



Board of Appeals of Baltimore County

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June 8, 2016

Jonny Akchin, Assistant County Attorney
Department of Permits, Approvals & Inspections.
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

RE: *In the Matter of: Michael and Jessica Adams*
Case No.: CBA-16-037

Dear Counsel:

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 cursive script that reads "Sunny Cannington Han".

Krysundra "Sunny" Cannington
Administrator

KC/tam
Enclosure
Duplicate Original Cover Letter

c: Michael and Jessica Adams
Lawrence M. Stahl, Managing Administrative Law Judge
Gris Batchelder, Environmental Impact Review/DEPS
Brian Lindley, Supervisor, Environmental Compliance/DEPS
Vincent J. Gardina, Director/DEPS
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF
MICHAEL AND JESSICA ADAMS
16916 YEOHO ROAD
PARKTON, MARYLAND 21120

APPELLANTS

Citation/Case No. EIR-15-01-C1

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA-16-037

* * * * *

OPINION

This matter comes before the Baltimore County Board of Appeals as an appeal from an March 17, 2016 decision from the Administrative Law Judge upholding civil monetary penalties in the amount of \$8,000.00 (Eight Thousand Dollars) for violations of Article 33, Title 6, § 104(b) of the Forest Conservation Regulations after failing to comply with a Violation Notice dated July 23, 2015, stating that the owner must cease forest clearing activities, pay fine of \$16,535.00 and file Declaration of Intent in accordance with Baltimore County Code (“BBC”) § 33-6-104(g).

The Board convened for a hearing on May 24, 2016. Jonny Akchin, Assistant County Attorney, appeared on behalf of Baltimore County. Lawrence E. Schmidt of Smith, Gildea and Schmidt appeared on behalf of the Appellants, Michael and Jessica Adams (“the Adams”). This case comes before the Board as a record appeal, with no new evidence being admitted. Counsel for the parties offered oral argument as well as thoughtful and well-reasoned written memorandums. A transcript of the December 23, 2015 hearing before the ALJ was also provided.

BACKGROUND

On October 29, 2015, pursuant to § 1-2-217 of the Baltimore County Code, Brian Lindley issued a Code Enforcement Citation. The citation was sent to the Respondent by 1st class mail and/or

posted to the above listed address. The Citation proposed a civil penalty of \$17,000.00 (Seventeen Thousand Dollars).

At the December 23, 2015 hearing before the ALJ, Brian Lindley testified on behalf of the County that upon a citizen complaint received on June 22, 2015 of an alleged illegal logging operation on the Appellants' property an inspection of the subject site was carried out on June 24, 2015 by Gris Batchelder of Baltimore County Environmental Impact Review, revealing that a considerable number of trees had been removed, leaving cleared and graded areas. He stated that he spoke with Mrs. Adams, who informed him that they had in fact, hired a logger who, over a period of approximately two months, removed trees they considered a "hazard" to the house.

Mr. Lindley further testified that on June 26, 2015 he had marked out the area of disturbance on the subject property by means of the Global Positioning System (GPS); and had determined that 66 large trees had been removed, and that the area affected (some 41,337 sq. ft.) had been the subject of clearing and grading. Lindley stated that on July 23, 2015 a Violation Letter was sent to the Appellants, informing them that the removal of the trees was contrary to County regulations and that a Declaration of Intent ("DOI"), claiming an exemption had not been filed. He enclosed a copy of the DOI to be completed as well as photo evidence in the County's possession of the removal. A non-compliance fee of \$0.40 per sq. ft. (instead of the \$1.20 per sq. ft. permitted to be assessed) totaling Sixteen Thousand, Five Hundred Thirty-Five (\$16,535.00) was assessed. A deadline of September 30, 2015 was set for compliance.

The deadline set out in the County's letter of July 23, 2015 having expired, a Citation was issued and mailed to the Appellants. A final site visit was carried out on December 17, 2015, noting no additional tree removal on the Appellants property.

Jessica Adams, one of the Appellants, testified that she had been on the property since June, 2014. She explained that her insurance company (USAA) had sent an inspector to the site after they had purchased it. He advised that to protect the property and limit liability some trees close to the house (one of which had, on a previous occasion, fallen on the shed) should be removed. She also had concerns about the safety of her family, as well as noting that rotting tree limbs had previously fallen on the driveway. She stated that they decided to remove approximately 15 trees designated by the insurance inspector. She further stated that they consulted the Maryland Department of Natural Resources' website to locate a licensed forestry service. They hired Paul Hamby. She related that Mr. Hamby came to their site to view the trees to be removed. She testified that he also marked 15 additional trees which the Appellants agreed he could remove and keep- thus reducing the costs to be paid by the Appellants for the 15 trees they originally wished to be removed.

She testified that Mr. Hamby never said anything about permits, rules or regulations. She explained that since he was on the Maryland State list, she believed that he would do what was required under the law. She recalled that work began in early April, 2015 at sporadic times, until June, 2015. She saw that the property appeared thinner out back of the house, and concluded that Mr. Hamby had evidently removed more trees than he should have. Admitting that they didn't watch all the time, she recalled finally noticing a tree they knew wasn't supposed to be removed. She stated that they then decided to tell Mr. Hamby to stop all further operations-and it appeared to them that he took with him the original "requested" 15 trees as well as the 15 they agreed he could take to represent "credit" against what they had contracted to pay Mr. Hamby, along with some additional trees that were also removed.

She maintained that they had depended at all times on Mr. Hamby to obtain proper permission to remove the trees and insisted that they didn't know there was a problem until Mr. Batchelder inspected the property.

ARGUMENT

Baltimore County Code ("BCC") § 3-6-205(c) sets forth mandatory criteria regulating the required content in a Code Enforcement Citation. It shall:

- (i) Be in writing and describe with particularity the nature of the violation, including a reference to the Code or County Code provision the violator has allegedly violated;
- (ii) Include any civil penalty proposed to be assessed; and
- (ii) Include any civil penalty proposed to be assessed; and
- (iii) Advise the violator that the violator may contest the citation or proposed civil penalty by filing with the Code Official or Director, with 15 days after receipt of the citation, a written request for a code enforcement hearing.

Additionally, pursuant to BCC § 3-6-209(c)(3)(i): "A civil citation may require the violator to comply with the correction notice." "Correction notices issued under the authority of BCC § 3-6-203(a) and share the citations requirement of "be[ing] in writing and . . . describ[ing] with particularity the violation and the manner of correction."

Counsel for the Appellants argues that the Citation issued to the Mr. and Mrs. Adams is insufficient as a matter of law. Counsel bases this argument on his contention that the citation at issue failed to cite a provision of law which the Appellants have violated. Counsel asserts that the purpose of this statute is to comport to due process and fundamental fairness, in that a violator must be informed of the provisions of law allegedly violated in order to prepare an adequate defense. *Schultz v. Pritts*, 291 Md. 1, 7 (1981).

Counsel for the County argues that term “particularity” found in BCC § 3-6-205(c)(1)(i) is to be more liberally interpreted and that the citation in question was sufficiently “particular” in advising the Appellants as to the nature of the violation that they were alleged to have committed.

The citation at issue in this matter cites alleged non-compliance BCC § 33-6-104(b). BCC § 33-6-104(b) is entitled “Declaration of Intent” (“DOI”). As stated in § 33-6-104(a), the purpose of a DOI “is to verify that the proposed activity is exempt from the provisions of this title.” BCC § 33-6-104(b), states that “a person seeking an exemption under § 33-6-103(b)(3), (4), (10), (13), or (20) of this title shall file a declaration of intent with the Department.” Consequently, reading on face value the citation issued to the Adams, the County cited them for their failure to file a DOI.

Counsel for the Appellants contends that in order for the Adams to be cited for failure to file a DOI, they must first fit into one of the enumerated exceptions that allows for filing of a DOI found in BCC § 33-6-104(b)(3), (4), (10), (13) or (20). In both the hearing before the ALJ, in his memorandum, and in oral argument, Counsel for Appellants has asserted that none of these sections applied to the Appellants, and at the hearing before the ALJ, even got Mr. Lindley to agree with him. However, as noted by Assistant County Attorney, Akchin, Mr. Lindley is not the final word on how the law is interpreted, that was the task of the ALJ, who ultimately found that at least one of the enumerated exceptions did apply.

BCC§ 33-101 defines “commercial logging or timber harvesting operation” as cutting and removing of tree stems from a site for commercial purposes, leaving the root mass intact. Mrs. Adams testified that she retained Mr. Hamby to remove 15 hazard trees and that “he had marked fifteen others that he would take for lumber, that would help reduce the cost to the Adams. The County argues that since the Adams were to receive a pecuniary gain in addition to the removal of the 15 hazard trees, that the activity done by Mr. Hamby constitutes “commercial logging.” While

it is clear to this Board, that this was not the Adams primary purpose for the tree removal, and also clear that Mr. Hamby appears to have over-stepped the parameters of his agreement with the Adams, the Board concurs with the ALJ's finding that "commercial logging" had occurred as defined by statute.

Accepting that commercial logging was at issue, BCC §33-6-104(b) would come into play in determining whether any of the enumerated exceptions applied from which the Adams should have requested a DOI. In reviewing the exceptions found in BCC § 33-6-104(b)(3), (4), (10), (13) and (20) and Counsels' competing arguments as to which applies to the tree removal activity found on the Adams property, we must review the opinion of the ALJ to determine which exception he relied on in deciding that the citation was sufficient. As this case comes to the Board as a record appeal, we must give considerable deference to the ALJ's findings of fact. In reviewing the ALJ's opinion, he does not make a specific factual finding as to what exception pursuant to BCC § 33-6-104(b) he deemed to apply. In this Board's review of the record, we determine that BCC § 33-6-104(b)(10) is the only exception that logically applies in this matter. § 33-6-103(b)(10) allows an exception for "forest clearing activity . . . [which] [d]oes not result in the cumulative cutting, clearing, or grading of more than 40,000 square feet of forest."

It is the application of this section to the alleged violations by the Adams which causes this Board concern. In returning to the Appellants' argument that the citation issued to the Adams was legally insufficient in that it failed to comply with the "particularity" requirements found in BCC § 3-6-205(c)(i), we must review what the citation was issued exactly stated. In the July 23, 2015 Violation Letter from Mr. Batchelder, it stated:

Environmental Impact review (EIR) Staff visited your above-referenced property in response to a tree clearing complaint. The site visit revealed approximately 41,337 square feet of forest was cleared including at least 66 large trees. . . . As a result of the forest clearing, EIR has determined your property is in violation of §

33-6-104(b) of the Baltimore County Code. (See County Exhibit 4, December 23, 2015 Hearing Before the ALJ.) (See County Exhibit 4, December 23, 2015 Hearing Before the ALJ.)

The correction notice goes on to explain that “you are receiving this violation notice because you failed to file a Forestry Declaration of Intent (DOI) with this office prior to the clearing in accordance with the County’s Forest Conservation Regulations. *Id.*

The notice further instructs the Adams that:

“In order to bring your property into compliance with our Forest Conservation Regulations, you are hereby ordered to:

1. Cease further clearing activities on the property.
2. Pay a noncompliance fee, payable to Baltimore County of \$16,535.00 (0.40 per square foot multiplied by 41, 337 square feet) for the area disturbed on your property and submit a Forestry DOI.” *Id.*

After receiving this correction notice, if the Adams were to venture to inspect BCC§ 33-6-104(b) of the Baltimore County Code as referenced in the letter from Mr. Batchelder and the further referenced exceptions of BCC § 33-6-104(b)(3), (4), (10), (13) and (20), and were able to deduce that maybe § 33-6-104(b)(10) applied to their situation, they would have eventually learned that such an exception was not available to them since their area of disturbance exceeded 40,000 square feet. In short, the specified parameters set forth in the Violation Letter of July 23, 2015 were an impossibility. Consequently, there was nothing that the Adams could do to be in compliance BCC § 33-6-104(b) of the Baltimore County Code. The specific language of Mr. Batchelder’s letter was “you are receiving this violation notice because you failed to file a Forestry Declaration of Intent (DOI) with this office prior to the clearing in accordance with the County’s Forest Conservation Regulations”, when, in fact, it was impossible for the Adams to do so. *Id.* In the October 29, 2015 Citation letter from Mr. Batchelder to the Adams, he restates the impossible again:

You are receiving the attached citation because your property is still in violation of Section 33-6-104(b) of the Baltimore County Code. In order to resolve the violation you must cease all forest clearing activities, pay the \$16,535 noncompliance fee to Baltimore county and submit a Forestry Declaration of Intent as stipulated in our July 23, 2015 violation letter. (See County Exhibit 1, December 23, 2015 Hearing Before the ALJ.)

Despite the obviously confusing instructions given in both the Violation Letter and the citation issued to the Adams, the County contends that the Appellants, with assistance of counsel were sufficiently aware of the nature of the violation alleged. Conversely, Counsel for the Appellants argues that such confusion violates due process.

This Board takes notice that this citation and fine is significant in the realm of Code Violations. While Code Enforcement and Code Enforcement Hearings do not always follow the same practices found in State Courts in adjudicating similar matters, cases with possible fines in the area of \$17,000.00 call for a particular amount of attention to be paid to the tenets of due process. While it is obvious that Code Enforcement is somewhat different from standard criminal law enforcement, this Board finds that (“BCC”) § 3-6-205(c)(i) implies that a citation must be held to the same standard of “particularity” found in any other charging document. For example, it is often the case that in traffic matters that if a person is charged with Driving While Suspended pursuant to Maryland Transportation Article § 16-303(c), but actually is guilty of Driving While Suspended pursuant to § 16-303(h) (Suspended for reasons not enumerated in §(c)), then the charge will not be sustained absent the court allowing for amendment of the charging document. No such amendment was requested by Mr. Lindley in his prosecution of this matter. Applying the County’s reasoning to this scenario, the driver should be found guilty because he was on sufficient notice that his case dealt with driving while suspended, in general. This Board cannot agree with this reasoning and finds that citing a statute that does not clearly spell out the alleged violation is not in compliance with BCC § 3-6-205(c). Consequently, the Board finds merely citing BCC §

33-6-104(b) on the Appellant's citation is not in compliance with the Baltimore County Code or the tenets of due process.

DECISION

Pursuant to § 3-6-304(a) of the *Baltimore County Code*, the Board of Appeals in such cases may:

- (1) Remand the case to the Hearing Officer;
- (2) Affirm the final order of the Hearing Officer; or
- (3) Reverse or modify the final order if a finding, conclusion, or decision of the Code Official, the Director, or the Hearing Officer:
 - (i) Exceeds the statutory authority or jurisdiction of the Code Official, the Director, or the Hearing Officer;
 - (ii) Results from an unlawful procedure;
 - (iii) Is affected by any other error of law;
 - (iv) Subject to subsection (b) of this section, is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
 - (v) Is arbitrary or capricious.

Based on the Violation Letter, citation and applicable statutes in this matter, this Board finds that sustaining the citation based on the Baltimore County Code provision listed in the Violation Letter and the citation is affected by an error of law and should be reversed.

ORDER

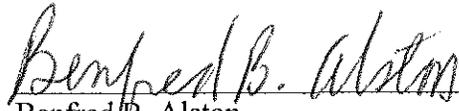
Therefore, it is this 24th day of June, 2016 by the Board of Appeals of Baltimore County

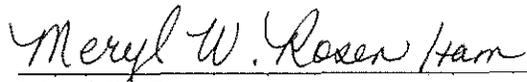
ORDERED that, for the reasons stated above, the decision of the ALJ be and is hereby **REVERSED**.

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 Chair


Benfred B. Alston


Meryl W. Rosen