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County Commissioners for Queen Anne's County
The Liberty Building
107 N. Liberty Street
Centreville, MD 21617

Dear Commissioners:

I am writing this letter on behalf of my clients, Chesapeake Wildlife Heritage, Inc. and Queen Anne's Conservation, Inc. My clients are concerned about repeated proposals having to do with the Chesterhaven Beach property located on Piney Creek. Chesapeake Wildlife Heritage, Inc. owns property which is on the other side of Piney Creek from the subject property.

As you know, a tremendous amount of County resources are being utilized reviewing, processing, deciding, and litigating the seemingly never-ending stream of proposals by the owners of this property. It is our view that these resources are being wasted because virtually all of the proposals are predicated upon the false premise that the Chesterhaven Beach property enjoys grandfathered density for 180 dwelling units. This claim by the landowners is based solely upon the recordation in 1959 of a plat depicting 186 building lots on the property.

As a matter of law, this fact alone is not enough to grandfather density of 186 units for this property. Indeed as will be illustrated below, that issue has already been decided by the Queen Anne's County Board of Appeals, the Circuit Court, and affirmed by the Maryland Court of Special Appeals.

The Property

The Chesterhaven Beach property is an extremely important and environmentally significant piece of property. The property is practically surrounded by tidal waters of the State of Maryland. It fronts on the Chester River on one side, and Piney Creek on another side. The perimeter of the property is 12, 957 feet, of which 8,074 feet are shoreline. Thus, 62% of the perimeter of the property is shoreline. Virtually all of the property is located in the Critical Area and is about one-third woodlands.

Although the property has been variously represented by the landowner to occupy between 103 and 109 acres, a recent survey reveals that it consists of approximately 97 acres. This last area computation includes substantial portions of land that was recaptured in a recent shoreline restoration project.

Of the 97 acres, a McCrone report from 1992 indicated 84 acres are hydric soils. That same report indicated 82% of the property has wetlands or wetlands soils.

The property is adjacent to the Queen Anne's County Cross-Island Trail and is the location of an important Blue Heron rookery.

A recent submittal by the landowner indicated that only about 30 acres of the entire property is located outside of the Critical Area buffer.

In 1988 and 1999 when the original Critical Area program was enacted in Queen Anne's County this property was designated a Resource Conservation Area. The landowner did not oppose or appeal that classification of the property. The property remains classified as Resource Conservation Area.

Historical Use of the Property

Since 1959, the property has either lay fallow or been partially farmed. No roads or any other infrastructure pursuant to the 1959 plat have ever been bonded, permitted, or constructed.

The landowner has always maintained an agricultural assessment on the property, and has never paid taxes on individual building lots.

Although it has been represented from time to time that the landowner had these lots "approved" in 1959, it is now quite clear that there was no subdivision law in effect in Queen Anne's County in 1959. Moreover, there is no evidence that the lots were ever perked until 1976. At that time a Health Department letter to the previous owner indicated that 42 lots had "passed."

In 1962, the previous owner certified to the Zoning Office that substantial construction on the roads had occurred and two (2) lots had been sold by *bona fide* contract of sale. In fact, as noted above, no roads pursuant to the subdivision plat have ever been constructed on the property. Moreover, the first deed from the previous owner to anyone occurred thirteen years later on June 6, 1975. At that time, two (2) lots were deeded to Charles and Bertha Flom and Jeanette Shapiro for no consideration. Subsequently, in March of 1991, those same two lots were deeded back to Chesterhaven Beach Partnership by Flom and Shapiro for no consideration.

Over the years, various owners have made various applications to reconfigure these lots, but none have come to fruition despite the tremendous expense to the County and other agencies to review these applications.

The 1992 – 1995 litigation

In 1992, the Chesterhaven Beach Partnership applied to the Board of Appeals for variances and conditional use to allow a planned unit development on the property, once again asserting that the property was grandfathered for 186 single family dwellings. In November of 1992, the Board of Appeals issued a detailed, comprehensive, well-reasoned decision authored by their attorney, Michael Foster, Esquire.

In its decision the Board of Appeals unanimously found that the applicant failed to demonstrate that they were entitled to the transfer of density benefits under Section 5000 of the Critical Area program that was in effect at that time. [Section 5000 is currently codified in Chapter 14:1-22. The Code provisions that formed the basis of the Board's decision remain the same today as they were in 1992.]

In short, the Board found that the property failed to satisfy the grandfathering provisions in the Queen Anne's County and State Critical Area programs. Specifically, the Board found that, although the lots were recorded, they were not "legally buildable" and that the lots had not received "final approval" prior to June 8, 1984. These findings are applicable to the current Code requirements set forth at Section 14:1-22C(3).

Furthermore, the Board addressed Section 5000C which is now codified at Section 14:1-22D. The Board found that the precursor to this section was not intended to expand what constituted a grandfathered lot as defined by the previous sections. The applicant had argued that Section 5000C created new substantive vested rights. The Board's interpretation of that argument was,

> To find that Section 5000C created new substantive vested rights would require one to find that a naked plat without any development activity confers more rights than grandfathered lots. This conclusion would be inconsistent with not only the Sections 5000B.1, 2, 3, and 4, but also the Critical Area criteria as it related to grandfathered lots.

The Board went on to explain in detail the specific findings that must be made to allow density grandfathering in the Critical Area in Queen Anne's County. The Board found that the Chesterhaven Beach property did not meet these requirements, and accordingly, did not enjoy grandfathered density.

Understandably, the landowner appealed the decision of the Board of Appeals to the Queen Anne's County Circuit Court. The Circuit Court affirmed the decision of the Board of Appeals and expressly affirmed their decisions relating to the grandfathering of the property. The Court went on to explain,

> The purpose of such grandfathering provisions is to preserve any vested rights landowners might have under prior ordinances; its purpose is not to create rights for present landowners which were never vested in them or their predecessors in title.

The Court further held,

> Even if such a plat was recorded, the approval of legally buildable lots under a prior ordinance is required to create the vesting. The Applicant's own evidence and testimony supports the Board's conclusion that there was never an approved plat or subdivision for any part of this property because it would not meet percolation standards".

The landowner appealed the Circuit Court decision to the Maryland Court of Special Appeals. The landowner asked the Court of Special Appeals for, and was given the opportunity to present additional evidence pertaining to the vesting issue. Notwithstanding that evidence, the Court of Special Appeals affirmed the decision of the Circuit Court. The Court of Special Appeals panel included Judges Harrell and Cathell, both of whom went on to serve on the Maryland Court of Appeals and to become known as the foremost authorities on land use and Critical Area law in Maryland.

The Court of Special Appeals' decision observed as follows:

> Before concluding, we have two observations. First, the professional staff abdicated its responsibility in its role in respect to conditional uses and variance. It recommended favorably that, which, if granted, would have been clearly illegal and arbitrary. We can understand, however, that in areas where severe environmental regulations, *i.e.*, Critical Area regulations, overlay zoning regulations, the two statutory schemes can be an irreconcilable conflict. What is permitted by one scheme may be prohibited by the other. When that occurs - and it may well have occurred here – we perceive that there can exist extreme pressure within the staff to attempt to reconcile the irreconcilable…. It is not the function of staff to make such policy decisions in the absence of legislative action. We do not perceive that it was the legislative intention of passing the State or local Critical Area legislation that zoning variance procedures would be prostituted in order to alleviate the harshness of environmental regulation….

Recent History

The response by the owners of the Chesterhaven Beach property to these stunning rulings was to simply ignore them. Rather than redesign their project consistent with current Critical

Area regulations and density provisions, they decided to simply act as if nothing had happened. They simply waited ten years after the Court of Special Appeals entered its ruling, during which time either failing memories or staff turnover took these important judicial rulings out of play. They then came back to the County and asked to "consolidate lots 18, 20, 21, 22, 23 by a revised plat". This consolidation was approved and recorded. It is certainly permissible to look upon this approval as a new two-lot subdivision. In that regard, it does not offend the current density standards for this property.

However, around this same time frame, the County began to review its Comprehensive Plan and in particular the Chester-Stevensville Plan. The Chesterhaven Beach property was proposed to be removed from the designated growth area (as indeed it should have been in view of the judicial rulings enumerated above). The landowners, now *represented* by Mr. Foster responded by telling anyone who would listen, including the Planning Commission, the Sanitary District Commission, the Department of Public Works and the Planning Office, that they had 186 grandfathered lots and therefore, should be a vital component of the County's growth areas. Notwithstanding these pleas to the Commissioners, the property was in fact deleted from the growth area in May of 2007. This decision by the Commissioners spawned an appeal to the County Board of Appeals by Chesterhaven Beach attacking the process by which the adoption took place. In February of 2010 the Board of Appeals dismissed Chesterhaven Beach's appeal. Chesterhaven Beach appealed that decision to the Circuit Court for Queen Anne's County, who in October of 2010, affirmed the Board of Appeals' decision and ruled that the 2007 decision by the County Commissioners to delete the Chesterhaven Beach property from the growth area was a valid decision and stands as a matter of law.

Notwithstanding the County Commissioners' decision to delete this property from the growth areas of Queen Anne's County, Chesterhaven Beach persisted in its efforts to upgrade its status under the Comprehensive Water and Sewer Plan on the basis that it enjoyed 186 grandfathered lots and would be allowed to build 186 dwelling units on its property.

Since applying for the administrative lot line adjustment, the landowner has continued to occupy staff time. Landowner sought and received an opinion letter from Ms. Rossing confirming that this was an 186 lot nonconforming subdivision. (Apparently Ms. Rossing is unaware of the prior ruling of the Board of Appeals and the ensuing judicial decisions.) In addition to these minor incursions into staff time, the developer has now also applied, over the last two years, for several different iterations of "resubdivision" all predicated upon the landowner's alleged grandfathered status for 186 lots.

Significantly, in January of last year, in reviewing one of the applications the State Critical Area staff innocently commented that the County must make findings that all lots seeking grandfathered status were legally buildable on the grandfathering date. Clearly, the Critical Area Commission has never been made aware of the prior litigation of that very issue.

In the final analysis, the Planning Office files are replete with assertions that this property is grandfathered notwithstanding that that issue has already been decided to the contrary and notwithstanding the fact that grandfathering, once lost, cannot be rejuvenated.

Conclusion

We ask that the County Commissioners take definitive action to put an end to this never-ending depletion of County resources, not to mention the efforts that my clients are called upon to make almost weekly to keep track of what is happening on this property.

We sympathize with the fact that the County's attorney is conflicted out of this matter, since his partner now represents the landowner. Also, since Mr. Drummond has acted to advise various agencies on this matter, he cannot provide objective, unconflicted representation to the County Commissioners.

We ask that the County either employ qualified land use counsel, or seek representation by the office of the Attorney General to advise the County on how to proceed with this matter.

We have in our files extensive documentation that bears on this subject which we are glad to share with whomever is representing the County in this regard.

Thank you for your kind consideration of this rather tedious and lengthy letter.

Very truly yours,

C. Daniel Saunders

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