

IN THE MATTER OF
MARY AND ROBERT PENCARSKI
LEGAL OWNERS
6427 CATALPA ROAD, FORK, MD 21051

RE: EPS DECISION /DENIAL OF VARIANCE

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA-13-004

* * * * *

OPINION

This case comes before the Baltimore County Board of Appeals on a timely appeal brought by the Appellants/Protestants, Mary and Robert Pencarski from a decision letter from Vincent Gardina, Director of Department of Environmental Protection and Sustainability (DEPS) denying requested variance from Protection of Water Quality, Streams, Wetlands and Floodplains (Sections 33-3-101 through 33-3-120) of the *Baltimore County Code*. The variance request proposes allowing unauthorized tree removal measuring approximately 18,230 square feet within a Forest Buffer Easement (FBE) on the 3.19-acre residential property.

The subject property is located at 6427 Catalpa Road in Fork Maryland 21051 of Baltimore County, 11th Election District, 6th Councilmanic District.

The Board of Appeals held a public hearing on Wednesday, November 28, 2012. A public deliberation followed on January 15, 2013.

The Appellants, Mary and Robert Pencarski appeared *pro se* and Jonny Akchin, Assistant County Attorney, represented Baltimore County.

Background

Mr. and Mrs. Pencarski were notified by a letter (County Exhibit #2) dated February 1, 2012 that there was recent activities noticed by a field inspection that were in violation of Section 33-3-112

of the Baltimore County Code. They were informed that the Forest Buffer Easement was created in 1997, at the time of the Brintonwood Subdivision. They were instructed to cease any disturbance in the area and a list of disturbances were listed in the letter; specifically noted were the cutting of trees and grading to stop immediately.

They were told to delineate the FBE and replant the 18,225 area of disturbed area. They were given two plans of remedy, namely, 84 trees 1 ½ caliper, over 6 feet tall, 15' on-center; or 42 trees 2 ½ caliper, over 7 feet tall, 20' on-center.

The regulation relative to the instant case reads as follows:

§ 33-3-115. ENFORCEMENT PROCEDURES.

(a) *In general.* The Director may enforce the provisions of this title in accordance with Article 3, Title 6 of the Code.

(b) *Revocation or suspension of approval or permit.* The county may revoke or suspend any approval or permit issued by the county after written notice to the permittee for the following reasons:

(1) Any violation of the conditions of the permit or approved plans;

(2) Construction, grading, timber harvesting, tree cutting, clearing, or grubbing that is not in accordance with the approved plans;

(3) Noncompliance with a correction notice or stop-work order;

(4) Changes in site characteristics upon which plan approvals and permit issuance was based; or

(5) Any violation of this title or any regulations adopted under this title.

(Bill No. 82-06, § 4, 8-24-2006)

§33-3-119. LIABILITY FOR EXPENSES CAUSED BY VIOLATION

A person who violates any provision of this title, or an order or permit condition promulgated or issued under this title may be liable for any costs or expenses incurred by the county as a result of the violation. (1988 Code, § 14-349) (Bill No. 224, 1990, § 1; Bill No. 94-02, § 2, 7-1-2004)

§33-3-119. ADDITIONAL REMEDIES FOR VIOLATION

(a) *In general.* In addition to any other sanction under this title, a person who fails to comply with the provisions of this title, orders, or permit conditions promulgated or issued under this title relating to forest buffers, stream systems, and water pollution shall be liable to the county in a civil action for damages in an amount equal to twice the cost of restoring the forest buffer, stream system, and water quality as determined by the Department.

(b) *Use of recovered damages.* Any damages that are recovered under this section shall be used:

(1) For the restoration of forest buffers, stream systems, and water quality; or

(2) For the administration of the Department's program for the protection and restoration of water quality, streams, wetlands, and riverine floodplains.

(1988 Code, § 14-350) (Bill No. 224, 1990, § 1; Bill No. 94-02, § 2, 7-1-2004)

Testimony and Evidence

Mrs. Pencarski testified that they purchased the home from Joseph Kilpatrick for \$700,000 and no one informed them of the FBE. Mrs. Pencarski filed for the variance (County Exhibit #3) citing practical difficulty or hardship, listing basically that the tree canopy was destroying the home and it cost them \$20,000 to cut the trees down. She did admit to cutting an estimated 80 large trees in the buffer with a cost incurred to them of \$20,000. Mrs. Pencarski was convinced that the trees of at least 75 feet away were destroying her home and that is why they cut them down.

Zachary Pencarski, son of Robert and Mary Pencarski testified that he lives in the home with his parents. He is a student at Morgan State and a part time real estate agent. He admitted that he was the one who cut down the trees to let in light to dry up the mold and dry out the roof of the house. he says the canopy is destroying the home and sheds (All Appellants Exhibits). He does not want to plant the native trees on the list; he would rather plant non-native species.

Thomas Krispin a Natural Recourses Officer II for Baltimore County testified he had been to the property and calculated the size of the disturbance of the FBE. He stated it was not an easy task, not only were the trees cut down but the stumps were also ground out and grass had

been planted over the area. He noted that he used the Forest Conservation Manual to come up with his number since all the stumps were missing. He met Zachary Pencarski January 26th on his field inspection and he did not dispute that the area was a FBE.

Decision

This board does sympathize with the home owner and believes they do suffer from wet conditions and mold and moss growing on the home.

The Baltimore County Code 33-3-112 states

§ 33-3-112. MANAGEMENT REQUIREMENTS FOR FOREST BUFFERS.

(a) In general.

(1) The forest buffer, including wetlands and riverine floodplains, shall be managed to enhance and maximize the unique value of these resources.

(2) Management includes specific limitations on alteration of the natural conditions of these resources.

(b) Prohibited practices.

(1) The practices and activities that are restricted within the forest buffer under paragraph (2) of this subsection, are restricted except as provided for:

(i) Forest harvesting operations that are implementing a forest management plan approved by the Department, the State Department of Natural Resources, the County Forest Conservancy District Board, or the County Soil Conservation District;

(ii) Surface mining operations that are operating in compliance with a state surface mining permit; and

(iii) Agricultural operations in accordance with a soil conservation and water quality plan approved by the County Soil Conservation District.

(2) (i) The following practices and activities are restricted within the forest buffer.

(ii) Except as provided in subsection (c) of this section, the existing vegetation within the forest buffer may not be disturbed, including disturbance by tree removal, shrub removal, clearing, mowing, burning, spraying, and grazing.

(iii) Soil disturbance may not take place within the forest buffer by grading, stripping of topsoil, plowing, cultivating, or other practices.

(iv) Filling or dumping may not occur within the forest buffer.

(v) Except as authorized by the Department, the forest buffer may not be drained by ditching, underdrains, or other drainage systems.

(vi) Pesticides may not be stored, used, or applied within the forest buffer, except for the spot spraying of noxious weeds consistent with the recommendations of the University of Maryland Cooperative Extension Service.

(vii) Animals may not be housed, grazed, or otherwise maintained within the forest buffer.

(viii) Motorized vehicles may not be stored or operated within the forest buffer, except for maintenance and emergency use approved by the Department.

(ix) Materials may not be stored within the forest buffer.

(c) Authorized structures, practices, and activities.

(1) The following structures, practices, and activities are permitted in the forest buffer.

(2) (i) Roads, bridges, trails, storm drainage, stormwater management devices and practices, and utilities approved by the Department are authorized within the forest buffer provided that an alternatives analysis has clearly demonstrated that no other feasible alternative exists and that minimal disturbance will take place.

(ii) The alternatives analysis shall be submitted to the Department in accordance with § 33-3-106 of this title.

(iii) These structures shall be located, designed, constructed, and maintained to:

1. Provide maximum erosion protection;
2. Have the least adverse effects on wildlife, aquatic life, and their habitats; and
3. Maintain hydrologic processes and water quality.

(iv) Following any disturbance, the impacted area shall be restored.

(3) Stream restoration projects, facilities, and activities approved by the Department are authorized within the forest buffer.

(4) Scientific studies approved by the Department, including water quality monitoring and stream gauging, are authorized within the forest buffer.

(5) Horticulture practices may be used to maintain the health of individual trees in the forest buffer.

(6) Individual trees in the forest buffer that are in danger of falling, causing damage to dwellings or other structures, or causing the blockage of streams may be removed.

(7) Other timber cutting techniques approved by the Department may be undertaken within the forest buffer under the advice and guidance of the State Departments of Agriculture and Natural Resources, if necessary to preserve the forest from extensive pest infestation, disease infestation, or threat from fire.

(1988 Code, § 14-342) (Bill No. 224, 1990, § 1; Bill No. 94-02, § 2, 7-1-2004)

Having reviewed the testimony and evidence before us, the Board finds unanimously that the Petitioners did not meet the standard of proof to receive the requested variance. We carefully reviewed the criteria as stated above and presented to us .

This Board does not believe that a practical difficulty nor an unreasonable hardship exists based on the testimony and evidence before us. After reviewing all the set backs the overlays and testimonies we agree with the County. We also believe all the FBE information for this home was provided to the current homeowner.

Evidence and testimony overwhelmingly sustain a finding that the Petitioner has not fulfilled all what that the law requires to grant a variance.

ORDER

THEREFORE, FOR THE REASONS STATED ABOVE, IT IS THIS

21st day of March, 2013 by the Board of Appeals of Baltimore County

ORDERED that the May 23, 2012 decision of Vincent Gardina, Director of Department of Environmental Protection and Sustainability (DEPS) denying requested variance from Protection of Water Quality, Streams, Wetlands and Floodplains (Sections 33-3-101 through 33-3-120) of the *Baltimore County Code*, be and is hereby **AFFIRMED**; and it is further

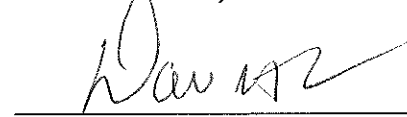
ORDERED that Applicant's request for a variance from Protection of Water Quality, Streams, Wetlands and Floodplains (Sections 33-3-101 through 33-3-120) of the *Baltimore County Cod* be and the same is **DENIED**.

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*.

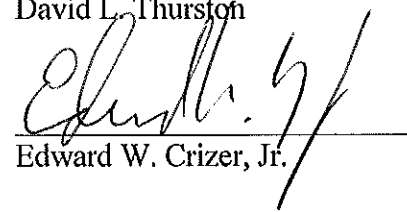
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Andrew M. Belt, Chairman



David L. Thurston



Edward W. Crizer, Jr.



Board of Appeals of Baltimore County

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March 21, 2013

Mary and Robert Pencarski
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Jonny Akchin, Assistant County Attorney
Dept. of Permits, Approvals and Inspections
Real Estate Compliance Section
111 W. Chesapeake Avenue
Towson, MD 21204

RE: *In the Matter of: Mary and Robert Pencarski – Applicant/Appellant*
Case No.: CBA-13-004

Dear Mr. and Mrs. Pencarski and Mr. Akchin:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

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*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in black ink that reads "Theresa Shelton/kc".

Theresa R. Shelton
Administrator

TRS/klc
Enclosure
Duplicate Original Cover Letter

c: Julie Roberts, Natural Resource Planner/State of Maryland Critical Area Commission Chesapeake & Atlantic Coastal Bays
Office of People's Counsel
Vincent J. Gardina, Director/Department of Environmental Protection and Sustainability
Patricia M. Farr, Manager, Environmental Impact Review/EPS
Thomas Krispin, Natural Resource Specialist II, Environmental Impact Review/EPS
Nancy C. West, Assistant County Attorney
Michael Field, County Attorney