

Lawless Enforcement of Environmental Laws

By William Nicoson

“The first thing we do, let’s kill all the lawyers,” shouts one rioter to another as they plan to take over the kingdom in Shakespeare’s “Henry VI, Part 2.”

These days, in Fairfax County anyway, that’s not necessary. No one in power, least of all the county’s environmental police, bothers to consult lawyers. Learning that Reston Association had built a holding pond and rain garden in RA’s Nature Center to prevent erosion of stream banks, county officials declared RA had acted illegally by failing to obtain the county’s prior approval and must do penance by obliterating pond and garden.

These hair-trigger law enforcers shoot first and apparently ask questions of their lawyers later or not at all. So look out. For once in my journalistic life, I’ll cite chapter and verse and play a lawyer consulted too late.

The area required for the pond and garden project was less than 2,500 sq. ft. A patch of poison ivy, involving some 1,300 additional sq. ft., was removed to protect the health and safety of visitors. Since the purpose of building the pond and garden (preventing erosion) was wholly different from the purpose of removing poison ivy (protecting health), these two undertakings must be considered separate activities, neither of which exceeded 2,500 sq. ft. in scope.

The square footage is critical under county ordinances. The ordinance providing for erosion and sedimentation control exempts from the requirement of obtaining county approval of a conservation plan any “[d]isturbed land areas for commercial or noncommercial uses of two thousand five hundred (2,500) square feet or less in size” (Sec.104-1-7(m)(9)).

When I pointed this out to county environmental officials, they took refuge in another ordinance enacted pursuant to the state’s Chesapeake Bay Preservation Act . This ordinance regulates “Resource Protection Areas” (RPAs), meaning “lands at or near the shoreline or water’s edge” of the Bay (Sec. 118-1-6(x)), and “Resource Management Areas” (RMAs), meaning “all areas outside of RPAs” (Sec. 118-1-7(a)). The Reston Nature Center is thus subject to county regulation as an RMA.

But lurking in the fine print of the county’s Chesapeake Bay Preservation Ordinance is an unhappy clause for draconian county enforcers: “The following activities shall...be exempt from the provisions of this Chapter...(b) *Within Resource Management Areas*: any land-disturbing activity of twenty-five hundred (2,500) square feet or less in size” (Section 118-5-3, original emphasis).

Thus exactly the same exemption based on size applies under the Chesapeake Bay Preservation Ordinance as under the zoning ordinance regulating erosion and sedimentation.

Not only did county environmental officials wreak environmental havoc in the Nature Center by ordering reversal of a valuable project to mitigate erosion, they had no legal authority to do so. RA deserves a formal apology from the county for this travesty. You can guess what I think the county's environmental cops deserve.

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