

**ATTACHMENT D**

MONTGOMERY COUNTY PLANNING DEPARTMENT

THE MARYLAND NATIONAL CAPITAL PARK AND PLANNING COMMISSION

v.

CHRISTOPHER PIRTLE,

RESPONDENT

- \* BEFORE STUART G. BRESLOW,
- \* AN ADMINISTRATIVE LAW JUDGE
- \* OF THE MARYLAND OFFICE
- \* OF ADMINISTRATIVE HEARINGS
- \* VIOLATION OF FOREST CONSERVATION
- \* PLAN #119980960

\* \* \* \* \*

**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 November 16, 2010, the Montgomery County Planning Department (MCPD) of the Maryland National Capital Park and Planning Commission (MNCPPC or Agency) issued a Notice of Hearing (Notice) to Chris Pirtle (Respondent) alleging that the Respondent violated the Montgomery County Forest Conservation Law<sup>1</sup> as a result of removing the understory in a Category I Conservation Easement; cutting grass in a Category I Conservation Easement and installing a swing set and six foot by six foot timbers edging in a Category I Conservation Easement that is located on property owned by the Respondent and his wife.<sup>2</sup>

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<sup>1</sup> Code of Montgomery County Regulations (COMCOR), Chapter 22A.  
<sup>2</sup> An identical Notice of Violation was sent to the Respondent on October 27, 2010, but was returned to the MCPD as unclaimed. The case was previously postponed on November 3, 2010 at the request of the Respondent. The Respondent was personally served with the Notice by Joshua Kaye, Inspector, MCPD on November 16, 2010.

I held a hearing on December 8, 2010 at the MNCPPC offices located at 8787 Georgia Avenue, Silver Spring, Maryland 20910. Andree Green, Associate General Counsel, MNCPPC, represented the Agency. The Respondent was present and represented himself.

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 17, 2010) and COMCOR 22A-10.

### **ISSUES**

1. Did the Respondent violated COMCOR 22A?
2. If the Respondent violated COMCOR 22A, should he be assessed an administrative penalty; and if so, in what amount?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits on behalf of the Agency:

PD #1 Letter from Mark Pfefferie, Acting Chief of Environmental Planning, to the Respondent, dated October 5, 2010, attaching the Notice and the Agency's Enforcement Rules

PD#2 Notice, dated October 27, 2010

PD#3 Notice, dated November 16, 2010

PD#4 Montgomery County Planning Board Opinion, dated November 16, 1999

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

PD#6 Final Forest Conservation Plan plat, Kaufman Property

PD#7 Plan of the Kaufman Property

PD#8 Record Plat depicting the lot owned by the Respondent, dated January 12, 2000

PD#9 Letter from Mike Bingley, Project Manager, to the Respondent and his wife, dated March 7, 2002

PD#10 Letter from Grant F. DeMeritte, Secretary/Treasurer, Sherbrooke Homeowners Association, Inc. to the Agency, dated June 16, 2003

PD#11 Notice of Violation issued to Respondent, dated February 19, 2010

PD#12 Administrative Citation issued to Respondent, dated May 26, 2010

PD#13 Three black and white photographs, August 2008 investigation

PD#14 Three black and white photographs, November 2010 investigation

The Respondent did not offer any exhibits on his behalf.

#### Testimony

Joshua Kaye, Inspector, MCPD and Mark Pfefferle, Forest Conservation Program Manager, Supervisor of Inspectors and Acting Chief of Environmental Planning testified on behalf of the Agency.

The Respondent testified on his own behalf and did not present any additional witnesses.<sup>3</sup>

#### **FINDINGS OF FACT**

I find the following by a preponderance of the evidence:

1. The Respondent is the owner of Lot 11A, located on the Kaufman property plan.

It is also known as 1020 Heartfield Drive, Silver Spring, Maryland (Property).

2. Prior to the development of the Kaufman property, the Montgomery County Planning Board held a public hearing to consider the areas to remain forested and the areas that were to be cleared for development. The final forest conservation plan was approved for the

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<sup>3</sup> The Respondent offered the testimony of Susan Marney, an owner of a lot in the Sherbrooke subdivision; however, I ruled, after objection by the Agency, that her proffered testimony was not relevant to the issues in this case.

Kaufman property on November 16, 1999.

3. The subdivision record plat for the Sherbrooke development, which includes part of the Kaufman property, also includes the Property. It was approved and recorded among the land records of Montgomery County at Liber 17693, Folio 424. (PD#8).

4. The record plat for the Sherbrooke development identifies the Category I Conservation Easements for the Property and others in the subdivision. It also references the agreement establishing Category I Conservation easements, which are found among the land records of Montgomery County at Liber 13178, folio 412.

5. The Respondent purchased the Property on October 12, 2001.

6. On March 7, 2002, the developer of the Sherbrooke property informed the Respondent and his wife that certain areas in the development were protected from clearing and other activities due to a conservation easement. Along with the letter, the developer enclosed a copy of the conservation easement and directed the Respondent to the MNCPPC office to review the map showing the easement locations. The Respondent received the copy of the conservation easement.

7. The Category I Conservation Easement covers 3,750 square feet of the Property behind the dwelling.

8. The Category I Conservation Easement extends from the property line at the rear portion of the Property to the Respondent's dwelling.

9. The Respondent graded, seeded and removed understory in the rear of the Property.

10. Of the 3,750 square feet of property affected by the Category I Conservation Easement, 3,250 square feet of the Property was affected by grading, seeding and removal of

understory by the Respondent. No trees were removed by the Respondent.

11. On June 16, 2003, the Secretary/Treasurer of Sherbrooke Homeowners Association, Inc., requested that the MNCPPC change the Conservation Easement that exists on the Sherbrooke property from a Category I Easement to a Category II Easement.

12. On July 17, 2003, the Environmental Planner of the Countywide Planning Division of the MNCPPC responded with instructions on the procedures for changing the easement designation and further explained that the staff would not support the requested change from a Category I Conservation Easement to a Category II Conservation Easement.

13. The Respondent supports changing the classification of the conservation easement from a Category I to a Category II, but has not initiated any action to apply for a change in easement designation.

14. On August 8, 2008, in response to a complaint, Joshua Kaye, MCPD Inspector, visited the Property.

15. Mr. Kaye observed that understory removal and grading had occurred on the portion of the Property located in the Category I Conservation Easement. In addition, Mr. Kaye observed six foot by six foot timbers in the same area that were going to be used as a boundary for a swing set.

16. Mr. Kaye advised the Respondent that a swing set was not permitted in a Category I Conservation Easement and was warned not to install the swing set.

17. On February 17, 2010, Mr. Kaye conducted a follow-up visit to the Property and discovered that the swing set was installed, despite his warning to the Respondent on August 8, 2008. The Respondent was issued a notice of violation as a result of this inspection. He was required to remediate the situation by March 31, 2010 but failed to do so.

18. The Respondent was issued an Administrative Citation for violating the Category I Conservation Easement on May 26, 2010 for failing to comply with the notice of violation remedial requirements.

**DISCUSSION**

The Agency has the burden of proof to establish by a preponderance of the evidence that the Respondent has committed the violation charged in the Notice of Hearing that was hand delivered to the Respondent on November 16, 2010. (PD#3). Montgomery County Planning Board Enforcement Rules, 3.11.

The Montgomery County Council finds that trees and forest cover provide a valuable and important resource for the county. COMCOR 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) COMCOR 22A-2(a).

On December 30, 1994, a Category I Conservation Easement was established by agreement which was intended, in accordance with the Forest Conservation Plan, to protect and preserve natural forest cover. (PD#5). The Category I Conservation Easement runs with the land. The subject Property falls under the Category I Conservation Easement. The Category I

Conservation Easement prohibits construction, grading and erection of play equipment. (PD#5, page 3, paragraphs 6a and b). The Respondent does not dispute that he graded and seeded an area behind the dwelling of his Property that fell within the boundary of the Category I Conservation Easement. He had prior notice that the rear portion of his Property was subject to the Category I Conservation Easement, and as a result, was prohibited from grading and removing the understory as well as building a swing set. He had an opportunity to carefully review the maps showing the easement boundaries prior to settling on his house.

Although he was fully aware prior to grading the Category I Conservation Easement on his Property and making preparations for a swing set that he would be in violation of the Category I Conservation Easement, he proceeded with the work to grade and seed his backyard and made preparations for building a swing set by placing a six foot by six foot timber boundary where the swing set was to be installed.

Not only did he knowingly violate the terms of the Category I Conservation Easement by taking these actions, he further violated the Category I Conservation Easement by installing a swing set after being warned not to install it by the MCPD Inspector. When questioned at the hearing on why he flagrantly disregarded the warning of the Inspector, the Respondent replied that his backyard was not suitable in its natural condition for his child to use as a play area; therefore, he cleared the area and installed a swing set so his son could play in the rear portion of his Property.

The Respondent did not dispute that he was in violation of the Category I Conservation Easement on his Property and admitted to the violations. The Agency has sustained its burden of proof by a preponderance of the evidence.

While not disputing the violations, the Respondent seeks a stay of this proceeding so that

he can apply to have the Category I Conservation Easement changed to a Category II Conservation Easement. A Category II Conservation Easement is not nearly as restrictive as a Category I Conservation Easement regarding what is allowed to be done to property that is subject to the easement. There was no evidence offered, however, that the Respondent had begun the process of applying to have the designation changed from a Category I Conservation Easement to a Category II Conservation Easement.

### Remedies

The Agency is seeking both administrative civil penalties (COMCOR 22A-16) and corrective action. (COMCOR 22A-17) as a result of the Respondent's violations. As to the requested corrective action, the Agency is recommending that a professional survey be conducted at the expense of the Respondent that shows the boundaries of the Category I Conservation Easement on the Property. In addition, the Agency requests that the Respondent remove the grass and replace it with groundcover, native wildflower mix, or mulch within the planted forest area. The Respondent is to remove the swing set and the six foot by six foot timbers. The Agency also wants the Respondent to install signage to demark all forest Category I Conservation Easement boundaries on the Property and to plant three ¾ inch to 1 inch caliper native canopy trees and ten native shrubs.

The authority to seek corrective actions is found in COMCOR 22A-17(a). The Agency can seek the following corrective 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.

Clearly, the Agency has the authority to stop the violation and require the Respondent to restore the area that was disturbed by his actions. Removal of the swing set and the timbers, along with mulching and planting wildflowers, will allow the area to return, in time, to its natural condition. As there was no evidence introduced that trees had been removed from the Property, the Agency's request that trees be planted is not supported by the corrective action authority found in COMCOR 22A-17(a). Furthermore, there is no authority to require the Respondent to conduct a survey or to demark the boundaries and post them with six by six foot posts and signage.

In addition to the corrective actions, the Agency is seeking an administrative civil penalty as well. COMCOR 22A-16. The Planning Board or Planning Director must consider the following eight factors in considering the amount of the administrative civil penalty. COMCOR 22A-16(d)(2). They are as follows:

(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 administrative civil penalty may not be less than \$0.30 per square foot. Md. Code Ann., Nat. Res. § 5-1608 (2005). The maximum penalty is \$9.55 per square foot, which was established by Montgomery County Resolution 15-1271. In this case, the Agency recommended a penalty of \$1.08 per square foot after weighing all of the factors. There was no testimony concerning the Respondent's ability to pay and as a result, no value was assigned to this factor. Likewise, there was no penalty assigned to the "other" factor. As to "willfulness," the Agency recommended a penalty of \$3.00 per square foot.

The Respondent did not disturb the easement by accident. He knew that the Property was subject to a Category I Conservation Easement when he purchased the Property. He acknowledged receiving the easement documents at settlement. He was warned by Joshua Kaye not to install his child's swing set, but ignored the admonition and installed it anyway. The Respondent's actions were a blatant disregard of the law. Rather than try and change the designation of the Category I Conservation Easement before clearing the land and installing the swing set, the Respondent decided to ignore the law, anticipating that he would be able to obtain a stay of the enforcement proceedings at a hearing. As outlined earlier, the only issues before me are whether a violation occurred, and if so, should an administrative penalty be assessed. The issue of whether the proceeding should be stayed is not an issue before me. Accordingly, I find that the \$3.00 factor assigned to the willfulness category was not unreasonable and, if anything, was generous in light of the willfulness of the Respondent's actions.

I also considered the \$1.00 per square foot assessment proposed for resource damage. The Respondent testified that he did not remove any trees from the Property. The resource damage calculation was based, in part, on the trees that were removed from the area. The Agency was not able to prove by a preponderance of the evidence that

there were trees on the Property that the Respondent had removed. As a result, I have elected not to assign a penalty to this factor. The water quality impact has also not been proven by the Agency by a preponderance of the evidence. The representative testified that trees and their root systems improve the water quality and, therefore, their removal would adversely affect water quality. If the Agency was unable to establish that trees were removed, then it follows that it is unable to establish by a preponderance of the evidence that the water quality was adversely impacted. Therefore, I have not assigned a penalty to this factor as well. The Respondent received an economic benefit for having a backyard that his child could play in. The Agency assigned a value of \$1.00 per square foot for the economic benefit. This figure is not unreasonable given the benefit the Respondent received by his actions.

The actions of the Respondent in clearing the Property of understory took place over a period of time. In addition, the swing set was installed only after the Inspector warned against installing the swing set. This activity establishes a recurrent pattern of behavior that supports the penalty of \$1.50 per square foot that was recommended by the Agency. As to the resource damage, the grading and removal of the understory clearly damaged the resource that was protected by the Category I Conservation Easement. As such, a \$1.00 per square foot penalty is appropriate and not unreasonable.

Finally, the Agency allows for a credit to be considered for the cost of performing the corrective actions. The Agency assigned a credit of \$1.00 per square foot. This credit would include not only the restoration of the affected area, but would also take into account all of the other corrective actions the Agency is seeking including the boundary survey and the planting and signage requirements. Since the corrective actions I am

proposing are not as comprehensive as requested by the Agency, I have reduced the credit by one-half to \$0.50 per square foot. As a result, the average administrative penalty is now \$0.83 per square foot. Since the total square feet affected is 3,250 square feet, the proposed administrative civil penalty is \$2,697.50.

### **CONCLUSIONS OF LAW**

I conclude that the Agency has established by a preponderance of the evidence that the Respondent has violated the Category I Conservation Easement located on the Property. Land Records of Montgomery County at Liber 13178, Folio 412; Montgomery County Planning Board Enforcement Rules, 3.11.

I further conclude that as a result of the violations, the Respondent is subject to administrative civil penalties in the amount of \$2,697.50 and corrective actions. COMCOR 22A-16 and COMCOR 22A-17.

### **RECOMMENDED ORDER**

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

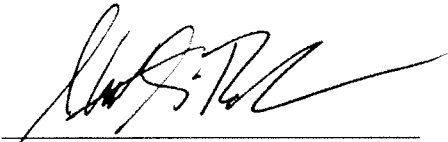
**ORDER** that the Respondent be found in violation of a Category I Conservation Easement; and

**ORDER** that the Respondent pay an administrative civil penalty of \$2,697.50; and

**ORDER** that the Respondent take corrective action to remove the grass and replace it with groundcover native wildflower mix, or mulch within the planted forest area. The Respondent is to remove the swing set and the six foot by six foot timbers and install ten native shrubs.

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

January 6, 2011  
Date Decision Mailed



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Stuart G. Breslow  
Administrative Law Judge

SGB/rbs  
#119204

**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 4.2. 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. A party may file an answer opposing any exception within fourteen days after the exceptions are served. Written exceptions should be addressed to the Chair of the Montgomery County Planning Board, 8787 Georgia Avenue, Silver Spring, Maryland 20904. The Office of Administrative Hearings is not a party to any review process.

Copies Mailed To:

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Exhibits

I admitted the following exhibits on behalf of the Agency:

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