



MONTGOMERY COUNTY PLANNING BOARD
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

JUL 31 2012

MCPB No. 10-180

Respondent: Dany Smith

Hearing Dates: February 1 and March 11, 2010

OPINION AND ORDER

On December 4, 2009, the Montgomery County Planning Department issued a notice of hearing alleging that Mr. Dany Smith, the owner of a 2.14-acre lot located at 21627 Ripplemead Drive in Laytonsville, Maryland, violated Montgomery County's forest conservation law by engaging in certain prohibited activities in areas covered by forest conservation easement. On February 1, 2010 and continuing on March 11, 2010, the Planning Board, which has primary enforcement authority under Montgomery County's forest conservation law, Mont. Co. Code, Ch. 22A, conducted a hearing to consider the alleged violations. Based on the evidence and arguments presented at those hearings, the Planning Board finds that Mr. Smith is responsible for the violations alleged by the Planning Department. Further, the Planning Board orders Mr. Smith to take certain corrective actions, as detailed herein.

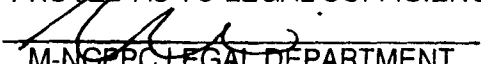
Based on the evidence and arguments presented at those hearings, the Planning Board found on motion of Commissioner Wells-Harley, seconded by Commissioner Presley, by a vote of 4-0, that Mr. Smith is responsible for the forest conservation law violations alleged by the Planning Department. Further, on motion of Commissioner Wells-Harley, seconded by Commissioner Presley, by a vote of 4-0, the Planning Board ordered Mr. Smith to take certain corrective actions.

The Forest Conservation Easement

Mr. Smith's lot is located in the Fairhill Subdivision. The Planning Board originally approved the Fairhill subdivision in 1980, before Montgomery County enacted its forest conservation law. Thus, there were no forest conservation requirements associated with it. Subsequently, however, the lots came under the forest conservation law when the developer sought a sediment control permit. Under Section 22A-4(b) of the forest conservation law, where a party seeks approval of a sediment control permit on an area of land 40,000 feet or greater and covered by a preliminary plan approved prior to July 1, 1984, the forest conservation law requires approval of a forest conservation plan. The Planning Department presented a copy of the approved forest conservation plan for the Fairhill Subdivision as part of its case in this matter.

Where the forest conservation law requires that trees be planted, protected, or allowed to regenerate, those trees must be protected by a long-term protective measure. In this case, the long-term protective measure was a Category I forest conservation easement. The record in this case demonstrates that the easement

APPROVED AS TO LEGAL SUFFICIENCY


M-NCPPC LEGAL DEPARTMENT

covering Mr. Smith's lot was recorded in the land records at Liber 15627, folio 293 on March 13, 1998.

Mr. Smith raised threshold questions in this case about the effectiveness of the forest conservation easement on his lot and the Planning Board's jurisdiction over this matter, both in a preliminary motion to dismiss and in oral arguments presented to the Board. In his motion to dismiss, Mr. Smith argues that the forest conservation easement is invalid because it was not shown on the record plat. Further, Mr. Smith contends, because of these alleged defects the Board does not have jurisdiction to hear this enforcement matter. Mr. Smith argues that in not requiring the easement to be shown on the record plat, the Board failed to follow its Trees Technical Manual.

The Planning Department, which maintains that Mr. Smith's lot is covered by a Category I forest conservation easement, opposed the motion to dismiss. The Department disputed Mr. Smith's contention that the Planning Board must strictly follow the Trees Technical Manual in order for a Category I forest conservation easement to be effective. The Planning Department argues that the Trees Technical Manual is a guide, which does not create binding requirements on the Planning Board. Moreover, according to the Department, when a party challenges an agency's failure to follow its own rule, it is first necessary to examine whether the rule allegedly not followed was intended to confer an important procedural benefit, or if it was adopted for the orderly transaction of agency business. If it is the former, it is necessary to ask further whether the party challenging the agency action has demonstrated prejudice. The issue of prejudice requires factual analysis and therefore is not appropriate for a motion to dismiss.

The Planning Board disagrees with Mr. Smith's contention that not requiring amendment of the existing plat to show the easement renders the easement unenforceable, and denies Mr. Smith's motion to dismiss.

The time for arguing that the forest conservation easement had to be shown on the plat would have been when the Board approved the forest conservation plan for the Fairhill subdivision without requiring it to be shown on the record plat. Mr. Smith is foreclosed from making this argument now. If a party had argued to the Board that the easement had to be shown on the plat at the time the Board approved the forest conservation easement, that issue could have then been raised in an action for judicial review of the Board's approval of the forest conservation easement or plat. The Planning Board approved the forest conservation plan and easement for Mr. Smith's lot years ago, and the time for appealing those approvals is past. Mr. Smith cannot revive that long-settled issue now. To do so would be inconsistent with the obligation to raise issues before an administrative body at the time of the operative decision, and would strip the administrative process of the certainty that comes from prohibiting the endless

reopening of issues that have already been decided. The fact that Mr. Smith purchased the property after the Board made the decision not to require the plat to be amended to reflect the forest conservation easement does not change the analysis. When a party purchases a property, they take it subject to the approved plans on that property. Each new purchaser does not have the ability to challenge settled administrative decisions anew.

In addition to being out of time, Mr. Smith's contentions about the effect of not showing the forest conservation easement on the plat are incorrect. Mr. Smith bases his argument about the plat on the Trees Technical Manual, which the Planning Board published in 1992 to provide guidance to applicants on how to prepare forest conservation plans. In particular, Mr. Smith points to the definition of "conservation easement" in the Manual – which includes the statement, "[t]his easement is shown on the record plat and its terms and conditions are recorded in the county's land records" – and a statement in the Manual that "[t]he easement boundary must be shown by a line on the record plat and a note which references a recorded easement agreement." Mr. Smith takes the position that the Manual requires that a conservation easement be shown on a record plat to be effective. While it is preferable for a forest conservation easement to be shown on a plat because it provides additional notice, where, as here, there is other actual or constructive notice of the easement, the easement is enforceable regardless. The Board finds that the Trees Technical Manual was not intended to create any substantive right, but instead to guide the preparation of forest conservation plans.

Mr. Smith's contention that a Category I easement must be shown on a plat, or else it is unenforceable, is further undermined by the fact that the forest conservation law does not require a Category I easement, per se, but instead requires an acceptable long-term protective measure. Mont. Co. Code, Sec. 22A-12(h). It would make little sense to require one form of long-term protective measure to be shown on a plat, but not another form. Mr. Smith's insistence that the absence of the forest conservation easement from the plat renders the easement ineffective is inconsistent with the flexibility allowed by the law.

In further support of his motion to dismiss, Mr. Smith argues that if the easement had been shown on the plat, the Department of Permitting Services would not have issued a building permit for a shed in the forest conservation easement, because Permitting Services checks the plat as part of the building permit review process. While this may be true and it would have been fortuitous if Permitting Services had blocked construction of the shed, it does not, as Mr. Smith's argument implies, in any way relieve Mr. Smith of the obligation to comply with the terms of the forest conservation easement.

For the foregoing reasons, the Board rejects Mr. Smith's motion to dismiss. The Board further rejects Mr. Smith's contention that the Board lacks jurisdiction over this enforcement matter. Montgomery County's forest conservation law expressly provides the Planning Board the primary authority for enforcing the forest conservation law. Mont. Co. Code, Sec. 22A-16(b). The approved forest conservation plan and easement in this case are more than sufficient prima facie evidence of the existence of an easement to permit the Board to move forward with hearing an enforcement matter as contemplated by the forest conservation law. And, for the reasons discussed herein, the evidence in this case supports the effectiveness of the easement.

Beyond the precise issues raised in Mr. Smith's motion to dismiss, for an easement to be effective under Maryland law there must be actual or constructive notice. There was ample evidence in this case of actual and constructive notice.

The clearest evidence that Mr. Smith had notice of the easement is his purchase contract for the lot, which mentioned the forest conservation easement in several places. Moreover, the contract of sale contained standard language allowing Mr. Smith to review all covenants and easements on the property, and to void the contract if he was dissatisfied with any such documents. Mr. Smith further acknowledges that portions of the forest conservation easement area were staked out on his property when he purchased it, although, he contends, not accurately.

For the foregoing reasons, the Planning Board rejects Mr. Smith's contention that the forest conservation easement on his lot is ineffective or otherwise unenforceable.

The next issue to consider is what the easement covers and what it prohibits. The forest conservation easement on Mr. Smith's property, which includes approximately 16,000 square feet of land in two non-contiguous areas, Easement Area One and Easement Area Two, respectively covering the northeast and southeast corners of the lot.

The goal of placing a Category I forest conservation easement on a development is to fulfill the objectives of Montgomery County's forest conservation law. The forest conservation law reflects a legislative determination that trees and forest cover are an important natural resource, and that the loss of trees to development is a serious problem. Among the goals of the forest conservation law are to save, maintain, and plant trees for the benefit of current and future County residents, and to minimize the loss of trees to development. Under Section 22A-12(h) of the forest conservation law, a forest conservation plan, such as the one approved for the Fairhill Subdivision, must include "long-term protective measures," which may include conservation easements. In the case of the Fairhill Subdivision, the requirement for long-term protective measures was met through a Category I forest conservation easement.

The Category I easement on Mr. Smith's lot strictly limits the disturbance of trees, shrubs, grass, and other plant materials in the conservation area covered by the easement: "No living trees or shrubs (of any size or type) shall be cut down, removed or destroyed without prior written consent of the Planning Board." Moreover, "[n]o plant materials (including, but not limited to brush, saplings, undergrowth, or non-woody vegetation) shall be mowed or cut down, dug up, removed or destroyed unless removed pursuant to the terms of an approved forest management plan." Relevant to this matter, the Category I easement further provides that "[n]o mowing, agricultural activities, or cultivation shall occur," and prohibits, among other things, "construction, excavation or grading," "erection of any building or structural improvements," and any other "activities which in any way could alter or interfere with the natural ground cover or drainage."

The Alleged Violations

By a notice of hearing issued on December 4, 2009, the Planning Department alleged that Mr. Smith violated the forest conservation easement on his lot by (1) cutting grass, and (2) building a shed within a Category I forest conservation easement. These activities violate the restrictions of the forest conservation easement.

There is no dispute about whether Mr. Smith engaged in the activities alleged in the notice of violation. Mr. Smith admits to having been responsible for constructing the shed, and admits to having cut grass in the easement area, although he claims to have been unaware of the presence of the easement where these activities occurred. Josh Kaye, a Planning Department inspector who visited the property several times beginning in early 2009, described the conditions that he observed at the site and other evidence about the condition of the site.

Mr. Kaye presented evidence that Mr. Smith, through mowing and shed construction, violated approximately 10,066 square feet of the easement area. Mr. Smith questioned the reliability of the Planning Department's calculations of the impacted area, which were based on geographical information systems. Mr. Smith claimed that the numbers were too unreliable to support any finding of violation in this case. He did not contest the actual numbers, or offer alternative numbers. The Planning Board does not find Mr. Smith's objections to the geographical information systems to be compelling. The Planning Department employed measurement tools that are widely used for planning purposes, and the Board is satisfied with their accuracy. Mr. Smith's contention that the whole case against him should be dismissed due to an alleged inaccuracy would dramatically overcorrect for a problem that has not been demonstrated. Moreover, under the requirements of this order the precise dimensions of the easement area violated is not material at this point. The size of the impacted area is relevant primarily for calculating the amount of area that must be planted and placed in

forest conservation easement to rectify the violations. This area will be determined as part of the revised forest conservation plan that Mr. Smith will be required to file and have approved.

Based upon all of the evidence, the Planning Board finds Mr. Smith is responsible for the violations alleged by the Planning Department. Based upon the evidence presented by the Planning Department, the Board finds that through shed construction and mowing Mr. Smith impacted a total of 10,066 square feet subject to forest conservation easement.

Corrective Actions

The Planning Department recommended that Mr. Smith be required to take certain corrective actions to mitigate the impact of mowing and locating the shed in the forest conservation easement areas. To avoid demolishing the shed, the Planning Department recommended that the Planning Board remove certain portions of the forest conservation easement and require Mr. Smith to perform compensatory planting. The Department further recommended that Mr. Smith be required to perform supplemental planting to make up for the damage to the easement area caused by Mr. Smith's mowing activities, and to remove grass and plant a wildflower mix in the planted areas. This proposal is designed to vindicate the public interest in protecting those areas that have been dedicated to forest conservation, and to accommodate Mr. Smith's interest in retaining the shed on his lot, which, due to the fact that it was constructed on a concrete slab, cannot be relocated.

The Planning Department further recommended that Mr. Smith be required to enter into a maintenance and management agreement and post a financial security to ensure that the planting occurs and the viability of the newly planted trees, the same type of security that would be required of any party subject to a forest planting requirement.

The Planning Board finds that the corrective actions recommended by the Planning Department are appropriate under the circumstances of this case. The corrective actions required under this order vindicate the public interest in promoting forest growth and protection. Allowing the removal of the easement from certain areas is also appropriate. The Board would have been fully within its rights to require that all prohibited activities be removed from all forest conservation easements, and that the areas be planted with trees to restore them to their intended state. But the Board finds that allowing substitute planting and protection will substantially, if not completely, satisfy the forest conservation goals associated with this development.

As noted by the Planning Department, modifying the forest conservation easement areas on Mr. Smith's property will require certain administrative steps, including the filing of a preliminary plan amendment for forest conservation purposes. Further, to ensure timely compliance with the requirements of this order, the Order includes deadlines for Mr. Smith to file required plan amendments, perform required planting, and pay the required penalty. This Order specifies the actions that Mr. Smith must take and the timing of those actions. Additional deadlines will be set as necessary when Mr. Smith files a preliminary plan amendment.

Mr. Smith will be required to submit a preliminary plan amendment for forest conservation purposes within 90 days of the date of this order. No later than 14 days after the Board issues a resolution approving the preliminary plan amendment, Mr. Smith must post financial security such as a bond sufficient to cover the cost of all required planting. The required planting must occur no later than the second planting season after the Board issues the resolution approving the preliminary plan amendment. After the preliminary plan amendment is approved, Mr. Smith must submit a revised record plat showing the forest conservation easements.

ORDER

The Planning Board hereby ORDERS:

1. No later than 90 days from the date of this Order, Mr. Smith must submit a limited preliminary plan amendment to modify the Forest Conservation Plan. The amendment must comply with the requirements of this Order; including by removing the area containing the shed from Easement Area One and compensating for the removal by adding appropriate an equivalent easement area elsewhere on the lot, and must be approved within six months of submittal. No later than 14 days after the Board approves the preliminary plan amendment, Mr. Smith must submit to the Planning Department a financial security sufficient to cover the cost of all required planting.
2. No later than 90 days after the Board approves the required preliminary plan amendment, Mr. Smith must record a new record plat reflecting all conservation easements.
3. No later than 90 days after the Board approves the required preliminary plan amendment, Mr. Smith must install six-inch by six-inch posts marking all forest conservation easement boundaries.
4. No later than the second planting season after this Order is issued, Mr. Smith must compensate for any removed easement area at a ratio of one to one of onsite, planted forest in a recorded Category I conservation easement to

conservation area removed. Further, Mr. Smith must plant trees in the approximately 4,583 square feet of Easement Area Two impacted by grass cutting. The precise number of trees to be planted will be determined with the limited preliminary plan amendment for forest conservation purposes required by this Order. Mr. Smith must also replace groundcover with native wildflower mix within the planted forest area.

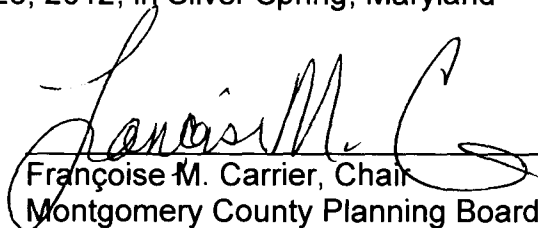
JUL 31 2012 BE IT FURTHER RESOLVED, that the date of this Order is _____ (which is the date of mailing to parties of record); and

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 Order, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules).

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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 Presley, seconded by Vice Chair Wells-Harley, with Vice Chair Wells-Harley, and Commissioners Anderson and Dreyfuss voting in favor of the motion, and Chair Carrier and Commissioner Anderson abstaining at its regular meeting held on Thursday, July 26, 2012, in Silver Spring, Maryland


Françoise M. Carrier, Chair
Montgomery County Planning Board