MCPB No. 12-38
Respondent: Marquis McClure
Date of Hearings: January 11 and 25, 2010

OPINION AND ORDER

The Montgomery County Planning Department issued a notice of hearing alleging that Mr. Marquis McClure, the owner of a 5.21-acre lot located at 21611 Ripplemead Drive in Laytonsville, Maryland, violated Montgomery County's forest conservation law by engaging in certain prohibited activities on areas of his lot covered by a forest conservation easement. On January 11, 2010, the Planning Board, which has primary enforcement authority under the forest conservation law, conducted a hearing to consider the alleged violations. The Board continued the hearing on January 25, 2010.

Based on the evidence and arguments presented at those hearings, the Planning Board found on motion of Commissioner Alfandre, seconded by Commissioner Wells-Harley, by a vote of 3-1, Commissioners Alfandre, Hanson, and Wells-Harley voting in favor, and Commissioner Presley voting against, that Mr. McClure is responsible for the forest conservation law violations alleged by the Planning Department. Further, on motion of Commissioner Alfandre, seconded by Commissioner Wells-Harley, by a vote of 4-0, Commissioners Alfandre, Hanson, Presley, and Wells-Harley voting in favor, the Planning Board decided to order Mr. McClure to pay a civil administrative penalty and to take certain corrective actions, as detailed herein.

The Forest Conservation Easement

Before turning to the easement and what it prohibits, Mr. McClure has raised threshold questions in this case about the effectiveness of the forest conservation easement on his lot. The developer of the Fairhill Subdivisiongranted a Category I forest conservation easement to the Commission. Mr. McClure maintains, however, there is no valid forest conservation easement on his lot. The Planning Board rejects Mr. McClure's contention that the Category I forest conservation easement is ineffective.

Mr. McClure'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 the subdivision. Subsequently, however, the lots came under the forest conservation law when the developer sought a sediment control permit in or about 1996. 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 square feet or greater in size that is 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 – as in most forest conservation plans – the long-term protective measure was a Category I forest conservation easement. The record in this case demonstrates that the easement on Mr. McClure's lot was recorded in the land records at Liber 15627, folio 293 on March 13, 1998.

Mr. McClure asserts that the Category I forest conservation easement is not effective because it was not properly indexed in the land records and because it is not reflected on his record plat. Mr. McClure further testified that he was unaware of the forest conservation easement when he purchased the property.

We will discuss the indexing issue first. In order for an easement to be effective, there must be actual notice or constructive notice of its existence. *Kiler v. Beam*, 74 Md.App. 636, 539 A.2d 1138 (1988) Based on evidence that the easement was recorded in the land records, including a certification from the Clerk of the Circuit Court for Montgomery County, the easement having been identified in Mr. McClure's purchase documents, and other evidence discussed below, the Planning Board finds that Mr. McClure had constructive and actual notice of the existence of the forest conservation easement on his lot when he purchased it.

Vince Berg, who testified for Mr. McClure, contended that the easement was not properly recorded, because it was not indexed against Mr. McClure's lot separate from the larger parcel from which Mr. McClure's lot was subdivided. The evidence that the Board received, however, included a certification from the Clerk of the Circuit Court for Montgomery County verifying that the easement documents were filed in the land records long before Mr. McClure purchased his lot.

Even if Mr. McClure were correct that the easement was not properly indexed, there was other evidence of actual or constructive notice in this case. First and foremost, documents signed by Mr. McClure when he purchased the property acknowledge the existence of a forest conservation easement on his lot. Moreover, the developer of the subdivision included a description and graphic depiction of the forest conservation easement in the homeowners association documents that were filed in the land records and distributed to purchasers at settlement.

Mr. McClure argued that the fact that the forest conservation easement was filed after the homeowners association documents somehow undermines the homeowners

association documents' reliability as a form of notice. (The homeowners association documents were recorded in September 1997, and the forest conservation easement was recorded in March 1998.) But, as a practical matter, the description of the forest conservation easement in the homeowners association documents would provide notice of the easement's existence to anyone reviewing those documents. In order to conclude that the homeowners association documents do not provide constructive notice of the forest conservation easement, one would have to implausibly assume that a party, upon finding the description and depiction of the forest conservation easement in the homeowners association documents, would then search out the forest conservation easement, find that it was filed after the homeowners association documents, and, from that information, conclude that there is no forest conservation easement on the property. It would be unreasonable to draw such a conclusion, especially for Mr. McClure, because the forest conservation easement was recorded long before he purchased his lot in 2000. The constructive notice provided by the homeowners association documents would lead a reasonable person to conduct a thorough search to find the easement and determine its applicability to their property, not to jump to the incorrect conclusion that the sequence of its filing in the land records relative to the filing of the homeowners association documents somehow invalidates it.

In addition to the recorded forest conservation easement and the homeowners association documents, the Planning Department presented marketing materials used by the developer of the Fairhill Subdivision that identified the forest conservation easement. The existence of these materials does not prove that Mr. McClure saw them, although Mr. McClure cited almost identical documents to demonstrate that the development had been marketed as a place for people interested in owning horses. The materials do, however, contribute to an overall impression that there were many means through which to learn that the forest conservation easement in question existed. Mr. McClure claims he was not informed by the developer from whom he purchased his lot about the existence of the forest conservation easements. But if the developer failed to meet any obligation to disclose the easements, that is between Mr. McClure and the developer. It does not make the easement unenforceable.

Finally, there is additional evidence that Mr. McClure or his agent had actual notice of the conservation easement. On March 20, 2003, Mr. McClure received a building permit for the construction of a hot tub and deck on the rear of his house. The final location plat associated with that building permit included a drawing delineating the lot boundaries and the areas covered by a forest conservation easement. This building permit evidences Mr. McClure having acknowledged, through his agent, the existence of the easement. The fact that the forest conservation area was shown on the building permit application submitted on behalf of Mr. McClure demonstrates either that he had actual knowledge of the easement area or that he at least had constructive notice of the easement. It is impossible to explain how the easement area would have appeared on

the building permit application without such actual or constructive notice. In addition to undermining Mr. Mc Clure's claim that there was insufficient notice of the easement for it to be effective, the fact that the easement was reflected on the building permit drawing also undermines the testimony of Mr. Berg asserting that the easement was difficult to locate in the land records, because it shows that someone else was able to locate it.

Mr. McClure also argues incorrectly that the Board should have required the forest conservation easement to be shown on the record plat, and that the easement is ineffective because the Board did not do so. For the reasons discussed below, the Board finds that there is no merit to Mr. McClure's contention that the Trees Technical Manual requires a forest conservation easement to be shown on the plat. But if there were any merit to this argument, the time to make it would have been when the Board approved the forest conservation plan for Mr. McClure's property without requiring it to be shown on the record plat. Mr. McClure is foreclosed from making this argument now. If a party had made that argument to the Board, and the Board had rejected it, 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. McClure's lot years ago, and the time to appeal those approvals is past. Mr. McClure 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 the body is making the operative decision, and would strip the administrative process of the certainty that comes from not allowing parties to reopen issues that have already been decided. Mr. McClure's plat does not show the forest conservation easement because the Fairhill Subdivision plats were recorded prior to the existence of the forest conservation law, and prior to the forest conservation easement being established on Mr. McClure's lot. If the forest conservation easement were shown on the record plat for Mr. McClure's lot, that would have provided an additional source of constructive notice, but the fact that this source of notice was absent in this case does not render the forest conservation easement ineffective. That Mr. McClure purchased the property after the Board made the decision not to require the plat to be amended to reflect the addition of a forest conservation easement does not change the analysis. When a party purchases a property, they take it subject to the approved plans or that property. Each new purchaser does not have the ability to challenge settled decisions anew.

In support of his contention that the absence of the forest conservation easement from the plat renders the easement ineffective, Mr. McClure relies on the Trees Technical Manual, which was published by the Commission in 1992 to provide guidance to developers on how to prepare forest conservation plans. In particular, Mr. McClure points to the definition of "conservation easement" in the Manual – which includes the statement that "[t]his easement is shown on the record plat and its terms and conditions are recorded in the county's land records" – and to 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. McClure takes the position that the Manual requires that a conservation easement be shown on a record plat to be effective. The Board disagrees. 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 it is not essential to the easement's enforcement.

The law and the Trees Technical Manual both allow several forms of long-term protective measure, whereas the language quoted above applies only to one. The fact that there may be many acceptable forms of long-term protective measure undermines Mr. McClure's contention that a Category I easement must be shown on a plat, or else it is unenforceable. It would make little sense for the Trees Technical Manual to require one form of long-term protective measure to be shown on a plat, but not another form. Mr. McClure's insistence that the absence of the forest conservation easement from the plat renders the easement ineffective elevates form over substance in a manner that is inconsistent with the flexibility allowed by the law. It is less important what the long-term protective measure is called than what it provides, which in this case is not in dispute.

Beyond whether the easement should have been shown on the plat, Mr. McClure generally asserts that he purchased his lot with the intent to keep horses on it, and with the expectation that he should be able to do so. He claims that advertisements for the subdivision, which included illustrations of horses, led him to believe that he would have the ability to have horses. But what the developer may have advertised as being permitted within the subdivision in no way relieves Mr. McClure of the responsibility for complying with the forest conservation easement.

For all of the foregoing reasons, the Board finds that the forest conservation easement on Mr. McClure's lot is effective and enforceable.

The forest conservation easement covers three separate areas on Mr. McClure's property. Easement Area One comprises approximately 21,625 square feet of land in the western portion of the lot. Easement Area Two comprises approximately 12,284 square feet in the northern portion of the lot. Easement Area Three comprises approximately 85,324 square feet in the central and eastern portions of the lot. At the time the forest conservation plan was approved for the property, easement areas one and two contained existing forest. Easement Area Three contained some existing trees, but consisted primary of a naturally regenerating growth that was deemed to be sufficient in quality and quantity that it could be left to grow and would eventually become forest.

What the easement prohibits is not in dispute. 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. McClure's lot strictly limits the disturbance of trees, shrubs, grass, and other plant materials in the conservation areas 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," "[c]onstruction of any roadway or private drive," "pasturing of livestock (including horses)," 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 alleges that Mr. McClure violated the forest conservation law by (1) cutting grass, (2) installing asphalt and stone, (3) parking and storing trailers, (4) grazing a horse, and (5) installing a fence without approval, all within a Category I forest conservation easement. However, at the outset of the hearing in this matter, the Planning Department withdrew its allegation that Mr. McClure had installed a fence without approval.

Mr. McClure's liability for the alleged violations was supported by the testimony of Josh Kaye, a Planning Department inspector who visited Mr. McClure's property five times between January 2009 and the hearing. Mr. Kaye testified that each time he visited Mr. McClure's property he witnessed the alleged violations, with the exception of the asphalt paving, which was installed sometime after Mr. Kaye's first visit to the site.

Mr. Kaye presented aerial photos taken two years apart, from 2002 to 2008, which demonstrate that foliage was removed from the conservation areas over time, particularly in the area used for horse grazing. Mr. McClure grazed horses in easement area number three, which was designated to allow natural regeneration of forest, but which Mr. Kaye testified had been trampled by horses. A natural regeneration area is an area where, although there may be little or no existing forest, there was a sufficient amount of native woody saplings that the approved forest conservation plan called for leaving the existing growth undisturbed, so that it can grow into forest over time. Under the forest conservation easement, the requirements for protection of a natural regeneration area are the same as for an area that is already covered by forest canopy.

Mr. Kaye further testified that he personally observed evidence that grass had been cut within areas covered by the forest conservation easement. His testimony was based on having seen the grass in a manicured state during the grass growing season. Mr. Kaye also testified that he had on several occasions observed trailers parked within the area covered by the forest conservation easement. Finally, Mr. Kaye testified that he witnessed horses being kept within the area covered by the forest conservation easement, Mr. McClure had constructed a paddock. Mr. Kaye testified that he first witnessed these violations when he visited the property in January 2009, and that he observed them continuing on approximately four subsequent visits. However, the addition of paving within the forest conservation easement area occurred after his first visit to the site in January 2009.

No violations are alleged in easement area two. The total encroachment of unpermitted activities in Easement Area One and three amounted to approximately 1.79 acres out of a total of 2.8 acres covered by easements on the property.

Mr. McClure argued that certain of his activities had been approved by M-NCPPC inspector David Wigglesworth in or about 2005. Neither Mr. McClure nor the Planning Department called Mr. Wigglesworth as a witness. However, Mr. McClure submitted into the record correspondence between Mr. Wigglesworth and him showing that Mr. Wigglesworth had previously investigated and sought to resolve alleged violations on his lot. Mr. McClure asserts, or implies, that Mr. Wigglesworth approved many of the activities that are the subject of the current enforcement action.

Nothing Mr. Wigglesworth said or wrote to Mr. McClure excuses the alleged violations in this case. In this case, Mr. McClure is alleged to have violated the forest conservation easement on his lot. To the extent that Mr. McClure is arguing that Mr. Wigglesworth relieved him of the obligation to comply with any of the restrictions of the forest conservation easement, he is incorrect. The easement runs in perpetuity with the land. The terms of the easement can only be modified by agreement of the Planning Board. Even if Mr Wigglesworth had purported to modify the requirements of the

easement – which even Mr. McClure does not argue happened in this case – he did not have the authority to do so. Far from exempting Mr. McClure from the obligation to comply with the forest conservation easements on his property, the evidence concerning Mr. McClure's response to Mr. Wigglesworth's past enforcement activities conflicts with Mr. McClure's assertion that the forest conservation easements on his property are invalid or that they are unenforceable. Mr. McClure testified that he had attempted to work with the Planning Department to modify the easement in the past. That Mr. McClure attempted to modify the easement – thereby conceding its existence and effectiveness - undermines Mr. McClure's contention now that the easement is invalid.

Moreover, the activities that Mr. Wigglesworth previously addressed with Mr. McClure are different from the ones that the Planning Departments alleges as violations in this case. Although Mr. Wigglesworth granted permission for Mr. McClure to remove invasive species, he did not approve the removal of any other growth. Similarly, he did not approve the grazing of horses in the easement area. In fact, in a December 2005 letter he notified Mr. McClure that the forest conservation easement prohibited the pasturing of horses, and instructed him to remove horses from the easement area. The grazing of horses resulted in Easement Area Three being reduced from an area containing a large amount of high quality growth capable of regenerating into a forest to a largely denuded grass field. Mr. McClure argues that Mr. Wigglesworth approved the removal of some invasive species, but that does not justify the removal of the high quality growth identified on the approved forest conservation plan. Finally, the fence that Mr. McClure claims Mr. Wigglesworth approved was at the perimeter of the forest conservation area, and is not one of the alleged violations that the Planning Board considered in this proceeding. Mr. Wigglesworth also directed Mr. McClure to remove gravel that had been laid within one of the easement areas, and noted Mr. McClure's compliance with that directive. That gravel is different from the pavement that Mr. McClure installed within the easement post-January 2009, which is the subject of one of the alleged violations in this case.

Mr. McClure's claim that he paved the driveway in Easement Area One in order to address erosion problems does not absolve him of responsibility for violating the easement. The easement does not allow otherwise prohibited activities simply because they are done to remedy a problem on the site.

For all of these reasons, the Planning Board finds Mr. McClure is responsible for the violations alleged by the Planning Department. Based upon the evidence presented by the Planning Department, the Planning Board finds that Mr. McClure impacted a total of 17,393 square feet of existing forest and 58,684 square feet of naturally regenerating forest within a conservation easement. These dimensions are significant for calculation of the administrative civil penalty, which is discussed below.

Civil Administrative Penalty

After concluding that Mr. McClure had violated the forest conservation easement on his property as alleged by the Planning Department, the Planning Board heard further evidence and argument concerning the appropriate civil administrative penalty to assess against Mr. McClure and the appropriate corrective actions.

Under Section 22A-16(d) of the County Code, "a person who violates this Chapter, any regulation adopted under it, a forest conservation plan, or any associated agreement or restriction, is liable for an administrative penalty imposed by the Planning Board," no more than the $9.55 per square foot maximum set by the County Council and no less than the $0.30 per square foot minimum penalty established by state law. The law further establishes eight criteria that the Board must consider in determining the appropriate administrative penalty.

Under the forest conservation law, each day that a party fails to remedy a violation is a separate violation. Although many of the violations in this case are of a continuing nature, the Planning Department has alleged only one violation for each activity. Thus, for example, the Planning Department has calculated the penalty for grazing horses within the easement areas, which occurred on multiple days, and perhaps years, be treated as one violation rather than multiple violations. The Planning Department has treated the trailer parking in the same manner. The effect of this methodology is to greatly reduce the potential penalty amounts for which Mr. McClure might be liable.

The Planning Board adopts the Planning Department's recommendation to assess a penalty of $1.30 per square foot for violations in regeneration areas and $1.50 per square foot for removal of existing forest. The Planning Department calculated the recommended penalties by assigning a dollar amount to each of the applicable categories, within the $9.55 per square foot maximum allowed under the law, and averaging them, as follows:

Factor	Existing Forest	Regenerating Forest
Willfullness	$3/square foot	$2/square foot
Resource damage	$1/square foot	$1/square foot
Cost of Corrective Action	NA	NA
Water Quality Impact	$1/square foot	$1/square foot
Pattern	$1.50/square foot	$1.50 per square foot
Economic Benefit	$1/square foot	$1/square foot
Ability to Pay	NA	NA
Other	NA	NA
Average	$1.50 per square foot	$1.30 per square foot

The amounts recommended by the Planning Department in the individual categories are at the low end of what the record in this case might support, and therefore are conservative. The penalty that Mr. McClure is eventually required to pay may turn out to be even lower, because, as discussed below, the Board may reduce the penalty amount to reflect the costs of corrective action under certain circumstances. The relatively low penalty in this case is supported by the fact that the resource and water quality damage, while significant, was mitigated by the fact that adverse impacts in this case were largely to regenerating forest instead of existing forest. On the other hand, Mr. McClure's violations dealt a substantial setback to the reforestation of this area, and deprived the environment and the community of the resulting benefits. There is no question that Mr. McClure received an economic benefit from his actions, including by pasturing horses and parking trailers on his property for an extended period, and increasing the value of his property by putting to active use property that under the forest conservation easement would only be available for more passive enjoyment. The benefit of these activities would include the avoided cost of doing the same activities offsite. These facts warrant at least the relatively small penalty recommended for the economic benefit factor.

The recurrent pattern and willfulness of Mr. McClure's activities, including such actions as adding paving within an easement area after he had already been noticed that he had committed other violations, and refusing to remove a trailer from an easement area, justify a somewhat higher penalty of $1.50 per square foot.

In response to the proposed penalties, Mr. McClure perfunctorily asserted that he cannot afford to pay the proposed penalty amount. Based on this testimony, the Board does not conclude that the penalty amount should be reduced. The fine has already been set at a small fraction of what the law permits, and the point of the penalty is to deter forest conservation violations.

The main thrust of Mr. McClure's response to the proposed penalty is that he did not intend to violate the easements and that he has tried to work with Planning Department staff to resolve their concerns. Insofar as the Board believes that Mr. McClure had actual knowledge of the easement prior to the violations that are the subject of this case – even if he may not have fully appreciated the easement's significance – it appears that Mr. McClure chose to take a violate-first-and-ask-for-forgiveness-later approach to the easement. Therefore, the Board gives limited credence to Mr. McClure's claim that he did not intend to violate the easements, and does not find that it is appropriate to reduce the penalty amount below the relatively low amount that the staff has proposed. Mr. McClure's argument that he did not intend to violate the easement goes most directly to the issue of willfulness, a penalty factor that the Board has set at a very low level. If the Board had been convinced that Mr. McClure was completely willful in his violation of the easements, in calculating the appropriate penalty it might have assigned closer to the $9.55 per square foot maximum to the willfulness factor, leading to a substantially higher penalty. Instead it assigned $2.00-$3.00 per square foot.

Looking past the surface of Mr. McClure's claim that he has endeavored to resolve the Planning Department's concerns about the encroachments into his forest conservation easements, it is apparent that the resolution Mr. McClure has had in mind is simply to remove the easement from enough of his land to allow him to continue all of the currently prohibited activities, albeit with one-to-one offsite mitigation. Such a resolution would be inconsistent with the priorities of the forest conservation law, and with the forest conservation law's requirement for two-to-one mitigation for offsite planting. It is unclear from the record whether Mr. McClure was proposing to preserve existing offsite forest, which the Board has generally credited at a lower rate than planting new forest. Mr. McClure's claim that he has attempted to address the Planning Department's concerns is belied by his actions. Mr. McClure acknowledges, for example, that a Planning Department inspector asked him to remove trailers from the forest conservation easement area, and that he refused to do so because, he claims, he had no other place to park them. Yet there would have been nothing other than inconvenience, and possibly some expense, to prevent him from parking them off-site. Similarly, he installed pavement in Easement Area One after being notified of other violations on his lot. The forest conservation easement is not to be observed only when it is convenient, and inconvenience is not an excuse for violating it.

The Board is cognizant that even though the penalty recommended by the Planning Department is a small fraction of what the law permits, it is nonetheless a significant amount. This amount reflects the large area impacted by the violations and the importance that Montgomery County places on protecting trees and regenerating forest in the land development process. This policy recognizes both the importance of

trees to the County and its residents and the need to deter forest conservation violations. In the absence of substantial penalties, property owners who may be able to increase the value of their property significantly by violating an easement might lack an incentive to comply with the forest conservation law. For example, a property owner who chooses to build a pool in a forest conservation easement may considerably improve their property value. Similarly, Mr. McClure could potentially increase the value of his property by improving it with a horse paddock. The desire to make such improvements is perfectly understandable, but it is unacceptable to do so at the expense of forest conservation easements and the purpose they are intended to serve.

Based on the foregoing discussion and on the penalty calculations recommended by the Planning Department, and considering all of the circumstances of this case, the Board finds that it is appropriate to order Mr. McClure to pay an administrative civil penalty of $102,378.70, although, as discussed below, this amount may be reduced by Mr. McClure's cost of timely completing required corrective actions.

Corrective Actions

In addition to paying an administrative penalty, the Planning Department recommended that Mr. McClure be required to undertake certain corrective actions. In an attempt to accommodate Mr. McClure's continued use of his property for keeping horses, the Planning Department recommended that the Board remove the forest conservation easement from certain areas of Mr. McClure's lot with compensatory offsite planting, that Mr. McClure perform tree planting in certain areas that remain under forest conservation easement, and that Mr. McClure take certain steps to modify the existing forest conservation plan on his property and to ensure the future protection of the areas remaining in easement. The Planning Department also recommended that the Board consider reducing the civil administrative penalty that Mr. McClure must pay by the amount he spends timely performing the required corrective actions. Mr. McClure argued, on the other hand, that areas in violation should be removed from a Category I Easement, and that some planting to screen neighbors from Mr. McClure's property might be appropriate.

In Easement Area One, which is located at the front of the lot, the Planning Department recommended that Mr. McClure be required to conduct a professional survey of the easement area noting the easement boundary and impervious surfaces, remove grass and replace groundcover with a native wildflower mix within the planted forest area, remove all pervious surfaces from the easement area, install signs marking the boundaries of Easement Area One six-by-six-inch posts, and replant the area with 19 two-and-a-half-inch caliper native trees and ten three-quarter-inch to one-inch caliper native trees. The Planning Department further testified that the Board may wish to consider allowing Mr. McClure to remove the paved driveway area from the easement,

consisting of approximately 4,000 square feet, in which case he must perform off-site planting or pay a fee in lieu at a two-to-one ratio to the easement area removed.

In Easement Area Three, which is located at the rear of the lot, the Planning Department recommended that Mr. McClure be ordered to conduct a professional survey of the easement area noting the easement boundary and impervious surfaces, plant an 85-foot deep forest along the rear property line to be planted with 23 one-half inch and eight three-quarter inch to one-inch caliper native trees, and install a permanent fence and signs marked on six-by-six inch posts marking the easement boundary. The Department recommended removing the balance of Easement Area Three from the forest conservation easement with two-to-one replacement offsite or payment of a fee in lieu.

Mr. McClure argued that in light of his past efforts to comply with the forest conservation law, his efforts to work with Planning Department staff, and alleged defects in the recordation and platting of the easement on his lot that the Category I Easement should be removed from the areas where violations are alleged, and that some additional planting may be appropriate for purposes of screening his house and other activities from a neighboring property. The Planning Board rejected substantially the same arguments when it found Mr. McClure to be in violation of the easement on his property. Moreover the Board factored in these considerations when it assessed the willfulness of Mr. McClure's actions.

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. Requiring tree planting will help to ensure that areas where forest was intended to be preserved, or where natural growth was expected to be become forest, will eventually attain that status. It will also will help make up for time lost in that process as a result of the violations. 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 off-site tree planting and protection will substantially, if not completely, satisfy the forest conservation goals associated with this development.

Modifying the forest conservation easement areas on Mr. McClure's property will require certain administrative steps, including the filing of a preliminary plan amendment for forest conservation purposes. Further, in order to ensure timely compliance with the requirements of this order, the Order includes deadlines for Mr. McClure to file required plan amendments, perform required planting, and pay the required penalty. This Order specifies the actions that Mr. McClure must take, and the timing of those actions.

Additional deadlines will be set as necessary when Mr. McClure files a preliminary plan amendment.

Mr. McClure 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. McClure must post financial security such as a bond sufficient to cover the cost of all required planting, including off-site planting or fee in lieu payments. The required planting must occur within the first planting season after the Board issues the resolution approving the preliminary plan amendment. After the preliminary plan amendment is approved, Mr. McClure must submit a revised record plat showing the forest conservation easements.

No later than 90 days after the required tree planting has been performed or the end of the first planting seasons, whichever comes first, Mr. McClure must pay the full administrative penalty or, if all required actions have been timely performed, file a report with the Board documenting the costs of the mitigation. If the Board finds that all required corrective actions have been timely performed, it will reduce the amount of the administrative civil penalty by the demonstrated cost of the corrective actions. The Board will require Mr. McClure to provide clear documentation demonstrating the compliance costs. If the required corrective actions are not timely completed, Mr. McClure must pay the entire required civil administrative penalty ordered herein no later than 90 days after failing to meet any deadline required by this Order. For example, if Mr. McClure fails to submit a limited preliminary plan amendment within 90 days of the date of this Order, Mr. McClure will have 90 days from the date that this Order required the preliminary plan amendment to be filed to pay the required administrative penalty.

ORDER

The Planning Board hereby ORDERS:

1. Mr. McClure must pay an administrative penalty of $102,378.70 no later than 90 days from the earlier of the date of (a) non-compliance, or (b) timely completion of required planting, except as provided in paragraph (2) below.

2. If Mr. McClure timely meets all of the requirements of this Order, within 90 days of completing the required tree planting he may file a written request with the Planning Board to reduce the amount of the administrative penalty by the amount of the demonstrated costs of compliance. The deadline for paying the administrative penalty under 1(b), above, is extended if Mr. McClure files such a request. If Mr. McClure establishes that he has timely met all of the

requireme nts of this Order, the Board will reduce the administrative penalty owed by Mr. McClure by the demonstrated costs of complying with this order, including engineering, tree planting, and filing fees, excluding any legal fees. Mr. McClu re must pay any remaining administrative penalty in the amount specified by the Board no later than 90 days after the Board rules on his request to reduce the administrative penalty.

3. No later t han 90 days from the date of this Order, Mr. McClure must submit a limited amendment to Preliminary Plan No. 119960710 for Forest Conserva ion Plan purposes. The preliminary plan amendment must comply with the requirements of this Order, and must be approved within six months of submit al. No later than 14 days after the Board approves the preliminary plan amendment, Mr. McClure must submit to the Planning Department a financial security sufficient to cover the cost of all required planting, including off-site planting or fee in lieu payments.

4. No later than 90 days after the Board approves the required preliminary plan amendment, Mr. McClure must record a new record plat reflecting all conserva ion easements.

5. No later than 90 days after the Board approves the required preliminary plan amendment, Mr. McClure must install six-inch by six-inch posts marking all forest conservation easement boundaries.

6. No later than 90 days from the date of this Order, Mr. McClure must submit to Planning Department Staff a professional survey of Easement Area One and Easement Area Three boundaries that also identifies the location of all impervious surfaces (e.g., driveways, sheds, buildings) and fences that are within either easement area or on an easement boundary;

EASEMENT AREA ONE

7. No later than 90 days from the Board's approval of the required preliminary plan amendment, in Easement Area One Mr. McClure must:

   a. remove all impervious surfaces, fences, trailers, vehicles, and structures, with the exception of the paved driveway, which may be removed from the easement area as part of the preliminary plan amendment with compensatory planting; and

   b. install six-inch by six-inch posts and signage to demarcate all forest conservation easement boundaries.

8. No later than 90 days from the Board's approval of the required preliminary plan amendment, Mr. McClure must compensate for any removed portion of Easement Area One at a ratio of two to one with offsite, planted forest in a recorded Category I conservation easement, or payment of an equivalent fee in lieu.

9. In the next planting season following the Board's approval of the required preliminary plan amendment, Mr. McClure must plant 19 two and one-half-inch caliper native canopy trees and ten three-quarter to one-inch caliper native trees in Easement Area One, remove grass, and replace groundcover with native wildflower mix within the planted forest area;

EASEMENT AREA THREE

11. Mr. McClure must remove a portion of Easement Area Three that is currently pasture from the forest conservation easement via the preliminary plan amendment, but maintain an 85-foot-wide planted easement at the eastern property line;

12. No later than 90 days from the Board's approval of the required preliminary plan amendment, in Easement Area Three Mr. McClure must:

    a. compensate for any area removed from the easement at a ratio of two to one with offsite, planted forest in a recorded Category I conservation easement, or payment of a fee in lieu;

    b. remove all impervious surfaces, fences, trailers, vehicles, and structures from Easement Area Three; and

    c. demarcate new easement lines with permanent fencing that will prohibit horses from entering Easement Area Three.

13. In the next planting season following the Board's approval of the required preliminary plan amendment, Mr. McClure must plant Easement Area Three with 23 one-and-one-half-inch caliper and eight three-quarter to one-inch caliper native trees, remove existing, remaining grasses from Easement Area Three, and replace groundcover with a native wildflower mix.

BE IT FURTHER RESOLVED, that the date of this resolution is APR 10 2012 (which is the date that this order is mailed to all 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).

* * * * * * * * * * *

This is to certify that the foregoing is a true and correct copy of an Order adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission on motion of Vice Chair Wells-Harley, seconded by Commissioner Presley, with Chair Carrier, Vice Chair Wells-Harley, and Commissioner Presley voting in favor of the motion, with Commissioner Dreyfuss abstaining, and Commissioner Anderson absent at its regular meeting held on Thursday, April 5, 2012, in Silver Spring, Maryland.

Françoise Carrier, Chair
Montgomery County Planning Board