

IN THE MATTER OF  
RAYMOND D. and VICKEY L. BURKE  
LEGAL OWNERS /APPLICANTS  
16306 MATTHEWS ROAD  
MONKTON, MARYLAND 21111  
8<sup>TH</sup> ELECTION DISTRICT  
3<sup>RD</sup> COUNCILMANIC DISTRICT

\* BEFORE THE  
\* BOARD OF APPEALS  
\* OF  
\* BALTIMORE COUNTY  
\* Case No. CBA-12-002

RE: DENIAL OF WAIVER FROM  
REGULATIONS FOR THE PROTECTION OF  
WATER QUALITY, STREAMS, WETLANDS  
AND FLOODPLAINS/FOREST BUFFER  
EASEMENT/ FOREST CONSERVATION EASEMENT

\* \* \* \* \*

OPINION

This case comes before the Baltimore County Board of Appeals on a timely appeal brought by the Appellant/Applicant, Raymond and Vickey Burke from the letter decision dated June 22, 2011 from EPS Director to Mr. Raymond Daniel Burke denying the requested waiver from Regulations for the Protection of Water Quality, Streams, Wetlands and Floodplains/Forest Buffer Easement and Forest Conservation Easement.

The subject property is located at 16306 Matthews Road, Monkton, Maryland 21111 , 8th Election District, 3<sup>rd</sup> Councilmanic District.

The Board of Appeals held a public hearing on April 17, 2012. Closing Memorandums were submitted by the parties on May 18, 2012. A public deliberation followed on June 12, 2012.

The Appellant was *pro se*. Adam M. Rosenblatt, Assistant County Attorney, represented Baltimore County.

Background

Raymond and Vickey Burke purchased lot 3 in Corbett Valley on which they constructed a single family home.. They moved into the home in February of 2000. Lot 3 is one of six lots that were subdivided from the prior property known as the Shank Property.

## **Burke Opinion – CBA-12-002**

The location of the house on lot 3 and the Forest Buffer Easement (FBE) and the Forest Conservation Easement (FCE) are shown on Baltimore County's Exhibit No. 1. It is further depicted in detail in Appellants Exhibit No. 10. Mr. Burke also delineates the signage that is posted on his property of the boundaries for the FBE in Exhibit 1.

Mr. Burke testified that at the time of the purchase, there was no Declaration of the FBE or the FCE on the lot; however, the Developer and the County entered into an Agreement establishing the FBE and FCE. The prior owner was ordered to plant grass in 1997 (Burke Exhibit No. 3). the grass was never planted until after the construction of the Burke home and the grading had been completed to the FBE wood line. That all took place in early 2000. The grass was then planted by the Builder when the Spring weather permitted. The Contractor had established a permanent lawn in all graded areas of the lot, including the portion of the FBE between the easement boundary and the woods. Mr. Burke admitted he had maintained a lawn in the graded are ever since the start, that included the FBE. Mr. Burke also requested to the Contractor that he would like to keep the two stands of trees in the FBE. He felt maintaining a well-manicured lawn in the FBE was still controlling the run-off and providing sediment control to a stream that cuts through his property.

Mr. Burke further detailed how they have planted more than twenty large trees and even a greater number of shrubs on their lot outside of the FBE and FCE. Inspectors have been to the property over the years while he was maintaining the lawn in the FBE but no Correction Notice or Citation had been given to the Burkes.

The neighborhood had been mowing in the FBE in different lots until March of 2011, at which time Charles Batchelder, a Natural Resource Specialist II for the Baltimore County Department of Environmental Protection and Sustainability (DEPS), reviewed and inspected the

## **Burke Opinion – CBA-12-002**

easements in the Corbett Valley and surrounding subdivisions. The Inspector discovered that the Burkes, along with other neighbors, had been mowing in the FBE. Mr. Burke and the neighbors were given Notice to stop disturbing the FBE.

Mr. Burke appealed the decision letter of DEPS and asked for a waiver/variance from the FBE contending practical difficulty and unreasonable hardship.

### **The Applicable Law**

The Board is well aware of the law that must be applied to the facts of the case to arrive at a conclusion. The Maryland courts have long held that “as a general rule, variances are to be granted sparingly and under exceptional circumstances. To do otherwise, would decimate zonal restrictions and eventually destroy all zoning regulations.” *Carney v. the City of Baltimore*, 201 Md. 130, 137 (1952). In *Cromwell v. Ward*, 102 Md.App. 691 (1995), the Court of Appeals, through Judge Cathell, articulated the standards that administrative bodies were required to consider in the granting of variances. The first step enunciated required that the subject property be unique. “The need for a variance must be due to the unique circumstances of the property and not to the general condition in the neighborhood.” Judge Cathell wrote, “The treatise writers are also in accord with the rule that variance should only be granted when the uniqueness or peculiarity of the subject property is not shared by neighboring property and where the uniqueness of the property results in extraordinary impact on it by the operation of the statute, thus creating undue difficulty or unnecessary hardship in respect to use and variances. It is fundamental that the difficulties and hardships must be unique to justify a variance; they must be peculiar to the application of zoning restrictions on a particular property and not general in character...It is not uniqueness of the plight of the owner. But uniqueness of the land in causing the plight which is the criteria. If the hardship is common to the whole neighborhood, it may be grounds for an exception for a special use permit (if the statute so

**Burke Opinion – CBA-12-002**

provides)...The hardship (in order to justify a variance) however...must relate to the particular property of the Appellant.” As was further stated in *North v. St. Mary’s County*, 99 Md. App. 512, the Court of Appeals held that the ordinance requires a finding that “special conditions or circumstances exist upon the property or neighboring property.” “Uniqueness” of property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area; i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions or other restrictions). In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing of party walls.

Based upon this review, the Board is unable to determine any uniqueness as to the Burke property that would qualify it as “unique” in accordance with standards imposed by higher Maryland Courts. Additionally, there is nothing unusual or unique on any of the lots which encompass the exhibits that were viewed by the Board members.

Mr. Burke offered no testimony concerning the unique aspect of their home and was not compelling as to the uniqueness factor. Having determined that the Appellant has not satisfied the first prong required by *Cromwell v. Ward*, in that the property has been found by the Board not to be “unique” based on the evidence and testimony reviewed by its members, it is not necessary for the Board to discuss the second prong – or “practical difficulty” (as distinguished from unusual hardship in respect to use variances). However, in order to complete the record, the Board will express its opinion concerning this element.

The standard required to be met by a Petitioner in an area zoning variance case has been defined by the Maryland Court of Appeals in the well-known case of *McLean v. Soley*, 270 Md. 208 (1973), as follows:

**Burke Opinion – CBA-12-002**

1. Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome;
2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; and
3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

It is undisputed that Mr. Burke purchased the subject property approximately 12 years ago and there is no question but that the Appellant has requested the waiver/variance for a permitted purpose. However, does the request “render conformity with such restrictions unnecessarily burdensome”?

Mr. Burke stated that the practical difficulty and unreasonable hardship is that high grass and weeds (at the closest point to the house would be thirty-five (35) feet) violates the County's own Livability Code provisions. Due to the fact that this property is located in a rural area, it brings the woods close to his family dwelling. These woods are inhabited with wildlife, including rodents, snakes and pests. Although Mr. Burke admitted managing this situation, he now feels it will become unmanageable.

Another problem Mr. Burke discussed was the hazard of fire. That the higher grass and weeds in a drought condition would make his house unsafe and could result in his home being destroyed. He also testified that this would negatively impact the value of his home or the his ability for a fair re-sale.

While understanding the sincere motives of the Applicant/Appellant in seeking the waiver/variance, the Board does not believe that the present restrictions place an unreasonable

burden upon the Appellant. The Board feel there is no practical difficulty or unreasonable hardship. All issues that were presented were opinions and there was no expert testimony presented.

DEPS regulates the FBE pursuant to Section 33-3-101 and 102 of the *Baltimore County Code*. It states as follows:

§ 33-3-101. DEFINITIONS.

(a) *In general.* In this title the following words have the meanings indicated.

(b) *Agricultural operation.* “Agricultural operation” means properties used for the production of agricultural products in accordance with a soil conservation and water quality plan approved by the County Soil Conservation District.

(c) *Agriculture.*

(1) “Agriculture” means all methods of production, processing, storage, and management of livestock, crops, vegetation, and soil.

(2) “Agriculture” includes:

(i) The related activities of tillage, fertilization, pest control, harvesting, and marketing; and

(ii) The activities of feeding, housing, maintaining animals, including cattle, dairy cows, sheep, goats, hogs, horses, and poultry and handling their by-products.

(d) *Applicant.*

(1) “Applicant” means a person requesting approval of development under this title or Article 32, Title 4 of the Code.

(2) “Applicant” includes an owner, contract purchaser, or the legally authorized representative of either.

(e) *Best management practices (bmps).* “Best management practices (BMPs)” means conservation practices or systems of practices and management measures that control soil loss and

reduce water quality degradation caused by nutrients, animal wastes, toxins, sediment, and runoff.

(f) *Department.* “Department” means the Department of Environmental Protection and Sustainability.

(g) *Development.* “Development” means:

- (1) The improvement of property for any purpose involving building;
- (2) Subdivision;
- (3) The combination of any two or more lots, tracts, or parcels of property for any purpose;
- (4) Subjecting property to the provisions of the Maryland Condominium Act; and
- (5) The preparation of land for any of the purposes listed in items (1) through (4) of this subsection.

(h) *Forest buffer.*

- (1) “Forest buffer” means a wooded area that exists or is established to protect a stream system.
- (2) “Forest buffer” includes trees, shrubs, and herbaceous vegetation.

(i) *Plan.* “Plan” means a written and graphic representation of all proposed development, forest harvesting operations, surface mining operations, agricultural operations, and other land use activities not otherwise exempt from the provisions of this title that is prepared in accordance with § 33-3-108 of this title.

(j) *Pollutant.* “Pollutant” means:

- (1) Any waste or wastewater that is discharged from:
  - (i) Any publicly-owned treatment works, or
  - (ii) An industrial source; or
- (2) Any other liquid, gaseous, solid, or other substance that will pollute any waters of this state.

(k) *Public improvement.* “Public improvement” means any improvement, facility, or service together with its associated public site or right-of-way necessary to provide transportation, drainage, public or private utilities, energy, or similar essential services.

(l) *Waste.* “Waste” means industrial waste and all other liquid, gaseous, solid, and other substances that will pollute any waters of this state.

(m) *Wastewater.* “Wastewater” means:

(1) Liquid waste substance derived from industrial, commercial, municipal, residential, agricultural, recreational, or other operations or establishments; or

(2) Other liquid waste substance containing liquid, gaseous, or solid matter and having characteristics that will pollute any waters of this state.

(1988 Code, § 14-336) (Bill No. 224, 1990, § 1; Bill No. 10-96, § 3, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004; Bill No. 122-10, § 13, 1-16-2011)

□§ 33-3-102. LEGISLATIVE FINDINGS OF FACT.

(a) *Federal policy.*

(1) Section 101(a) of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500), as amended by the Clean Water Act of 1977 (P.L. 95-217), declares that the objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.

(2) In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act:

(i) It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(ii) It is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and



propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(iii) It is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(iv) It is the national policy that federal financial assistance be provided to construct publicly owned waste treatment works;

(v) It is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each state;

(vi) It is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(vii) It is the national policy that programs for the control of nonpoint source pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint source pollution.

(b) *COMAR*. COMAR 26.08.02 prohibits:

(1) Pollution of the waters of this state; and

(2) Degradation of the quality of certain waters of this state.

(c) *Chesapeake Bay Agreement*. The state is:

(1) Committed to the 1987 Chesapeake Bay Agreement, the goal of which is to reduce nutrient loads entering the Chesapeake Bay by 40% by the year 2000; and

(2) Initiating implementation of Maryland's Chesapeake Bay Nutrient Reduction Plan 1985--2000, which calls for the

establishment of forested buffer strips along stream channels adjoining cropland.

(d) *Department to administer.* The Department has received delegation from the state for the administration of environmental programs.

(e) *Master plan.* The County Master Plan 1979--1995 calls for the protection of the natural functions of stream valleys and the County Master Plan 1989--2000 states that wetland and riparian vegetation play an essential role in the natural functioning of stream systems.

(f) *Hydrogeological studies and environmental effects reports.* Section 34-1-101 of the Code provides for hydrogeological studies and environmental effects reports and authorizes the disapproval of any subdivision within the watershed of a public water supply reservoir if the studies, reports, or both show that disapproval is required in the interest of the protection of the watershed and the public health, safety, and welfare.

(g) *Floodplain and wetland restrictions.* Section 32-4-414 of the Code:

(1) Restricts construction in or alteration of any riverine floodplain;

(2) Prohibits dredging, filling, or construction in any wetland; and

(3) Requires that any wetland must be adequately protected from contamination.

(h) *Preservation of natural features.* Section 32-4-416 of the Code requires that natural features, including watercourses and significant vegetation, must be preserved.

(i) *Nuisances.* Section 13-7-112 of the Code provides for abatement of nuisances affecting health or the environment.

(j) *Watershed Management Agreement.* The county is a signatory to the 1984 Reservoir Watershed Management Agreement and the 1990 Reaffirmation Agreement, which calls for the county to adopt policies to maintain vegetated buffers along streams in new subdivisions.

(k) *Water Quality Steering Committee.* The County Water Quality Steering Committee has determined that forest buffers are necessary to protect water quality, streams, wetlands, and riverine floodplains and has recommended that regulations concerning the same be enacted.

(1988 Code, § 14-331) (Bill No. 224, 1990, § 1; Bill No. 94-02, § 2, 7-1-2004)

### Decision

The Board believes that to grant the waiver/variance would not be within the spirit and intent of the ordinance(s) under the *Baltimore County Code* or applicable law as stated above.

Having reviewed the testimony and evidence before us, the Board finds unanimously that the Applicant/Appellant has not met all the criteria and requirements for the granting of his request for a waiver.

The Board carefully reviewed the criteria as stated above and presented to us. The members of the Board are aware that this will impact the Burke's way of life, but the Board also feels that this home has a lot of property around it that can be mowed to give the Burkes the comfort they need.

Therefore, we will affirm the decision letter dated June 22, 2011 from the Director of DEPS and deny the requested waiver/variance.

**ORDER**  
THEREFORE, IT IS THIS 1<sup>st</sup> day of October, 2012 by the Board of Appeals of Baltimore County


**ORDERED** that the Applicant's requested waiver from Regulations for the Protection of Water Quality, Streams, Wetlands and Floodplains/Forest Buffer Easement/ Forest Conservation Easement denied by the Department. [Sections 33-3-101 through 33-3-120 of the *Baltimore County Code*] be and is hereby **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
Andrew M. Belt, Panel Chairman

  
David L. Thurston

  
Edward W. Crizer, Jr.