

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

PARTIAL [FINAL 13 MINUTES]

TRANSCRIPT OF

ENFORCEMENT HEARING:

MONTGOMERY COUNTY PLANNING DEPARTMENT V. CHRISTOPHER PIRTLE

BEFORE THE

MONTGOMERY COUNTY PLANNING BOARD

MARCH 10, 2011

COMMISSIONERS PRESENT:

FRANCOISE M. CARRIER, CHAIR

MARYE WELLS-HARLEY, VICE CHAIR

JOE ALFANDRE

NORMAN DREYFUSS

COMMISSIONERS ABSENT:

AMY PRESLEY

1 MS. CHRISTINA SORRENTO, M-NCPPC LEGAL COUNSEL
2 REPRESENTING THE PLANNING DEPARTMENT, THE PLAINTIFF: I do
3 have to just say that the whole mitigation that the, that Mr.
4 Pirtle has brought up of converting it to a Category II, it
5 was in front of the Hearing Examiner, but the Hearing
6 Examiner recommended Category I. So, in a way,

7 CHAIR FRANÇOISE M. CARRIER: But the Hearing Examiner
8 didn't know that there was a neighbor directly behind

9 MS. SORRENTO: That's correct.

10 CHAIR CARRIER: who argues that he's suffering from
11 stormwater damage. I mean, we have no way to assess that
12 information. That is a, that is an adjudicatory function that
13 we can't perform, to decide whether it's true, you know,
14 whether

15 MS. SORRENTO: That's correct.

16 CHAIR CARRIER: engineering-wise that's actually what's
17 happening

18 MS. SUE CARTER, ATTORNEY REPRESENTING THE RESPONDENT,
19 MR. CHRISTOPHER PIRTLE: And may I just suggest that, I don't
20 know, but it would seem to me that if we're going to be back
21 here, if the Board were inclined to do what we've asked and
22 to allow us to come back and to amend the plan, perhaps that
23 issue could be addressed as part of the consideration.

24 CHAIR CARRIER: You know, if the applicant would, ah, you

1 know, that certainly

2 COMMISSIONER NORMAN DREYFUSS: That was where I was
3 going.

4 CHAIR CARRIER: that is the obvious way to go about this,
5 is to figure out a way for you to do something that would
6 satisfy this problem. I don't know if you will succeed in
7 that endeavor, and in a violation case, we don't want to go
8 on indefinitely waiting to find out.

9 COMMISSIONER DREYFUSS: What are the, ah, Ms. Sorrento,
10 if we follow your recommendation, does this Board see
11 anything again or does the, ah, who gets to approve the plan
12 that is submitted by Mr. Pirtle to, ah, go to a Category II?

13 MS. SORRENTO: The Planning Board does. The Planning
14 Board approves all

15 COMMISSIONER DREYFUSS: So we will see a plan when it
16 comes back.

17 MS. SORRENTO: Yes, the Planning Board approves all plans
18 that change easements.

19 COMMISSIONER DREYFUSS: Okay. Okay.

20 MS. CARTER: And if I might, and this is, again, we're
21 going sort of beyond, to me, the record, but to the, um, it's
22 been pointed out to me that this gentleman's property only,
23 um, a portion of the rear yard here, it's really a little bit
24 further. And you know, again, this is getting all into the

1 testimony

2 CHAIR CARRIER: My feeling is if the applicant is willing
3 to offer to undertake to try and find a way to satisfy Mr.
4 Wiestma as part of a plan, I think that would be fine. And we
5 can allow him to do that, right, Mr. Lieb?

6 COMMISSIONER DREYFUSS: Voluntarily.

7 CHAIR CARRIER: But if

8 MR. DAVID LIEB, LEGAL COUNSEL TO THE BOARD: Yes. I have
9 concerns if that's unable to happen we're going to be back
10 here [inaudible] in a potentially awkward position.

11 CHAIR CARRIER: If that doesn't happen then we have to
12 decide whether to send it back to the Hearing Examiner to
13 hear evidence on remedy. We have the authority to remand it,
14 don't we? Ms. Sorrento?

15 MR. LIEB: Yes. You do have the authority to remand it.

16 MS. SORRENTO: The Planning Department, though, asks
17 strictly for a decision on whether this should be, whether
18 Mr. Pirtle should be allowed to submit for a Category II, for
19 an amendment to convert his Category I easement to a Category
20 II now. Otherwise, the other option is just to stick with
21 what the Hearing Examiner originally recommended and doing
22 those corrective actions.

23 COMMISSIONER DREYFUSS: I would make a motion to follow
24 the recommendation of, ah, the revised recommendation

1 CHAIR CARRIER: It's actually the recommendation of the
2 Hearing Examiner.

3 COMMISSIONER DREYFUSS: No, it was the recommendation of
4 the staff as to mitigation, not the Hearing Examiner. The
5 Hearing Examiner recommended that it goes back to Category I.

6 CHAIR CARRIER: Well, we have to start with the Hearing
7 Examiner's recommendation, with a finding of violation.

8 COMMISSIONER DREYFUSS: Okay. We find there was a
9 violation.

10 CHAIR CARRIER: And then we [inaudible] penalty.

11 COMMISSIONER DREYFUSS: I agree with the penalty.

12 CHAIR CARRIER: The penalty that the Hearing Examiner

13 COMMISSIONER DREYFUSS: The Hearing Examiner set a dollar
14 amount. And I would recommend that the staff, or, is it staff
15 or Planning Board, or Department of Environment, who is
16 making the recommendation?

17 CHAIR CARRIER: What is it that you're trying to

18 VICE CHAIR MARYE WELLS-HARLEY: [simultaneous speaking-
19 inaudible]

20 COMMISSIONER DREYFUSS: I'm trying to accept the revised

21 MR. LIEB: The staff has recommended that the Board order
22 the respondent to file within 60 days an amended preliminary
23 and forest conservation plan necessary to convert the
24 Category I easement to a Category II.

1 COMMISSIONER DREYFUSS: Right. And pay the fine. All the
2 recommendations that Ms. Sorrento brought out.

3 UNIDENTIFIED VOICE: Except. Except

4 COMMISSIONER DREYFUSS: All.

5 UNIDENTIFIED VOICE: Okay.

6 COMMISSIONER DREYFUSS: And then they have to come back
7 here with a plan for approval for a new preliminary plan and
8 a record plat and, so that [simultaneous speaking-inaudible]
9 yeah the payments go into the [simultaneous speaking-
10 inaudible]

11 CHAIR CARRIER: Does your motion include anything
12 regarding Mr. Wiestma's allegations?

13 COMMISSIONER DREYFUSS: No.

14 CHAIR CARRIER: You would just ignore those?

15 COMMISSIONER DREYFUSS: Well, I would hope that the
16 applicant doesn't ignore them, but I think it was clear that
17 it's not part of the record and we can't add them.

18 CHAIR CARRIER: I would be inclined to remand it for
19 another hearing, personally.

20 UNIDENTIFIED VOICE: May I ask a question?

21 CHAIR CARRIER: I mean, unless we're going to allow the
22 applicant the chance to work something out. I just think we
23 can't, how can we craft an appropriate remedy? Unless
24 somebody's going to tell me that this is just beyond the

1 purposes of the forest conservation law

2 [simultaneous speaking-inaudible]

3 MS. SORRENTO: I would argue that this is beyond the
4 violation specifically for Mr. Pirtle's property and putting
5 a swing set in a Category I conservation easement. And I
6 would argue that

7 CHAIR CARRIER: Well, ah, I'm sorry, go ahead and finish.

8 MS. SORRENTO: I would argue that this is outside of the
9 scope of the purposes of what this violation hearing was
10 brought forth.

11 CHAIR CARRIER: But isn't the forest conservation law
12 partly to retain trees and forest because it has benefits for
13 surrounding properties. Just like the allegations here, that
14 when you take out forest and understory, it changes things
15 like stormwater flow. So it seems to me that it is relevant
16 to deciding whether in this individual case, it is
17 appropriate and within the purposes of the forest
18 conservation law, to allow a conversion to Category II. This
19 may be a circumstance where the topography and so forth makes
20 it inappropriate and, this particular property owner should
21 be required to do what the Planning Department originally
22 asked for, which was to plant some bushes, and plant some
23 ground cover, and take out the swing set. That was not what I
24 expected at the beginning of this, but

1 MR. LIEB: Maybe I can, ah, sorry, maybe I can suggest a
2 solution. The Board has before it the issue of how to act,
3 how to, um, what to do in response to the Hearing Examiner's
4 recommended order, um, as in the modification of the Category
5 I to Category II that's been proposed here, that contemplates
6 this matter coming back before the Board.

7 CHAIR CARRIER: Right.

8 MR. LIEB: When a forest conservation plan is put before
9 the Board, that itself, I think, is something that is subject
10 to public testimony about the adequacy of that plan. And so
11 there, I think, there would be an opportunity for this
12 gentleman, he'll have to be a little vigilant and make sure
13 he's aware that that plan is coming, but for him to come back
14 and testify about the adequacy of that plan in the context of
15 a plan review. And that might factor into whether the Board
16 decides to accept the proposed forest conservation plan or
17 not.

18 UNIDENTIFIED VOICE: Will that plan contain grading
19 lines?

20 MR. LIEB: I think typically a forest conservation plan
21 will contain

22 CHAIR CARRIER: No? Mr. Pfefferle?

23 UNIDENTIFIED VOICE: Will it show water flow?

24 MR. LIEB: a natural resources inventory that would show,

1 I think, some topography.

2 UNIDENTIFIED VOICE: Yeah, topography. The grading lines.

3

4 MR. MARK PFEFFERLE, ENVIRONMENTAL PLANNING STAFF: For
5 the record, Mark Pfefferle. That plan would show existing
6 topography; if there were any changes required that he's
7 supposed to do, it would show new contours. If there are no
8 changes, it would show existing contours.

9 UNIDENTIFIED VOICE: Okay. Fine.

10 VICE CHAIR WELLS-HARLEY: So, would there be any way at
11 that juncture, that we would have, or information that was
12 definitive, to determine that the actions of Mr. Pirtle was,
13 in fact, the cause

14 MS. CARTER: Right. And that's what, I guess, I wanted to
15 say is that, I mean, Mr. Pirtle, who's anxious to speak, is
16 telling me that whatever problem there may be pre-existed
17 even this Category I easement. So at that time, I think, we
18 would have to address whether or not we, indeed, agreed that
19 this was even a factor in whatever issues this gentlemen was
20 experiencing. We'd have to address that, at the hearing.

21 VICE CHAIR WELLS-HARLEY: Is that something that we would
22 take a look at when we were determining whether it was
23 appropriate to change it to a Category II?

24 MR. PFEFFERLE: Yes, we would take it into consideration.

1 I would take into consideration a number of different things,
2 and that is one of them. I'd also take into consideration
3 what was the purpose of putting the easement there to begin
4 with.

5 VICE CHAIR WELLS-HARLEY: Okay.

6 COMMISSIONER DREYFUSS: Can your review include
7 recommendations for ground cover for an area for reasons of
8 controlling stormwater flow, or absorption of the soil? Is
9 that some comment you make in a Category II or not?

10 MR. PFEFFERLE: No. Typically we don't make that

11 COMMISSIONER DREYFUSS: Can an applicant proffer that?

12 MR. PFEFFERLE: An applicant could, yes.

13 CHAIR CARRIER: Well it sounds like we would have some
14 leeway when we review a forest conservation plan to consider
15 more than we can appropriately consider today.

16 MS. CARTER: To take into account any [inaudible]
17 factual, because I think Mr. Pirtle would like the
18 opportunity at that point, then, to respond, because it is
19 his sense that whatever waters, any water problem is not,
20 it's unrelated to his rear yard.

21 MR. LIEB: There would be an opportunity for

22 MS. CARTER: At that time.

23 MR. LIEB: At that time, Mr. Pirtle would be in the
24 position of an applicant seeking to amend the forest

1 conservation plan.

2 MS. CARTER: Okay. So he would have the opportunity to
3 provide

4 MR. LIEB: So there would be an opportunity to present
5 information about that at that time, yes. So.

6 MS. CARTER: Okay.

7 MS. SORRENTO: If I may, I think I could offer something
8 that might be a bit of a solution here. If Mr. Pirtle comes
9 forward with his plan, and the Planning Board finds that
10 conversion from a Category I to a Category II is not
11 appropriate, then at that time, and maybe this can be written
12 into the Planning Board's resolution from this enforcement
13 case, at that time the Hearing Examiner's original
14 recommendation of removing the swing set, six by six timbers,
15 planting of native shrubs, and putting wildflower mix down,
16 that that would then be required.

17 CHAIR CARRIER: I'm not sure that we want to decide right
18 now that that is the inevitable outcome, but that certainly
19 seems

20 MR. LIEB: As a practical matter, the Category I easement
21 is going to remain here until there's an amended easement.

22 CHAIR CARRIER: I mean, if we reject the plan that Mr.
23 Pirtle comes up with, then the obvious alternative is to go
24 to the Hearing Examiner's recommendation.

1 MS. SORRENTO: Well, okay. As long as the Board is
2 comfortable with that, just because right now we have a swing
3 set in a Category I conservation easement, and if they submit
4 for a plan now, it's going to remain in a Category I
5 conservation easement until that's resolved. So, I don't know
6 if it's such a natural assumption on Mr. Pirtle's part that
7 if his plan doesn't go through, that he would have to go and
8 do those things.

9 MS. CARTER: I think we understood that, that this would
10 enable us to have an opportunity to attempt to amend that
11 plan without him having to go out, tear down the swing set,
12 put back, tear out the grass, put everything back, then apply
13 and then come back and undo it all if we were successful. We
14 suggested this with the understanding that there would be
15 enforcement measures consistent with what the Hearing
16 Examiner had recommended if he's unsuccessful.

17 MS. SORRENTO: I just ask that the Planning Board's
18 resolution reflect that, so that it ties this enforcement
19 case up, completely, and that there's no need to remand back
20 to a Hearing Examiner.

21 CHAIR CARRIER: Okay. Well, Mr. Dreyfuss, would your
22 motion include the idea that if the plan is not approved, if
23 we do not approve a plan within six months of its submission,
24 then the ah, we will revert to the remedy recommended by the

1 Hearing Examiner, which was to return the property to its
2 original condition

3 VICE CHAIR WELLS-HARLEY: And maintain the Category I

4 CHAIR CARRIER: And maintain the Category I easement.

5 COMMISSIONER DREYFUSS: Yeah. I was just going to say,
6 that doesn't automatically happen if we don't, if the time
7 frame that you've set

8 CHAIR CARRIER: I think you have to say it.

9 VICE CHAIR WELLS-HARLEY: Yeah.

10 MR. LIEB: I think there's a good argument that it ought
11 to automatically happen that way, but I think Ms. Sorrento
12 has helpfully, ah, suggested that it just be tied up in the
13 language of the resolution so there isn't any question

14 COMMISSIONER DREYFUSS: Okay. I agree with that language.
15 And then one other thing that Mr. Alfandre reminded me of,
16 that the applicant asked for 60 days instead of 30 days,
17 which is, I think okay with me

18 CHAIR CARRIER: To pay the penalty?

19 COMMISSIONER DREYFUSS: Yeah to pay the penalty. It's
20 okay with me, so I'll modify my motion, and also add Ms.
21 Sorrento's penalty phase, or, end result if it doesn't work.
22 Whatever you want to call it.

23 VICE CHAIR WELLS-HARLEY: I would support that.

24 CHAIR CARRIER: Is that a second?

1 VICE CHAIR WELLS-HARLEY: Second.

2 CHAIR CARRIER: Is there any further discussion? Hearing
3 none, all those in favor, say Aye.

4 UNANIMOUS: Aye.

5 CHAIR CARRIER: Any opposed? The motion carries. So the
6 upshot of this is that the applicant has to submit a plan
7 within 60 days and then he has six months to get it approved.

8 UNIDENTIFIED VOICE: Okay.

9 CHAIR CARRIER: And I'm sure that you will hear from the
10 applicant in that time frame.

11 MR. PFEFFERLE: Yes, you would be notified as an
12 adjoining or confronting property owner.

13 CHAIR CARRIER: Good.

14

15

16 CERTIFICATION

17 This is to certify that the attached proceedings before
18 the Maryland-National Capital Park and Planning Commission,
19 Montgomery County Planning Board, in the matter of
20 Enforcement Hearing; Montgomery County Planning Department
21 v. Christopher Pirtle, held in the auditorium at 8787
22 Georgia Avenue, Silver Spring, Maryland, on Thursday, March
23 10, 2011, were held as herein appears, and that this is a
24 transcript of the final 13 minutes of the hearing, taken
from the recording.



Ellyn Dye
Technical Writer