPD, I held a hearing on February 13, 2018, at the MNCPPC offices at 8787 Georgia Avenue, Silver Spring, Maryland. Nicholas D. Dumais, Esquire, Associate General Counsel, represented the Agency. The Respondent participated without representation.

On February 15, 2018, the Respondent telephoned the Office of Administrative Hearings and spoke with a secretary. He requested that I allow him to submit additional evidence. On February 17, 2018, I denied that request because the notice of hearing had provided the Respondent with the hearing procedures in specific detail. A secretary informed the Respondent by telephone of my decision and telephoned Mr. Dumais to let him know of the request and the denial.

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 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 (2014 & Supp. 2017); Code of Maryland Regulations (COMAR) 28.02.01; Montgomery County Planning Board Enforcement Rules, Chapters 1 through 4 (June 17, 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, what penalty should be assessed?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the MCPD:

1. Plat of the Respondent's property, surveyed June 27, 1985.

2. Aerial photograph of the Respondent's property and surrounding property, taken in 2015.

3. Aerial photograph of the Respondent's property and surrounding property, taken in 2017.

4. Forest conservation plan for the German School, June 16, 2009.

5. Administrative Citation No. EPD 000332, issued October 2, 2017, with Frequently Asked Questions attached.

6. Sediment Control Permit Application, October 11, 2017.

7. Notice of Violation from the Montgomery County Department of Permitting Services, October 5, 2017.

8. Photograph of the Respondent's property showing a pile of cut trees and limbs.[2]

9. Photograph of the Respondent's property showing a pile of cut trees.

10. Photograph of the Respondent's property showing Bobcat[3] tracks in dirt, a stump, and some cut tree limbs.

11. Photograph of the Respondent's property showing a Bobcat, Bobcat tracks in dirt, and several tree stumps.

12. Photograph of the Respondent's property showing the back of the Respondent's house, several tree stumps, and an area of dirt.

13. Photograph of the Respondent's property showing a Bobcat, a pile of cut limbs and branches, and several stumps.

14. Photograph of the Respondent's property showing a Bobcat next to a stream and some cut trees or limbs.

15. Photograph of the Respondent's property showing a cut tree and stump, leaf litter, and branches.

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[2] MCPD Exhibits 8 through 24 were taken by Stephen Peck on October 2, 2017.

[3] "Bobcat" is a brand name for a small piece of tracked heavy equipment with interchangeable front-end attachments that can be used for many purposes, including clearing and grading land.

16. Photograph of the Respondent's property showing a pile of cut limbs in the flood plain.

17. Photograph of the Respondent's property showing cut limbs in a stream.

18. Photograph of the Respondent's property showing a small cut tree, a stump, and forest.

19. Photograph of the Respondent's property showing two cut trees and their stumps.

20. Photograph of the Respondent's property showing a large cut tree fallen onto a smaller tree.

21. Photograph of the Respondent's property showing a Bobcat in the flood plain behind the Respondent's house.

22. Photograph of the Respondent's property showing the Respondent's house, a cleared area with stumps, and a Bobcat.

23. Photograph of the Respondent's property showing cut trees and stumps.

24. Photograph of the Respondent's property showing the Respondent's house, a partially cut white oak, and a tulip poplar stump.

25. Blank Conservation Deed of Easement form.

26. Aerial photograph of the Respondent's property and surrounding property showing the proposed easement area.

27. State Department of Assessments and Taxation Real Property Data Search, February 5, 2018.

28. Deed of Trust, August 31, 2016.

29. Maryland Deed of Trust, December 1, 2017.

30. Administrative Civil Penalty factors and assigned monetary values.

31. Estimated Cost of Corrective Actions.

32. Recommended Administrative Civil Penalty.

I marked three Respondent's exhibits (Resp. Ex. 1, 2, and 3), which were not offered as evidence. They remain in the file as part of the administrative record.

Testimony

The following witnesses testified on behalf of the Agency:

1. Stephen Peck, Forest Conservation Inspector.

2. Mark Pfefferle, Chief, Development Applications and Regulatory Coordination, MCPD.

The Respondent testified on his own behalf and presented testimony from Anthony Erb, his father.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. The Respondent owns real property known as 9323 Kendale Road, Potomac, Maryland (the Property), which is improved by a dwelling house.

2. The Property is an irregularly-shaped lot that comprises 2.0008 acres, or approximately 87,155 square feet.[4] A small stream, Kendale Branch, runs through the property behind the house.

3. The areas of the Property adjacent to the stream include a stream buffer area and the 100-year flood plain.

4. Most of the Property that lies behind the house and along the stream was wooded before the Fall of 2017, with a mix of deciduous canopy trees; understory trees, bushes, and plants; and an organic layer of soil sometimes referred to as leaf litter.

5. The Respondent was worried that one or more large trees on the Property might fall onto his house or a neighbor's house. In the Fall of 2017, he contracted with Alfaro's Tree Expert (Alfaro's) to cut and remove trees from the Property.

6. Alfaro's is licensed by the Maryland Department of Natural Resources as a tree expert.[5]

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[4] An acre equals 43,560 square feet.

[5] Md. Code Ann., Nat. Res. § 5-417 (Supp. 2017). According to Inspector Peck's testimony, Fidel Alfaro holds the license.

7. Alfaro's identified to the Respondent trees that allegedly posed a danger to his house or a neighbor's house.

8. The Respondent engaged Alfaro's to remove the trees the company had identified as potentially dangerous.

9. Alfaro's used its employees and a Bobcat to carry out the removal. The employees cut the trees, then used the Bobcat's grapple to move them to the driveway area, where they would be chipped or hauled away.

10. The felling of large trees and the movements of the employees and the Bobcat through the Respondent's property caused significant damage to the forested area.

11. The fifteen to twenty larger trees that were taken down sometimes fell upon and damaged or destroyed understory trees and other plants.

12. The Bobcat stripped away the organic top layer of soil, leaving bare dirt in many areas. It also damaged roots of plants by running over them and compacting the soil.

13. The Respondent did not obtain approval for the tree-cutting project from the MCPD, did not seek an exemption from approval, and did not notify the MCPD before beginning the project. He also did not obtain a sediment control permit until after the project was underway.

14. Around the beginning of October 2017, an anonymous caller told Montgomery County employees that a tree-cutting project had been going on at the Property for several days.

15. Mark Pfefferle, Chief of Development Applications and Regulatory Coordination for the MCPD, received word of the complaint and assigned Stephen Peck, Forest Conservation Inspector, to inspect the Property.

16. Inspector Peck visited the Property on October 2, 2017.

17. Inspector Peck observed large piles of cut trees and limbs awaiting removal and many stumps of trees that had been freshly cut, including white oaks, tulip poplars, American beeches, and at least one hickory, all native North American trees.

18. The hickory tree was small and some distance away from the house, posing no danger.

19. Also cut was a musclewood tree, which was small and no danger to the house.

20. Large trees that Alfaro's cut fell on and damaged a witch hazel and a mountain laurel, small understory trees.

21. Inspector Peck saw the Bobcat on the Property, in the flood plain, and observed that it had destroyed much of the forest understory in the cleared area.

22. Inspector Peck measured the total area disturbed by the tree-cutting activity as approximately 9,600 square feet.

23. Some of the trees that Alfaro's cut had rot in their heartwood.

24. A tree is not more dangerous or likely to fall only because it has rot in the heartwood.

25. On October 2, 2017, Inspector Peck issued Administrative Citation No. EPD 000332 to the Respondent. The citation levied a fine of $1,000.00 and required as remedial action that the Respondent submit for approval a Natural Resources Inventory/Forest Stand Delineation (NRI/FSD), then submit for approval and implement after approval a forest conservation plan.

26. The citation also warned the Respondent that he may be subject to an administrative civil penalty and further corrective measures.

27. As of the date of the hearing, the Respondent had not paid the fine.

28. As of the date of the hearing, the Respondent had not submitted an NRI/FSD or a forest conservation plan.

29. The Respondent's activities on the Property decreased wildlife habitat, harmed water quality, and increased the potential for erosion.

30. The Respondent has not previously violated the Montgomery County Forest Conservation Law.

31. The Respondent did not gain any economic benefit from the tree-cutting project on the Property.

DISCUSSION

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 and citation. Montgomery County Planning Board Enforcement Rule 3.11.

Section 22A-4 of the Montgomery County Forest Conservation Law sets forth the applicability of that law, as follows:

> Except as otherwise expressly provided in this Chapter, this Chapter applies to:
>
> (a) a person required by law to obtain an approval or amendment to a development plan, diagrammatic plan, project plan, floating zone plan, sketch plan, preliminary plan of subdivision, or site plan;
> (b) a person required by law to obtain special exception approval or a sediment control permit on a tract of land 40,000 square feet or larger, and who is not otherwise required to obtain an approval under subsection (a);
> (c) a person who performs any cutting or clearing, or any other land disturbing activity that would directly threaten the viability of, any champion tree, wherever located;
> (d) a government entity subject to mandatory referral on a tract of land 40,000 square feet or larger which is not exempt under subsection 22A-5 (f);
> (e) highway construction not exempt under subsections 22A-5 (c) or (p); and
> (f) a public utility not exempt under subsections 22A-5 (g), (o)(1) and (2), or (p).
>
> Any person who expects to cut, clear, or grade more than 5000 square feet of forest or any champion tree, and who believes that the cutting, clearing, or grading is exempt under Section 22A-5, 22A-6, 22A-7, or 22A-8, must notify the Planning Director in writing before performing any cutting, clearing, or grading and seek confirmation from the Director that the cutting, clearing, or grading is in fact exempt from Article II. Failing to notify the Director as required by this Section, or performing any cutting, clearing, or grading before the Director confirms that an exemption applies, is a violation of this Chapter.

> The Planning Director must notify the Department of Permitting Services if this Chapter would apply to any cutting, clearing, or grading of which the Department would otherwise not be notified.

Montgomery County, Md., Code, Sec. 22A-4.

COMCOR 22A.00.01.05B provides more details of what is required to gain permission to cut forest in Montgomery County, as follows:

> The general procedure for meeting the requirements of Chapter 22A for these plans is:
>
> (1) preparation by a qualified professional, of a natural resources inventory which includes a forest stand delineation, as described in Section 106 and in the latest versions of *Environmental Management of Development in Montgomery County* (MNCPPC) and the *Trees Technical Manual*, to be reviewed and approved by the Planning Director.
>
> (2) identification by a qualified professional, of forest and tree retention areas per subsection 22A-12(b) of the Forest Conservation Law, Sections 106 and 107, and the criteria for area to be cleared in the *Trees Technical Manual*.
>
> (3) preparation by a qualified professional, of a forest conservation plan to be approved by the Planning Board or Planning Director, as applicable, which includes:
>
> (a) lot lines, building, and proposed infrastructure, located to maximize retention areas;
>
> (b) afforestation and reforestation areas and planting plan, as required;
>
> (c) appropriate protection and maintenance measures; and
>
> (d) a timetable for construction and planting.

Section 22A-5 of the Montgomery County Code provides exemptions from the need for approval, including construction of a new dwelling house, agricultural activities, tree nurseries, commercial logging, public utilities, and government projects. None of the exemptions apply in this case.

The Respondent's lot size is more that 40,000 square feet, being 2.0008 acres, or approximately 87,155 square feet, according to Inspector Peck's testimony and the recorded plat of the Property. Inspector Peck also testified that the Respondent was required to obtain a sediment control permit because he disturbed more than 5,000 square feet of land. This testimony is corroborated by the fact that the Montgomery County Department of Permitting Services issued a Notice of Violation to the Respondent on October 5, 2017 because he had not

obtained the necessary sediment control permit or plan (MCPD Ex. 7). A few days later, the Respondent applied for a sediment control permit (MCPD Ex. 6); the Respondent also testified that he installed a Supersilt sediment control fence on the Property.

Thus, looking at Section 22A-4 of the Forest Conservation Law, the Respondent's lot size was more than 40,000 square feet and he required a sediment control permit for his tree-cutting activity. Under Section 22A-4(b), the Forest Conservation Law applies, and the Respondent should have submitted an NRI/FSD and obtained approval for a forest conservation plan before beginning work. Section 22A-11(a)(1) of the Montgomery County Code states, in pertinent part: "The forest stand delineation and forest conservation plan must be submitted and reviewed in conjunction with the review process for a development plan, floating zone plan, project plan, sketch plan, preliminary plan of subdivision, site plan, special exception, conditional use, mandatory referral, or sediment control permit under this Section."

The Respondent acknowledges that he did not submit an NRI/FSD plan or obtain approval for a forest conservation plan. The Respondent also presented no evidence or argument contending that his project fell under one of the exemptions in Section 22A-5.[6] Instead, the Respondent presented four possible defenses to the MCPD's proposed sanctions.

The first two potential defenses are easily considered and rejected. First, the Respondent presented what might be called, in other circumstances, the duress or necessity defense, i.e., that he took the action he did to prevent a greater harm. The elements of this defense are as follows:

> 1) the defendant actually believed that the duress placed [him] [her] in immediate and impending danger of death or serious bodily harm; 2) the defendant's belief was reasonable; 3) the defendant had no reasonable opportunity for escape; and 4) the defendant committed the crime because of the duress.

McMillan v. State, 428 Md. 333, 354 n.7 (2012) (quoting *Maryland Pattern Criminal Jury Instructions* 5.03). The Respondent testified that he was worried that one or more of his large

[6] Both Inspector Peck and Mr. Pfefferle testified that the Property would not have been eligible for an exemption.

trees might fall on his house or his neighbor's house. As a basis for this belief, the Respondent stated that Fidel of Alfaro's had identified a number of trees that were potentially dangerous.

Inspector Peck agreed that Alfaro's is licensed by the State as a tree expert. However, Alfaro's is also a commercial enterprise whose economic well-being depends on cutting trees for paying customers. It is in Alfaro's interest to convince those customers that trees should be cut. Other than Fidel's hearsay declaration that fifteen to twenty trees should come down, the Respondent presented no objective evidence that any necessity to cut the trees existed. The record is devoid of any indication of the size of the trees, their proximity to the houses, or their appearance and apparent state of health. To be sure, several of the stumps showed rot in the trees' heartwood, but Inspector Peck testified that heartwood rot alone does not make a tree more likely to fall than a completely healthy tree would be; whether a tree topples or stays upright depends on many factors.

The Respondent's evidence falls far short of establishing the defense of duress or necessity. The Respondent did not testify that he believed he or his neighbors were in danger of imminent death or bodily harm. If he had, his belief would have been unreasonable. The law does not recognize danger to property as a basis for the defense of necessity, and that defense does not exist in this case.

Second, the Respondent explained that, since buying the Property in 2016, Montgomery County has caused him considerable frustration, primarily in dealing with his driveway. Apparently, Kendale Branch is eroding its banks under the Respondent's driveway, causing the driveway to, as the Respondent put it, fall into the stream. The Respondent has spent time and effort approaching other county agencies, such as Environmental Resources and Permitting Services, to help him find a solution to this problem that the county would accept. He testified that his efforts have borne no fruit and that the county has been unhelpful. The Respondent stated

that the citation issued by the MCPD and its request for further sanctions seem to be a continuation of a pattern of harassment that he has suffered.

The evidence shows no connection between the Respondent's driveway and his cutting of trees that led the MCPD to take action in this case. The driveway approaches the house from the opposite direction and is not near the area that was cleared. It is also upstream from the section where the trees were cut. Obviously, the Respondent feels beset by the actions of Montgomery County as regards his Property, but this case involves only the alleged violation of the Forest Conservation Law. The larger picture of the Respondent's dealings with the county is not relevant.

The remaining two defenses raised by the Respondent are potentially more viable. Under Section 22A-4, the Forest Conservation Law does not apply to clearing less than 5,000 square feet of forest. The Respondent contends that the MCPD has not proved that his tree-cutting operation affected more than 5,000 square feet. Inspector Peck testified that he measured the total area disturbed, including where trees were cut and where the Bobcat had disturbed the ground and understory. He said he used a measuring wheel, which he has used often and finds to be an accurate device for linear measurement. Inspector Peck's technique was to measure out several polygons of cut and disturbed forest, calculate the area of each polygon, and add the areas together. The total, he stated, was approximately 9,600 square feet. Inspector Peck further testified that he did not just measure from stump to stump because that would not give a true picture of the whole area where the forest had been destroyed and disturbed.

The Respondent challenged Inspector Peck's measurement as inaccurate, but he did not provide an alternative. He did not testify that he, or anyone else, had measured a particular area and found that it contained a certain number of square feet. Nor did he raise any specific

disagreements with Inspector Peck's measurement by pointing out areas that should not have been included, or show that Inspector's Peck's measurement was erroneous in any respect.

The standard of proof in this case is by a preponderance of the evidence; that is, more likely than not. Given Inspector Peck's testimony about how he measured the area and calculated the square feet, and the lack of any competing evidence from the Respondent, I accept Inspector Peck's testimony. I find by a preponderance of the evidence that the Respondent's activities of cutting trees and disturbing the ground cover and understory encompassed approximately 9,600 square feet.

The Respondent's final defense is that the area where he cut trees was not forest. "Forest" is defined in Section 22A-3 of the Montgomery County Code as follows:

> *Forest* means a biological community dominated by trees and other woody plants (including plant communities, the understory, and forest floor) covering a land area which is 10,000 square feet or greater and at least 50 feet wide. However, minor portions of a forest stand which otherwise meet this definition may be less than 50 feet wide if they exhibit the same character and composition as the overall stand. *Forest* includes:
> (1) areas that have at least 100 live trees per acre with at least 50 percent of those trees having a 2 inch or greater diameter at 4.5 feet above the ground; and
> (2) forest areas that have been cut but not cleared.
> *Forest* does not include an orchard.

Specifically, the Respondent faults the MCPD's lack of evidence that the area in question contained 100 live trees per acre.

The MCPD's contention that the affected area was a forest rests upon several pillars – Inspector Peck's observations, knowledge, and experience; the forest conservation plan for the German School (MCPD Ex. 4); and aerial photographs of the Property (MCPD Ex. 2, 3, and 26).

Inspector Peck testified that he did not count either the live trees or the stumps on any area of the Property. Although not offered as an expert witness, he testified that he has a Master of Science degree in Forestry from the University of Maine, is certified by the International Society of Arboriculture, and has more than nine years of experience as an inspector.

Inspector Peck testified that the Property is "part of a large forest area." He pointed out that the forest conservation plan for the German School[7] shows the Property in the lower left-hand corner with the legend "Forest stand to remain." This plan was approved in 2009.

Inspector Peck also referred to MCPD Exhibits 2 and 3, aerial photographs of the Property taken in 2015 and 2017, respectively, and testified that both show that the Property meets the definition of a forest. Trees and shadows of trees are clearly visible on the Property in both photographs. According to Inspector Peck, the Property contains not only forest but also a stream buffer, defined in COMCOR 22A.00.01.03(44) as follows: "'Stream buffer' means a strip of natural vegetation contiguous with and parallel to the bank of a perennial or intermittent stream, the width of which must be determined according to the latest version of *Environmental Management of Development in Montgomery County, Maryland* (MNCPPC)." An area of forest in a stream buffer would not be eligible for an exemption under Section 22A-5 of the Code.

Concerning his specific observations, Inspector Peck testified that when he visited the Property on October 2, 2017 he saw "a forest-clearing operation underway." There were cut trees and pieces of trees lying in the driveway, and cut trees, stumps, and a Bobcat in the flood plain behind the house. The undisturbed area of the Property still constituted a forest, but in the cleared area the organic top layer of the soil had been stripped away along with understory plants and the large trees that Alfaro's had cut. Inspector Peck testified that all the photographs he took that day (MCPD Ex. 8-24) show that the Property had the characteristics of a forest, specifically, a deciduous hardwood forest in a riparian area.

Mr. Pfefferle, Inspector Peck's supervisor, testified that he is familiar with Inspector Peck's methodology in determining that a forest existed on the Property and that 9,600 square

[7] The school is adjacent to the Property.

feet had been disturbed. He stated that Inspector Peck followed standard methods as outlined in Montgomery County manuals.

The Respondent testified that, like Inspector Peck, he did not count trees or stumps to determine whether the Property contained fewer than 100 live trees per acre. He did not present any evidence that the disturbed area did not meet the definition of a forest. His argument is simply that the MCPD did not count the trees, so it has not proved that his Property contained a forest.

Section 22A-3 of the Montgomery County Code defines "forest" primarily as "a biological community dominated by trees and other woody plants (including plant communities, the understory, and forest floor) covering a land area which is 10,000 square feet or greater and at least 50 feet wide." It goes on to state that a forest "includes . . . areas that have at least 100 live trees per acre[.]" The language of this section does not state that *only* an area with at least 100 live trees per acre is a forest; it says that a forest *includes* such areas. According to this statutory language, there is no need to count the number of trees in an acre to determine whether it is a forest. If the area is dominated by trees and other woody plants, including the understory and the forest floor, it is a forest. Inspector Peck's testimony, combined with the photographic and documentary evidence, leaves no real doubt that he observed a forest on the Property.

It was this forested area that the Respondent engaged Alfaro's to clear. Since the Respondent did not seek or obtain approval for clearing the forest, he violated the Forest Conservation Law and is subject to an administrative penalty under section 22A-16 and an order for corrective actions under Section 22A-17. Section 22A-16(d) sets forth the MCPD's authority in determining the appropriate administrative civil penalty as follows:

> (1) In addition to any other remedy under this Article, a person who violates this Chapter, any regulation adopted under it, a forest conservation plan, or any associated agreement or restriction, including any easement, is liable for an administrative civil penalty imposed by the Planning Board. This administrative

civil penalty must not exceed the rate set by the County Council by law or resolution, except as provided in paragraph (3), but must not be less than the amount specified in Section 5-1608(c) of the Natural Resources Article of the Maryland Code.[8] Each day a violation is not corrected is a separate violation.

(2) In determining the amount of the administrative civil penalty, or the extent of an administrative order issued by the Planning Director under Section 22A-17, the Planning Board or Planning Director must consider:

(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.

The Board or Director may treat any forest clearing in a stream buffer, wetland, or special protection area as creating a rebuttable presumption that the clearing had an adverse impact on water quality.

(3) In addition to any amount set under paragraph (1), an administrative civil penalty imposed under this Section may also include an amount that equals the fair market value of any conservation easement needed to enforce any mitigation or restoration requirement under this Chapter in the area of the violation. The Planning Board may specify the acceptable methods of calculating the fair market value of a conservation easement by a regulation adopted under Section 22A-26(a).

(4) The Planning Board must include the reasons for imposing an administrative civil penalty in its resolution adopting the administrative order.

Montgomery County, Md., Code, Sec. 22A-16.

Mr. Pfefferle testified that factors (A) through (D) were all present, (E) and (F) were not present, and there were no other relevant factors. The MCPD presented the State Department of Assessments and Taxation's assessment of the current valuation of the Property as $831,300.00, as well as two deeds of trust on the Property for $652,000.00 and $310,000.00, as proof of the

[8] Section 5-1608 of the Natural Resources Article is part of the State's Forest Conservation Law. Paragraph (c)(1) states: "Any person found to be in noncompliance with this subtitle, regulations adopted under this subtitle, the forest conservation plan or the associated 2-year management agreement shall be assessed by the Department or local authority, the penalty of 30 cents per square foot of the area found to be in noncompliance with required forest conservation." Md. Code Ann., Nat. Res. § 5-1608 (2012).

Respondent's ability to pay.[9] The MCPD's theory is that the Respondent would not qualify for these loans without a demonstrated ability to repay them.

Mr. Pfefferle also explained the Agency's practice of setting a monetary amount for each factor present, including the minimum of thirty cents a square foot for the factors that are not present, which in this case are repeated violations and economic benefit. Cost of correction and ability to pay are considered separately, outside of the valuation. The MCPD's valuations are as follows:

(A) Willfulness of the violation - $2.00 per square foot because the violation was not accidental;
(B) Damage to tree resources - $5.00 per square foot, considering the trees that were cut and damage to the understory, forest floor, and tree roots;
(D) Adverse impact on water quality - $3.00 per square foot under the presumption of adverse impact contained in the statute;

(E) Repeated offenses - $.30 per square foot as this factor is not present; and
(F) Economic benefit - $.30 per square foot as this factor is not present.

MCPD Ex. 30.

The average of the above factors is $2.12 per square foot. Multiplying this figure by the 9,600 square feet of damaged and destroyed forest yields $20,352.00 as the MCPD's proposed civil administrative penalty for the violation. Added to this number is the $1,000.00 fine assessed in citation EPD 000332, for a total liability of $21,352.00.

From this sum, the MCPD subtracts the cost of corrective action under Section 22A-17 of the Code, which allows the county to enter an administrative order as follows:

> (a) *Administrative order.* At any time, including during an enforcement action, the Planning Director may issue an administrative order requiring the violator to take one or more of the following actions within a certain time period specified by the Planning Director:
> (1) stop the violation;
> (2) stabilize the site to comply with a reforestation plan;

[9] The MCPD requested financial records from the Respondent in discovery. Montgomery County Planning Board Enforcement Rules 2.6.1(a)(3). The Respondent did not provide the requested records.

(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.
(b) *Effectiveness of order.* An order issued under this Section is effective according to its terms, when it is served.

Montgomery County, Md., Code, Sec. 22A-17. Mr. Pfefferle testified that the MCPD wants the Respondent to restore the unlawfully cleared area, submit a forest conservation plan, and place a conservation easement on the forested area of the Property. The MCPD estimated the costs of these measures as follows:

$1,400.00 in application fees;
$4,000.00 to hire qualified professionals to prepare a forest conservation plan;
$4,400.00 to plant twenty-two trees at $200.00 per tree; and
$5,000.00 to survey the area to be placed under easement; equals
$14,800.00 total cost of correction.

MCPD Ex. 31.

The final requested civil administrative penalty is $21,352.00 minus $14,800.00, which equals $6,552.00.

Having considered the evidence, I find that the MCPD's recommendation is reasonable. The Respondent's action was certainly willful, in the sense that it was not accidental, having been done without seeking approval from any county agency. The clearing operation removed fifteen to twenty canopy trees, damaged other trees by causing larger trees to fall on them or the Bobcat crushing their roots, and removed the forest understory and organic soil. Water quality is presumed to be degraded under Section 22A-17, and the photographs of the Bobcat and tree limbs in Kendale Branch confirm this.

Under Chapter 3.14.3(c) of the Montgomery County Planning Board Enforcement Rules, if I find that trees have been cut in violation of the Forest Conservation Law, I "must recommend corrective action." Having found that the Respondent violated the Forest Conservation Law by clearing forest on the Property, I shall recommend corrective action as recommended by the MCPD.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Respondent violated the Forest Conservation Law by clearing, cutting, and otherwise destroying approximately 9,600 square feet of forest at 9323 Kendale Road, Potomac, Maryland. Montgomery County, Md., Code Chapter 22A-4 and 11.

I further conclude as a matter of law that the Respondent failed to comply with Administrative Citation EPD 000332, issued on October 2, 2017. Montgomery County, Md., Code Chapter 22A-17.

I further conclude that as a result of the violations the Respondent is subject to an administrative civil penalty in the amount of $6,552.00. Montgomery County, Md., Code Chapter 22A-16(d).

I further conclude that as a result of the violations the Respondent must undertake corrective action as directed by the MCPD, including restoration of the damaged area, submission of a forest conservation plan, and placing a conservation easement on the forested and stream buffer areas of the Property. Montgomery County, Md., Code Chapter 22A-17; Montgomery County Planning Board Enforcement Rules, Chapter 3.14.3(c)

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 the Forest Conservation Law;

ORDER that the Respondent shall pay an administrative civil penalty of $6,552.00;

ORDER that the Respondent shall take corrective action including restoration of the damaged area, submission of a forest conservation plan, and placing a conservation easement on the forested and stream buffer areas of his Property; 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.

March 5, 2018
Date Decision Issued

Richard O'Connor
Administrative Law Judge

ROC/sw
#172388

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.

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