DECISION
TALBOT COUNTY BOARD OF APPEALS
Appeal No. 16-1661 (10-1534)

Pursuant to due notice, an initial public hearing was held by the Talbot County Board of Appeals (the Board) at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 7:00 p.m. April 24, 2017[1] on the application of **ANGEL ENTERPRISES LIMITED PARTNERSHIP and MORTON BENDER** (the Applicant)[2]. The Applicant has filed an administrative appeal in accordance with §20-6 B(1) and §58-12 A of the *Talbot County Code* (the *Code*) contending that the County's Chief Code Compliance Officer (the CCCO) erred by assessing civil penalties for six (6) separate violations of the *Code*, *i.e.* (**1**) violation of *Code* §73-3C(6)(a) (failure to meet retention, afforestation and reforestation requirements as required by administrative abatement orders dated January 23, 2009 and February 19, 2009 and the decision of the Talbot County Board of Appeals, Appeal No. 1519); (**2**) violation of *Code* §73-10 B(1) (failure to leave trees, shrubs and plants located in non-tidal wetlands and their buffers and critical habitat in an undisturbed condition; failure to effect retention as required by decision of the Talbot County Board of Appeals, Appeal No. 1519); (**3**) violation of *Code* §73-10 B(2) (failure to leave contiguous forest that connects the largest undeveloped or most vegetated tracts of land within and adjacent to the site in an undisturbed condition; failure to effect retention as required by the decision of the Talbot County Board of Appeals, Appeal No. 1519); (**4**) violation under *Code* §58-7 A(1) (ongoing failure to correct, discontinue, or abate ongoing critical area violation as required by administrative abatement orders dated January 23, 2009 and February 19, 2009 and the decision of the Talbot County Board of Appeals, Appeal No. 1519); (**5**) violation of *Code* §58-7 A(1) (ongoing failure to correct, discontinue, or abate ongoing non-critical area violation as required by administrative abatement orders dated January

[1] The hearing was continued at the close of the first evening. It was apparent that multiple evenings would be required to accommodate the parties, so the continued matter was heard subsequently on May 1, 2017, May 10, 2017; July 26, 2017; August 28, 2017, September 11, 2017 and September 25, 2017. The transcripts of the testimony for each session are identified as T-date at page.

[2] Mr. Bender was added to the supplemental abatement order of February 19, 2009 ostensibly for the reason that the limited partnership was not in good standing with the State Department of Assessment and Taxation.

23, 2009 and February 19, 2009 and the decision of the Talbot County Board of Appeals, Appeal No. 1519); (**6**) violation of *Code* §190-93 D (performing development activities in the critical area without submission of a Forest Preservation Plan). The property contains 62 acres, more or less, and is located at 7751 Rollyston Drive, St. Michaels, Maryland 21663 in the RC/WRC zones. The property owner is Angel Enterprises Limited Partnership, and the property is shown on tax map 32 grid 18 as parcel 194.

Present at all hearings for the Board of Appeals were Paul Shortall, Jr., Chairman; Phillip Jones, Vice-Chairman; John Sewell, Louis Dorsey, Jr. and Frank Cavanaugh, Board Members. Anne C. Ogletree served as attorney for the Board. The Applicant was represented by Mark Gabler and Warren Rich and Rich and Henderson, P.C. of Annapolis, Maryland. Talbot County (the County) was represented by Michael Pullen, County Attorney and Anthony Kupersmith, Assistant County Attorney. It was noted for the record that all members had visited the site. The Chairman then proceeded to swear those witnesses present who were expected to testify.

APPELLATE EXHIBITS

The Board received the following exhibits in the hearings in addition to those provided in the parties' exhibit books previously filed in the proceedings:

Applicant's Exhibits

1. Chronology prepared by M. Gabler.
2. January 23, 2009 Abatement Order - Applicant's Exhibit Book 0001.
3. January 23, 2009 Abatement Order - Applicant's Exhibit Book 0004.
4. December 2, 2009 six penalty assessments (collectively marked as Exhibit 4) - Applicant's Exhibit Book 564-575.
5. Full Forest Stand Delineation, Forest Conservation and Critical Area Planting Plan - Applicant's Exhibit Book 527-528.
6. Compilation of County correspondence with Lane Engineering re the proposed Full Forest Stand Delineation, Forest Conservation and Critical Area Planting Plan.
7. Email to E. Deflaux dated 10/13/2013 - Applicant's Exhibit Book 334.
8. Email to S. Callahan dated 10/17/2103 - Applicant's Exhibit Book 335.
9. Two (2) emails from S. Callahan to County officials dated 2/13/2013.

10. Summary of Penalty Assessments prepared by Mr. Gabler.
11. Bridges Land Management Letter dated 8/27/2015 - Applicant's Exhibit Book 435.
12. Letter from E. Deflaux confirming completion of project - Applicant's Exhibit Book 436.
13. E. Deflaux 8/31/15 memorandum regarding inspection and completion - Applicant's Exhibit Book 368.
14. Package of materials containing inspection reports - Applicant's Exhibit Book 402-421, 357-358 and May 14, 2014 letter to M. Bender.
15. Edward Launay Resume.
16. Diagrams produced by E. Launay.
17. Aerial with demarcations by E. Launay.
18. Chart of penalty assessments produced by Talbot County - Applicant's Exhibit Book 489-490.
19. Cover page for approved plan showing the scale for dimensions shown on the plan.
20. Timeline for both cases (abatement and penalty) prepared by M. Gabler.

County Exhibits

1. Copy of a portion of former *Code* zoning ordinance
2. Date stamped copy of cover page of Lane initial submission
3. Diagram prepared by M. Pullen
4. Copy of *Code* §73-3, dated 8/26/02
5. Copy of *Code* §73-18, dated 09/1/11
6. Copy of *Code* § 58-10.1, dated 4/1/17

FACTUAL AND PROCEDURAL BACKGROUND

This is the second appeal spawned by two administrative abatement orders issued by Robert D. Graham, CCCO of Talbot County, requiring the Applicant to abate damages caused by development activities on its property. Alerted to the problem by the Maryland Department of the Environment (MDE), Mr. Graham inspected the property on January

22, 2009. Decision, Appeal No. 1519 at 5[3]; T-5/1/17 at 46. At that time it appeared the Applicant had commenced construction of a second driveway or roadbed to the residence on the property[4]. The Applicant's activity resulted in the clearing of forest and other vegetation in both the critical area (8,560 square feet affected) and non-critical area (22,133 square feet affected) as well as intrusion into non-tidal wetlands and/or buffers. 1519 Decision at 8-9. The Applicant conducted its construction without the benefit of having obtained the necessary county approvals. 1519 Decision at 7-10.

Based on his observations, Mr. Graham issued six (6) abatement orders to Angel Enterprises Limited Partnership, (AELP), the landowner, on January 23, 2009. He subsequently amended and supplemented those orders with the assistance of the County Attorney on February 19, 2009. He added Mr. Bender, the general partner of AELP, to the supplemental abatement order[5]. T-5/1/17 at 55. The following dates are the relevant to the action before the Board at this time:

March 6, 2009: Correction date required in first abatement order.

March 20, 2009: The Applicant appeals the abatement orders to the Board[6]. Testimony is taken in multiple hearings over the ensuing months. 1519 Decision at 4.

April 6, 2009: Correction date required by the supplemental abatement order.

November 4, 2009: The Board issues its written 1519 Decision[7]. The Board determines the abatement orders were factually and legally justified.

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[3] The Decision of the Board in Appeal No. 1519 is included in the Applicant's Exhibits binder at 529-563, and in Talbot County's Exhibit List binder Tab 4. It is hereinafter referenced as 1519 Decision at page.

[4] According to the Applicant, the actual construction occurred in or during 2006, and the project had been dormant for some time when Mr. Graham appeared. T-5/1/17 at 72-73; Applicant's Pre-hearing Statement at 1. In its 2009 decision the Board noted that Mr. Dennis Evans, the excavating contractor employed by the Applicant, had testified that the road was not complete. 1519 Decision at 30.

[5] The addition was made as AELP 's charter had been forfeited and it was no longer in good standing with the State Department of Assessment and Taxation. 1519 Decision at 5, n. 2.

[6] The County response to the Applicant's Motion in Limine and Motion to Dismiss notes, correctly, that following the date the abatement orders were appealed it could not have imposed penalties until the Board made its decision. *Code* § 20-6 B(3); *Code* §58-12 A(3) .

[7] Pursuant to Code, The Decision of the Board in Appeal No. 1519 is included in the Applicant's Exhibits binder at 529-563, and in Talbot County's Exhibit List binder Tab 4. It is hereinafter referenced as 1519 Decision at page.

December 2, 2009: The Applicant, unhappy with the Board's decision, appeals the abatement and supplemental abatement orders to the Circuit Court. Applicant's Exhibit 1, Chronology.

December 2, 2009: The CCCO issues six (6) civil penalty assessments, each for failure to comply with certain corrective action required by the abatement orders.

At this point the two appeal cases - the abatements and the penalties - diverge. While the abatement orders were making their way through the circuit and appellate court processes, matters involving the civil penalties began a life of their own - a separate track that constitutes the only relevant timeline for the matter before the Board in this appeal. For the penalty action the following dates are relevant:

December 8, 2009: Penalties begin to accrue under the penalty assessments for failure to comply with the abatement orders.

December 9, 2009: Applicant files a request for Administrative Review of all of the December 2, 2009 civil penalties[8].

December 29, 2009: Applicant files six (6) separate appeals to the Board challenging each of the six (6) penalty assessments together with the appropriate fees[9].

January 2010: The County files an intent to participate in the penalty appeal.

January 2010 - March 2010: Counsel for the Board, the County Attorney and Applicant negotiate procedural and timing issues.

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[7] According to the Applicant, the actual construction 20-7 C(3) The parties are required to supply all documentary evidence upon which they intend to rely. The 1519 Decision, appears in Applicant's Pre-Hearing Submission (Applicant's Exhibit Book) at 529-563 and in the County's Pre-Hearing Submission (County's Exhibit Book) Tab 4. All of the pre-Hearing Submissions and legal memoranda are considered to be a part of the appellate record by the Board T-7/26/17 at 90-91. References to exhibits are made to the Applicant's Exhibit Book in most cases, as those pages are consecutively numbered. The County's Exhibit book is tabbed.

[8] The *Code* formerly provided an unqualified right to Administrative Review pursuant to §§58-2, 58-5 and 58-12. Bill No. 1346 passed by the Talbot County Council in 2016 limited the right of Administrative Review in those sections to matters in which the penalties assessed do not exceed $5,000.00. County's Response to Applicant's Motion to Dismiss and Motion in Limine, Exhibit 9.

[9] Pursuant to the negotiations between the parties, all parties agreed to consolidate the six separate penalty assessments into one appellate proceeding before the Board. Applicant's Exhibit Book at 289-290. The initial fee, $4,200.00 was returned to the Applicant's counsel and was eventually replaced with the agreed fee of $700.00 for the single consolidated appeal.

April 12, 2010: A scheduling order negotiated by the parties counsel is presented to and signed by the Board Chairman. The order consolidates the six separate appeals into one and provides that the Board hearing on the civil penalty case will be deferred until the Administrative Review of the penalty assessments is concluded. Applicant's Exhibit Book at 289-290.

May 27, 2010: An informal consent agreement is entered in circuit court case 20-C-09-007001. It stays **all** pending administrative actions until the Circuit Court decision on the abatement orders. County's Response to Motion to Dismiss and Motion in Limine, Exhibit 1 [emphasis added]

June 13, 2012: The Circuit Court affirms the Board's 1519 Decision County's Exhibit Book Tab 9, Applicant's Exhibit Book 294-315.

September 11, 2012: Lane Engineering meets regulators on site to begin work on the restoration plan required to bring the property into compliance. T-5/10/17 at 17, 20-21.

October 2012 - December 2012: Lane Engineering prepares Applicant's Sediment and Erosion Control Plan and Full Forest Stand Delineation, Forest Conservation and Critical Area Planting Plan (the latter hereinafter referred to as the Restoration Plan, or the Plan).

January 3, 2013: Lane Engineering submits Applicant's Plan to Talbot County (the County) for review[10]. County Exhibit 2.

January 2013- October 2013: Plan adjustments and revisions are made pursuant to comments from Planning and Zoning, Soil Conservation, and Public Works. Applicant's Exhibit Book at 317-334.

October 13, 2013: The County approves Applicant's revised Restoration Plan, Applicant's Exhibit Book at 527-528; County's Exhibit Book at Tab 7.

December 2013-September 2014: Periodic inspections of restoration work conducted by the County. Applicant's Exhibit Book 402-434.

August 31, 2015: The County approves completion of restoration. Applicant's Exhibit Book 434.

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[10] While the plan legend suggests that the plan was submitted December 12, 2012, County Exhibit 2 indicates that it was received on January 3, 2013.

July 26, 2016: Bill No. 1346 becomes effective, limiting administrative review of penalty challenges to matters in which the cumulative total of penalties assessed is less than Five Thousand Dollars ($5,000.00), thus mooting Applicant's request for Administrative Review under *Code* §58-2. County's Response to Applicant's Motion to Dismiss and Motion in Limine, Exhibit 9.

August 26, 2016: The County files a complaint, case no. 20-C-16-CV-000021 asking the court to enter a money judgment for accrued civil penalties for the six (6) violations before it issues a temporary occupancy permit for the residence. Applicant's Exhibit Book at 504-519.

October 18, 2016: The Circuit Court enters a consent order requiring Applicant to post a cash bond of $713,400.00 as security for any penalties to be assessed in the penalty case. Further circuit court proceedings are stayed until the conclusion of "the pending administrative and all ensuing judicial reviews and appeals have been exhausted or otherwise terminated." The penalty case is to be scheduled by Talbot County within ninety (90) days of the court's order[11]. Applicant's Exhibit Book at 520-521.

November 15, 2016: the Applicant submits one appeal consolidating the six penalty appeals[12] as ordered by the Board's scheduling order of April 12, 2010. Applicant's Exhibit Book at 289-290. Some confusion over numbering of the appeal ensues as the original April 12, 2010 scheduling order was numbered Appeal No. 10-1534 although there has never been a Board file for this matter bearing that number. To simplify matters the Board's staff renumbers the appeal as Appeal No. 16-1661.

February 24, 2017: The Applicant submits its prehearing statement.

March 13, 2017: The Applicant files a Motion to Dismiss and Motion in Limine arguing that the administrative appeal automatically stayed all penalty assessments following the appeal's filing date pursuant to *Code* §§20-6 B(3) and 58-12 A(3).

March 20, 2017: The County submits its prehearing statement.

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[11] . On October 18, 2016, the date of the circuit court order in case 20-C-16-CV-000021, the Applicant was unaware that the County had revised the *Code* in July of 2016. AELP had initially filed for an Administrative Review in 2009 pursuant to the then existing *Code* provisions §§58-2, 58-5 and 58-12. That remedy became unavailable following the enactment of Bill No. 1346.

[12] The Applicant actually resubmitted the paperwork filed for the original six (6) appeals with a letter stating they had been consolidated by the scheduling order, along with the revised fee.

March 22, 2017: Conference call is held between Board's counsel, Applicant's counsel and County Attorney regarding limitation of issues and establishing a schedule for the filing of prehearing memoranda.

March 22, 2017: County files a Request for Relief asking for permission to inspect the Applicant's property.

April 10, 2017: Applicant files a memorandum in support of its appeal. In addition to the issues raised in its Motion to Dismiss and Motion in Limine, it argues, *inter alia*, that:

(1) the appeal is *de novo,* as the Applicant is entitled to a due process hearing at which it can confront witnesses. It cites case law and *Code* §§20-13, 20-14, 20-16, 20-17, 20-19 as legal authority;

(2) the enforcement action (assessment of penalties) is barred by *res judicata*;

(3) "continuing violations" are not authorized by the Express Powers Act;

(4) the County's assessment of $0.30 per square foot of forest cleared pursuant to *Code* §73-3 C(6)(b) is an exclusive remedy under *Code* §58-5 A, and no other penalty can be assessed;

(5) the penalty assessments are barred by limitations;

(6) the penalty assessments deny the Applicant substantive due process; and

(7) *Code* §58-10.1 was enacted following the issuance of the abatement orders and does not apply to the critical area violations.

April 10, 2017: The County responds to the Applicant's Motion to Dismiss and Motion in Limine arguing that the procedures to be followed in an administrative appeal to the Board differ from those applied to Administrative Review and that the automatic stays referred to in *Code* §§58-12 A(3) and 20-6 B(3) apply prospectively and do not "reach back" to cancel the accrual of penalties pursuant to a penalty assessment already made.

April 10, 2017: Applicant responds to the County's Request for Relief arguing the Board does not have the power to permit inspection by the County.

April 17, 2017: The County files a Response to Applicant's Memorandum in Support of Appeal. It argues that:

(1) the Board reviews the penalty assessments pursuant to *Code* §20-6 and its own Rules of Procedure. The order of proof and presentation of evidence is governed by *Code* § 20-19;

(2) the administrative appeal process satisfies the necessary due process requirements;

(3) the assessment of a mandatory minimum penalty pursuant to *Code* §73-3 C(6)(b) does not preclude the County from assessing additional penalties pursuant to *Code* Chapter 58;

(4) *res judicata* does not apply to bar the penalty assessments;

(5) *Code* §58-5 C allows the County to impose a penalty in addition to the mandatory penalty established in *Code* §73-3 C(6)(b);

(6) *Code* §73-18 A(3) provides that the penalty for violation of the Forest Conservation Ordinance can be assessed in addition to the mandatory non-compliance penalty;

(7) the County can lawfully assess penalties on a per day basis;

(8) the assessment of penalties is not barred by limitations;

(9) the County appellate process affords the Applicant both procedural and substantive due process and is therefore constitutional; and, not surprisingly,

(10) *Code* §58-10.1 does apply in this case, as the County is mandated to comply with state critical area law.

April 17, 2017: Applicant files a reply to the County's Response to Applicant's Motion to Dismiss and Motion in Limine essentially reiterating that the penalty assessments were stayed on the filing of the appeal on December 29, 2009 and cannot become binding until their validity is determined by the Board.

April 18, 2017: The County files a "surreply" to Applicant's Response to the County Request for relief.

April 21, 2017: The County submits an Amended Response to Applicant's Memorandum in Support of Appeal.

APRIL 24, 2017 -- THE MOTIONS HEARING

In the March 22, 2017 conference call, counsel agreed that the Applicant's motions should be heard before the evidentiary portion of the appeal, as granting one or

more of the motions might obviate the necessity for a protracted hearing. Counsel felt the Board would have the benefit of comprehensive memoranda filed by both sides and might be able to narrow the focus of the evidentiary hearing.

Mr. Shortall opened the motions hearing by asking if any of the Board members wished to make a motion to go into closed session to receive the advice of counsel. Mr. Jones made a motion that the Board meet with counsel in closed session to obtain legal advice. The motion was seconded by Mr. Sewell and unanimously approved. The Board entered closed session at 7:01 pm and returned to open session at 7:15 pm. The Chairman then invited Mr. Gabler to proceed.

Mr. Gabler introduced a chronology he had prepared as Applicant's Exhibit 1. He noted that the penalty assessments were made on December 2, 2009. The Applicant was advised that penalties would accrue beginning December 8, 2009. He explained that the County believed each day after December 2, 2009 during which the violation existed constituted a separate offense under *Code* §58-5 A. He acknowledged that the purpose of a penalty for a continuing violation is to coerce compliance since the offender would be charged with a new violation and an additional penalty for each subsequent day. The Applicant believed that pursuant to *Code* §§58-12 A(3) and 20-6 B(3) the filing of the appeal to the Board stayed the accrual of penalties following December 29, 2009.

Addressing the County's argument that the Applicant was requesting a retroactive stay, Mr. Gabler pointed out that the automatic stay provision of *Code* §58-12 A(3) states "...an appeal stays all actions by the Chief Compliance Officer **seeking enforcement or compliance with the order or decision being appealed** ...". Similarly, §20-6 B(3) operates prospectively, staying "all **further proceedings to enforce compliance with the order, requirement, decision or determination ...**". Both refer to future enforcement. Both sections are silent with regard to what constitutes enforcement[13].

Moving on to other issues, Applicant's counsel admitted that there was no dispute that the CCCO provided notice of the six penalty assessments to the Applicant. He

[13] In the Applicant's written motion Mr. Gabler directed the Board to the Rules of Construction set out in Code, Art II, §1-13 . That section defines an enforcement action as "any action, demand, **monetary penalty,** abatement order or other civil or criminal proceeding" brought to enforce the *Code.* [emphasis added] .

reminded the Board that due process of law is two pronged and requires both notice of the action to be taken and the opportunity to be heard concerning that action. Although the *Code* does not specifically state that administrative appeals are *de novo,* Mr. Gabler felt the language of §§20-14 and 20-17 indicated that the Applicant is entitled to a full evidentiary hearing before penalty assessments become final. He added that the Applicant had made numerous requests of the County asking for information on how the total penalty sum was calculated[14]. Given the initial lack of response by the County, Mr. Gabler felt that the Applicant had been prejudiced by not having that information.

Mr. Jones commented that the Applicant could have had its *de novo* hearing years earlier in the Administrative Review process had it gone forward.

Mr. Gabler replied he understood the County believed it could not have issued the penalties at the time the abatement orders were appealed because there was an automatic stay of enforcement actions when the abatement orders were appealed. T-4/24/17 at 29-30. However, there had been nothing to prevent the County from imposing the civil penalties at the time the abatement orders had issued.

Board's counsel inquired if Mr. Gabler was suggesting that the County had split[15] its cause of action. He acknowledged it had, as the County had imposed the mandatory penalties required by *Maryland Code,* Natural Resources Art. §5-1608(c)(1)[16] and incorporated in *Code* §73-3 C(6)(b) in one of the abatement orders. He felt the County could have imposed all penalties when the abatement orders issued, and therefore those matters could have been brought in the abatement action. As the County had chosen not to do everything at one time he believed the Applicant could contest those assessments as being barred by *res judicata*. T-4/24/17 at 32.

The Applicant also posited that the County did not have the legally delegated authority to assess continuing penalties for tree cutting and clearing violations that had occurred years earlier. A Board member asked why the violation didn't continue until the site was restored. Mr. Gabler acknowledged that the Applicant believed the Board would

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[14] See the correspondence attached to the Applicant's Motion to Dismiss and Motion in Limine as exhibits 6 and 7..

[15] T-4/24/17 at 32 line 5 incorrectly states "flipped" rather than split.

[16] The Maryland Code is, Natural Resources Article is hereinafter cited as *Md. N.R. Code*. §.

have to determine if the violation was the tree cutting done in 2006 - in which case the violation was not continuing, or whether the violation was the failure to restore the site - violations that continued until the County approved the restoration. T-4/24/17 at 36-37.

A Board member asked Mr. Gabler to clarify why the Applicant has asked for a stay of the penalties in circuit court if the automatic stay was in effect. Mr. Gabler responded that although he had not been involved in that prior action he understood that the Applicant's then counsel had requested all administrative actions, including the Administrative Review before the hearing officer, and the penalty case, be stayed in the circuit court abatement case, County's Response to Motion to Dismiss and Motion in Limine at Tab 2. He added that the parties had then agreed to a stay of all administrative actions pending the final resolution of the abatement case in circuit court. T-4/24/17 at 40, County's Response to Motion to Dismiss and Motion in Limine at Tab 1.

The Applicant argued that the Express Powers Act did not explicitly authorize continuing violations as an enforcement tool. When queried by Board's counsel he acknowledged that the Express Powers Act also provided that the County could obtain enforcement authority from other state laws and that the Forest Conservation Powers were delegated to local authority under the state statute[17]. He did not read *Code* §73-18 to authorize continuing violations.

Mr. Gabler then addressed the County's Request for Relief. He stated that *Code* §58-11.1 did not give the County an unqualified right to enter the Applicant's property to inspect at any time it chose. The approval of the restoration work was granted in 2015. The right to inspect under the planting continued for two years, but did not allow the County to gather evidence for a lawsuit. T-4/24/17 at 52-53.

The Chairman thanked him for his presentation and asked Mr. Pullen to present the County's position.

Mr. Pullen began with the County's abatement order on January 23, 2009 and supplemental abatement order of February 19 2009. Both of the abatement orders advised the Applicant that the County was reserving the right to assess penalties for non-

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Md. N.R. Code §5-1603(a)(1) requires a local jurisdiction to have a Forest Conservation program. § 5-1612 (a)(2) delegates enforcement to local authority. §5-1612 (d)(1) provides for penalties up to $1,000.00/day per violation . **Each day the condition exists is deemed to be a separate violation**. [Emphasis added] The broad grant of general power under *Md. Code*, Local Gov't Art. §10-202(b) allows a charter county to provide for enforcement of an ordinance ... by civil fines not exceeding $1,000... .

compliance with the orders. He explained that the County deems enforcement to be discretionary but for the mandatory penalty for non-compliance found in *Code* §73-3 C(6)(b). In this case it exercised its discretion and issued abatement orders. The orders were then appealed to the Board in March of 2009. Once appealed, the automatic stay prevented the County from taking additional enforcement action -- in this case issuing civil penalties. T-4/24/17 at 54-57.

After the Board made its 1519 Decision November 4, 2009 the County was free to issue the penalties and "assessed" them on December 2, 2009. He explained that the County considered the assessment to be a single act that determined the amount of the penalty. The penalties began "accruing" on a daily basis as of December 8, 2009 in an attempt to encourage the Applicant to begin restoration. T-4/24/17 at 58.

The County Attorney then introduced County Exhibit 1, a copy of the former zoning ordinance noting that the Board no longer had the same powers. He added that the procedure for administrative appeals was changed due to a previous appeal involving Mr. Bender. The changes shifted the burden of proof and now require that the Applicant carries the burden of proof. T-4/24/17 at 60-62.

Board's counsel asked if Mr. Pullen believed the current Board process providing the Applicant with the opportunity to call witnesses, cross-examine witnesses, and provide documentary evidence comported with procedural due process requirements. Mr. Pullen responded that it did.

Mr. Pullen continued, adding that each of the abatement orders was appealed to the Circuit Court on December 2, 2009. The abatement orders did not refer to the civil penalties at that time. The CCCO exercised the County's discretion to issue penalties -- coincidentally they were "assessed" on the same date. He felt *res judicata* did not apply as the County was initiating a distinct enforcement proceeding. T-4/24/17 at 67-68.

When asked if the delay in assessing the civil penalties could amount to a denial of substantive due process - being arbitrary and capricious, Mr. Pullen responded that case law indicated the County had considerable discretion in determining whether to assess any penalty. In response to a question from Board's counsel asking if there was a point at which discretion becomes excessive, Mr. Pullen answered he did not believe the actions in this case constituted an abuse of discretion. T-4/24/17 at 70-73.

A Board member asked if the later imposition of the penalties was arbitrary. Mr. Pullen stated that the Applicant knew that penalties could be imposed once the stay was lifted. The County's goal was always to achieve compliance. He suggested that the Board's only decision was to determine if the CCCO had erred in assessing the amount of the penalty for each violation. T-4/24/17 at 73-75.

The Board's counsel stated that the second issue is whether the accrual of penalties had been stayed by the appeal of the penalty assessments to the Board on December 29, 2009.

Mr. Pullen suggested that under the Applicant's theory there would never be a civil penalty if the stay operated to stop the accrual of civil penalties. Board's counsel stated that she believed the Applicant to be suggesting that the delay in assessing the civil penalties was an abuse of discretion and operated as a denial of substantive due process. Mr. Pullen disagreed vehemently. He believed that the Applicant's position was that pending the Board's hearing the Applicant could act with impunity and suffer no consequences for the failure to restore the site. Board's counsel asked if *Code* §1-13 in Article 2 "Rules of Construction" applied to the accrual of penalties, and asked Mr. Pullen to look closely at the state forest conservation statute. If each day the violation continues is considered to be a separate offense, under that statute, and a penalty is assessed for that day's violation, wouldn't each daily assessment constitute an enforcement action?

Mr. Pullen disagreed. He distinguished "assessment" which had occurred prior to the stay and "accrual" which occurred subsequent to the stay, believing them to be different terms. Although *Code* §1-13 defines a monetary penalty as an enforcement action, and the term is not defined elsewhere in the *Code,* Mr. Pullen asserted that the definition applied only to Article 2 and pursuant to *Code* §58-5 D the accrual is automatic and unaffected by the automatic stay provisions of *Code* §58-12 A(3) and *Code* §20-6 B(3). T-4/24/17 at 78-84.

A Board member asked about the timeline given to Mr. Bender to bring the site into compliance[18]. Mr. Pullen responded that the restoration plan submitted by AELP indicated the restoration would be complete in April 2014, but that the County had not approved the restoration until August 31, 2015. The same member inquired if the Applicant had requested an extension. Mr. Pullen stated that he did not know, but that Ms. Verdery was present, and he could ask. T-4/24/17 at 86-87.

Mr. Pullen then addressed the County Request for Relief asserting that §58-11.1 gives the County the authority to enter the property so that the County could have the same view of the property as the Board had.

Mr. Shortall disagreed stating that the site restoration was not at issue, merely the penalties for non-compliance.

Mr. Pullen suggested that it was within the Board's authority to allow inspection. Mr. Jones responded that he had listened to Mr. Pullen reminding the Board for years that it only had certain delegated powers. He knew of no *Code* section authorizing the Board to express an opinion on what an ordinance intended.

In a valiant effort to achieve the result he desired, Mr. Pullen asked if the Board would visit the site with the County. Mr. Shortall reminded him that the Board had been advised "hundreds of times" to visit the site individually. Mr. Sewell added that the condition now is not relevant to the issues in this case, as the site restoration was approved by the County in 2015. T-4/24/17 at 88-93.

In rebuttal Mr. Gabler commented that the County could have either assessed the penalties with the abatement orders or could have held the due process hearing earlier. With respect to the procedural due process issue he believed that it should be the County's burden to go forward.

The Board then began discussion. Mr. Cavanaugh thought that the County had the authority to issue the assessments as did Mr. Shortall. Mr. Shortall wasn't so sure about the accrual of penalties during the ensuing years.

Mr. Jones commented that he was torn. He believed the County had the right to issue the penalty assessments, but he was uncertain why it had taken so long to come

[18] It is unclear if the Board member was asking about the compliance dates established in the initial abatement orders, the December 8, 2009 date established by the penalty assessments or the planting date set in the Applicant's restoration plan.

before the Board. He thought the hearing was delayed by both parties. He recognized that although the monetary penalty is coercive and intended to induce compliance, it is always a citizen's right to take appeals, all the way to the Court of Appeals, if necessary. He felt that right could be chilled because the penalty is running the whole time. He added that this case isn't just about Mr. Bender, it's about other citizens as well, and he favored the right to appeal free of constraints. He noted that the Board rules and the *Code* provisions "stack the deck" in favor of the County, adding that the appellate fees are burdensome for most citizens.

Mr. Sewell commented that the first question had to be -- did the CCCO err in assessing penalties? He believed they were authorized, and that the Applicant had notice that they might be in the offing. He was less clear on the second issue. He moved that the Board find that the CCCO did not err in assessing penalties. There was no second.

Mr. Pullen suggested that the motion was premature as the evidentiary hearing had not occurred. He suggested that the issues of stay and burden of proof were before the Board.

Mr. Jones stated that the Board had no authority to do anything other than follow *Code* and its existing rules.

Mr. Rich commented that he believed that the Board's procedure was constitutionally deficient, and that the government should have to proceed. He suggested that the County consider assessing the penalties at the time the abatement order issues to prevent similar issues in the future.

Mr. Dorsey asked if the question was -- Were the penalties stayed between December 29, 2009 and August of 2015[19]? Board's counsel responded that that was one question the Board should consider.

Mr. Jones inquired about the Circuit court stay. Counsel reminded him that the 2009 circuit court action involved all administrative actions, not just the penalties. Mr. Jones then suggested that the Board go into closed session to meet with its counsel and receive legal advice. He made a motion to that effect. Mr. Cavanaugh seconded the

[19] Mr. Dorsey misspoke stating 2006, but the Board's consensus was that the period of time penalties could be assessed would run until restoration was complete on August 15, 2015..

motion. The Board went into closed session at 9:35 pm and returned to open session at 9:50 pm.

Mr. Jones moved that the Board conduct the hearing as required by *Code*, Chapter 20. Mr. Cavanaugh seconded the motion and it passed 5-0.

Mr. Cavanaugh then moved that the Board defer a ruling on the matter of a stay until the close of evidence. Mr. Jones seconded the motion and it carried 5-0. T-4/24/17 at 96-112.

THE EVIDENTARY HEARINGS

The evidentiary hearings began on May 1, 2017. Witnesses attending the motions hearing had been sworn. Mr. Gabler called his first witness, Mr. Robert Graham, CCCO for Talbot County. Mr. Graham's testimony is summarized as follows:

Mr. Graham was a Code Compliance Officer for Talbot County for fourteen (14) years. He has been CCCO since 2008. His prior career was as a law enforcement officer, having been a circuit court bailiff after retiring from the Maryland State Police as a major following a thirty (30) year career in that agency. He had no formal training in biology, forestry or environmental science. His usual procedure with regard to complaints would be to make a site visit, assess the site for *Code* violations, and write up any abatement order required. The orders give the property owner an opportunity to correct the violation. If the owner does not comply, Mr. Graham has the authority to issue a monetary penalty to "incentivize" the property owner to correct the violation. He explained that the purpose of the penalty was to achieve correction of the violation, not generate income for the County. He had no idea of how many penalties he had issued over the years.

The AELP violation was reported to him by MDE a short time before his site visit. He met with MDE on site and observed the damage. He acknowledged that the site dimensions as shown on the abatement orders were incorrect and believed that those figures were from information he had obtained from MDE. He identified Applicant's Exhibit 2 as an abatement order and explained that he had given AELP until March 6 to comply with that order. He noted that it was standard procedure to give the property owner about thirty (30) days to correct the violation. If the violator cannot meet that time

frame, they usually call and request an extension. Under *Code* procedural due process issue be believed that it should be the procedural due process issue be believed that it should be the §58-7 C(2) there is a rebuttable presumption that thirty (30) days is sufficient time to correct violations. He has the discretion to make the period longer. In this case, although the Applicant might not have been able to complete restoration within the allotted time, work could have been started.

Mr. Graham stated that it is sometimes possible for a violator to correct the violation without the assistance of experts, and if additional time is required for experts to complete their work, the County would extend the time for compliance. He had never received such a request from the Applicant. He was the individual who wrote and issued the original abatement order. He identified Applicant's Exhibit 3 as the supplemental abatement order. He signed the supplemental order but advised that the County Attorney had assisted in writing it. All of the information on the original abatement orders was included in the supplemental order, and there was material added.

Mr. Graham identified Applicant's Exhibit 4[20], the penalty assessments. He alone made the decision to issue the assessments. They were reviewed and corrected by Mr. Pullen. The penalties would start to accrue on December 8, 2009. The penalty assessments were issued after the Board's 1519 Decision. He was not aware that the Applicant had filed a petition for judicial review on the date of the assessment. The penalty assessments were the first actual notice of the amounts assessed. Although there is no restriction in the *Code* about adding an assessment to abatement orders that is not the County practice. To stop the penalties from accruing, the CCCO would have to hear from the violator and would have wanted to know what steps were being taken to abate the violations. AELP never called. Mr. Bender never called. Had they done so he would have considered extending the time for compliance as long as AELP was "moving forward".

On the site visit in January 2009 he was not able to determine if the construction was ongoing. There was construction equipment on site and dirt had been moved. He was unaware of any additional tree cutting and he did not personally review the 2012 Restoration Plan. He was aware it had been approved, but did not know when it was

[20] Applicants Exhibit 4 consisted of each of the six penalty assessments marked collectively as Exhibit 4.

approved. As CCCO, the witness wanted the property owner to achieve compliance. That would not happen until restoration was complete or until there was an appeal to the Board that stayed further County action.

Mr. Graham assessed the amount of the penalty for each violation by reviewing the facts and applying the criteria in Chapter 58 of the *Code*. All violations arose from the tree cutting and driveway project. The penalties were issued because of the original action and the failure to restore the site. The first violation was for performing development activities in the critical area by building a road. Although he did not know when the actual construction took place, Mr. Graham knew that it was done without a permit, and the failure to obtain a permit was a *Code* violation. The second violation referred to the failure to leave contiguous forest and was also related to the building of the driveway. The three penalties for failure to affect retention were for removing vegetation and failing to keep it in place. The two final penalties were broad directives for failure to correct continuing violations in either the critical or non-critical areas.

The witness believed that the penalties were for related violations. He did not have personal knowledge of when compliance activities began. Although he received copies of Ms. Deflaux's inspection reports he had no personal knowledge of what was being done on site. Mr. Graham considered the Applicant's failure to abate the violation expeditiously, or at a minimum, to start that process, to be a sign of bad faith. It was within his discretion to consider the lack of communication as a sign of bad faith. There had been a prior critical area violation that was eventually abated. He considered the cutting of trees to create a serious environmental impact, and he considered the cost of restoration including the necessity to plant certain native species in mitigation when making his assessments. T-5/1/17 at 38-105

The evidentiary hearing continued on May 10, 2017. Mr. Gabler reserved the right to recall Mr. Graham. Mr. Pullen elected not to cross examine Mr. Graham at the time, but reserved the right to call him as a witness in the County's case. T-5/10/17 at 3.

Mr. Gabler then called Sean Callahan of Lane Engineering, Inc., (Lane) business address, 117 Bay Street, Easton, MD 21601 as a witness. Board's counsel stated for the record that Mr. Callahan was her nephew but that the relationship would not affect her

decisions. She added that she might actually be a little harder on him for that reason. Mr. Gabler objected to that comment for the record. T-5/10/17 at 4.

Mr. Callahan stated that he was a principal of Lane Engineering. He is a graduate of Salisbury State University with a degree in geography and planning. He has approximately twenty-five (25) years experience in site planning. He manages the jobs at the firm. The jobs cover all types of surveying, engineering and permitting work, large and small.

Lane previously assisted Mr. Bender with the house site, location of improvements, and the original driveway. Lane was later involved with the Applicant's initial decisions about creating a drive running to the St. Michaels Road. He recalled early discussions about that driveway, and concerns about a plat notation, but believed nothing came of those discussions. Sometime later he received a call from Mr. Bender's property manager, requesting assistance with an erosion and sediment control plan and assistance in obtaining permits relating to a driveway that had begun without permits. He recalled seeing the abatement orders, but was unsure when.

His firm has assisted Mr. Bender in trying to resolve the violations. The first violation addressed by Mr. Gabler concerned a declaration of intent. Mr. Callahan stated that a County form was required to approve the Applicant to clear up to forty thousand (40,000) square feet of forest. It covers the non-critical area only. In the critical area one has to file a forest preservation or forest mitigation plan. After reviewing the abatement orders, Mr. Callahan concluded that the Applicant had built the driveway and done the clearing without permits, and that the site had to be brought into compliance by submitting the required plans.

Mr. Callahan identified Applicant's Exhibit 5, a copy of the Plan ultimately approved by the County. He oriented the Board to the location of the driveway. He participated in the preparation of the Plan. He identified the forest conservation area and critical area mitigation area on the plat. Lane had also done a sediment erosion control and stormwater management plan that was required. When asked to describe the amount of work involved, the witness stated that it had been fairly involved and there had been surveying, identification of wetlands as well as forestry required. He estimated it had

taken about six weeks for the preparation of the initial Plan following his on-site meeting with the regulatory authorities. The on-site meeting occurred September 11, 2012.

Mr. Callahan described the County approval process and the necessity of responding to comments made during reviews. The sediment and erosion control plan was submitted to the County for review in October 2012. He identified Applicant's Exhibit 6, a compilation of the County's review comments to the various plans and his responses. He noted a comment concerning planting to occur by April 1, 2014. The date was picked by the County, as planting usually occurs in either the spring or fall. The letter containing the planting date was written in June of 2013. He stated that at the time letter was written, June 2013, two (2) planting seasons -- fall and spring were reasonable -- provided the plan was immediately approved. It was not.

A final revised Plan was submitted in compliance with the County's comments in August of 2013. Mr. Callahan identified Applicant's Exhibits 7, 8 and 9 as correspondence concerning the final Plan approved on October 13, 2013. Although the Applicant requested permission to begin removing the driveway before the final approval, permission was denied. The approval process took approximately eight (8) months. Mr. Callahan reviewed Applicant's Exhibit 10, a chart of the penalty assessments created by Mr. Gabler. He was unaware of the imposition of penalties while Lane was working on the Plan. He opined that the "failure to effect retention" meant failure to retain forest on site. He observed significant retention during his site visits. He did not see any difference in the violations alleged on the assessments labeled 5.2, 5.3 and 5.4 in Exhibit 4. Mr. Callahan stated that when he visited the site there was no on-going work. The driveway had been built and the forest cleared. The violations described in Exhibit 4, 5.2, 5.3 and 5.4 were all encompassed in violation 5.5. With respect to critical area violation 5.1, he felt it was subsumed by the language in violation 5.6. T-5/10/17 at 4-44.

On cross examination by Mr. Pullen, Mr. Callahan stated that he had not seen the 1519 Decision. He acknowledged that the abatement orders created an affirmative duty requiring the Applicant to do certain things, and that they had not been done. All of the requested actions were components of the *Code*. He disagreed that contiguous forest was not retained on site, but acknowledged that it was possible to build a smaller road. He reiterated that a significant amount of forest was retained. Regarding all violations, Mr.

Callahan agreed that compliance would be achieved once the site was restored pursuant to the approved Plan.

On redirect examination Mr. Callahan responded that two obligations, those created by the abatement of violations described in 5.5 and 5.6 covered all of those actions required by the violations described in Exhibit 4, 5.1, 5.2, 5.3, and 5,4.

On re-cross examination Mr. Callahan stated that he saw the notice of possible civil penalties for non-compliance in the original abatement orders, but did not know if that language constituted adequate notice of the County's discretion to issue subsequent civil penalties. T-5/10/17 at 45-74.

Mr. Gabler next presented Eric Bridges who was sworn. Mr. Bridges stated that he worked for Bridges Land Management, 1114 South Talbot Street, St. Michaels, MD 21663. He was familiar with the Bender property and had been hired to complete the mitigation work on that property. He was on site during August 2015. A previous contractor had performed the work prior to his involvement. He identified Applicant's Exhibit 11 as a letter he had written advising the County that the mitigation work had been completed. He had received the Plan, Exhibit 5, before beginning work and he met with Mr. Graham to be certain of what needed to be done. He next identified Applicant's Exhibit 12, an inspection report by Ms. Deflaux confirming that the required work was complete and Applicant's Exhibit 13, a completion report he received concerning the project. He believed any delays had been caused by the previous unlicensed contractor rather than the Applicant. He was aware that the Applicant was anxious to complete the project.

On cross examination he explained that Mr. Graham had explained the necessity of a speedy completion as the Applicant was being fined until the job was complete and approved.

Responding to Mr. Gabler on re-direct examination Mr. Bridges stated the driveway removal was complete and stabilized and that there was evidence of some planting on site when he began his work. He did additional planting as required and over planted, being proactive in the event that some of the seedlings might die. T-5/10/17 at 75-85.

The Applicant's next witness was Elisa Deflaux, Talbot's Environmental Planner. Her business address is 215 Bay Street, Easton, MD 21601. Ms Deflaux joined the County work force as a secretary at the Department of Planning and Zoning in 2001, spent some time as an administrative assistant to the county council, then became a code enforcement officer in 2003. In 2005 she became the environmental planner. As the environmental planner she implements the critical area and forest conservation ordinances. She reviews plans for *Code* compliance. She has a paralegal degree and has taken courses in forestry, wetlands, biology, environmental science and botany. Ms. Deflaux was familiar with the abatement orders and penalty assessments. She did not review any of those documents before they were issued. She had no involvement with the preparation of the abatement orders. She was aware that there were deadlines in the abatement orders. In reviewing the penalty assessments she was aware that the Applicant would have had six (6) days to complete restoration, and did not believe it would have been possible to achieve both review of the restoration plan and completion of the restoration work within that time frame.

Ms. Deflaux was not aware that the Circuit Court case concerning the abatements was decided June 13, 2012. She stated that the Applicant's initial plan was date stamped when submitted on January 3, 2013. She did not recall participating in the September 2012 site visit. She had seen a letter from Mr. Mertaugh referring to the September 11, 2012 site visit, and believed she had attended but had no specific recollection of the meeting. She was aware of legal proceedings concerning the abatement orders, but not any specifics regarding those proceedings. She knew the Restoration Plan was approved in October of 2013, and felt that the ten (10) month process was normal given the reviews and turn around time for corrections.

She identified the documents marked collectively as Applicant's Exhibit 14, a series of inspection reports and a letter. She did not know of her own knowledge that the Applicant had started work until her first inspection, although she had seen a memo from a former inspector stating that work was already in progress in December 5, 2013. She noted that progress had stopped in the fall of 2014, and wrote the Applicant advising it to notify her once the planting was complete. Ms. Deflaux explained that the County always gives completion deadlines for planting, and that the normal would be two

growing seasons -- fall and spring, Planting is the last phase of the project. It has nothing to do with the earlier restoration deadlines or the penalties involved for failing to restore the site, but the restoration is not complete until the planting has been approved.

Ms. Deflaux was familiar with the term priority retention area and defined it as designated non-tidal wetlands, mature forests and stream banks. She believed that the language in Applicant's Exhibit 4, documents identified as 5.2, 5.3 and 5.4 referred to different types of retention -- failure to leave contiguous forest; failure to leave non-tidal wetland vegetation undisturbed; and failure to replant following Plan preparation. She did not believe there was duplication, although all concerned Plan implementation. T-5/10/17 at 86-113.

Mr. Pullen asked if, given her familiarity with the project, she could determine if it would have been possible to complete both the Restoration Plan and restoration work required for the site between December 2, 2009 and June 13, 2012. She responded that it was possible. She was familiar with state law requiring restoration planting within a year or within two growing seasons. That was one reason for the April 2014 planting completion date. The date had nothing to do with penalty assessments.

Ms, Deflaux identified the signature block and date stamp on the Applicant's Restoration Plan, County Exhibit 2. The plans were logged in January 3, 2013. She acknowledged that scheduling the Plan preparation and completing the restoration work were within the Applicant's control.

Mr. Gabler asked if Ms. Deflaux was aware that there has been a May 27, 2010 Circuit Court consent order in case 20-C-09-007001 staying the abatement orders. She was not. She added that if there was a stay in place she assumed that no other enforcement actions would be taken. T-5/10/17 at 113-124.

On July 26th, 2017 the evidentiary hearings resumed. Mr. Gabler called Edward Launay whose business address is Environmental Resources, Inc. P.O. Box 169, Sutersville, DE as Applicant's witness. In response to Mr. Shortall's question he acknowledged he had been previously sworn.

Mr. Launay stated he is an environmental consultant. He founded his current employer, Environmental Resources, Inc. in 1989. Prior to that he had lived and worked in Talbot County. As an environmental consultant and certified wetland scientist he did a

good deal of work regarding wetlands as well as preparing reports on environmental conditions for wildlife, forestry, streams and buffers. The firm also prepared environmental impact statements. Those documents assess the impact of a particular project on the environment. He has been a certified professional in forest conservation work since 1993. Since that time he had prepared over a hundred forest conservation plans. He identified Applicant's Exhibit 15 as a copy of his resume. He has been qualified as an expert in a number of cases in federal courts in Maryland and Delaware, and has testified before local agencies in Delaware, New Jersey, Maryland and Virginia.

Mr. Gabler offered Mr. Launay as an expert in the field of biology and forest conservation. Mr. Shortall accepted his qualifications as an expert. T-7/26/17 at 8.

The witness explained that a forest conservation plan required a forest stand delineation -- a document determining the forest boundaries, acreage and type of forest including the delineation of priority retention areas to protect wildlife, habitat, and sensitive areas. The forest stand delineation leads to the preparation of a forest conservation plan that determines how much forest can be cleared and how much should be retained. The final step would be to mark and permanently protect the priority retention areas.

He was familiar with the Bender property and had visited the site[21]. He had reviewed the abatement orders. They directed the Applicant to comply with the *Code* and obtain permits. The Declaration of Intent would have permitted the Applicant to clear up to forty thousand (40,000) square feet of forest. The work done on the Bender property would have qualified for the declaration -- it was slightly more than half an acre. In the supplemental abatement order the County alleged that the failure to file the Declaration of Intent was willful, and therefore required that the Bender property meet the afforestation and reforestation requirements of the *Code.* If corrective action was not taken, the Applicant might be subject to other unspecified enforcement action.

The abatement orders required the retention of existing forest and non-tidal wetlands and the reforestation of lands cleared without the permit, as well as restoration of the non-tidal wetlands cleared without a permit. .

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[21] All Mr. Launay's site visits all occurred after the approval of and completion of the restoration on the Bender property. T-7/26/17 at 12-13.

He explained that the strip of forested land remaining shoreward of the St. Michaels Road was already part of an existing 109 acre forest that covered several properties. Mr. Launay identified Applicant's Exhibit's 16 and 17. He cited the Forest Conservation Technical Manual and the *Code*, opining that the break in the forest had to exceed thirty-five (35) feet to render the forest non-contiguous and to be considered for reforestation. Based on the Lane Plan he estimated the break to be twenty (20) feet from side to side. He felt that the four (4) non-critical area violations were redundant and were covered by the single penalty assessment in Exhibit 4 item 5.5

Regarding the critical area violations, he opined both referred to the construction of the driveway and the failure to abate the violation by obtaining a permit and restoring the site. He believed the violations noted in the penalty assessment Applicant's Exhibit 4, item 5.1 would necessitate the same corrections as those required by the violations listed in item 5.6.

Mr. Launay reviewed Applicant's Exhibit 18, the penalty chart received from Talbot County. He noted that some of the assessment days did not seem to coincide with other assessment days and found that confusing, as all had arisen from the same actions in 2006.

Following an objection by Mr. Pullen, Mr. Jones commented that he did not believe the witness had the expertise in the area of enforcement that would allow him to render an opinion on validity of the penalties.

Mr. Gabler then asked if Mr. Launay had an opinion on the environmental impact caused by the construction of the driveway and the clearing of the forest. Mr. Launay responded that he did, and found it to be minimal with respect to forest habitat, and noted that the re-grading of the driveway actually could be beneficial for wildlife -- an unintended consequence of the removing the roadbed construction. T/7/26/17 at 9-53

On cross examination Mr. Launay stated he had not served as an enforcement officer for any state or federal agency nor had he assessed penalties for critical area violations. He did not agree that the primary purpose of the forest conservation ordinance was to avoid or minimize impacts from development -- he believed it existed to balance development with the preservation of more valuable forests. In response to a question relating to diagram 2 drawn by Mr. Pullen and introduced as a part of County's Exhibit 3,

Mr. Gabler objected. He stated Mr. Launay had testified only with respect to diagram 1 on County Exhibit 3. That diagram represented the site conditions. He had not addressed diagram 2. The objection was sustained.

Mr. Launay admitted that the document located at page 490 of the Applicant's Exhibit Book concerned a penalty assessment for a critical area violation for performing development activities in the critical area without a plan and agreed that the penalties would terminate when the plan was filed. With respect to the second critical area penalty assessment, he acknowledged it would continue until project completion. T-7/26/17at 53-67.

Mr. Gabler next called Michael Starke McLaughlin. Mr. Shortall stated there was no need to go through Mr. McLaughlin's credentials as the Board was familiar with him and would recognize him as an expert. Mr. Pullen did not object. Mr. McLaughlin testified that he is a private consulting forester operating his own firm, MSN Forestry Services. The company address is 23161 Grove Road, Preston MD 21655. He was familiar with the Bender property and had been involved with forestry activities on the property for more than thirty (30) years. While working for Lane in 2009 he was asked to visit the site. He observed a young maturing forested area, almost all pine with small hardwood intrusions. He did some forest investigation so he could get some idea of number and species of trees removed to provide data to create the forest delineation and forest conservation plans. The Plan that Lane subsequently prepared covered both the delineation and conservation. At the time of his visit he did not observe any obvious environmental impacts. He did not observe any impact to forest cover or the surrounding forest.

In response to a question from Mr. Gabler, Mr. McLaughlin explained that if AELP had applied for permission to clear the roadbed by filing the Declaration of Intent, that permission would have been granted as the area to be cleared was less than the maximum permitted. He understood that the hearing concerned the penalty assessments. He did not consider the roadbed to be a severe violation. From a forester's perspective he opined that woods roads were common.

Mr. Jones wanted to know if it was a standard forestry practice to lay a base, rip out stumps and bring a roadbed up to private road standards. The witness stated it was

not. He added that he had visited the site in 2014 and 2015, during the relevant period. He did not consider the damage to the site to be severe from a forester's point of view. T-7/26/17 at 67-85.

Mr. Bender was Mr. Gabler's last witness. He resides at 2839 McGill Terrace, N.W. Washington, D.C. 20008. Mr. Bender stated that he had basically no involvement with the restoration. He had been very ill with a succession of medical problems. Mrs. Bender had handled most of the project. They were both anxious to get it completed. They had initially hired a Mr. Evans, who was not the right person for the job. Mr. Bridges completed it.

Mr. Pullen inquired if Mr. Bender was aware of any requests for extension made on his behalf. He was not. He added that Mr. Evans was the same person who had constructed the road without permits. T--7/26/17 at 86-89.

After clarifying that all material and legal memoranda were a part of the Board's record, the Applicant concluded its case in chief.

On August 28th 2017, the hearing resumed. Mr. Pullen opened the County's case by calling Mr. Graham as his witness. Mr. Graham reviewed his credentials noting that he had been in *Code* enforcement for approximately twenty four (24) years in total, the last eight (8) as CCCO. He was involved in the AELP matter from the beginning and had issued the abatement order and supplemental abatement order. He recalled that the abatement orders were appealed to the Board of Appeals and that there were multiple hearings in which he participated. He knew that the Board had affirmed the abatement orders. He subsequently issued the six (6) monetary penalties. The same form was used for all of the penalty assessments. He knew that it specified there were three factors he had to consider in assessing the non-critical area penalties -- the severity of the violation; the presence or absence of good faith and any history of prior violations. Those were the criteria he considered in assessing the penalties in the non-critical area.

In assessing penalties for critical area violations he had to consider different criteria -- the gravity of the violation; the willfulness of the violation; the environmental impact of the violation; and the costs of restoration. He had considered the requisite criteria in deciding the amount of each penalty. He was unaware of any additional enforcement actions filed against the Applicant once the civil penalties were assessed.

Mr. Pullen directed Mr. Graham's attention to the civil penalty form addressing continuing violations and asked if Mr. Graham could give his understanding about how the penalties accrued. Mr. Graham responded that they were like interest and kept mounting up until the violations were abated. Mr. Pullen asked if the accrual was stayed while the appeal to the Board was pending, Mr. Graham answered that the civil penalties were stayed. He subsequently added that he might not have understood the question. Mr. Pullen rephrased the question and Mr. Graham responded that the civil penalties continued to run during the pendency of the appeal. T-8/28/2017 at 11-13.

On cross examination Mr. Graham admitted that he had told Mr. Gabler that enforcement actions were stayed following an appeal. He did not consider the accrual of a civil penalty to be an enforcement action. He believed that the assessment of penalties prior to the appeal was an enforcement action, but that the accrual was the "automatic part." T-8/28/2017at 16. He acknowledged that he had told Mr. Gabler that, generally speaking, penalties were a mechanism the County used to 'force' people to comply with the terms of the abatement order. He also acknowledged that the penalties began to accrue on December 8, 2009, six (6) days after the assessment but disagreed that compliance could not be achieved within those six days. He clarified that the total restoration did not have to be completed within six (6) days, but the violator had to make some meaningful efforts towards the resolution of the problem and the date would be extended upon request.

Mr. Graham was asked if he felt it was important that he understand the term "enforcement action" as defined in the *Code* in order to determine if monetary penalties fell within that definition. He did not believe that it was necessary. T-8/28/17 at 21-24. The witness was unaware of any subsequent unlawful action by the Applicant after the penalty assessments issued.

Returning to the factors that the CCCO had to consider for each penalty Mr. Gabler asked how Mr. Graham had weighed each of the factors to arrive at the penalty assessment.

Mr. Pullen objected stating that the agency or official had only to comply with three requirements in order for the action to be valid -- the official or agency had to 1)

consider the appropriate criteria; (2) the assessment had to be within the statutory limits; and (3) the amount could not be arbitrary and capricious.

The Chairman felt that the Board needed to know the basis of the assessment so that it could make an informed decision on the validity.

Mr. Pullen argued that the Board did not have jurisdiction to look at anything other than what Mr. Graham did on the date of the assessment. Board's counsel disagreed as the Board had to determine whether the monetary penalties were enforcement actions and therefore stayed.

Mr. Jones commented that he was looking at one of the penalty assessments and directed Mr. Pullen to the last box on the second page. He stated that the paragraph following the box did not make sense. Mr. Pullen agreed explaining that the form had been created in 2009 when the appeal was a two step process. The form refers to an appeal from the hearing officer. That process is no longer applicable in cases over $5,000. The Applicant bears the burden of proof to show that the assessment is invalid.

Mr. Gabler objected pointing out that such a narrow reading of the Board's jurisdiction essentially deprived his client of due process, the right to challenge the assessments on any legal grounds. He emphasized that this appeal is the only opportunity the Applicant would ever have to determine if the CCCO has acted properly, considered the appropriate criteria and exercised his discretion properly. To truncate that right deprived the Applicant of its constitutional right to confront the County's CCCO and determine if that individual's actions were taken in accordance with the law.

Mr. Graham stated that he had issued the penalties based on the application of the relevant factors and his experience as a code enforcement officer and later, CCCO. All amounts assessed were within the limits of the penalties permitted by the statutes or ordinances involved and were authorized by *Code*. He believes the total of the penalties issued were only six (6%) percent of those permitted. He had not consulted with anyone else in the Department. He had could not explain how he exercised his discretion other than to say he relied on his experience on the job and his observations -- anyone could have seen the cut through the woods.

Responding to questions from Mr. Pullen, the witness explained that as CCCO he had the authority and the discretion to set penalties for non-compliance. He did that on December 2, 2009, and there was no requirement that he do anything additional.

Mr. Gabler inquired if, as CCCO, he had certified to the Board that there was an emergency requiring the lifting of the stay pursuant to Code §58-12 A(3). Mr. Graham stated he had not.

The County's next witness was Elisa Deflaux who had been previously sworn. Ms Deflaux testified concerning her credentials. She had been the environmental planner since 2005. During the succeeding years she had reviewed several hundred forest conservation plans and declarations of intent. The review process was similar for both documents. She was familiar with the violations on the Bender lands, the abatement orders and had some knowledge of the 1519 Decision. All required a forest conservation plan and/or a forest preservation plan to be submitted for review and to be approved. The AELP Plan was submitted in January 2013.

With respect to the non-critical area penalty assessment labeled 5.2 she explained that when a forest is cut, the stumps removed and the area is graded, it is no longer considered to be a forest. Additionally she believed the thirty-five (35) foot measurement referred to by Mr. Launay was derived from the Forest Interior Dwelling Species Manual (FIDS Manual) which applies in the critical area. She did not believe it applied in the non-critical area.

Mr. Jones commented that the Board had heard about the FIDS Manual before, and referred to a number of zoning regulations requiring the planner or Applicant to consult the manual, and if it said the break in the trees is a certain number of feet, then that would be what the County considers to be the determining factor. Ms. Deflaux agreed.

Returning to the penalty assessments Ms. Deflaux agreed that cutting and clearing the forest was failure to leave it undisturbed. Removing wetland vegetation was also a failure to leave it undisturbed. She identified a portion of the forest conservation ordinance as County Exhibit 4 and agreed that it provided that a person found in non-compliance could be required to meet the requirements of afforestation or reforestation. She acknowledged that County Exhibit 5, also a portion of the forest conservation

ordinance, provided that penalties could be assessed for failure to comply with an administrative order. She agreed that *Code* §58-10.1 stated that each critical area violation constituted a separate offense, and that each day the violation continued constituted a separate offense.

Mr. Gabler showed the witness page two (2) of Applicant's Exhibit 5 and asked about the width of the roadbed. Ms Deflaux stated that she had reviewed the plan, and that she had used the scale on the plat and determined it to be about thirty-five (35) feet in width. She acknowledged that all of the violations leading to the penalty assessments were related in that they arose from the same project, but each addressed a different impact. She also believed that the violation was severe because the work had not been permitted, because stumps were removed and fill brought in, and because there were impacts to the forest and non-tidal wetlands. She was not aware of any impacts to the remainder of the forest. She did not believe that new "edge" habitat was as valuable as contiguous habitat. She was unaware of the age of the forest and would have considered the state of the forest were she doing a forest delineation, as it would bear on designating priority retention areas.

Mr. Pullen revisited the abatement orders and restoration required. In response to a series of questions Ms. Deflaux explained that it was the violator's obligation to advise the County when restoration was complete.

Mr. Gabler asked if it was reasonable to believe that the restoration could have been completed within six (6) days. Ms. Deflaux stated that it would not have been possible. She was unaware of any *Code* provision that permitted the County to penalize the Applicant for non-compliance with the planting requirement before the date specified in the plan.

In answer to Mr. Pullen's questions she stated that it was County policy to allow the extension of deadlines for a reasonable period to allow completion of abatement. She was unaware of any efforts by Mr. Bender to bring the property into compliance before the submission of the Restoration Plan. She was aware of the one year/two growing seasons completion period with regard to planting, but believed it was a policy rather than a requirement.

Mr. Gabler asked when the planting completion period began. Ms. Deflaux stated it started with plan approval. Mr. Gabler pointed out that the April 2014 deadline was less than a year from Plan approval. Ms. Deflaux stated that the extension policy was not written, as far as she knew, and property owners with violations who needed more time usually called and requested an extension.

Mr. Pullen reserved the right to call a witness from the Critical Area Commission who was unavailable until the following meeting to be held September 11, 2017

On September 11, 2017 Mr. Pullen called Claudia Jones. She was sworn. She is employed by the Critical Area Commission (the Commission). Its address is 1804 West Street, Annapolis, MD 21401. Ms. Jones is a science advisor to the Commission, She develops policies for the Commission and co-authored the Forest Interior Dwelling Bird Guidelines (FIDS Manual). She had also helped to develop policy for regulations, water quality and wildlife. She worked as a planner for the Commission prior to being promoted to science advisor. Prior to that she worked for coastal management and parks in North Carolina, for the U.S. Fish and Wildlife Service as a wetland biologist, and for the Chesapeake Bay Foundation as a staff scientist. She had approximately thirty (30) years service and experience in related fields. She held an undergraduate degree in biology and a masters in sustainable development and conservation. She had testified as an expert in a number of circuit courts. Mr. Pullen requested she be designated as an expert on the environmental impacts of development. Mr. Shortall accepted her as such.

Ms Jones was familiar with the site. She had seen photographs and had made one site visit. She walked the area under discussion. The 2009 pictures disclosed an area between twenty (20) and thirty (30) feet wide that had been cleared. The canopy was open and there was some wetland vegetation evident. Because of the size and location of the wooded tract it is considered forest interior dwelling bird species (FIDS) habitat. FIDS are birds requiring a large area of contiguous forest to breed successfully. Openings make these species susceptible to predators. The openings also create micro climates and may allow intrusive species to invade the forest and choke out native species. Forests provide carbon sequestration. According to the results of a study by Tufts University, the low range for the loss of trees on the Bender site would equate to losing more than eight thousand (8,000) pounds of carbon sequestration. At the upper

range forty thousand (40,000) lbs. of carbon sequestration would be lost by the tree clearing. She considered that to be a significant impact. In her observation there was a closed canopy over Rollyston drive, the existing driveway, not so over the illegal road.

Ms. Jones estimated the width of the illegal road to be thirty-two (32) feet. -- 12 feet of road surface and two (2) ten (10) foot shoulders. The shoulders increase the impact, as would adding fill, as it changed the site hydrology and could eliminate the wetlands. Raising the roadbed would change the drainage and create an adverse impact.

Mr. Rich conducted cross examination on behalf of the Applicant. The witness stated that she had been contacted by the County about eighteen months prior to the hearing. Her visit was the previous year, late summer or early fall as the leaves were still on trees. She did not do a tree survey, but was aware there were different species of trees on site, predominately pine. She observed some dead trees and deadfall. She admitted that clearing might be beneficial for some species, but not for FIDS. She had not done a bird count. She acknowledged that her testimony was based on scientific studies.

Mr. Jones asked about the quality of the habitat. Ms. Jones responded that edge habitat is still habitat, but FIDS breeding will be less successful in that location. She explained that the construction of the road would impact birds because some would not want to be within a certain distance of the edge of the forest. Had the Applicant submitted the driveway plan before construction, her office would have reviewed it and made suggestions to minimize impact.

The County then concluded its case in chief.

Mr. Gabler called Mr. Launay in rebuttal. Mr. Launay testified that the clearing was not thirty (30) feet in width. The Plan, approved by the County, scales to twenty (20) feet. He also scaled the length. He identified Applicant's Exhibit 19, a summary he had prepared. He compared his field measurements to Plan measurements and found them consistent.

Mr. Shortall directed the witness to refer only to the Plan measurements as his field measurements and comparisons were after the approval of restoration.

Mr. Launay next addressed the "break" in the forest. He stated that the thirty-five (35) foot number is derived from the Forest Conservation Technical Manual as well as the *Code*. He directed the Board's attention to two (2) sections of the *Code* §§73-2(a) and

73-12 (A)(1)(d) that discuss the thirty-five (35) foot width in connection with reforestsation He also reiterated that the forest was contiguous referring to Applicant's Exhibit 17, the aerial photograph.

In response to questions from Mr. Pullen Mr. Launay agreed that none of the road had been properly permitted, so there were impacts. He had looked at aerials showing the site before the driveway construction and agreed that they showed contiguous forest. He had observed a disturbance of approximately twenty (20) feet in width where trees had been cleared. Testimony then concluded. Following closing argument Mr. Jones made a motion that the Board meet with counsel to receive legal advice. The motion was seconded and passed 5-0. The Board went into closed session at 9:10 pm and returned to open session at 9:43pm.

FINDINGS OF FACT

The Board makes the following findings of fact:

1. The tree cutting and clearing that were the basis for the Code violations took place during 2006. Those conditions were brought to the attention of the CCCO by MDE in January of 2009. Mr. Graham made a site visit on January 22, 2009 and the first abatement order issued on January 23, 2009.

2. The abatement orders of January 23, 2009 and February 19, 2009 required the Applicant to correct certain violations listed in those orders. The abatement orders were appealed to this Board, and subsequently to the Circuit Court then the Court of Special Appeals. A petition for the writ of certiorari was denied. There is no further recourse available to the Applicant regarding the validity of the abatement orders, and the Board takes 'judicial notice' of its own decision in Appeal 1519 and the decisions of the circuit and appellate courts.

3. The abatement orders contained language notifying the Applicant of the possibility of additional enforcement actions in the form of monetary penalties. Applicant's Exhibit Book at 0001, 0004.

4. The Board issued its 1519 Decision on November 4, 2009. The decision found that the CCCO's abatement orders were factually and legally justified. Applicant's Exhibit Book 529-563. The following events then occurred:

a. December 2, 2009: The CCCO issued six (6) civil penalty assessments, one for each failure to comply with the abatement orders. On the same date the Applicant filed a petition for judicial review of the 1519 Decision in circuit court.

b. December 8, 2009: Penalties began to accrue on each penalty assessment for failure to comply with the abatement orders.

c. December 9, 2009: Applicant filed a request for Administrative Review of the December 2, 2009 civil penalties.

d. December 29, 2009: Applicant filed six (6) separate appeals to the Board challenging each of the six (6) penalty assessments together with the appropriate fee.

e. January 2010: The County filed an intent to participate in the appeal.

f. April 12, 2010: A consent scheduling order negotiated by the parties' counsel was signed. The order consolidated the six separate appeals into one and provided that the Board's hearing on the civil penalty case would be deferred until the Administrative Review was concluded.

g. May 27, 2010: The parties consented to a stay of the penalty case while the Circuit Court action, 20-C-09-007001, was pending. County's Response to Motion to Dismiss and Motion in Limine Tab 1.

h. June 13, 2012: The circuit court affirmed the Board's 1519 Decision validating the abatement orders. Applicant's Exhibit Book, 294-315

i. September 11, 2012: Lane Engineering met with regulators on site to begin work on a restoration plan to bring the property into compliance. T-5/10/17 at 17, 20-21.

j. January 3, 2013: Lane Engineering submitted Applicant's Plan to Talbot County (the County) for review. County Exhibit 2.

k. October 13, 2013: The County approved Applicant's revised Restoration Plan, Applicant's Exhibit Book at 527-528; County's Exhibit Book at Tab 7.

l. August 31, 2015: The County approved completion of restoration. Applicant's Exhibit Book 434.

m. July 26, 2016: Bill No. 1346 becomes effective, limiting administrative review of penalty challenges to matters in which the cumulative total of penalties assessed is less than Five Thousand Dollars ($5,000.00) The Applicant's right to an

administrative review is terminated by the enactment - and the agreed deferral established in the scheduling order of April 12, 2010 terminates. County response to Motion to Dismiss and Motion in Limine , Tab 9

n. August 26, 2016: The County filed a complaint, case no. 20-C-16-CV-000021 asking the court to enter a money judgment for accrued civil penalties for the six (6) penalty assessments. Applicant's Exhibit Book at 504-519.

o. October 18, 2016: The Circuit Court signed a consent order requiring Applicant to post a cash bond of $713,400.00 as security for any penalties to be assessed in this matter. Further circuit court proceedings are stayed until the conclusion of all appeals emanating from the penalty appeal this Board. Applicant's Exhibit Book at 520-521.

p. November 15, 2016: the Applicant submits a consolidated appeal of the six (6) penalty assessments pursuant to this Board's April 12, 2010 scheduling order.

5. The April 12, 2010 scheduling order entered with the consent of all parties provided that there was a deferral of the administrative actions involving the civil penalties until completion of the Administrative Review requested by the Applicant on December 9, 2009.

6. Applicant's request for Administrative Review was pending until Bill No. 1346 became effective July 26, 2016. Once the ordinance was amended, the remedy evaporated and the County was free to continue its enforcement action. It chose to file a circuit court case seeking the monetary penalties that are the subject of this appeal. That case is now stayed pending the completion of judicial review and all appeals from the decision to be rendered by this Board in this appeal.

7 . This appeal has been properly advertised and all adjoining landowners were notified. All Board members visited the site.

8. Robert Graham, CCCO, has been active in law enforcement and/or code enforcement for almost fifty (50) years. He has dealt with environmental violations during his fourteen (14) year tenure as a code enforcement officer. In this case he made a site visit and observed the road construction and site conditions.

a. With respect to the violations in the non-critical areas of the property he found that: (i). The clearing of the driveway created a severe impact on the forest and

wetlands; (ii). The Applicant's failure to abate the violation or, at a minimum, take steps to start that process and lack of communication were evidence of bad faith; and (iii) The Applicant had had a prior critical area shoreline buffer violation that was eventually, but not promptly, abated. T-5/1/17 at 97-99. As a result of these findings about conditions in the non-critical area of the property, he exercised his discretion and assessed penalty amounts that, in his judgment and experience, "fit the crime". All amounts set were within the authority delegated to him by *Code*. *See,* Applicant's Exhibit 4, items 5.2, 5.3, 5.4, and 5.5

b. With respect to the critical area violations he found that: (i.) Clearing the critical area portion of the property without going through the permitting process resulted in a definite impact on the environment. He considered it to be serious. (ii) The Applicant had created the driveway without permits but was aware permits would be required due to previous discussions with Lane about creating a driveway and the Applicant knew the Board had found the activity to be willful in its 1519 decision on November 4, 2009; (iii). The Applicant had cut trees in the critical area resulting in a loss of resources and habitat; (iv) The CCCO considered the cost of restoring the site and the cost of mitigation planting. T-5/1/17 at 100-102. As a result of his observations of conditions in the critical area of the property, he exercised his discretion and assessed penalty amounts that, in his judgment and experience, "fit the crime". All amounts set were within the authority delegated to him by *Code*. *See*, Applicant's Exhibit 4, items 5.1 and 5.6.

c. The total of the six (6) daily penalty assessments were less than the maximum daily total that could have been assessed, and were intended to encourage compliance.

9. Lane met with the regulatory officials on site in September 2012, three (3) months after the agreed May 27, 2010 circuit court stay of the abatement orders and penalties ended. Considerable professional time was devoted to the preparation of the Plan between October and December 2012. The Plan, Applicant's Exhibit 5, was accepted for review January 3, 2013 and approved ten (10) months later. Applicants Exhibits 6, 7, 8, 9, 12, 13 and 14 document the County's concerns and requested corrections, the Applicant's responses, and the final Plan approval, all made during what Ms. DeFlaux referred to as a "normal" approval process. Once the abatement orders were affirmed in

circuit court the Applicant was "moving forward" although it did not request an extension time.

10. Full compliance with the abatement orders was achieved when the final phase of the restoration work (planting) was approved on August 31, 2015.

11. Ms. Jones and Mr. Launay, both experts in conservation, agreed that clearing the roadbed created an impact on the forest and wetlands. They disagreed on the degree of the impact. Mr. Launay said it was "minimal and negligible". T-5/10/17 at 51-52. Ms. Jones felt there would be substantial impacts on carbon sequestration, FIDS habitat, wetlands hydrology and drainage. All would be adverse. T-9/11/17 at 12-16. Mr. McLaughlin also observed clearing and road construction but opined it was not a "severe" impact on the forest. T-7/26/17 at 80-84.

The Board finds that the testimony of all three experts is in accord --- the Applicant's activities had an impact on the forest and wetlands. If the highly qualified experts could not agree on the extent of the impact, the Board finds it was certainly within the discretion of the CCCO, operating independently, to assess the site conditions and determine what violations had occurred and to characterize the impact as grave or severe .

CONCLUSIONS OF LAW -- QUESTIONS PRESENTED

I. Do the *Code* and the Board's Rules of Procedure [22] (Board Rule 9 G) deprive the Applicant of procedural due process by requiring that the Applicant present its case first?

II. A. Does Talbot County have the legal authority to impose penalties for continuing violations?

B. Did the CCCO err in assessing the amount of the monetary penalties?

III. Were the monetary penalties assessed stayed by the automatic stay provisions of *Code* §§58-12 A(3) and 20-6, and, if so, for what period of time?

DISCUSSION

I. A. **Did the *Code* and the Board's Rules of Procedure deprive the Applicant of procedural due process by requiring that the Applicant present its case first?**

[22] The Board's Rules of Procedure are cited as Board Rule ____

Following the motions hearing, after having read the documentary evidence, the extensive well prepared memoranda submitted by both the County and the Applicant, and after having had the opportunity to hear argument by counsel on the issues raised, Mr. Jones made a motion that the Board conduct the evidentiary hearing pursuant to *Code* Chapter 20 and the Board's Rules of Procedure. The motion was seconded and approved 5-0. The Board made this decision for the following reasons:

This Board operates on a delegated grant of specific authority found in Chapter 20 of the *Code*. *Code* §20-17[23] prescribes the order of proof, and *Code* §20-19 imposes the burden of production of evidence and burden of persuasion upon the Applicant[24]. The Applicant is required to prove its case by a preponderance of the evidence.

This is the Applicant's second challenge to the Board's procedure -- the matter was raised, heard and decided by the Judge Campen in 20-C-09-007001, the abatement case. *See,* Memorandum Opinion at 6-8, 10-11. Applicant's Exhibit Book 299-301, 303-304. As such, it is an issue (1) between the same parties (2) that was actually raised and (3) litigated to conclusion in the prior proceeding. In *Colandrea v. Wilde Lake*, 361 Md. 371, 387 (2000) Judge Cathell, writing for the court stated:

> ...In *Janes v. State*, 350 Md. 284, 711 A.2d 1319 (1998), we stated that: Collateral estoppel, or issue preclusion, began life and retains life as a common law doctrine. A common and well-established articulation of the doctrine is that "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Murray International v. Graham*, 315 Md. 543, 547, 555 A.2d 502, 504 (1989), quoting from RESTATEMENT (SECOND) OF JUDGMENTS, § 27 (1982). The functions of this doctrine, and the allied doctrine of *res judicata*, are to avoid the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions. *Graham*, *supra*, 315 Md. at 547, 555 A.2d at 504, citing *Montana v. United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970, 973-74, 59 L. Ed. 2d 210, 217 (1979).

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[23] Board Rule 9 G requires evidence to be presented as set out in Code §20-17.

[24] There is a rebuttable presumption that the order issued by an administrative official, the CCCO in this case, is correct. *Maryland Securities Commissioner v. U.S. Securities Corporation*, 122 Md. App. 574. 588 (1998). *cf. $ 3417.46 U.S. Money v. Kinnamon*, 326 Md. 141, (1992) involving a rebuttable presumption established by statute in civil forfeiture cases..

In *MCP Inc.v. Kenny*, 279 Md. 29-32 (1977) the distinction between *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) was explained as follows:

> The delineation between res judicata and collateral estoppel was expressed in *Sterling v. Local 438,* 207 Md. 132, 140-41, 113 A.2d 389, *cert. denied,* 350 U.S. 875 (1955):"... If the second suit is between the same parties and is upon the same cause of action, a judgment in the earlier case on the merits is an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated [res judicata]. If, in a second suit between the same parties, even though the cause of action is different, any determination of fact, which was actually litigated in the first case, is conclusive in the second case [collateral estoppel]." (citation omitted).

The Court of Appeals has established a four (4) part test to determine if collateral estoppel (issue preclusion) applies:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question? 2. Was there a final judgment on the merits? 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue? *Washington Suburban Sanitary Commission v. TKU Associates*, 281 Md. 1, 18-19, (1977)

If the Board applies the Court's test to this case, (1) the Applicant challenged the same procedural processes; (2) the issue was decided on the merits in the prior case; (3) AELP, Mr. Bender and the County are the same parties who raised the issue in the abatement case; and (4) the abatement case was extensively litigated at both the administrative and circuit court levels.

The Board notes, parenthetically, that if it had not proceeded as required by the *Code* and adhered to its own Board Rule 9 G, its actions would have been *ultra vires,* arbitrary and capricious, thus denying the County substantive due process.

The Applicant also urged this Board to find that the assessment of penalties was barred by application of the doctrine of *res judicata* also known as claim preclusion. It argues that all civil penalties could have been and should have been included in the abatement orders, and therefore the later assessment should be barred.

As defined in *MPC, Inc. supra*, claim preclusion requires: (1) the same parties;

(2) the same cause of action; and (3) a final judgment on the merits of the claim. *Accord*, *Esslinger v. Baltimore City*, 95 Md. App. 607, 616 (1993). Mr. Graham testified that there was no requirement that he delay penalty assessments, but that the County wished to give violators a chance to comply before discretionary penalties issued. T-5/1/17 at 40-41.

The Board finds that the administrative appeal and the petition for judicial review in the abatement case were filed by the Applicant. The issue in each was the validity of the abatement orders[25]. The Applicant challenged the mandatory penalty for development in the critical area without an approved declaration of intent (Code §73-3 B(6)) as it was a part of the abatement order. It also could have challenged the possibility of assessment of additional unknown penalty amounts at some future but undetermined time as being arbitrary and capricious. It was in control of the issues on appeal. It did not. That issue is not barred in this suit.

The Board concludes that *res judicata* (claim preclusion) does not bar the County's claim for penalties.

II. A. Does Talbot County have the legal authority to impose penalties for continuing violations?

During the Board's discussion following the motions hearing Mr. Sewell opined that "It's the number one question -- did the code compliance officer err?" T-4/24/17 at 100. It is, however, a many faceted question. The Applicant has raised several issues challenging the ability of Talbot County to create and legally impose penalties for "continuing violations." If the authority is not properly delegated to the County, there is no authority for the CCCO to coerce compliance by use of a "continuing violation." The Board considers its conclusions on this issue to be a part of its broader decision that the CCCO did not err in issuing the monetary penalties, as hereinafter discussed.

Mr. Gabler argued both before this Board and in the Applicant's Memorandum in

[25] The abatement orders did include the mandatory penalty required by the critical area law and Code §73-3 B(6) . The County had given the Applicant until April 6, 2009 to comply with the supplemental abatement order, Exhibit 3. It is logical to assume that the County intended to honor its own deadline before imposing additional penalties.

Support of Appeal that the Express Powers Act now contained in *Md. Local Government Code*[26] does not specifically authorize the County to create a "continuing violation".

The Express Powers

All government operates by deriving its authority from the people. *Maryland Declaration of Rights*[27], Article 1. The Declaration of Rights recognizes that the Constitution and laws of the United States are the supreme law of the State, and that the powers not delegated to the federal government reside in the State. *Decl.* Art. 2 and 3.

Article XI-A §2 of the Maryland Constitution authorizes the General Assembly to grant express powers to a charter county. The Express Powers Act was formerly contained in *Md. Code,* Art. 25A but that article was repealed during the code revision process and the express powers provisions were transferred to *Md. L. Gov't Code*, Title 10; *See also, Laws of 2013*, Ch. 119 § 2.

The former codification in *Md. Code*, Art. 25 §5 was a laundry list of various powers, including delegation the power to "provide for the enforcement of all ordinances, ... adopted under this article" *Id.* at §5(A)(2). The revised version of the act substitutes a broad general grant of authority "**In addition to other powers granted to charter counties**, the charter county may exercise by legislative enactment the express powers provided in Subtitles 2 and 3 of this Title". *Md. L. Gov't. Code*, §10-102(a). [emphasis added]

Subtitle 2 of Title 10 applies only to charter counties. *Md. L. Gov't. Code*, §10-201. Section 10-202(b) gives a charter county the authority to enforce ordinances enacted "under this title" by civil fines not exceeding $1,000.00. Section 10-206(a)(2) permits a county council to pass any "ordinance... not inconsistent with state law" that may aid in maintaining "the peace, good government, health and welfare" of the county.

The clear import of the language in *Md. L. Gov't. Code*, §10-102(a) is that there may be other state law or laws enabling a charter county to adopt an ordinance providing for the preservation or enhancement of some component of the "peace, good government, health and welfare" of the county **provided that** it is "not inconsistent with state law." [emphasis added]

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[26] *Md. Local Government Code* is hereinafter cited *Md. L.Gov't. Code*, ' ___

[27] The Declaration of Rights is hereinafter cited as *Decl.* Art. ___.

State Law and Local Code

The restoration actions to be taken in the abatement orders, Applicant's Exhibits 2 and 3, are for the violation of two state environmental laws: Forest Conservation -- codified in *Md. N.R. Code, Title 5, Forests and Parks, subtitle 16*; and Chesapeake and Atlantic Coastal Bays Critical Area Protection -- codified in *Md. N.R. Code, Title 8, Waters, Subtitle 18.*

The Applicant was charged with a violation of the County's Critical Area Ordinance adopted pursuant to *Md. N.R. Code, Title 8 Subtitle 18* for performing development activities in the critical area without submission of the requisite plans. Exhibit 4, items 5.1. It was also charged with failing to correct the violations, Exhibit 4 item 5.6. The corrective action required was specified in each of the abatement orders. Applicant's Exhibit 2 and 3. *Md. N.R. Code* §8-1815(a)(iii)(1) is mandatory -- it requires the County to take enforcement action[28]. *Code* §58-5 A authorizes penalties not to exceed $1,000.00 per day.

The State has asserted an interest in the conservation and retention of forests to enhance the health and welfare of its citizens[29]. This nexus between the health and welfare of a charter county's citizens and forest conservation brings the penalties for violation of a forest conservation program mandated by *Md. N.R. Code* §5-1603(a)(1)

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[28] Section 8-1815(C)(2)(i) authorizes fines not to exceed $10,000.00 as sanctions in circuit or district court. It does not authorize that amount as an administrative sanction.

[29] § 5-102. Findings and policy

(a) Findings. -- The General Assembly finds that:

(1) Forests, streams, valleys, wetlands, parks, and scenic, historic, and recreation areas of the State are basic assets and their proper use, development, and preservation are necessary to protect and promote the health, safety, economy, and general welfare of the people of the State;

(2) Enhancing the extent and condition of tree and forest cover in the Chesapeake Bay watershed is critical to the success in restoring the Chesapeake Bay because forests are the most beneficial use of protecting water quality due to their ability to capture, filter, and retain water, as well as absorb pollution from the air;

(3) Forests and trees are key indicators of climate change and can mitigate greenhouse gas emissions by carbon sequestration;

(4) Forests provide habitat for hundreds of wildlife species, including habitat needed for rare, threatened, and endangered species; * * *

(b) Policy. -- It is the policy of the State to encourage the retention and sustainable management of forest lands *** *Md. N.R. Code* §5-102

and established by local ordinance squarely within the express power authorization in *Md. L. Gov't Code* §10-206(a)(2).

The Board also recognizes that state law delegates enforcement of the forest conservation program to the local jurisdiction *Md. N. R. Code* §5-1612(a)(2). A mandatory penalty of thirty (30) cents per square foot of the area found to be non-compliant is required by *Md. N. R. Code* §5-1608(c)(1). *Md. N.R. Code* §5-1612(d)(1) provides that a violator may be charged a penalty not to exceed $1,000.00 per day, with each day constituting a separate violation. Clearly, these sections create two different penalties.

The Talbot County Forest Conservation Ordinance, *Code* Chapter 73 establishes the required forest conservation program. *Code*, §73-1. The ordinance does not discuss enforcement other than establishing that failure to file a declaration of intent may trigger a variety of enforcement actions. *Code* §73-3 B(6). Enforcement tools are found in *Code*, Chapter 58. Although *Code* §58-3 does not use the verbiage "continuing violation" it provides: "Each violation that occurs and each calendar day that a violation continues shall be a separate offense[30]."

The Board therefore concludes that the County does have the delegated authority to provide for a continuing violation.

II.B Did the CCCO err in assessing the amount of the monetary penalties?

Administrative agencies have a great deal of discretion in assessing monetary penalties. *Md. Transp. Auth v. King,* 369 Md. 274 (2002) In Talbot County that duty has been delegated to Mr. Graham as CCCO. *See,* Exhibit 2 to Talbot County's Response to Applicant's Memorandum in Support of Appeal. It is the Applicant's burden to convince the Board that the actions of the CCCO are so extreme as to constitute an abuse of discretion. If the CCCO's penalty assessments are disproportionate to the harm caused by the violation, they may be arbitrary and capricious, and an abuse of discretion denying the Applicant substantive due process. *Md. Aviation Admin. v Noland,* 386 Md. 556, 581 (2005)

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[30] If read in conjunction with the *Code* Art 1, Ch 2 Rules of Construction §1-13 defines an enforcement action as "Any suit, demand, monetary penalty abatement order or other administrative, civil or criminal proceeding brought by the County to enforce the *Code*." The County believes the definitions apply only to Chapter 2, although the terms are not defined elsewhere.

Both parties have cited *Neutron Prods. Inc. v. Dep't of Environment*, 166 Md. App. 549 *cert denied*, 392 Md.726 (2006) for different propositions. The County asserts it stands for the proposition that this Board cannot permit inquiry into the factual basis of the CCCO's decision, and, if the amounts assessed are within those established by *Code*; the CCCO's action is presumptively reasonable. The Applicant believes that it permits inquiry into the factual basis for the CCCO's penalty decision and allows it to inquire if "the punishment fits the crime." The Board believes both parties are partially correct. *Neutron* references *Bucktail v. Talbot County Council,* 352 Md. 530 (1999) which in turn discusses what the Applicant is entitled to receive as a matter of due process.

> ..."[A] fundamental right of a party to a proceeding before an administrative agency [is] to be apprised of the facts relied upon by the agency in reaching its decision and to permit meaningful judicial review of those findings. In a judicial review of administrative action the court may only uphold the agency order if it is sustained by the agency's findings and for the reasons stated by the agency."); *United Steelworkers of America AFL-CIO, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665, 679, 472 A.2d 62, 69 (1984) In accordance with the above standard of judicial review, in order for the reviewing court to determine whether the Council's action was fairly debatable, findings of fact are required. Findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions. *Id.* at 553.

In Findings of Fact Nos. 8 and 11 this Board has determined that Mr. Graham, acting as the duly authorized agency representative, did consider all relevant factors required in setting the penalty amounts. It is true that after the passage of almost nine (9) years he did not recall exact details of how he made his decisions, but he was abundantly clear that he had looked at the site, considered each of the factors, and used his experience to determine the appropriate penalty amount for each separate violation. *Noland, supra*, does not require more.

Neutron, supra, also supports the County. Once the underlying facts supporting the impositions of penalties are disclosed -- in this case Mr. Graham's assessment of the violations alleged in the abatement orders using the appropriate factors, *Neutron* does not require that Mr. Graham specify why he felt a certain violation was allotted a certain monetary penalty. If the assessments were within that permitted by *Code*, they are presumptively reasonable.

The Board concludes that Mr. Graham did not err in assessing the monetary penalties.

III. Were the monetary penalties assessed stayed by the automatic stay provisions of *Code* §§58-12 A(3) and 20-6, and, if so, for what period of time?

Under Chapter 20 of the *Code*, an administrative appeal to this Board that alleges error in the actions of an administrative official automatically stays "all further proceedings to enforce compliance with the order, requirement, decision or determination." *Code* §20-6 B(3) In Finding of Fact 4 b. this Board determined that penalties began to accrue December 8, 2009. In Finding of Fact 4 d. we determined that this administrative appeal was filed on December 29, 2009. We conclude that after December 29, 2009 the accruing penalties, separate violations pursuant to *Code* §58-3, all intended to enforce compliance with the abatement orders according to Mr. Graham, T-5/1/17 at 63; T-8/28/17 at 17 were stayed.

Although the County disagrees, we do not believe that *Code* §58-5 D means that the penalties accrue regardless of the automatic stay requirement in *Code* §58-12 A(3) . Mr. Graham testified both on direct examination in the Applicant's case, and direct examination in the County's case that an appeal stayed enforcement actions. T-5/1/10 at 78-79; T-8/28/17 at 11. He later explained that he believed that any additional assessments were stayed, but that the accrual of penalties previously assessed was automatic. T-8/28/2017 at 13.

While the Board agrees that Mr. Graham did not need to log an assessment for each day the violation continued, *Code* §58-3 clearly states that "...Each violation that occurs and each calendar day that a violation continues shall be a separate offense". The automatic accrual amounts to a separate assessment -- an automatic assessment -- for each day the violation continues.

> ... The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature." [internal citations omitted] "Statutory construction begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology." [internal citations omitted] "When a statute's plain language is unambiguous, we need only to apply the statute as written, and our efforts to ascertain the legislature's intent end there." [internal citations omitted] *Crofton Convalescent Ctr., Inc. v. Dep't of Health & Mental Hygiene*, 413 Md. 201, 216 (2010)

Since both *Code* §§58-12 A(3) and 20-6 B(3) are plain and unambiguous, The Board concludes that penalties were stayed by the appeal to this Board on December 29, 2009.

THE BOARD HAVING MADE THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW proceeded to decision.

(1) Mr. Cavanaugh made a motion that the six (6) penalty assessments were valid and enforceable and fell within the statutory limits and that Mr. Graham acted properly. Several members spoke at one time seconding the motion, and it carried 5-0.

(2) Mr. Cavanaugh made a second motion that the *Code* made it clear that the appeal to the Board stayed all actions following December 29, 2009. Several members spoke at one time seconding the motion, and it carried 5-0.

GIVEN OVER OUR HANDS, this 15th day of DECEMBER, 2017.

TALBOT COUNTY BOARD OF APPEALS

Paul Shortall, Chairman

Phillip Jones, Vice-Chairman

John Sewell, Member

Louis Dorsey, Jr., Member

Frank Cavanaugh, Member