

MONTGOMERY COUNTY PLANNING
DEPARTMENT

* BEFORE WAYNE A. BROOKS,
* AN ADMINISTRATIVE LAW JUDGE

THE MARYLAND NATIONAL
CAPITAL PARK AND PLANNING
COMMISSION

* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS

v.

OLUSEYI AND OYINLOLA FASHINA,

* VIOLATION OF FOREST CONSERVATION
* PLAN # 120020730

RESPONDENTS

* * * * *

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 Oluseyi and Oyinlola Fashina (Respondents). The notice alleged that the Respondents violated the Montgomery County Forest Conservation Law¹ as a result of continual grass cutting in a Category I Conservation Easement, and failing to pay an Administrative Citation and complete remedial action as directed.

I held a hearing on February 1, 2011 at the MNCPPC offices located at 8787 Georgia Avenue, Silver Spring, Maryland 20910. Christina Sorrento, Office of General Counsel, MNCPPC, represented the Agency. Mr. Fashina represented his and his wife's interest.

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 Respondents violate the Montgomery County Forest Conservation Law?
2. If the Respondents violated the Montgomery County Forest Conservation Law, should they 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 Respondents, 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 12804 Timber View Court, Silver Spring, Maryland 20904, dated January 16, 2004, filed April 9, 2004;
- MCPD#7 House Location Survey, dated February 6, 2004;

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

MCPD#9 Administrative Citation signed by Josh Kaye, MNCPPC, to Respondents, dated September 14, 2010;

MCPD#10 Photograph showing planted trees and cut grass in conservation area in yard of 12804 Timber View Court, taken 6/3/10;

MCPD#11 Photograph showing planted trees in conservation area in yard of 12804 Timber View Court, taken 6/3/10;

MCPD#12 Photograph showing cut grass in conservation area in yard of 12804 Timber View Court, taken 6/3/10;

MCPD#13 not submitted

MCPD#14 Geographic Information System (GIS) aerial image of 12804 Timber View Court, taken in 2008.

I admitted the following exhibit on behalf of the Respondents:

Resp. Ex. # 1 Aerial image of Timber View Court, taken in 2002.

Testimony

Joshua (Josh) 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.

Respondent Oluseyi Fashina (Respondent) testified on his own behalf.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. The Respondents are the owners of Lot 45 in Block 1, located in the subdivision known as Victoria Forest, Springwood, in Montgomery County, Maryland. It is also known as 12804 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 be reforested and marked with a forest conservation fence and signs.

8. The conservation easement area on the Property covers the rear portion of the lot up to the surrounding property lines of the neighboring lots.
9. On January 16, 2004, the Yetleys sold the Property to the Respondents. 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 April 9, 2004.
10. At the time of transfer in January 2004, the Property was unimproved land; no house existed at the time.
11. Sometime after purchasing the Property, the Respondents began constructing a house on it. A surveyor's certificate dated March 14, 2004 shows the position of the house under construction on the Property and the conservation easement area.
12. In December 2009, Josh Kaye, Forest Conservation Inspector, was investigating a complaint regarding another property and observed encroachments into the conservation easement area on the Property.
13. In December 2009, almost the entire easement area consisted of cut grass. The encroachment into the conservation easement area cover 3,975 square feet of the 7,600 square feet of conservation easement area on the Property, which is approximately a 52% encroachment on the easement area.
14. On June 1, 2010, the MCPD sent the Respondents a Notice of Violation (NOV).
15. The NOV cited the Respondents for failing to comply with the approved forest conservation plan and easement agreement. The Respondents were directed to stop continual grass cutting, and/or remove grass, 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 NOV 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 Respondents were to call the MCPD inspector when the corrective action was complete.

16. On or about July 7, 2010, Mr. Kaye met with the Respondents and explained what needed to be done to correct the encroachments into the easement.
17. The Respondents did not correct the encroachments into the easement area after meeting with Mr. Kaye.
18. On September 14, 2010, Mr. Kaye delivered an Administrative Citation to the Respondents for failure to complete the remedial actions described in the NOV. To correct the violation, the Respondents were to cease continual cutting of the grass, and/or remove the grass and replace it with wood chips. In addition, two two-inch caliper shade trees and one one-inch caliper deciduous tree were to be planted within the easement. The Administrative Citation also fined the Respondents \$250 and granted the Respondents until October 15, 2010 to complete the remedial action.
19. The Respondents did not correct the encroachments into the easement by October 15, 2010.
20. As of the date of the hearing in this matter, the Respondents have not completed the corrective actions.

DISCUSSION

Violation of the Forest Conservation Law

The Agency has the burden of proof to establish by a preponderance of the evidence that the Respondents 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 Respondents in this case purchased the unimproved land from the Yetleys on January 16, 2004. Thus, the Property was subject to the Category I Conservation Easement Agreement prior to the Respondents' 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. In December 2009, Mr. Kaye observed the following encroachments into the conservation easement area on the Property almost the entire easement area consisted of cut grass. Mr. Kaye observed those same encroachments on June 1, 2010. Mr. Kaye testified that the encroachment into the conservation easement area cover approximately 4,000 square feet of the 7,600 square feet of conservation easement area on the Property, which is a 52% encroachment on the easement area.

The Respondent testified that he was surprised about the NOV because he was led to believe by the builder that the silt fence defined the easement area and the limits of disturbance. The Respondent contended that the MCPD was aware of the disturbance in the easement area prior to him and his wife taking ownership, yet MCPD did nothing to correct the violations of the builder. The Respondent went further to argue, in essence, that it was patently unfair for MCPD

to now seek an administrative civil penalty against them, when it did nothing against the builder. Finally, the Respondent testified that he continued to cut the grass after notification of the violation into the easement area because he believed that there was a genuine health concern for his children. The Respondent indicated that he feared ticks would populate more in the uncut area, and potentially impact his young children.

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 January 16, 2004 deed by which the Yetleys sold the Property to the Respondents 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, or the builder, not Montgomery County or any government entity, to notify the Respondents 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. A proper title search would have revealed the easement. Further, the Respondents should have noticed the easement and its location during the construction of their home. A surveyor's certificate dated February 6, 2004 shows the position of their house on the Property and the location of the conservation easement area. If there was a concern about the scope of the easement, the surveyor's location survey should have triggered a response from the Respondents at the time it was created.

It is unlikely (though possible) that the Respondents never looked at the surveyor's location survey, the record plat, or any other document that showed the location of the house

under construction and its relation to the location of the easement; instead simply relying upon the alleged description by the builder. Thus, the Respondents, as well as their 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 Respondents' purchase of the Property. Furthermore, it matters not whether MCPD pursued any action against the builder. Mr. Kaye testified that the present action against the Respondents only covered the time period beginning with date of the NOV and going forward. The Respondents have not presented any evidence to show that the easement does not exist or that its location is different than that identified in MCPD's exhibits.

In any event, the Respondents had actual knowledge of the easement on their property when they were issued the NOV on June 1, 2010. In addition, Mr. Kaye met with the Respondents on July 7, 2010 and explained what needed to be done to correct the encroachments into the easement. The Respondents did not take the corrective action specified in the NOV by the compliance date of June 30, 2010. On September 14, 2010, Mr. Kaye issued to the Respondents an Administrative Citation assessing a \$250.00 fine and directing them to take remedial action by October 15, 2010; however, they failed to do so. Whether the Respondents initially created the encroachments into the easement is irrelevant. Even if the Respondents did not personally install the grass within the easement, they are still responsible, as the owners of the Property, for any 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 Respondents had the opportunity to take corrective action and comply with the NOV from June 1, 2010 to June 30, 2010 without any

administrative penalty. As of the date of the hearing, the Respondents had stopped cutting the grass beginning that fall. 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 and that encroachments into the easement have existed since at least June 1, 2010. Therefore, I conclude the Respondents committed the violations charged in the November 19, 2010 Notice of Hearing.

Remedies

Based on the Respondents' violations, the Agency is seeking both corrective actions, Montgomery County, Md., Code Chapter 22A-17, 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 Respondents have a professional survey conducted at their expense showing the boundaries of the Category I Conservation Easement on the Property. Two, the Respondents

install 6x6 corner posts and signage marking the easement boundaries. Three, the Respondents remove the grass in the easement and replace it with wood mulch. Four, the Respondents plant two two-inch caliper native trees and one one-inch caliper deciduous tree in the easement. Five, payment of the outstanding administrative penalty.

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 be reforested 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 reforestation plan. Removing the grass areas would stop the continuing violation and comply with the reforestation plan. Installing mulch and planting two two-inch caliper native trees and one one-inch caliper deciduous tree would facilitate reforesting the area that the Respondents have unlawfully kept clear by continual mowing. Mr. Pfefferle testified that continual mowing prevents natural forest regeneration. 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 Respondents. As of the date of the hearing, the Respondents had not complied with the Administrative Citation; thus, they 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 Respondents were issued the Notice of Violation in June 2010 and told to stop mowing. The Respondents chose instead to ignore those directives as to grass cutting because they believed that it would be a health risk. However, the feared health risk is no greater if the grass is cut or not. The Respondents' actions deliberately disregarded the law. Regarding damage or injury to tree resources, Mr. Pfefferle explained that continual mowing prevented natural forest regeneration. 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 Respondents' continual mowing but no other recurrent violations. Mr. Pfefferle did not provide any specific testimony regarding the Respondents' ability to pay, or the other factors.

After explaining his consideration of these factors, Mr. Pfefferle recommended a penalty of \$0.32 per square foot, which includes a credit for the cost of corrective action. Mr. Pfefferle testified that 3,975 square feet were impacted; thus, he recommended a total penalty of \$1,232.24. The Respondents 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 Respondents 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 Respondents are subject to an administrative civil penalty in the amount of \$1,232.24. Montgomery County, Md., Code Chapter 22A-16(d).

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 Respondents 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 Respondents are in violation of a Category I Conservation Easement;


ORDER that the Respondents pay an administrative civil penalty of \$1,232.24;

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

ORDER that the Respondents take corrective actions, including having a professional survey conducted at their 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 two two-inch caliper native trees and one one-inch caliper deciduous tree in the easement; 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 1, 2011
Date Decision Mailed



Wayne A. Brooks
Administrative Law Judge

WAB/kkc
#120445

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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