




THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION


MCPB
May 13, 04
Item # 5



May 7, 2004

MEMORANDUM

TO: Montgomery County Planning Board

VIA:  Jeff Zyontz, Chief
Countywide Planning Division

Jorge A. Valladares, P.E., Chief
Environmental Planning, CWP 

FROM: Candy Bunnag (301) 495-4543 
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SUBJECT: Hearing on administrative civil penalty # 04-01 and administrative order in accordance with Chapter 22A of the Montgomery County Code (Forest Conservation Law) for:
Harkins Builders, Inc. at Parcel P961, Deer Park, Silver Spring

RECOMMENDATION

Staff recommends that a civil penalty be imposed on Harkins Builders, Inc., in accordance with Section 22A-16(d) of the Montgomery County Code (administrative civil penalty under the forest conservation law), for **clearing about 15,531 square feet (0.36 acre) of forest, on Parcel P961, Deer Park, without an approved forest conservation plan or exemption from the forest conservation plan requirements. Staff recommends that the penalty be \$0.90 per square foot of forest cleared (or \$13, 978) minus the cost of reforestation of the cleared area.** Under the forest conservation law, the civil penalty can range from \$0.30 to \$1.00 per square foot of forest cleared.

BACKGROUND

The property that is the subject of the civil penalty, Parcel P961, Deer Park, covers 89.3 acres (see Attachment 1), much of which is forested. It lies within the Paint Branch watershed (Use III stream system). The property is owned by the Guru Nanak Foundation of America, Inc. It is adjacent to Parcel B, St Marks Parish at 12801 Old Columbia Pike. Parcel B, St. Mark's Parish has an approved special exception (S-2487) and preliminary subdivision plan and related forest conservation plan (no. 1-02110) for housing and related facilities for the elderly or handicapped persons. The two properties lie between Old Columbia Pike and Rte. 29, north of Randolph Road.

Chronology of Events

Attachment 2 summarizes the chronology of events for this case.

On February 6, 2002, the Board of Appeals granted the special exception for housing and related facilities for elderly or handicapped persons subject to conditions. The preliminary plan and preliminary forest conservation plan, no. 1-02110, was approved by the Planning Board on August 1, 2002. On April 24, 2003, a final FCP was approved. It included the clearing of 3.1 acres of forest on St. Mark's Parish, Parcel B, with a requirement for on-site and off-site forest mitigation. However, it did not include any grading or clearing of forest outside Parcel B.

A pre-construction meeting was held between Harkins Builders, the M-NCPPC inspector, and the Montgomery County Department of Permitting Services (DPS) inspector on August 1, 2003. An application for a small land disturbance area (SLDA) permit on parcel (P961) adjacent to the project site was submitted by Harkins Builders to DPS on August 5, 2003. According to the completed application, about 20,000 square feet of land disturbance was proposed to locate a temporary trailer. DPS referred the SLDA permit application to M-NCPPC staff to determine the need for a forest conservation plan or exemption from the forest conservation law.

After discussions with Harkins Builders, M-NCPPC staff determined that Harkins Builders' request was to amend the approved forest conservation plan for the elderly housing project to clear about 20,000 square feet of forest on the adjoining property to use as stockpiling and storage area during construction. Harkins Builders submitted a formal proposal to M-NCPPC staff on September 25, 2003 and initiated clearing activities shortly after without staff approval. After reviewing the proposal, staff issued a denial of the proposed additional forest clearing on October 3, 2003 (see Attachment 3). The proposed clearing would have been for a temporary use and it was not for infrastructure that was needed to serve the project.

On October 15, 2003, the DPS inspector issued a notice of violation to Harkins Builders for failure to obtain a sediment control permit for land-disturbing activities. The M-NCPPC inspector issued a civil citation on December 9, 2003 for clearing forest in excess of the approved forest conservation plan. Harkins Builders stockpiled soils on this cleared area as part of the construction activities for the elderly housing project. The cleared area covered about 15,531 square feet (0.36 acre) on the adjoining parcel (see Attachment 4).

M-NCPPC staff met with Harkins Builders on December 16 to explain and discuss the civil citation. At this meeting, Harkins Builders agreed to move the stockpile out of the cleared area within a three-week time frame, weather permitting. After some discussions with staff in January, 2004, Harkins Builders agreed to move the stockpiled earth out of the cleared area by January 9, 2004. An inspection by M-NCPPC staff on January 9 determined that the stockpiled earth had not been removed. A second civil citation was issued and the stockpiled earth was moved onto a part of the construction site on January 12.

Montgomery County Code, Chapter 19, requires that a property owner obtain a sediment and erosion control permit from DPS prior to commencing any disturbance of more than 5,000 square feet of land. Before DPS may issue a sediment and erosion control permit, the property owner must comply with the requirements of Montgomery County's forest conservation law (Mont. Co. Code, Sections 19-3A, 22A-4(b), 22A-11(d)(3)). The forest conservation law provides that, unless exempt, a property owner must receive review and approval of a forest stand delineation and a forest conservation plan, prior to undertaking the land-disturbing activity (Mont. Co. Code, Sections 22A-4, 22A-10, 22A-11(d)). Since Harkins Builders' activity involved the destruction of 15,531 square feet of forest, without the required plan approvals, it is a violation of the Montgomery County forest conservation law, and may be sanctioned accordingly.

The violations that have been issued under the County's sediment control law are under the jurisdiction of DPS. The Planning Board hearing covers those matters within the Board's jurisdiction, namely the violations associated with the forest conservation law.

DISCUSSION

A. Penalties and Enforcement Actions under the Forest Conservation Law

Staff believes that the forest clearing activity was egregious because the clearing occurred without M-NCPPC approval of the proposal to clear the forest. The fact that Harkins Builders submitted the proposal for review indicates that it was aware that such an approval was necessary. In accordance with Section 22A-16 of the forest conservation law, several penalties and enforcement actions may be imposed on violators. The possible penalties and actions under the forest conservation law and Harkins Builders' responses are discussed below. Under the law, the Commission may impose both a civil fine under a Class A violation and an administrative civil penalty.

It should be noted that collected fines are deposited into the forest conservation fund. The forest conservation law states that the "money deposited in this fund may be used for purposes of implementing this Chapter" (i.e., the forest conservation law).

Class A Violation

Under this violation, the maximum civil fine is \$1,000. Typically, violators of the forest conservation law are issued civil fines. It should be noted that M-NCPPC issues in the range of a dozen violations of the forest conservation law a year, and a fine of \$1,000 is not unusual.

Harkins Builders was fined \$1,000 on December 9, 2003. A second fine for \$500.00 was issued on January 9, 2004 for failure to remove the stockpile earth from the cleared area by January 9th, as agreed to by Harkins Builders. Both fines have been paid and the stockpile was removed from the cleared area by January 14th, as verified by the M-NCPPC inspector.

Civil Action

A judicial civil action may be “brought to enforce a forest conservation plan and any associated agreements and restrictions or to enforce an administrative order” in Montgomery County Circuit Court. M-NCPPC has not brought civil action against Harkins Builders.

Corrective Action and Civil Penalty

Section 22A-17 of the forest conservation law states:

“At any time, including during an enforcement action, the Planning Director may issue an administrative order requiring the violator to take corrective action within a certain time period. The corrective action may include an order to:

- (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; or
- (5) submit a written report or plan concerning the violation.”

An administrative order for corrective action was issued to Harkins Builders on February 9, 2004, in conjunction with the notice for a hearing for an administrative civil penalty (see Attachment 5). This corrective action consists of the following:

- Harkins Builders would obtain approval from the property owner of Parcel P961, Deer Park to restore the cleared area.
- Harkins Builders would submit for M-NCPPC review and approval a restoration plan to replant the forest that was cleared. Harkins Builders would also implement the plan.

- The Director advised Harkins Builders that staff would recommend to the Planning Board that the civil penalty of \$0.90 per square foot of forest cleared (which is \$13,978) be reduced by the cost of reforestation of the cleared area.

Harkins Builders has agreed to reforest the cleared area and has submitted a plan for M-NCPPC review and approval. As of the date of this memorandum, Harkins Builders has not provided documentation that it has obtained the permission of the property owner of Parcel P961, Deer Park to restore the cleared area.

Subsequent to the administrative order for corrective action, staff met with Harkins Builders. At that meeting and in a letter following the meeting (see Attachment 6), Harkins Builders put forth a request to modify staff's recommended civil penalty. Harkins Builders' proposal was to set the penalty rate at \$0.30 per square foot of forest cleared minus the \$700 fee paid by Harkins Builders to Montgomery County. Harkins Builders believes that the cleared area had "minimal tree growth". It also argued that it proceeded to clear the area because it anticipated an approval of its request to clear the area at issue of additional forest.

On April 15, 2004, M-NCPPC responded to Harkins Builders with a counter-proposal to lower the recommended civil penalty rate to \$0.50 per square foot of forest cleared (see Attachment 7). The penalty would not be reduced by the cost of reforestation or by \$700, which was not a fee imposed by M-NCPPC. Harkins Builders did not accept staff's counter-proposal and reiterated its original proposal (see Attachment 8). M-NCPPC did not accept Harkins Builders' proposal and set the Planning Board public hearing for May 13th (see Attachment 9).

Administrative Civil Penalty

In addition to the two civil fines (total of \$1,500), the Planning Board may impose a civil penalty. The amount of the penalty ranges from a mandatory minimum penalty of \$0.30 per square foot to a statutory maximum of \$1.00 per square foot of forest cleared. Section 22A-16(d) of the forest conservation law states the following:

- “(2) In determining the amount of the civil penalty, the Planning Board 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; and
 - (F) other relevant factors
- (3) The reasons for imposing a civil penalty must be provided in a written opinion of the Planning Board and included in its administrative order.”

B. Recommended Planning Board Action

By way of this Planning Board hearing, staff is requesting that the Planning Board impose an administrative civil penalty on Harkins Builders. Staff recommends that a civil penalty of \$0.90 a square foot of forest (\$13,978), minus the cost of reforestation of the cleared area be imposed. The reasons are as follows:

- (A) Staff believes the clearing of forest cover without waiting for action by M-NCPPC staff on the proposal and the loss of forest occurring outside the project's approved forest conservation plan limits constitute gross disregard for permit requirements in this case. Harkins Builders admittedly proceeded in advance of an M-NCPPC staff determination on the application, assuming it would be approved automatically. M-NCPPC clearly rejected the request to clear this area. DPS also sent written notification to Harkins Builders that the sediment control permit application for the proposed clearing was denied. **Staff considers this background to reflect a willful disregard by a builder of the long-established permit application and review procedures for land development projects in the county.**
- (B) The area of forest clearing is not large (0.36 acre) and the cleared area does not lie within an environmental buffer.
- (C) Harkins Builders has submitted a reforestation plan. It has also provided an estimate of about \$6700 to implement the plan.
- (D) The property is located in the Paint Branch watershed, which is a Use III stream system, indicating overall high quality water resource conditions. However, the property is not in the Special Protection Area. The forest clearing was not done in an environmental buffer area.
- (E) Although this is the first Forest Conservation Law violation charged against Harkins Builders, its access to the site from a location not approved for a construction entrance (see Item F, below), which also resulted in tree damage, reflects a pattern, at least on this project, of disregard for permit review and approvals that are designed to protect tree and forest resources.
- (F) It should be noted that on December 9, 2003, the M-NCPPC and DPS inspectors found that Harkins Builders had accessed the project construction site from a location not approved for a construction entrance. Trucks had brought in gravel across this area, which caused damage to root zones of four large, mature pin oaks. The M-NCPPC inspector required Harkins Builders to implement measures, as specified by a licensed arborist, to correct damages to the oaks. Harkins Builders has agreed to implement the measures.

CB:DW:ss
Attachments