

GEORGE GRAEFE, III, *et. al.*

*

IN THE

v.

*

MARYLAND TAX COURT

ANNE ARUNDEL COUNTY,
MARYLAND

*

No. 23-MI-AA-0251

*

MEMORANDUM AND ORDER

This case arose from a dispute between the Petitioners, George Graefe, III and Linda Graefe (“Graefes”), and the Respondent, Anne Arundel County, Maryland (“County”), regarding the propriety of the County denying the Graefes’ request for a refund of \$41,084 levied as mitigation for disturbance on the Graefes’ property (“mitigation fee”). The disturbance was necessary to accommodate the construction of a dwelling on the Graefes’ property. The issue before this Court is whether the fee was properly authorized by the County’s Critical Area Law.¹

The parties entered into a stipulation of facts, which is incorporated herein. See Petitioner’s Exh. 1. The Graefes offered testimony by Robert Johnson, who was qualified as an expert civil engineer, and who certified plans he prepared for development of the property, which the County then approved. The County offered testimony by Michael Day, who serves as a senior planner on the County’s Critical Area Team in the County’s Planning and Zoning Department. He reviewed the plans submitted by Mr. Johnson. The following facts are extracted from the stipulation of facts, the testimony, and the parties’ memoranda.

Graefes’ Exhibit 4 (“Buffer Map”) is a map of the area about the subject property, which was prepared by Mr. Day and relied upon by both parties. It depicts, among other

¹ Only the propriety of the fee is in dispute, not its calculation.

things, steep slopes, a 100-foot Critical Area Buffer to the water, a Buffer Modification Area (“BMA”), an expanded buffer, and a 50-foot expanded buffer. On the Buffer Map the circled “14” is the subject lot. A confluence of this lot with a neighboring lot is circled. A portion of the subject lot in this circled corner is indicated as within the 100-foot buffer to tidal water and the BMA. The circled “10” is the referenced neighboring lot, which was often referred to as Olga Iturrino’s lot. These 2 lots are depicted more clearly in Graefes’ Exhibit 2 and County’s Exhibit 9, where lot 14 is designated as 2644 and lot 10 is designated as 2646. The Mitigation Fee was levied for the Graefes’ proposed disturbance of land within the 50-foot expanded buffer, which abuts the top of the steep slopes.

The Graefes’ obtained a variance to construct a dwelling within the 50-foot expanded buffer. The permanent disturbance necessary for the construction required mitigation. As mitigation could not be accommodated on-site, the County levied the authorized fee-in-lieu at issue. See COMAR 27.01.09.01-2 (F).

The goal of the Critical Area law, relevant to this case, is to assure protection for sensitive areas abutting tidal waters so as to enhance the water quality of the Chesapeake Bay. Natural Resources Article (NR) § 8-1801(a); *Chesapeake Bay Foundation, Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 612-613 (2014); *McHale v. DCW Dutchship Island, LLC*, 415 Md. 145, 154 (2010). The cumulative impact of development abutting these tidal waters is noted as being adverse to this water quality. NR § 8-1801 (a) (9).

The law’s purpose is to be achieved “...on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their programs in a consistent and uniform manner subject to State and local leadership,

criteria and oversight.” *Id.* at (b)(2). In this regard, the law’s intent is for the County to “...have primary responsibility for developing and implementing a program, subject to review and approval by the [Critical Area] Commission.” *Id.* at (a)(1); *Chesapeake Bay Foundation, Inc. v. DCW Dutchship Island, LLC, supra.* at 613. To achieve this intent, the Critical Area Commission (“Commission”) has adopted regulations detailing “...criteria for [local] program development and approval.” *Id.* at (e) (1).

There is no dispute that the County’s Critical Areas program, detailed in its Code, has been approved by the Commission. And it is clear that the Commission’s regulations detail “...the **minimum** standards for a program sufficient to meet the goals of the Critical Area. Program [emphasis added].” *Id.* at (c) (1) (i); See also COMAR 27.01.01.03. As the County’s program has been approved, the provisions of the Anne Arundel County Code (“Code”) are relevant.

The Graefes’ filed a memorandum to which the County responded. During the hearing the Graefe’s raised issues not addressed in their memorandum. The issues raised in the Graefes’ memorandum will be addressed first.

The Graefes’ initially argued in their memorandum that there is no State authority for the County to extend the buffer 50 feet beyond the steep slopes abutting their property. In this regard, Code § 18-13-104 (b) (1) provides, in the relevant part, “... [i]f there are contiguous slopes, the buffer shall be expandedto the top of the slope and shall include all land within 50 feet of the top of the slopes.”² As this provision is part of the program approved by the Commission, any conflict with the Commission’s

² COMAR 27.01.09.01(7) requires the County to expand the buffer to include steep slopes.

regulations is not germane, as those regulations define minimum standards, which can be exceeded in a county-approved program. In this instance, the County properly chose, with the Commission's approval, to statutorily extend the buffer to within 50 feet of a slope's top.³ This conclusion is consistent with COMAR 27.01.01.03 (B)'s direction that “,, [i]n the event that a provision of this title conflicts with a provision of a local program, the stricter provision applies.”

Next, the memorandum asserts that, even if the 50-foot expanded buffer is authorized, there is no authority to levy a mitigation fee in this expanded buffer. The premise for this argument is that the COMAR provision for mitigation and planting standards applies only, in relevant part, to “... a development or redevelopment activity that occurs on a lot...that includes a **buffer to tidal waters** [emphasis added].” COMAR 27.01.09.01-2. The Graefes' argued that the reference to “buffer to tidal waters” restricts fee application to the buffer to which that regulation refers, i.e., in the relevant part, to 100 feet from tidal waters plus any abutting slopes. This restriction applies, the Graefe's argued, as the County incorporates COMAR 27's requirements for development within the buffer, but neglected to expand its requirement, insofar as the mitigation fee, to the 50-foot expanded buffer. See Code § 17-8-301 (b). This argument fails for four reasons.

Initially, the Code provision applies to “development on properties containing **buffers** [emphasis added].” *Id.* at (b). The “buffers” to which “the requirements of COMAR, Title 27...” apply are the Code defined buffers, which include the 50-foot expanded buffer. Code § 18-13-104 (a) & (b). This Code “buffer” definition clearly prevails.

³ As a charter county, Anne Arundel County has broad zoning authority. See *People's Counsel v. Loyola*, 406 Md. 54, 70-71 (2008).

Second, COMAR requires that a buffer management plan be submitted if there is to be a permanent disturbance in the buffer arising from a variance. COMAR 27.01.09.01-3 (B); See also *McHale v. DCW Dutchship Island, LLC, supra.* at 154. and there is a specific Code requirement for “...mitigation for variances to the required clearing limitations...” at a three-to-one ratio. Code § 17-8-602. This mitigation and its ratio are required by regulation. COMAR 27.01.09.01-2(H)

In this case, on-site mitigation was not feasible. See COMAR 27.01.09.01-2 (F). Accepting the Greafes’ argument, although required on-site mitigation was not feasible, they could avoid the fee-in-lieu, which is a specific benefit to the property owner, enabling disturbance in the buffer. This absurd result would be inconsistent with principles of statutory construction, for as the Supreme Court has directed, “...“[i]n every case, the statute must be given a reasonable interpretation, not one that is absurd, illogical, or incompatible with common sense.” *Comptroller v. FC-GEN.*, 482 Md. 343, 380.⁴

Third, by definition, the “[b]uffer’ **includes**,” in relevant part, 100 feet from the mean high tide and contiguous slopes. COMAR 27.01.01.01.B(8)(b). “Includes,” as used in a statute, is “by way of illustration and not by way of limitation” and is “...intended to be partial or illustrative.” *Clark v. State* 473 Md. 607, 619-620 (2021); General Provisions Article § 1-110. So, the definition would incorporate the more expansive County definition, i.e., the 50-foot extension from the top of the slope.

⁴ Statutory construction principles apply to interpretation of regulations. *Carven v. State Retirement*, 416 Md. 389, 407 (2010)

Last, the Graefes reading of the referenced COMAR buffer is too narrow. Throughout COMAR, there are references to “buffer.” See COMAR 27.01.09.01-2 (B), (C), (D) &(G); 27.01.09.01 (B)(3), (E) (3) & (7); 27.01.09.01-2 (E); & 27.01.09.01-3 (B). Reading these “buffer” references in the context of the Critical Area law’s purpose establishes that there is no distinction between the referenced “buffer to tidal waters” and “buffer.”⁵ This conclusion is consistent with the Supreme Court’s direction that:

“[t]he plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute. We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute’s object and scope.” *Comptroller v. FC-GEN.*, supra, at 380 (2022), quoting *Wheeling v. Selene Fin. LP*, 473 Md. 356 (2021)

The limitation for which the Graefes argue would be contrary to the clearly stated legislative intent of the Critical Area law. As the County correctly argues, “[e]xpanded buffer is buffer.”

During the hearing, the Graefes explained that the steep slopes did not affect their property as the confluence of their property with the 100-foot buffer was on flat land. A circle on the Buffer Map depicts this confluence on the flat land. They then argued that, as only flat land and not the slopes abutted their property at the 100-foot buffer, there could not be a 50-foot expanded buffer.

The County did not dispute that the confluence was flat land, not abutting a slope. But it argued that the focus should not be on the lot but on from where the slopes

⁵ COMAR 27.01.01.01(B)(8)(a)(i) provides the “buffer” includes the same area described as “buffer to tidal waters” at COMAR 27.01.09.01-2 without referring to it as such, suggesting the terms are interchangeable.

emanate.⁶ Referring to the Buffer Map, Mr. Day demonstrated that the slopes emanated from the buffer in an upside-down U-shaped pattern with a drainage swale in the center at the inner base of the slopes. A portion of those slopes fully abutted the Graefes' building site, providing the basis for the 50-foot expanded buffer.

Code § 18-13-104 (b) (1) supports the County's position. That section provides, in the relevant part, that "[i]f there are **contiguous** slopes ... the buffer shall be expanded and shall include all land within 50 feet of the top of the slopes. [emphasis added]." "Contiguous" clearly applies to the buffer, meaning the relevant perspective is from where the slopes emanate. As these slopes emanate from the buffer, upon them abutting the Graefes' property, the 50-foot expanded buffer would apply.⁷

Accordingly, it is hereby **ORDERED** by the Maryland Tax Court on this 29th day of February 2024 that the Graefe's refund request is **DENIED**.⁸

CERTIFIED TRUE COPY
TEST: Andrew Berg, Clerk

NOTICE: You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.

⁶ The County argued that the Graefes were bound by the 50-foot expanded buffer depicted on the plan Mr. Johnson certified and submitted to the County. Mr. Johnson's testimony indicated the certified plan reflected negotiations with County staff necessary to secure the variance sought by the Graefes. So, the County's argument is rejected.

⁷ The Graefes also argued that since a BMA abutted their property within the confluence, the buffer could not be expanded per County Code § 18-13-104 (c). But, since the slope emanating from the buffer is not fully encompassed in the BMA, this argument is not germane.

⁸ Issues and requests raised, but not specifically addressed, were deemed redundant, *de minimus*. Irrelevant or without merit.