

"Federation Corner" column
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M-NCPPC risks Federal lawsuit over failures to enforce Forest Conservation Law

by Wayne Goldstein
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Last May 12th, I wrote a column titled: "M-NCPPC unreliable in enforcing Forest Conservation Law," about the continuing loss of forest cover in Montgomery County because of a weak Forest Conservation Law (FCL) and a weaker M-NCPPC Environment Planning Section willing to bargain away the trees in the forest, even when the trees have been or would be cut in violation of the FCL. Since then, people around the county have felt so harmed by M-NCPPC's actions that they are now considering joining together to file a federal civil rights lawsuit.

The county's forest cover that was 45% in 1973, and 28% in 2000, dropped to 25% by 2003, meaning that the rate of forest loss has accelerated, now equaling 1% per year. These numbers may not include areas that have been reforested, but no one seems to know if those efforts have been successful. Forest cover may be at 22% in 2006 and could perhaps reach 20% by 2008. Such a percentage of county forest cover may then be comparable to the urban tree cover of 20% in the City of Baltimore, which recently won an award for pledging to double its current tree canopy to 40% by 2036. This county does not even make pledges.

The status of the three unresolved cases I described in May is no better. No action has been taken on the case at River and Chapel Roads in Potomac. It has now been almost 4 1/2 years since the violator signed a binding agreement that has still not been fully completed. Last week, I read the audit report for the Hillmead property case, which was to have investigated community allegations.

Unfortunately, the decision to use two Prince George's County M-NCPPC staff to do the audit report was not a wise one. The greatest problem is a potential conflict-of-interest because Faroll Hamer, who has been with the Prince George's County staff for almost two decades, serving most recently as its development review chief, is now in charge of Montgomery County M-NCPPC staff as the acting director of planning. Such a major connection, on top of what is an in-house effort, undermine the claim of an objective investigation, particularly to community members who felt justified enough to even make allegations of possible criminal wrongdoing.

Nevertheless, the audit report presents a disturbing portrait of M-NCPPC, even as the authors declare that the errors are minor and have no bearing on the quality and integrity of the final Hillmead staff report. This report, in referencing a more comprehensive report done of M-NCPPC's entire development review process, states: "Among other things, the [other] report noted that staff reports often contain erroneous details, omit pertinent facts, and do not clearly spell out residents' concerns. We agree with the... report recommendation with regard to the need for improvements to staff reports."

This audit report found that as of May 2006, ten months after Clarksburg first became publicly known, there were still general problems with staff reports. However, the audit report mutes stronger and more specific criticisms of such reports. It notes that a staff finding that part of the Hillmead property was a 24% slope, just below the threshold of 25% that would trigger stronger, environmentally protective requirements, could not be replicated by other staff. In addition, the audit report's authors, responding to an allegation by citizens concerning a person's qualifications, wrote: "After a review of the appropriate public records, we were unable to verify that [the person] is licensed as either a professional engineer, land planner or surveyor in the State of Maryland."

The report continues: "As to the allegation that [the person] was merely cutting and pasting the required signatures, it appears evident that the signature of the professional engineer was in fact cut and pasted on certain documents. Staff attributes this to the fact that [the person] is not as technologically sophisticated in preparing plans as most modern surveyors and land planners... The Development Review Supervisor for the subject application indicated that staff should probably have inquired as to the authenticity of the plans when submitted... Staff did not believe that [the person's] involvement in the application was in any way inappropriate..." In a recent letter, the property owner's attorneys state that the person in question was "under the direct supervision and responsible charge of ... a registered professional engineer..."

In response to this report, Hillmead community members recently wrote: "WE BELIEVE THAT THE ALLEGATIONS MADE ARE VERY SERIOUS, HAVE NOT BEEN REMEDIED AS OF THE DATE OF THIS LETTER, AND THAT THE REPORT DOES NOT PROVIDE THE BOARD WITH A BASIS FOR INFORMED DECISION-MAKING ON THE SUBJECT CASE... What we would like to see is meaningful enforcement of these laws and regulations with actionable financial and, even criminal penalties." [Sentence in caps provided by letter writers]

What is most baffling of all is what Ms. Hamer, asserting her authority as director to make decisions about FCL violations, decided to do about the Ashton case, which was one of the three cases described in detail in the May column. Despite overwhelming evidence provided by a neighbor, and despite assurances made by Ms. Hamer and other M-NCPPC staff since June that this evidence was very persuasive, Ms. Hamer decided last week that the property owner can end the FCL violation case by planting just 25 two-inch caliper trees. Ms. Hamer claims that she did not have any evidence that the violation was willful and considers this to be an adequate remedy for clearing more than 12,000 square feet of forest, even though the neighbor and others have provided evidence that more than 20,000 square feet of forest were cleared and have made the allegation that the owner had worked with an M-NCPPC inspector to conceal evidence of some of the clearing. In a case decided last month by the Planning Board, a property owner who cleared 80,000 square feet of forested wetland in Dickerson was fined over \$60,000 and also must spend tens of thousands more to restore the wetland and replant the entire site.

Community members around the county have become so frustrated and angered by inconsistent actions such as these, related to the performance of M-NCPPC's Environmental Planning section, that some of them are seriously considering filing a civil rights lawsuit in federal court against M-NCPPC, claiming that such inconsistent treatment under the county FCL violates their constitutional right to receive equal treatment under the law. MCCF has recently written a letter to the Planning Board asking that the Board order a new investigation of the Hillmead allegations to be done by someone whom everyone agrees is neutral, and that the Planning Board also schedule the Ashton case as an FCL violation hearing where the Board can see the facts and make a decision based on those facts. MCCF hopes that such interim measures, as well as upcoming efforts to strengthen the FCL, will eliminate the perception that major litigation is necessary, will begin to restore trust in M-NCPPC and its Environmental Planning section, and will stop the further loss of county forest.