



LAW OFFICES OF

**STEVENS
PALMER, LLC**

114 West Water Street, Centreville, Maryland 21617
410-758-4600 www.spp-law.com

February 7, 2019

Via Hand Delivery

**ADMINISTRATOR'S OFFICE
FEB 7 '19 PM2:31**

Queen Anne's County Commissioners
c/o Gregg Todd, Administrator
107 Liberty Street
Centreville, Maryland 21617

Re: Petition to Confirm Tolled Expiration Date of the DRRA.

Dear Commissioners,

I am filing on behalf of my client, K. Hovnanian's Four Seasons at Kent Island, LLC ("K. Hovnanian" or "Petitioner") the enclosed Petition to Confirm Tolled Expiration Date of the Developer's Rights and Responsibilities Agreement (DRRA) by and between K. Hovnanian's Four Seasons at Kent Island, LLC and the County Commissioners of Queen Anne's County, Maryland ("Petition"). The DRRA under its expressed terms is set to expire September 17, 2022. The Petition (with supporting exhibits) sets for the legal and factual basis on which the DRRA is tolled and its expiration extended until September 17, 2030.

Accompanying the Petition is a "Request for a Hearing on the Petition Confirm the Tolled Expiration Date." As explained in the Petition, a public hearing will provide K. Hovnanian and the public the opportunity to be heard on Petitioner's request to confirm tolled expiration date.

Should you have any questions please do not hesitate to contact me, otherwise I respectfully request that the public hearing be scheduled at your soonest opportunity.

Very truly yours,
STEVENS PALMER, LLC

Joseph A. Stevens

Petition to Confirm Tolled Expiration Date

February 7, 2019

Page 2

cc: Patrick E, Thompson, Esq., County Attorney (with enclosures)
J. Steven Cohoon, Dept. of Public Works (with enclosures)
Michael Wisnosky, Planning Director (with enclosures)
Mike Irons, K. Hovnanian (with enclosures)
Hugo DeCesaris, K. Hovnanian (with enclosures)
Kenneth Mahieu, Vice President and Chief Legal Counsel, K. Hovnanian
(with enclosures)

IN THE MATTER OF THE PETITION TO	*	PETITION NO. _____
CONFIRM TOLLED EXPIRATION DATE	*	THE COUNTY COMMISSIONERS
OF THE DEVELOPER’S RIGHTS AND	*	FOR QUEEN ANNE’S COUNTY,
RESPONSIBILITIES AGREEMENT BY	*	MARYLAND
AND BETWEEN K. HOVNIANIAN	*	
AT KENT ISLAND, LLC AND THE	*	
COUNTY COMMISSIONERS	*	
OF QUEEN ANNE’S COUNTY, MARYLAND	*	

* * * * *

K. Hovnianian’s Four Seasons at Kent Island, LLC, a Maryland limited liability company, (formerly known as K. Hovnianian at Kent Island, LLC) and owner of the lands which are the subject of this Petition (hereinafter referred to as “Petitioner” or “K. Hovnianian”), by and through its attorney Joseph A. Stevens, and the Law Offices Stevens Palmer, LLC in accordance with the authorities and facts identified herein, respectfully petitions the County Commissioners for Queen Anne’s County, Maryland (hereinafter referred to as “County Commissioners”) to confirm that the Developer’s Rights and Responsibilities Agreement (“DRRA”) dated September 17, 2002, which by its expressed terms is set to expire September 17, 2022, is tolled by effect of law and that the expiration date is extended to September 17, 2030, for the following reasons:

I. PREFACE.

K. Hovnianian owns approximately 556 acres of land on Kent Island (the “Property”) where it is developing an “active adult, age restricted” community known as Four Seasons at Kent Island (“Four Seasons”). The Four Seasons includes 1079 homes (both detached and condominium

dwelling), a clubhouse and related community/recreational amenities as well as an assisted living facility. The Property is located in the Stevensville and Chester Planned Growth Areas between the Cloverfields subdivision, Castle Marina subdivision, Bayside Condominiums and Queen's Landing Condominiums. The Four Seasons is serviced by public water and sewer, and is easily accessible to US Route 301/50 and Maryland Route 18. The Property was designated in the County's 2002 Comprehensive Plan as a "Priority Funding Area" consistent with the State's "Smart Growth" initiatives, and continues to be part of the "Planning Area" and Priority Funding Areas in the 2010 Comprehensive Plan.

The Four Seasons Phase I (162 detached and condominium dwelling) is under substantial construction. K. Hovnanian has made substantial (on and off-site) infrastructure and public facilities improvements (or payment thereto)¹ including: the construction of a 500,000 gallon water tower; construction of a sewer main and pump station; improvements to nearby public roads; and the creation of park facilities, all of which will be dedicated to the County and will service the Kent Island community in general, not just the Four Seasons. K. Hovnanian has filed final subdivision and site plan approval for Phase II with the County. New homes are currently selling and will be delivered in the Spring of 2019. Uncertainty as to the effect of the DRRA following September 17, 2022 may have a chilling effect on financing development as well as home sales. Lenders may be reluctant to participate in financing if there is a possibility that the project could be stopped because the tolling issue is left resolved until after the expressed DRRA expiration date of September 17, 2022. Furthermore, prospective buyers of homes for the early phases of the Four Season may not be willing to purchase homes if there is uncertainty as to the timing of buildout

¹ As provided in the DRRA, K. Hovnanian has made a \$1,000,000 payment directly to Queen Anne's County, as well as a \$138,750 payment to the Kent Island Volunteer Fire Department.

and amenity improvements due to the expiration of the DRRA. The potential for serious financial consequences for K. Hovnanian and the County is too great to leave the question of tolling of the DRRA until after the expressed expiration date.

As explained further in this Petition, the County Commissioners (as the “public principle”) are charged with administration and enforcement of the DRRA, and as such are vested with the authority to act under the contract and confirm the tolled expiration date.

II. HISTORY OF DEVELOPER’S RIGHTS AND RESPONSIBILITIES AGREEMENTS IN MARYLAND

A developer’s rights and responsibilities agreement is a contractual instrument designed to vest zoning and development rights by precluding application of subsequently enacted ordinances to an ongoing development project. Under Maryland caselaw vested rights to construct a development (not subject to change in zoning laws) occurs when a property owner: (1) obtains a building permit or occupancy certificate; and (2) proceeds under the permit in good faith to substantially begin to construct, so that the public is advised of the intended use of the land. *Prince Georges County, Maryland v. Sunrise Development Limited Partnership* 330 Md. 297 (1993). The result of vesting law in Maryland is that large multi-phased planned developments, which take years from early planning stages through construction (such as the Four Seasons), are vulnerable to changes in zoning and land use laws which could adversely affect permitted uses or allowable density after millions of dollars have been spent on planning, design, property acquisition and infrastructure construction.

The Maryland Legislature sanctioned developer’s rights and responsibilities agreements by enacting Land Use Article § 7-301 (formerly Article 66B §13.01 et. seq.), which specifically provides that: “The laws, rules, regulations and *policies* governing the *use, density or intensity* of

the real property subject to the agreement shall be the laws, rules, regulations, and *policies* in force at the time the parties execute the agreement.” §7-304 (*emphasis added*). A developer’s rights and responsibilities agreement, by legislative mandate, must include “permissible uses” of the property, the “density or intensity of use,” and “a description of the conditions, terms, restrictions, or other requirements determined by the governing body of the jurisdiction as necessary to ensure the public health, safety, or welfare.” §7-303. A developer’s rights and responsibilities agreement constitutes administrative acts of interpretation and application of laws, regulations, and policies of the local government. Schwartz, *Development Agreements*, 28 B.C. Envr. Aff. L. Rev. 719, 751-752 (2001). Thus, the regulations concerning land use, density or intensity of development in effect when a developer’s rights and responsibilities agreement was executed will remain unchanged as to the development subject to such an agreement. A developer’s rights and responsibilities agreement defines the permissible parameters of a development and confers discretionary approvals necessary to complete a long-term development project, regardless of any intervening changes in or interpretations of local regulations. *City of West Hollywood v. Beverly Towers*, 805 P.2d 329, 334, 52 Cal. 3d 1184, 1196, 278 Cal. Rptr 375, 380 (n. 6) (1991).

III. THE FOUR SEASONS DRRA

1. Summary of the Four Seasons DRRA

Queen Anne’s County and K. Hovnanian entered onto the DRRA on September 17, 2002. Petition Exhibit 1 DRRA exclusive of exhibits. The DRRA provides that “the laws, rules, regulations and policies governing the use, density or intensity of use or development of the real property subject to the agreement shall be the laws, rules, regulations and policies in force” at the time that the Agreement is entered into. In exchange for the agreement to “freeze” land use laws, rules, regulations and policies, K. Hovnanian agreed to construct or fund a significant amount of

improvements to infrastructure, parks and road systems that will benefit the public in general and are not necessarily the result of impacts created by the Four Seasons. The terms and conditions for development of the Four Seasons that are established in the Four Seasons DRRA include but are not limited to: approved general development plan complete with allowable uses, density, open space, resource protection areas, buffers and development design; a determination of adequacy of public facilities; required land dedications for parks, roads and waste water and water facilities; construction of on and off site waste water facilities, water facilities, parks and road improvements; the payment of “above and beyond” fees at the issuance of each building permit for a dwelling unit in the Four Seasons (Section 7.3 (b) 1. and 2. of the DRRA); and, up front and annual payments to the Kent Island Volunteer Fire Department (KIVFD). The benefits and obligations established by, and enforceable under the DRRA are set to expire by its expressed term on September 17, 2022. See Petition Exhibit 1, page 20.

2. County Commissioners as Public Principal.

The Maryland Court of Appeals in *Queen Anne's Conservation Association, Inc. v. The County Commissioners of Queen Anne's County Md., et al.* 382 Md. 306 (2004) held that the County Commissioners acted in their capacity as “public principal” in entering into the DRRA, and as such public principle they are authorized to undertake administration and enforcement of the DRRA. “As regards DRRAs in particular, Maryland Code (1957, 2003 Repl. Vol.), Article 66B, § 13.01(a)(4) defines the ‘public principal’ as ‘the governmental entity of a local jurisdiction that has been granted the authority to enter agreements under’ a local ordinance. The County Commissioners in Queen Anne’s County exercise the administrative authority of the public principal with respect to DRRAs.” Sole power to negotiate, execute, and enforce agreements lies with the public principal. Id at 334. Petition Exhibit 2.

In enacting the local enabling legislation for DRRAs, the County Commissioners reserved to themselves the role of the “public principal” with its concomitant powers to conduct hearings on, enter into, execute, and enforce DRRAs. As the public principal, the County Commissioners are authorized to enforce the DRRA. Enforcement is generally considered the act of compelling observance or compliance. Enforce, *Oxforddictionaries.com*, <https://en.oxforddictionaries.com/definition/enforce> (last visited Jan.29, 2019).

III. TOLLING EXPIRATION DATE

1. Legal Elements of Tolling.

K. Hovnanian requests the County Commissioners to confirm that the DRRA expiration date has been tolled as a matter of law. The Maryland Court of Special Appeals has weighed in concerning the tolling doctrine in cases involving expiration of a zoning approvals stating: “Where a valid permit is issued for a specified period, and where actual construction is delayed by litigation, involving parties who have standing to oppose the construction, past that time, a permittee otherwise proceeding in good faith is entitled to re-issuance of that permit, even where the zoning was meanwhile changed so that the project is nonconforming.” *National Waste Managers v. Anne Arundel County*, 135 Md. App. 585, 612-613 (2000), citing *Preseault v. Wheel*, 315 A.2d. 244, 247 (Vt. 1974). The Court of Appeals approved the *National Waste* rule in *Bowie v. Prince George’s County*, 384 Md. 413, 436-439 (2004) and like the Court of Special Appeals, looked outside of Maryland for guidance. “The regulatory process is not designed to be a spider’s web, snaring one who follows all the regulations and statutes, obtains all the necessary permits, and successfully defends a series of appeals, but then loses his right to proceed because the passage of time has caused the permits to expire.” *Fromer v. Two Hundred Post Assoc.*, 32 Conn. App. 799, 811, 631 A.2d 347, 353 (1993) (holding that limitations on a developer’s receipt of a wetlands

permit to construct a -26- condominium complex the permit should have been tolled until plaintiff's six years of litigation terminated). Further, "the time period at issue is ordinarily tolled during litigation for a period equal to the time that elapsed as a result of the litigation." *National Waste* 135 Md. App. at 609. ***It does not matter if litigation involves the action of a government agency, or if brought by an aggrieved property owner.*** *Preseault*, 315 A.2d at 253 and 255. (emphasis supplied)

The DRRA, in the context of the tolling decisions referenced above, is a land use action of an administrative official, and as such a party to the agreement can avail itself of the same legal principles of tolling prescribed above. As pointed out by the Court of Appeals in *Queen Anne's Conservation Association, Inc.* 382 Md. at 334, the County Commissioners, sitting as the "public principal" approving the DRRA, acted as an administrative official whose actions were appealable to the Queen Anne's County Board of Appeals:

The Conservation Association contends that the County Commissioners did not act as an "administrative official" because its determination of the DRRA's contents was a fundamentally legislative, rather than an administrative act.... We disagree.... The County Commissioners in the present case successively wore two different hats and performed a legislative action followed by an administrative/executive action... Initially, the County Commissioners acted legislatively, as a governing body under Maryland Code (1957, 2003 Repl. Vol.), Article 66B, § 13.01(b)(1), by authorizing DRRAs in Queen Anne's County through enactment of Subtitle 13 of the Land Use and Development Title of the Queen Anne's County Code. In enacting Subtitle 13, the County Commissioners reserved to themselves the role of the "public principal" under Maryland Code (1957, 2003 Repl. Vol.), Article 66B, § 13.01, with its concomitant powers to conduct hearings on, enter into, execute, and enforce DRRAs. ***Subsequently, the County Commissioners signed off on the DRRA in its administrative and executive role as the "public principal." The County Commissioners' approval was the act of an "administrative officer" or "administrative official" under the Maryland and County Codes...2*** (emphasis supplied)

2 Here the Court of Appeals dismissed a lawsuit filed by Queen Anne's Conservation Association, Inc. (et al.) challenging the DRRA because it failed to exhaust administrative remedies. The decision to approve the DRRA was an administrative decision of the public principal (County Commissioners) and the opponents had to first "appeal to the [Queen Anne's County] Board of Appeals prior to seeking judicial review in the Circuit Court." *Queen Anne's Conservation Association, Inc.* 382 Md. at 328.

The development of the Four Seasons was delayed by breach of contract, litigation/appeals, and the illegal denial of a State tidal wetlands license, the result of which was the loss of a significant portion of the most important protection bargained for under the Four Seasons DRRA, specifically the twenty (20) year freeze in zoning regulation. Should the DRRA expiration date not be tolled, the County is also at risk of loss of important public benefits the Agreement provides for toward the later part of the Four Seasons build out such as “above and beyond” payments at issuance of building permits for those permits which have not been issued. Section 7.3 (b) 1. and 2. of the DRRA.

2. Legal Challenges and Unlawful Denial that Delayed Four Seasons.

The DRRA was executed on September 17, 2002, and since its inception through October 2016 (when the Final Subdivision and Site Plan for Phase I was approved following an appeal to the Queen Anne’s County Board of Appeals) the DRRA and the Four Seasons have been embroiled in continuous and overlapping litigation and appeals, including the delay resulting from the County’s breach of the DRRA and the illegal denial of a State tidal wetlands license by the Maryland Board of Public Works. Under the tolling doctrine, it follows that delay caused by the breach of the DRRA, litigation, appeals and a wrongful denial of necessary State tidal wetlands license extends the termination date of the DRRA. K. Hovnanian submits to the County Commissioners that the delays described below effected a tolling of the term of the DRRA.

a. County Commissioner breach of the Four Season DRRA (Queen Anne’s County Circuit Court Civil No. 9494): In November of 2002, the incumbent County Commissioner’s who signed the DRRA were replaced by a board of newly elected Commissioners. On January 2, 2003, a private law firm retained by the newly elected County Commissioners sent a letter to K. Hovnanian stating “that the DRRA may be void *ab initio*,” and K. Hovnanian was

“directed” not to proceed with the development of Four Seasons. Petition Exhibit 3. On January 7, 2003, the County Commissioners issued a memorandum to “all County Department heads” directing each department “not to take any action with respect to any plans, plats, or permit application, and not to issue any permits or approvals with respect to the Four Seasons subdivision.” Petition Exhibit 4.

In response to these actions, K. Hovnanian had no choice but to file a lawsuit against the County seeking specific performance of the DRRA, and to recover money damages for the wrongful delay. The County filed a counterclaim requesting the Court declare the DRRA invalid. Following a trial, on September 18, 2003, judgment was entered in favor of K. Hovnanian on all issues related to the DRRA, but the Court reserved for a future trial the disposition of K. Hovnanian’s claim for damages, which was in excess of several million dollars. Petition Exhibit 5. An appeal was filed by the County, however, on October 28, 2003 K. Hovnanian and the Queen Anne’s County Commissioners entered into a Settlement Agreement. The delay caused by the County Commissioners breach of the DRRA was over ten (10) months from January 7, 2003 through October 23, 2003.

b. Litigation concerning growth allocation/overlay maps (Queen Anne’s County Circuit Court Civil No. 10855): Opponents to the Four Seasons filed a Complaint against Queen Anne’s County taking aim at the Four Seasons Chesapeake Bay Critical Area Growth Allocation by attacking the County Overlay Maps. On February 9, 2006 the Circuit Court affirmed and declared that the Four Seasons Chesapeake Bay Critical Area Growth Allocation was valid. The Court also ruled, however, that because of drafting errors made by the County, the Critical Area Overlay Maps were void, and that the County and K. Hovnanian were enjoined from obtaining any further approvals for the development of the Four Seasons until the County revised

its Overlay Maps to accurately reflect the Four Seasons Growth Allocation Plan. Opponents and K. Hovnanian appealed the Court's ruling to the Maryland Court of Special Appeals.

The County prepared and executed corrected Overlay Maps which were presented to the Circuit Court, but in June 2006 Judge Sause declined to rule on the corrected Overlay Maps until the Court of Special Appeals ruled on the pending appeals. Thus, the injunction remained in place and K. Hovnanian was prevented from seeking any development approvals during the pendency of the appeal. Petition Exhibit 6. On March 23, 2007, the Court of Special Appeals reversed injunctions entered by the Circuit Court and affirmed the validity of the previously granted Critical Area Growth Allocation for Four Seasons. The Court of Special Appeal further ruled that errors on the County's Overlay Maps do not invalidate previous approvals. Opponents filed for review by the Maryland Court of Appeals, which was granted. The Court of Appeals issued a decision on August 21, 2009 affirming in its entirety the decision of the Court of Special Appeals. *Robert Foley, et al v. K. Hovnanian at Kent Island LLC* 410 Md. 128 (2009). Petition Exhibit 7. The delay caused by the growth allocation overlay map litigation was over forty-two (42) months starting in February 9, 2006 through August 21, 2009.

c. State Tidal Wetland License. Required for the development of the Four Seasons, K. Hovnanian applied for a State tidal wetlands license for a bridge crossing over Cox Creek (to access Phase V of the Four Seasons) and to construct storm drain outfalls as part of the required stormwater management system. By any standard, the license request was routine in nature, but nonetheless, the State Board of Works (BPW) denied the license on May 23, 2007. The license denial was appealed by K. Hovnanian to the Queen Anne's County Circuit Court (Civil No 12481). In April of 2008 the Circuit Court issued a memorandum indicating that it would not

issue its opinion in the wetlands appeal until the Court of Appeals decided the Critical Area Overlay Map case discussed above, which was not decided until August 2009.

Thus, it was not until January 11, 2011 that the Circuit Court of Queen Anne's County reversed BPW denial of the routine wetlands license, finding that the majority of the members (the Governor and Comptroller) exceeded their constitutional authority in denying wetlands license and that the BPW is bound by the same legal standards as Department of Environment in its review of such licenses. The Court remanded the application back to the BPW for further consideration. The BPW did not then act on the wetland application, but instead appealed the Circuit Court's decision to the Court of Appeals. On April 23, 2012 the Court of Appeals filed its opinion concurring with the Circuit Court ruling that the BPW had committed legal error exceeded its authority. The application was remanded back to the BPW for further consideration. *Maryland Board of Public Works, et al. v. K. Hovnanian's Four Seasons at Kent Island, LLC* 425 Md. 482 (2012). The delay caused by the BPW illegal denial of the Four Seasons State tidal wetlands license was fifty-nine (59) months from May 23, 2007 through April 23, 2012. Petition Exhibit 8.

d. Four Seasons Phase I Subdivision and Site Plan Approval Appeal.

On December 8, 2005 final site plan and subdivision approvals were granted by the Queen Anne's County Planning Commission for Phase I ("Phase I Approval") of Four Seasons (consisting of 162 dwellings). On January 6, 2006, an appeal was filed to the Phase I Approval (A-010008) by Queen Anne's Conservation Association, et al. Petition Exhibit 9. Due to a series of lawsuits and delays, as discussed above, A-010008 was stayed for over a decade. On November 15, 2015 the BPW finally granted the Four Seasons State tidal wetland's license and K. Hovnanian soon thereafter requested the Queen Anne's County Board of Appeals to act on A-010008. After a series of hearings, on October 21, 2016 the Board of Appeals issued its decision upholding the

Planning Commission and approving Phase I subdivision/site plan approval. Petition Exhibit 10. The delay resulting from the Phase I approval appeal that tolls the DRRA expiration date begins on November 15, 2015, when the State tidal wetlands license was granted and the Board of Appeals was requested to proceed with the Phase I appeal, through October 21, 2016, when the Board of Appeals issued its decision approving Phase I, which is over eleven (11) months.

It should be noted that the delays caused by the actions described in subsections a. through d. above were in part concurrent and thus overlapped. Any concurrent and overlapping delays have been accounted for and there is no duplication in the amount of time Petitioner submits that the Four Seasons DRRA was tolled. Petition Exhibit 11 "Timeline and Concurrent Delays."

IV. REPEAL OF THE LOCAL ENABLING STATUE DOES NOT AFFECT THE OBLIGATIONS OF THE PUBLIC PRINCIPAL TO ACT.

The DRRA was executed on September 17, 2002, in accordance with the authority granted by both the Land Use Article and Queen Anne's County Code (QACC), Sections § 13.01 et seq. ("Local Enabling Ordinance") On October 28, 2003, the County Commissioners enacted an ordinance to "eliminate the authority of the [County Commissioners] to enter into a DRRA by deleting reference to such Local Enabling Authority in the County's updated Zoning Ordinance." (Ordinance 03-17, Amendment 12). A fair reading of the Land Use Article § 7-301 et seq. and consideration of other applicable legal principles, nonetheless, leads to the conclusion that the County Commissioners, as "public principle" continue to have authority to administer the DRRA.

The DRRA itself remains in effect; thus the County Commissioners authority to act as "public principal" also continues. Despite repeal of the Local Enabling Ordinance, the Land Use Article § 7-301 et seq. still prevails: "It is, of course, axiomatic that a municipality may be given power to legislate concurrently with the General Assembly... In cases of conflict, however, the

public general law must prevail...” *Boulden v. Mayor and Comm’rs of Town of Elkton*, 311 Md. 411, 415 (1988), citations omitted, and see *Wharf at Handy’s Point v. Department of Natural Resources*, 92 Md. App. 659, 670 (1992).

Furthermore, it is unlikely the County Commissioners could repeal the Local Enabling Ordinance as it pertains to the DRRA because under the Land Use Article § 7-304: [T]he laws, rules, regulations and policies governing *the use, density, or intensity* of the real property subject to the agreement *shall be the laws, rules, regulations and policies* in force at the time the parties execute the [DRRA] agreement.” (Emphasis added.) Clearly, the Local Enabling Ordinance governs use, density, or intensity of property through and under the prescribed terms of a DRRA. Thus, the County’s original Local Enabling Ordinance is one of the land use laws vested under the DRRA itself, and is no more subject to repeal than any other zoning regulation applied to the Four Seasons.

Finally, retroactive application of a law is disfavored. Such application of a statute to contracts or property involves the same mischief as an *ex post facto* law that has the effect of taking or impairing rights acquired under existing law. Refer to Scalia and Garner, *Reading the Law*, Cannon 41, p. 261-262 (2012). In Maryland, statutes are presumed to operate only prospectively, unless the legislature (or County Commissioners) clearly expresses an intent to apply the statute retroactively, and this presumption has particular application where the law interferes with vested rights. *Waters Landing v. Montgomery County*, 337 Md. 15 (1994). K. Hovnanian has vested contract or property rights that accrue under the DRRA, and Ordinance 03-17, Amendment 17 by its terms does not apply retroactively. Thus, the County’s repeal of the Local Enabling Ordinance cannot retroactively preclude the County Commissioners acting as the public principal for the administration and enforcement of the DRRA as requested herein this Petition.

CONCLUSION

Petitioner respectfully requests the County Commissioners, acting as public principal under the DRRA, confirm that the expiration of the DRRA has been tolled by operation of law and that the expiration date of the DRRA is extended by a period of 96 months until September 17, 2030.

Respectfully submitted,



JOSEPH A. STEVENS
STEVENS PALMER, LLC
114 W. Water Street
Centreville, MD 21617
410-758-4600
Attorney for Petitioner

IN THE MATTER OF THE PETITION TO	*	PETITION NO. _____
CONFIRM TOLLED EXPIRATION DATE	*	THE COUNTY COMMISSIONERS
OF THE DEVELOPER'S RIGHTS AND	*	FOR QUEEN ANNE'S COUNTY,
RESPONSIBILITIES AGREEMENT BY	*	MARYLAND
AND BETWEEN K. HOVNANIAN	*	
AT KENT ISLAND, LLC AND THE	*	
COUNTY COMMISSIONERS	*	
OF QUEEN ANNE'S COUNTY, MARYLAND	*	

* * * * *

REQUEST FOR A HEARING

ON THE PETITION TO CONFIRM TOLLED EXPIRATION DATE

K. Hovnanian's Four Seasons at Kent Island, LLC, a Maryland limited liability company, (formerly known as K. Hovnanian at Kent Island, LLC) and owner of the lands which are the subject of this Petition (hereinafter referred to as "Petitioner" or "K. Hovnanian"), by and through its attorney Joseph A. Stevens, and the Law Offices Stevens Palmer, LLC in accordance with Land Use Article § 7-301, respectfully requests that the County Commissioners for Queen Anne's County, Maryland (hereinafter referred to as "County Commissioners") schedule a public hearing on the Petitioner's request to "Confirm Tolled Expiration Date" of the Four Seasons DRRA. The purpose of the hearing is to provide the Petitioner and the public the opportunity to be heard on the Petitioner's request to "Confirm the Tolled Expiration Date."

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'J. Stevens', is written above a horizontal line.

BY: JOSEPH A. STEVENS
STEVENS PALMER, LLC
114 W. Water Street
Centreville, MD 21617
410-758-4600
Attorney for Petitioner

EXHIBIT 1

DOC. NO. 285603

DEVELOPER'S RIGHTS AND RESPONSIBILITIES AGREEMENT

THIS DEVELOPER'S RIGHTS AND RESPONSIBILITY AGREEMENT ("Agreement"), made as of the 17 day of Sept, 2002, by and between K. HOVNIANIAN AT KENT ISLAND, LLC, a Maryland limited liability company ("Developer"), and THE COUNTY COMMISSIONERS OF QUEEN ANNE'S COUNTY, MARYLAND, a body politic and corporate ("County Commissioners").

RECITALS

1. The Developer is the owner or contract purchaser of certain real property in Queen Anne's County, Maryland, as identified below:

QUEEN ANNE'S COUNTY
CIRCUIT COURT
SEP 18 PM 3:03

- a. Tax Map 49, Parcel 8 containing 87.473 acres more or less.
- b. Tax Map 49, Parcel 7 containing 210.577 acres more or less.
- c. Tax Map 49, Parcel 11 containing 43.749 acres more or less.
- d. Tax Map 57, Parcel 347 containing 7.863 acres more or less.
- e. Tax Map 57, Parcel 532 containing 66.708 acres more or less.
- f. Tax Map 57, Parcel 1 containing 70.951 acres more or less.
- g. Tax Map 57, Parcel 8 containing 66.76 acres more or less.

TMP FD SURE \$ 5.00
 RECORDING FEE 75.00
 TOTAL 80.00
 0001 Rec'd \$ 21842
 SM RCB 01: \$ 2046
 Sep 18, 2002 03:04 PM

and more specifically described in Exhibit 1, attached hereto and made part hereof, (collectively referred to as "Subject Property").

2. The names of all parties having an equitable or legal interest in the Subject Property, including lien holders, are set forth in Exhibit 2, attached hereto and made a part hereof and certified to by counsel to the Developer.

3. Pursuant to Section 13.01, Article 66B, Annotated Code of Maryland, and Section 18-1301, et. seq., Queen Anne's County Code, Queen Anne's County, (the "County") is authorized to enter into binding development rights and responsibility agreements with any person having legal or equitable interest in the Subject Property. Both the Developer and the County specifically recognize that a principal purpose of this Agreement is to bind the Developer to long term off-site public improvements which it can make in consideration of and upon reliance that the County will not change the rules and regulations pertaining to the development of the Subject Properties from those in effect when this Agreement was executed.

4. The Developer proposes an Age-Restricted active adult development upon the Subject Property to be known as K. Hovnianian's Four Seasons at Kent Island ("Four Seasons").

5. On June 14, 2001, the Planning Commission approved a sketch plan for the Four Seasons in order to, in part, comply with the Chesapeake Bay Critical Area Commission conditions of approval of growth allocation as well as the conditions of approval established in Resolution 01-13 hereinafter referred to as the "Sketch Plan" a copy of which is attached hereto as Exhibit 3 and made a part hereof.

6. On August 21, 2001, the County Commissioners adopted County Ordinance 01-01A finally granting Chesapeake Bay Critical Area Growth Allocation ("Growth Allocation") approval for the proposed Four Seasons development subject to the conditions contained therein.

7. On July 11, 2002, following review of this Agreement, the Planning Commission found that the terms, provisions, conditions and obligations in this Agreement are consistent with the Comprehensive Plan for Queen Anne's County, and in particular, the goals, objectives and policies of the Chester and Stevensville Community Plans, as evidenced by adoption of its minutes, a copy of which is attached hereto as Exhibit 4 and made a part hereof.

8. On August 6, 2002 the County Commissioners held a public hearing on this Agreement, notice of which had been published in accordance with §18-1306 of the County Code.

9. The County Commissioners and the Developer desire to enter into this Developer's Rights and Responsibilities Agreement ("Agreement") for the purposes of establishing development density and intensity for the Four Seasons, public improvements required to accommodate the Four Seasons and the timing and funding thereof, allowable uses, and duration and effect of this Agreement.

NOW, THEREFORE, in consideration of the foregoing recitals, which are not merely prefatory but are hereby incorporated into and made a part of this Agreement, and the mutual covenants and agreements set forth below, and other good and valuable consideration, the receipt and sufficiency of which the parties hereby acknowledge, the County Commissioners and the Developer hereby agree as follows:

ARTICLE I
DEFINITIONS

1.1 Definitions. The following words, when used in this Agreement, shall have the following meanings:

(a) "Age Restriction" or "Age Restricted" means a covenant consistent with the "55 or older" exemption to the Federal Fair Housing Act, as provided for in the Code of Federal Regulations, as amended and which covenant will burden the Subject Property and will prohibit permanent residents under the age of 19.

(b) "Agreement" means this Developer's Rights and Responsibilities Agreement.

(c) "Association" means the Four Seasons at Kent Island Homeowner's Association, Inc., and its successors and assigns.

(d) "County Code" means the Code of Local Public Laws duly adopted by the County Commissioners for Queen Anne's County and in effect on the Effective Date of this Agreement.

(e) "County Commissioners" means the County Commissioners of Queen Anne's County, Maryland, a body politic.

(f) "Declaration" means the K. Hovnanian Four Seasons at Kent Island Declaration of Covenants, Conditions & Restrictions to be recorded in the Land Records of Queen Anne's County, Maryland.

(g) "Department" means the Queen Anne's County Department of Planning and Zoning.

(h) "Development Approval" means final governmental approval of Subdivision Plat and Site Plan(s) for each respective phase of the Four Seasons has been obtained and all conditions of said approval have been satisfied, and all applicable appeal periods have expired without the filing of any appeal, or if an appeal(s) was filed, the appeal has been defeated beyond the possibility or existence of further appeal of any kind.

(i) "Developer" means K. Hovnanian at Kent Island, LLC, a Maryland limited liability company, its successors and assigns in ownership of the Subject Property.

(j) "DPW" means the Queen Anne's County Department of Public Works.

(k) "Effective Date of this Agreement" means the date the last party executes this Agreement.

(l) "Four Seasons" means the age-restricted active adult community which is to be comprised of the Subject Property and as further identified on the Sketch Plan, also known as "K. Hovnanian's Four Seasons at Kent Island."

(m) "Gross Acres" means the acreage of the Subject Property reflected on the Sketch Plan, i.e., before acreage is subtracted for dedications, rights-of-way, wetland and floodplain easements, tree conservation easements, or similar usual required diminishments.

(n) "Improvements" means those improvements to be made to road, sewer, water, stormwater, parks and other facilities necessary to service the Subject Property.

(o) "KNSG Treatment Facility Expansion" means the construction of an additional million gallon per day capacity expansion to the Kent Narrows/Stevensville/Grasonville sewage treatment facility.

(p) "Market Building Permit" means a building permit for a dwelling or group of dwellings other than a model home.

(q) "Phase" means any portion of the Four Seasons which has received Development Approval.

(r) "Planning Commission" means the Planning Commission for Queen Anne's County Maryland.

(s) "Public Works Agreement" means the agreement between the County's Department of Public Works and the Developer detailing the engineering cost and obligations of each party including the Developer's obligations with respect to public improvements to be constructed by the Developer.

(t) "Site Plan" means a final site plan for the Four Seasons, or any Phase thereof, prepared in accordance with the County Code and approved by the Planning Commission.

(u) "Sketch Plan" means the Original Concept Plan for the Subject Property as revised by the Amended Concept/Sketch.

(v) "Subdivision Plat" means a final plat(s) of subdivision for the Four Seasons, or any Phase thereof, prepared in accordance with the County Code and approved by the Planning Commission.

(w) "Subject Property" means all of the real property described in Article II hereof.

ARTICLE II
THE SUBJECT PROPERTY

2.1 The use and development of the Subject Property described in this Article II, Section 2.1(a) shall be subject to this Agreement.

(a) All that land described, shown and designated on the "SKETCH FOR K. HOVNANIAN'S FOUR SEASONS ON KENT ISLAND, FOURTH ELECTION DISTRICT, QUEEN ANNE'S COUNTY, MARYLAND" prepared by McCrone, Inc., dated May 23, 2001 and attached hereto as Exhibit 3 ("Sketch Plan"), which land is further described in Exhibit 1.

(b) The parties to this Agreement recognize that Exhibit 3 is intended to conceptually illustrate the proposed Four Seasons development. The parties further agree that the Developer may file with the County, subdivision plats and site plans which may vary from Exhibit 3, so long as said variations do not substantively or materially vary from the Sketch Plan or conflict with the terms, conditions, restrictions and obligations of this Agreement, as it may be amended from time to time. Specifically, but not by way of limitation, variations from the Sketch Plan which are the result of engineering requirements, soil conditions, government agency rules or regulation, condition of a governmental approval or any other requirement beyond the control of the Developer shall not constitute a substantive or material variation from the Sketch Plan.

ARTICLE III
LIMITATIONS, PERMITS AND PLAN CONSISTENCY

3.1 *Development Limitations.* Many development limitations have been established on the Sketch Plan, and when the same can be clearly ascertained therefrom (such as setbacks, building heights and buffer requirements) the same limitations are not repeated herein this Article III. If a limitation or restriction contained herein conflicts with that shown on the Sketch Plan, the more restrictive shall apply.

(a) The permissible uses on the Subject Property are those permitted in the Stevensville Master Planned Development Zone (SMPD) and the Chester Master Planned Development Zone (CMPD). Specifically, the Developer intends to build residential, assisted living and recreational uses, and related accessory uses as described in the Sketch Plan. Any modifications to the permissible uses must be approved by the Planning Commission as an amendment to the Sketch Plan, and the County Commissioners as an amendment to this Agreement.

(b) The density or intensity of uses on the Subject Property shall be that depicted on the Sketch Plan, but shall not exceed a total of 1,350 dwellings (plus an assisted living facility), as well as a clubhouse and a wide variety of recreational facilities. The total number of single family detached dwellings shall not exceed 930, while the total number of multi-family dwelling units may not exceed 420. All multi-family buildings exceeding one story shall be located east of Cox Creek. The maximum height of any building shall be 55 feet.

3.2 *Critical Area Growth Allocation.* The County Commissioners have granted the Critical Area Growth Allocation requested by Developer to facilitate the approval, permitting and development of the proposed Four Seasons, subject to the terms and conditions contained in County Ordinance 01-01A. In the event that the proposed Four Seasons development does not proceed as provided in this Agreement or in a manner reasonably consistent with any conditions of Sketch Plan, Site Plan or Subdivision approval, the Developer agrees that the County Commissioners may recapture that portion of the Critical Area Growth Allocation not previously utilized by the Four Seasons Development.

3.3 *Permits.* The County Commissioners and the Developer agree that the permits required by the County and those already approved for the proposed Four Seasons development are those set forth on Exhibit 5, attached hereto and made a part hereof.

3.4 *Regulation and Plan Consistency.* The Planning Commission has determined that the proposed Four Seasons development as depicted on the Sketch Plan and this Agreement is consistent with the Queen Anne's County Comprehensive Plan and the Stevensville and Chester Community Plans and that the Agreement provides for the recapture of growth allocation in the event the proposed Four Seasons development does not proceed as provided in this Agreement or in a manner reasonably consistent with any conditions of Site Plan or Subdivision approval.

3.5 *Plan Consistency.* The County Commissioners hereby determine that the proposed

Four Seasons development is consistent with the Queen Anne's County Comprehensive Plan, the Stevensville and Chester Community Plans and the Chesapeake Bay Critical Area Program for Queen Anne's County, as amended, for the reasons more particularly set forth in the Resolution No. 13-01.

ARTICLE IV
LAND DEDICATIONS AND EASEMENTS

4.1 *Dedication of parkland.*

(a) Prior to the issuance of the Fiftieth (50th) Market Building Permit and at no cost to the County Commissioners, the Developer shall have filed complete Site Plans with the County for bathroom and parking facilities on all that lot or parcel located in the southeastern portion of parcel 8, on tax map 57 containing 5.796 acres more or less (herein after referred to as "Cross Island Trail Park Property") in substantially the same form as set forth in the document attached hereto and made a part hereof as Exhibit 6. The Developer shall complete construction of said bathroom and parking facilities prior to the issuance of the Two Hundredth (200th) Market Building Permit. The Cross Island Trail Park Property dedication shall be made to the County by special warranty deed to be recorded among the Land Records of Queen Anne's County, Maryland in substantially the same form as set forth in Exhibit 6 ("Cross Island Trail Park Property Deed of Dedication"). Commensurate with the filing of plans as prescribed herein 4.1(a) above, the Developer shall file a performance bond or letter of credit in a form satisfactory to the County which insures the complete and timely performance of the obligation called for herein. The County Commissioners agree to accept the Cross Island Trail Park Property Deed of Dedication with the following covenants, restrictions, easements and limitations:

1. The Cross Island Trail Park Property Deed of Dedication shall contain an easement benefitting the remaining parcel 8, tax map 57 granting the Developer a non-exclusive right to use a portion of the Cross Island Trail Park Property dedication area for stormwater management area as generally depicted on Exhibit 3, the construction of which will be subject to the approval of the County.

2. The Cross Island Trail Park Property Deed of Dedication shall also contain covenants and conditions which restrict the uses of the Cross Island Trail Park Property Dedication Area to passive recreational uses in perpetuity.

3. The County Commissioners agree that the Cross Island Trail Park Property shall have a sign predominantly stating that the park was dedicated and improved by K. Hovnanian Enterprises.

(b) 1. Prior to the issuance of the Four Hundredth (400th) Market Building Permit, the Developer shall dedicate to public use and ownership, at no cost to the County Commissioners, a lot or parcel acceptable to the County containing approximately 27 acres more or less ("Off-site Park"). The deed of dedication shall be made to the County by special warranty deed

to be recorded among the Land Records of Queen Anne's County, Maryland. The County Commissioners agree to accept the deed of dedication which includes covenants, restrictions, easements and limitations to ensure the property remains in parkland use in perpetuity.

2. In the event that the Developer or the County are unable, after reasonable efforts, to obtain the Off-site Park as contemplated herein, in a manner satisfactory to the County, and within the time frame prescribed in (b)(1) above, then the Developer shall pay to the County Commissioners \$337,500 to be used for the purpose of acquiring parkland, and which will relieve the Developer of all its obligations to provide an Off-site Park as prescribed herein above.

3. At any time prior to the issuance of the Four Hundredth (400th) Market Building Permit the County Commissioners may purchase an Off-site Park for which the Developer shall pay to the County fair market value of the Off-site Park plus bonafide acquisition costs, not to exceed \$675,000.

4.2 Dedication and Reconstruction of Castle Marina Road, Construction of Pedestrian Path.

(a) Prior to issuance of the Fiftieth (50th) Market Building Permit, but not later than the issuance of the first Certificate of Occupancy (whichever occurs first), the Developer shall dedicate to public use and ownership, at no cost to the County Commissioners, all that part of the lot or parcel located in the southeastern portion of Parcel 7 on Tax Map 49, said area containing 1.94 acres more or less and in substantially the same form depicted on Exhibit 7, attached hereto and made a part hereof (hereinafter referred to as "Castle Marina Road Deed of Dedication"). County approval of said improvements shall be a prerequisite to acceptance of said dedication.

(b) Prior to the issuance of the Fiftieth (50th) Market Building Permit, but not later than the issuance of the first Certificate of Occupancy (whichever occurs first), the Developer shall construct, beginning at the north entrance to Bayside Condominiums and extending south to the Cross Island Trail, at its cost, an eight (8) foot wide paved pedestrian path along and within the west side of the Castle Marina Road right-of-way which will connect the Bayside and Queen's Landing communities to the Cross Island Trail.

(c) Prior to the issuance of the 401st building permit, the Developer shall at its cost, reclaim, re-profile and provide a minimum two inch bituminous concrete overlay of Castle Marina Road and regrade/relocate the associated roadside drainage ditches as required to meet the new roadway and pedestrian path cross sections all as shown on the final plans as approved by the County.

4.3 Easement to be Granted by the County Commissioners to the Developer.

(a) The County Commissioners are the owners of all that property which bisects the westernmost section of the Subject Property, (i.e., the property purchased by K. Hovnanian at

Kent Island, LLC, from Thomas C. Tanner, Jr. et al. by deeds recorded in the Land Records of Queen Anne's County Liber No. S.M. 757, folio 203), the County Commissioners' property being known as the "Cross Island Trail." The County Commissioners agree to grant to the Developer, at no cost, easements to construct and maintain a private road across and utilities under the "Cross Island Trail," as well as other rights of access as described in Exhibit 8. In consideration for the grant of such easements, the Developer shall construct at no cost to the County a grade separation of the roadway from the Cross Island Trail so that the pedestrian movement thereon is not impeded by the road crossing. Design of the grade-separated roadway and utility crossings shall be subject to the approval of the County. No trees shall be removed, nor shall any open cut utility trenches be made to the paved portion of the Cross Island Trail without the written approval of the Department of Public Works.

(b) The County Commissioners, within their reasonable discretion, agree to grant to the Developer, at no cost, easements over, under or through any County owned property as are reasonably necessary for the construction of those off-site improvements contemplated in this Agreement.

4.4 Easements and Dedications to be Granted by the Developer to the County Commissioners.

The Developer agrees to grant, at no cost to the County, easements over, under or through Developer's property as may be reasonably necessary for the maintenance of public utilities, including sewer and water lines.

4.5 Prior to issuance of the Fiftieth (50th) Market Building Permit, but not later than the issuance of the first Certificate of Occupancy (whichever occurs first), the Developer shall dedicate to public use and ownership, at no cost to the County Commissioners, all that part of the lot or parcel area containing 0.564 acres more or less and in substantially the same form depicted on Exhibit 9, attached hereto and made a part hereof (hereinafter referred to as "Vacuum Collection Station Deed of Dedication"). County approval of said improvements shall be a prerequisite to acceptance of said dedication.

4.6 The Developer shall reimburse the County for all actual cost of acquisition of easements for that portion of the Cross Island Trail located on the Subject Property.

4.7 Prior to issuance of the Fiftieth (50th) Market Building Permit, but not later than the issuance of the first Certificate of Occupancy (whichever occurs first), the Developer shall dedicate to public use and ownership, at no cost to the County Commissioners, all that part of the lot or parcel located in the southwestern portion of parcel 8, on tax map 57, said area containing 0.704 acres more or less and in substantially the same form depicted on Exhibit 10, attached hereto and made a part hereof (hereinafter referred to as "Water Tower Deed of Dedication"). County approval of said improvements shall be a prerequisite to acceptance of said dedication.

ARTICLE V
SENSITIVE AREAS AND HISTORIC STRUCTURES

5.1 The County Commissioners have required protection of sensitive areas through development limitations established in Resolution 13-01, and as further described in Article III of this Agreement.

5.2 The County Commissioners and the Developer agree that there are no historic structures on the Subject Property. Both parties recognize that the Maryland Historical Trust has surveyed the Benton farmstead and determined that the structure was neither listed on nor eligible for listing on the National Register of Historic Places. (See Internal National Register Eligibility Form, attached hereto as Exhibit 11 and made a part hereof.) It is recognized that the Developer is undertaking those archeological and historical studies upon the Four Seasons property required by the Maryland Historical Trust ("MHT"), in accordance with the rules and regulations of the MHT.

ARTICLE VI
PUBLIC FACILITIES

6.1 *Construction of On-Site Public Facilities.*

(a) The Developer shall construct the following on-site public facilities, pursuant to the requirements of the County Code and as depicted on final Subdivision(s) Plats and Site Plans approved by the Department and DPW, including but not limited to the County Code requirements for design, bonding and permitting of: sewer lines, water lines, private roadways, sidewalks and stormwater facilities. Prior to Development Approval for the first Phase of the Four Seasons (and for each Phase thereafter), the Developer and the County shall enter into a public works agreement (PWA) which details design and engineering standards for each of the on-site public facilities described herein for the applicable Phase. The terms and provisions of the PWA shall be subject to the approval of the County and shall not be inconsistent with the terms and conditions contained herein.

(b) The timing of the construction of the on-site public facilities shall be coordinated with the Phase of residential development related to such facilities, as approved by the Department and DPW.

(c) The County Commissioners acknowledge that the Developer shall have the right, subject to the approval of the Queen Anne's County Department of Environmental Health (a State agency), to construct a sewage holding tank system and temporary well for interim sewer use and water service to service the clubhouse, sales office and models, until such time as the sewage pumping station and conveyancing system is available for use, subject to all necessary plan approvals, and agree to issue temporary Certificates of Occupancy under such circumstances as long as all other occupancy criteria have been satisfied, including approval of the Queen Anne's County Department of Environmental Health. The number of model homes on a sewage holding tank system and

temporary well shall not exceed seven (7). No model home shall be used as a residence until connected to the County sewer and water system and a final Certificate of Occupancy has been issued.

(d) The County Commissioners agree that in order to provide adequate public facilities to all properties in the Stevensville area, it will reasonably assist in acquiring easements and rights-of-ways necessary to provide emergency and utility access to the Four Seasons properties. The County Commissioners may institute eminent domain proceedings to acquire utility and emergency access to the Four Seasons. The Developer agrees to pay the fair market value of the easement(s) and all reasonable costs of condemnation.

6.2 *Construction of Off-Site Public Facilities.*

(a) The Developer shall construct the following off-site public facilities, pursuant to the requirements of the County Code and as depicted on final Subdivision(s) Plats and Site Plans approved by the Department and DPW, including but not limited to the County Code requirements for design, bonding and permitting of: sewer lines, water lines, sidewalks, roads and stormwater facilities. Prior to Development Approval for the first Phase of the Four Seasons (and for each Phase thereafter), the Developer and the County shall enter into a public works agreement (PWA) which details design and engineering standards for each of the off-site public facilities described herein for the applicable Phase. The terms and provisions of the PWA shall be subject to the approval of the County and shall not be inconsistent with the terms and conditions contained herein.

(b) Prior to the issuance of the Fiftieth (50th) Market Building Permit, but not later than the issuance of the first Certificate of Occupancy (whichever occurs first) for a dwelling unit, other than the clubhouse and models, the Developer shall complete the construction of the following off-site water facilities and the same must be accepted by the County for operation. The design, engineering and construction of all facilities shall be subject to the approval of the DPW.

1. New 1,500 gpm well into the Lower Patapsco aquifer at the Chesapeake Business Park;
2. Upgrade Chesapeake Business Park water treatment plant to produce approximately 325 gpm;
3. 500,000 gallon elevated storage tank upon the Water Tower Property Dedication site as shown on Exhibit 10; and,
4. New 11,068± linear feet of 12 inch water main to connect Stevensville system to the Chester system.
5. Rehabilitation of the water treatment plant shall only occur between October 1 and April 30.

(c) Prior to the issuance of the Fiftieth (50th) Market Building Permit, but not later than the issuance of the first Certificate of Occupancy (whichever occurs first) for a dwelling unit, other than the clubhouse and models, the Developer shall complete construction of the off-site

sewer facilities listed below. The design, engineering and construction of all facilities shall be subject to the approval of the DPW.

1. 1,080 gpm @ 111 ft. Vacuum Pump Station; and
2. 15,000 feet of force main to connect to the Kent Narrows/Stevensville/Grasonville Sewage Treatment Facility.

(d) Prior to the issuance of the 401st Market Building Permit, the Developer shall construct the off-site water facilities listed below. The type of facility, including the design, engineering and construction of all facilities, shall be subject to the approval of the DPW.

1. New 1,500 gpm backup well into Lower Patapsco aquifer at Chesapeake Business Park and
2. New 750 gpm water treatment plant of an ultra-filtration design using low pressure vacuum operation with an immersed membrane system, capable of easy expansion to 1500 gpm at the Chesapeake Bay Business Park.

(e) Except as provided herein, prior to the issuance of the fiftieth (50th) Market Building Permit, but not later than the issuance of the first Certificate of Occupancy for a dwelling unit, other than models and the clubhouse, the Developer shall construct the off-site road improvements listed below. The design, engineering and construction of all improvements shall be subject to the approval of the DPW and the Maryland State Highway Administration and when applicable shall be consistent in design and quality to that included with the Sketch Plan.

1. Improve Castle Marina Road to a dualized boulevard from Maryland Route 18 on the south to the entrance to the west section of the Four Seasons development, including a 8-foot wide paved pedestrian path on the west side to connect the Cross Island Trail to the Bayside and Queen's Landing Communities.
2. Construct an at-grade pedestrian crossing where the Cross Island Trail crosses Castle Marina Road, in accordance with plans approved by the County.
3. Construct along Piney Narrows Road a 325' west bound right-hand turning lane.
4. Reconstruct the roundabout at Castle Marina Road and Maryland Route 18.
5. At the time called for in the Updated IAPFO (as defined in Section 12.1(c)), but not later than the issuance of the 401st Market Building Permit, the Developer shall have paid \$350,000 to the County, as a contribution toward the construction of a road improvement at the intersection of Maryland Route 18 and Maryland Route 552, or other comparable road improvement in the vicinity.

6.3 *Water and Sewer Allocation.*

(a) Prior to Development Approval for the first Phase of the Four Seasons, the Developer shall begin to purchase, and the County shall allocate sewer capacity to the Four Seasons. The Developer agrees to purchase, and the County agrees to sell, sewer allocation in accordance with the schedule below. The years referenced below are actual calendar years. The first payment shall be made concurrently with the Development Approval for the first Phase of the Four Seasons.

<u>Year</u>	<u>Dwelling/ Allocation Units</u>
1	75
2	200
3	115
4	115
5	115
6	115
7	115
8	115
9	115
10	115
11	115
12	<u>115</u>
	1,425 ¹

(b) The parties agree that the schedule prescribed herein establishes minimum purchase requirements on the part of the Developer. The Developer may, in its discretion, purchase sewer allocation in any given year in addition to the amount contemplated herein above, and the County shall sell said sewer allocation to the Developer, so long as the total number of allocation units purchased by the Developer does not exceed the total allocation contemplated herein. If the Developer purchases more allocation units in any given year than prescribed herein above then the Developer's obligation to purchase sewer allocation units in the following year(s) shall be reduced by a pro-rated amount. In no event shall the County be required to allocate to the Developer sewer capacity for more than 400 dwellings and the clubhouse until the KNSG Wastewater Treatment Facility Expansion is complete.

(c) The County hereby agrees that in view of the Developer's agreement to construct off-site water facilities as called for in Section 6.2 (b) and (d) at its sole cost, the Developer shall not pay any water allocation and/or connection fees. The County will allocate water to the

¹Allocation is for 1350 dwellings plus the clubhouse and assisted living facility which will utilize allocation equal to 75 dwellings.

Developer concurrent with sewer allocation as described herein, at no additional cost to the Developer.

(d) The cost of sewer allocation for the first 400 dwellings and the clubhouse shall not exceed the rates currently established in KNSG Rate Schedule, including annual increases prescribed therein, provided that sewer allocation is purchased prior to the effective date of a new KNSG Rate Schedule which reflects the capital costs of the KNSG Treatment Facility Expansion (as set forth below). The parties agree that the sewer allocation fee for the remainder of the Four Seasons shall be as prescribed in the new KNSG Rate Schedule to be adopted by the County which will be based on the capital cost of the KNSG Treatment Facility Expansion (including design, construction, financing and reserve funds). In no event shall the Developer be required to pay sewer allocation fees greater than that customarily assessed to similar users within the KNSG Sanitary District.

(e) The Developer agrees to provide to the County security for its commitment to purchase sewer allocation in accordance with the schedule contained herein 6.3(a) above by posting a bond in the amount of Three Million Dollars (\$3,000,000), naming the County as beneficiary in the event that the Developer fails to purchase sewer allocation in accordance with the schedule contained in 6.3(a) above. The bond shall be renewable on a two (2) year basis and shall be renewed at least thirty (30) days prior to its expiration. The bond may be drawn on by the County upon presentation by the County of a sworn statement that the bond is due to expire within thirty (30) days and the Developer has neither replaced the bond nor caused its expiration date to be extended in accordance with the requirements of this Agreement. The bond shall be in a form approved by the County, said approval not to be unreasonably withheld. In consideration of the Developer's agreement to secure its commitment to purchase sewer allocation as contemplated herein, the County agrees to waive any deposits for sewer allocation as otherwise may be specified in the KNS&G Sewer Allocation Policy. Any renewal bond shall be in an amount equal to thirty seven percent (37%) of the total cost of the remaining sewer allocation to be purchased by the Developer.

6.4. *County Construction of Off-Site Public Facilities and Grant of Sewer and Water Allocation.*

(a) The County Commissioners agree to take appropriate steps in good faith and with all due diligence to complete the design, permitting and construction of the KNSG Treatment Facility Expansion and agree that it will pursue a fully permitted and operational plant within two (2) years after the commencement of construction. The County Commissioners acknowledge that the Developer expects to complete its first 400 dwelling units, and the clubhouse within three (3) years after the Effective Date of this Agreement, and further, expects to complete its 401st through 1350th dwelling units during the 3rd through 12th years after the Effective Date of this Agreement. Time is of the essence for this Section 6.4(a).

(b) The County Commissioners acknowledge that the Developer is agreeing to make the payments set forth in Section 6.3 in reliance on the County Commissioners' guarantee of

sewer capacity for the Four Seasons development in accordance with the schedule outlined herein 6.3(a) above.

(c) In the event that the County is unable to allocate and sell sewer in accordance with the schedule established in Section 6.3(a) due to delay in the KNSG Sewer Treatment Plant Expansion, the County shall not be obligated to provide allocation for more than 400 dwelling units and the clubhouse until such time as the KNSG Sewer Treatment Plant is expanded as contemplated herein. The Developer's obligations to provide on-site improvements, off-site improvements and above and beyond payments shall not be affected by the delay in the KNSG Treatment Facility Expansion and shall continue to be made in accordance with the schedules in this Agreement except as otherwise provided for in Section 7.3(a). In the event that the County is unable to allocate and sell sewer in accordance with the schedule established in Section 6.3(a) because sewer is unavailable the County agrees that the Developer will be given the highest priority for purchase of sewer allocation when sewer allocation becomes available. In the event that it becomes apparent to the Developer that the County is unable to allocate and sell sewer in accordance with the schedule established in Section 6.3(a), the Developer may, in its sole discretion declare this Agreement null, void and of no further effect provided that the first Phase has not received Development Approval.

ARTICLE VII
IMPACT FEES AND "ABOVE AND BEYOND"
DEVELOPER'S AGREEMENT COMPENSATION

7.1 *Payment of School Impact Fees.*

(a) Impact fees are single payments required to be made by builders or developers and calculated to be the proportionate fair share of capital cost of providing major public facilities such as schools to a development. If a development generated no demand for a specific public facility, then there is no proportional fair share impact fee that could legally be assessed. Thereby, an Age Restricted development which prohibits school age children must be exempt from school impact fees. The Four Seasons prohibits school age children, thus, will generate no demand for school facilities, and is exempt from the payment of school impact fees pursuant to Article 18, Subtitle 3 of the County Code, as amended.

(b) If, for any reason whatsoever, including but not limited to final court decree or by vote of successors and assigns of the Declaration, it is no longer required that part or all of the Four Seasons residents be over the age of 19, then the Association shall pay to the County within thirty (30) days of said vote, final decree, etc., a school impact fee equal to that which would be payable and due on the date of said vote, final decree, etc. The Developer shall include a similar provision to this 7.1 (b) in the Declaration, which shall be enforceable as a lien by the County and collectable in the same manner as County taxes on any and all community property owned by the Association, and also on any lot that was otherwise exempt from school impact fees under this Agreement.

7.2 Payment of Emergency Service Facilities Impact Fees.

(a) The Developer agrees to pay to the Kent Island Volunteer Fire Department ("KIVFD") the following amounts, to be used to improve emergency service facilities near the Subject Property.

(b) The Developer will contribute directly to the KIVFD a total of \$438,750 ("Total Direct Contribution"). The Direct Contribution shall be made as follows:

1. Within thirty (30) days after Development Approval for the first Phase of the Four Seasons, the Developer shall pay to the KIVFD \$138,750 ("First Direct Contribution");

2. One year from the date on which the Developer has made its First Direct Contribution it shall pay to the KIVFD \$100,000 ("Second Direct Contribution");

3. One year from the date on which the Developer has made its Second Direct Contribution it shall pay to the KIVFD \$100,000 ("Third Direct Contribution");

4. One year from the date on which the Developer has made its Third Direct Contribution it shall pay to the KIVFD \$100,000 ("Fourth Direct Contribution");

(c) In addition to the Total Direct Contribution described in Section 7.2(b) above, the Developer shall establish an assessment for each and every dwelling constructed on the Subject Property as described below:

1. The Declaration for the Four Seasons shall establish that each dwelling unit constructed on the Subject Property shall be assessed a \$7.00 per month emergency fire and rescue service fee ("Emergency Service Fee").

2. An Association shall be established for the Four Seasons, and said Association shall collect the Emergency Service Fee in the same manner as other association dues and fees on a monthly basis.

3. The Association for the Four Seasons shall remit the Emergency Service Fee to the KIVFD on a quarterly basis.

4. The Association for the Four Seasons shall enforce payment of the Emergency Service Fee in the same manner as other association fees and dues;

5. The Emergency Service Fee shall be increased annually by the amount which the Consumer Price Index for Urban Wage Earners and Clerical Works, U.S. City Average, All Items, published by the Bureau of Labor Statistics of Department of Labor of the United States (1982-1984) shall have increased above the level prevailing as of the date of build out of the Four

Seasons. The increase called for in this Section 7.2(c)5 shall not begin until one year following the final allocation of sewer in accordance with Section 6.3(a).

6. The KIVFD is a volunteer organization which receives most of its operating funds from donations and fund-raising. The Emergency Service Fee is intended to provide annual revenue to the KIVFD from the Four Seasons proportionate to the need for services generated by the Four Seasons. However, it is not the intent of the County or the KIVFD that the residents of the Four Seasons pay more than their proportionate share of operating costs. The Emergency Service Fee shall discontinue and will no longer be due and payable or shall be reduced if any of the following events occur: (1) the KIVFD is dissolved or becomes inactive; or (2) in the event Queen Anne's County or any other government adopts a fire tax or special tax or fee for the purpose of funding annual operations and maintenance of the KIVFD, then the amount of the annual assessment called for herein 7.3(c) shall be reduced by the amount of said fee or tax paid by the Association.

7.3 *"Above and Beyond" Compensation for Developers' Rights and Responsibilities Agreement.*

(a) In addition to the other payments and/or construction of off-site facilities provided for herein, the Developer shall pay to the County One Million (\$1,000,000) Dollars ("Up Front Payment") in the following manner: Twenty-five Thousand (\$25,000) shall be paid upon full execution of this Agreement; and, the remaining Nine Hundred and Seventy Five Thousand (\$975,000) Dollars shall be paid at Development Approval for the first Phase or upon expansion of the KNSG Sewer Treatment Facility as contemplated herein, whichever occurs latest.

(b) Since it is not possible to predict future increases in Impact Fees, and in consideration for the Developer agreeing to provide off-site facilities which benefit the general public (i.e., additional water treatment capacity, improvements to the public water distribution system on Kent Island, park facilities, road improvements, and additional contributions directly to the Kent Island Volunteer Fire Department) as well as the additional "above and beyond" compensation for entering into this Agreement, the County agrees that any Impact Fees that might be assessed against the Four Seasons shall be paid from the additional "above and beyond" compensation called for herein 7.3(b)1 and 2, and the Developer shall not be required to pay any additional Impact Fees.

1. In addition to the Up Front Payment, and concurrent with the issuance of a building permit for each of the first 675 dwelling units the Developer shall pay the County Seven Thousand, Seven Hundred and Fifty (\$7,750) Dollars for each building permit issued.

2. Concurrent with the issuance of a building permit for each of the second 675 dwelling units the Developer shall pay the County Ten Thousand, Five Hundred and Forty-six (\$10,546) Dollars for each building permit issued.

3. The fees provided for herein 7.3(b)1 and 2 are in addition to normal permitting fees excepting impact fees as described above.

ARTICLE VIII
DECLARATION OF COVENANTS, CONDITIONS & RESTRICTIONS

8.1 *Declaration.* Not later than the time it presents the final Subdivision Plat(s) for the first Phase of the Four Seasons to the County for signatures and certifications pursuant to this Agreement, the Developer shall execute and deliver to the Director of the Department a Declaration containing covenants, conditions and restrictions concerning future payments to the Kent Island Volunteer Fire Department, age restrictions, shore buffer, woodland and forest clearing restrictions, private roads and bridge maintenance and all other terms and conditions reasonably necessary to enforce this Agreement in a form approved by the County.

8.2 *Solid Waste.* The Developer further agrees that the Association shall provide, through its Declaration, for solid waste (trash) removal for the Four Seasons and all of the dwellings therein through a private waste hauling company, which shall utilize the Mid Shore Regional Land Fill.

8.3 *Recordation and Interpretation.* After approval of the final Subdivision Plat(s) for the first Phase of the Four Seasons by the County, the Developer shall promptly cause the Declaration to be properly recorded along with the Subdivision Plat(s) among the Land Records of Queen Anne's County. In the event of a conflict in the application or interpretation of the terms and provisions of the Declaration and any terms and provisions of this Agreement, the terms and provisions of this Agreement shall govern and control the terms and provisions of the Declaration.

ARTICLE IX
DEVELOPMENT REVIEW

9.1 *Timely Development Review.* The County and Developer recognize that but for the construction and build out of the Four Seasons, many of the benefits to the public in the form of off-site improvements, increased tax revenue and positive fiscal impacts cannot begin to be realized by the community. Additionally, it is recognized that the Four Seasons has gone through extensive and comprehensive design and environmental review and approval including Sketch Plan approval and Chesapeake Bay Critical Area Growth Allocation approval. Accordingly, the County agrees to use its best efforts to ensure that all remaining development reviews, including but not limited to, preliminary subdivision, final subdivision and final site plan review are performed in a succinct, timely manner, without undue delay, not inconsistent with the County's current development review process.

ARTICLE X
SURVIVAL AND TRANSFER OF OBLIGATION

10.1 *Nature, Survival, and Transfer of Obligations.* The Developer agrees that all obligations assumed by it under this Agreement shall be binding upon it, its successors and assigns (except owners of an individual lot and/or dwelling purchased solely for use as a private residence), and upon any and all successor owners of record of all or any portion of the Subject Property (except owners of an individual lot and/or dwelling purchased solely for use as a private residence). To assure

that all such successors, assigns, and successor owners have notice of this Agreement and the obligations created by it, the Developer agrees that it shall:

(a) Have this Agreement recorded among the Land Records of Queen Anne's County within 20 days after the effective date of this Agreement;

(b) Incorporate, by reference, this Agreement into any and all real estate sales contracts entered into for the sale of all or any portion of the Subject Property, other than a contract of sale for the sale of an individual lot and/or dwelling solely for use as a private residence; and

(c) Prior to the transfer of all or any portion of the Subject Property (other than the transfer of an individual lot and/or dwelling purchased solely for use as a private residence), or any legal or equitable interest therein, require the transferee of said portion of the Subject Property to execute an enforceable written agreement, in a form reasonably satisfactory to the County Attorney, agreeing to be bound by the provisions of this Agreement, and to provide the County, upon request, with such reasonable assurance of the financial ability of such transferee to meet those obligations as the County reasonably may require.

10.2 The County agrees that upon a successor becoming bound to the obligation created herein in the manner provided herein and providing the financial assurances required herein, the liability of the Developer shall be released to the extent of the transferee's assumption of such liability. The Developer agrees to notify the County, in writing, at least 30 days prior to any date upon which the Developer transfers a legal or beneficial interest in any portion of the Subject Property, other than individual lots and/or dwellings purchased solely for use as a private residence.

10.3 The County agrees that all obligations assumed by it under this Agreement shall be binding on it, and its successors and assigns.

ARTICLE XI **BREACH AND REMEDIES**

11.1 If the Developer shall fail or refuse to perform its obligations as required, then after thirty (30) days written notice provided to the Developer by the County indicating the nature of said default and if the Developer has not cured said default, the County may seek and obtain equitable relief to enforce the terms and conditions of this Agreement either through a decree for specific performance or an injunction, and further the County shall be entitled to bring a legal action for damages or other redress, or declare this Agreement and the PWA null and void and of no further effect, and cease to issue building permits.

11.2 If the County shall fail or refuse to perform its obligations as required, then after thirty (30) days written notice provided to the County by the Developer indicating the nature of said default and if the County has not cured said default, the Developer may seek and obtain equitable relief to enforce the terms and conditions of this Agreement either through a decree for specific performance

or an injunction, and further the Developer shall be entitled to bring a legal action for damages or other redress. However, notwithstanding the foregoing, the parties agree that failure to allocate sewer as contemplated herein because of delay in the construction of the KNSG Sewer Treatment Plan Expansion shall not constitute a default.

11.3 In the event of a judicial proceeding brought by one party to this Agreement against the other party to this Agreement, for the enforcement or breach of any provision of this Agreement, the prevailing party in such judicial proceeding shall be entitled to reimbursement from the unsuccessful party of all costs and expenses, including reasonable attorneys' fees incurred in connection with such judicial proceeding.

ARTICLE XII
EFFECT OF DEVELOPMENT REGULATIONS

12.1 *Effect of Agreement.*

(a) Except as provided in Section 12.1(b) herein, the laws, rules, regulations and policies governing the use, density or intensity of the Subject Property, including but not limited to those governing development, subdivision, growth management (i.e., growth rate controls including, but not limited to, County limitations or "caps" on the issuance of building permits), impact fees, water, sewer, stormwater management, environmental protection, land planning and design, adequate public facilities laws and architecture, (hereafter collectively the "Development Laws") shall be the laws, rules, regulations and policies, if any, in force on the Effective Date of the Agreement. Notwithstanding the above, Resolution No.02-31, (also known as the Moratorium) which may be in effect at the time of execution of this Agreement shall be of no effect on the Four Seasons once said Moratorium has been repealed, expired or determined void for any other reason.

(b) If the County Commissioners have specifically determined that the imposition upon the Four Seasons development and compliance by the Four Seasons development with Development Laws enacted or adopted after the Effective Date of this Agreement is essential to ensure the health, safety or welfare of residents of all or part of Queen Anne's County, the County may impose the change in laws, rules, regulations and policies and the effect thereof upon the Four Seasons development. The County agrees that the foregoing phrase "essential to ensure the public health, safety and welfare of residents" requires study, evaluation, conclusions and findings above and beyond the legal standards and legislative discretion normally used to enact and apply land use regulations.

(c) The Developer has provided the County with an Interim Adequate Public Facilities study and mitigation plan as specified in Section 28-100 et seq. of the County Code (IAPFO). The public improvements called for Article VI of this Agreement concerning off site roads, sewer and water facilities are in compliance with the terms, provisions and level of service requirements of the IAPFO and have been "conceptually" approved by the Technical Review Committee which then recommends final approval of the mitigation plan to the Planning Commission. The Developer agrees that, prior to Development Approval, it will provide the County with an

updated IAPFO study and mitigation plan ("Updated IAPFO Study") that complies with the terms, provisions and level of service requirements of the IAPFO. The Updated IAPFO Study shall be performed in accordance with the IAPFO standards existing when this Agreement is executed. The Updated IAPFO Study and any subsequent approval shall be for the entire Four Seasons unless otherwise agreed to by the parties. Any additional improvements (those not already provided for herein Article VI) to off site sewer, water and road facilities identified in the Updated IAPFO Study (or by the Planning Commission as a condition of approval of the mitigation plan) shall be funded through the "Above and Beyond" compensation provided for in Section 7.3 of this Agreement, and the Developer shall have no further responsibility for the funding of additional off site improvements.

12.2 *Developer's Reliance.* The County Commissioners understand that but for their commitment to "freeze" County Development Laws for purposes of this Agreement to the maximum extent permitted by law as they apply to the development of Four Seasons, to those County Development Laws in effect upon the execution of this Agreement, the Developer would not make the long term financial contributions to the County as well as commitments to provide off-site and on-site improvements contained herein.

12.3 *Limitations on Issuance of Building Permits.* The County may limit the number of Market Building Permits issued to the Developer in a calendar year to not more than One Hundred Seventy Five (175). The limitation on issuance of Market Building Permits provided for herein shall be cumulative, thus, if less than One Hundred Seventy Five (175) Market Building Permits are issued in any year, the County shall allow the Developer to increase the number of Market Building Permits issued in any subsequent year so long as the total number of Market Building Permits issued for the Four Seasons does not exceed an average of One Hundred Seventy Five (175) per year. In no event shall the County be required to issue more than Two Hundred (200) Market Building Permits in any calendar year.

ARTICLE XIII MISCELLANEOUS

13.1 *Time of Essence.* Time is of the essence in the performance of all terms and provisions of this Agreement.

13.2 *Terms.* This Agreement shall run with and bind the Subject Property so long as the Four Seasons development is under construction and development, but in any event this Agreement shall be void 20 years after the effective date of this Agreement.

13.3 *Notices.* All notices and other communications in connection with this Agreement shall be in writing and shall be deemed delivered to the addressee thereof (1) when delivered in person on a business day at the address set forth below or (2) on the third business day after being deposited in any main or branch United States post office, for delivery by properly addressed, postage prepaid, certified or registered mail, return receipt requested, at the address set forth below.

Notices and communications to the Developer shall be addressed to, and delivered at, the following address:

K. Hovnanian Enterprises, Inc.
4090/A Lafayette Center Drive
Chantilly, VA 20151
Telephone (703) 631-0834
Attn: Mark D. Stemen
with a copy to:

The Southeast Regional Office of
K. Hovnanian Enterprises, Inc.
1802 Brightseat Road
Landover, Maryland 20785-4235
Telephone (301)772-8900
Attn: Steven Pelz, Esquire
Thomas Pellerito

with a copy to:

Law Offices of Stevens & Associates, LLC
114 West Water Street
Centreville, Maryland 21617
Telephone (410)758-4600
Attn: Joseph A. Stevens, Esquire

Notices and communications to the County Commissioners shall be addressed to, and delivered at, the following address:

The County Commissioners for Queen Anne's County
107 North Liberty Street
Centreville, Maryland 21617
Telephone (410)758-4098

with a copy to:

Foster, Braden, Thompson and Palmer
102 East Main Street
Stevensville, Maryland 21666
Telephone (410)643-4000
Attn: Patrick E. Thompson, County Attorney

By notice complying with the requirements of this Section, each party shall have the right to change

the address or addressee or both for all future notices and communications to such party, but no notice of a change of address shall be effective until actually received.

13.4 *Amendments.* All amendments to this Agreement shall be in writing and shall be executed by the County Commissioners and the Developer.

13.5 *Authority to Execute.* The County Commissioners and the Developer hereby acknowledge and agree that all required notices, meetings, and hearings have been properly given and held by the County with respect to the approval of this Agreement and agree not to challenge this Agreement or any of the obligations created by it on the grounds of any procedural infirmity or any denial of any procedural right. The County Commissioners hereby warrant and represent to the Developer that the persons executing this Agreement on their behalf have been properly authorized to do so. The Developer hereby warrants and represents to the County Commissioners (1) that it is the fee simple, record owner or the contract purchaser of the Subject Property, (2) that it has the right, power and authority to enter into this Agreement and to agree to the terms, provisions, and conditions set forth herein and to bind the Subject Property as set forth herein, and (3) that all legal actions needed to authorize the execution, delivery and performance of this Agreement have been taken.

13.6 To the extent practicable, the Developer agrees that prior to contracting with any party to provide services associated with the construction of public facilities ("subcontractor") which eventually will be dedicated to the County, the Developer will consult with the County for the purpose of obtaining any information the County has regarding a subcontractor's ability to perform the services contemplated.

13.7 *Governing Law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Maryland.

13.8 *Consent to Jurisdiction.* The parties irrevocably consent to the jurisdiction of the Circuit Court of Queen Anne's County, Maryland or any federal court sitting in the District of Maryland.

13.9 *Remedies Cumulative.* Each right, power and remedy of a party provided for herein, or any other agreement between the parties, now or hereafter existing, shall be cumulative and concurrent and in addition to every other right, power or remedy provided for in this Agreement or any other agreement between the parties, now or hereinafter existing.

13.10 *Parent Company Guarantor.* K. Hovnanian of Maryland, Inc. is the parent company of the Developer, and by joining herein agrees to enter into a separate agreement in a form mutually agreeable to the parties which guarantees payment for purchase of sewer allocation as provided for in Section 6.3.

13.11 *Severability.* In case any one or more of the provisions contained in this Agreement

shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

IN WITNESS WHEREOF, the parties have hereunto set their hands on the date first above written.

WITNESSETH:

K. HOVNIANIAN AT KENT ISLAND, LLC

Margie A. Houck

By: [Signature]
, President

K. HOVNIANIAN COMPANIES OF MARYLAND, INC., as evidence of consent to guarantee payments in accordance with Section 13.10 herein.

Margie A. Houck

By: [Signature]
Vice President

COUNTY COMMISSIONERS OF QUEEN ANNE'S COUNTY, MARYLAND

Margie A. Houck

[Signature]
George M. O'Donnell, President

Margie A. Houck

[Signature]
Marlene F. Davis, Vice President

Margie A. Houck

[Signature]
John T. McQueeney, Jr.

STATE OF MARYLAND, Queen Anne's COUNTY, TO WIT:

I HEREBY CERTIFY that on this 17 day of Sept, 2002, before me, the subscriber, a Notary Public for the State and County aforesaid, personally appeared Mark D Stemen, who acknowledged himself to be the _____ President of Hovnanian at Kent Island, LLC, Maryland limited liability company, and that he, as such _____ President, authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the company by himself as such officer.

WITNESS my hand and Notarial Seal.

Margie A. Houch

Notary Public

My Commission Expires: 4-1-06



STATE OF MARYLAND, Queen Anne's COUNTY, TO WIT:

I HEREBY CERTIFY that on this 17 day of Sept, 2002, before me, the subscriber, a Notary Public for the State and County aforesaid, personally appeared Mark D Stemen, who acknowledged himself to be the Vice President of K. Hovnanian Companies of Maryland, Inc., Maryland corporation, and that he, as such Vice President, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the company by himself as such officer.

WITNESS my hand and Notarial Seal.

Margie A. Houch

Notary Public

My Commission Expires: 4-1-06



STATE OF MARYLAND, Queen Anne's COUNTY, TO WIT:

I HEREBY CERTIFY, that on this 17 day of Sept, 2002, before me, the subscriber, a Notary Public of the State of Maryland, in and for the County aforesaid, personally appeared GEORGE M. O'DONNELL and MARLENE F. DAVIS, AND JOHN T. MCQUEENEY, JR., COUNTY COMMISSIONERS OF QUEEN ANNE'S COUNTY, and they acknowledged the foregoing instrument to be their act.

WITNESS my hand and Notarial Seal.

Margie A. Houch

Notary Public

My Commission Expires: 4-1-06



S:\Clients\KHovnanian\01-FOUR SEAS\Dev R&R Agmt.QAC4.DRAFT09.16.02.clean.A.wpd

EXHIBIT 2

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Lillian C. Blentlinger, LLC v. Cleanwater
Linganore, Inc., Md., November 17, 2017

382 Md. 306
Court of Appeals of Maryland.

QUEEN ANNE'S CONSERVATION, INC.
v.
THE COUNTY COMMISSIONERS OF QUEEN
ANNE'S COUNTY, MD, et al.

No. 108, Sept. Term, 2003.
|
July 29, 2004.

Synopsis

Background: Conservation association brought action against developer and county commissioners, seeking declaratory and injunctive relief to the effect that development rights and responsibilities agreement (DRRA) was invalid. The Circuit Court, Queen Anne's County, Sause, J., entered judgment in favor of defendants. Association appealed. Upon its own initiative the Court of Appeals issued a writ of certiorari.

Holdings: The Court of Appeals, Harrell, J., held that:

[1] commissioners were acting in administrative capacity in approving DRRA, and

[2] association failed to exhaust administrative remedies by not appealing to County Board of Appeals.

Affirmed.

West Headnotes (6)

[1] **Municipal Corporations**
⇒ Capacity to contract in general
Public Contracts
⇒ Authority and capacity of particular governmental bodies to contract

The negotiation of terms protective of public

health, safety, or welfare, in a contract entered into by a local government body, is a discretionary executive act, not a legislative one.

1 Cases that cite this headnote

[2] **Counties**
⇒ Nature and constitution in general
Counties
⇒ Powers and functions in general

A board of county commissioners functions as the county government and is the county body politic; in performing its various functions, it exercises legislative, quasi-legislative, executive, and quasi-judicial authority, sometimes in combination.

2 Cases that cite this headnote

[3] **Counties**
⇒ Mode of action in general

Test to determine when action by a county commission is legislative and when it is executive or administrative is whether the action is one making a new law, an enactment of general application prescribing a new plan or policy, or is one which merely looks to or facilitates the administration, execution, or implementation of a law already in force and effect.

4 Cases that cite this headnote

[4] **Zoning and Planning**
⇒ Nature of proceedings; legislative, judicial, or administrative action
Zoning and Planning
⇒ Nature and form of remedy and jurisdiction

County commissioners were acting in an

administrative capacity rather than a legislative capacity when they approved development rights and responsibilities agreement (DRRA) regarding development of housing complex in conservation area, and thus, conservation association was required to appeal its challenge to commissioners' approval of DRRA to County Board of Appeals; commissioners, in establishing procedures for DRRAs, reserved to themselves the role of public principal, with its concomitant powers to conduct hearings on, enter into, execute, and enforce DRRAs. West's Ann.Md.Code, Art. 66B, § 13.01.

3 Cases that cite this headnote

- ¹⁵¹ **Municipal Corporations**
 ⇒ Conformity to constitutional and statutory provisions in general

In cases of conflict between local and State enactments, the State statute must prevail.

Cases that cite this headnote

- ¹⁶¹ **Zoning and Planning**
 ⇒ Other particular cases
Zoning and Planning
 ⇒ Exhaustion of administrative remedies; primary jurisdiction

More broadly drafted state statute dealing with powers of County Board of Appeals overrode county ordinance that stated that aggrieved parties could appeal to the County Board of Appeals only those decisions of the Planning Director, and thus, conservation association was required to appeal its challenge to county commissioners' approval of development rights and responsibilities agreement (DRRA) to the County Board of Appeals in order to exhaust administrative remedies. West's Ann.Md.Code, Art. 66B, § 4.07.

2 Cases that cite this headnote

Attorneys and Law Firms

****326 *308** C. Daniel Saunders (Christina Harding Landskroener, Chestertown, on brief), for appellant.

John H. Zink, III (Kathleen E. Wherthey, Venable LLP, Towson, on brief), Joseph A. Stevens (Law Offices of Stevens & Associates, LLC, Centreville, on brief), (Nancy L. Slepicka, Fossett & Brugger, Chartered, Greenbelt, Patrick E. Thompson, Foster, Braeden, Thompson & Palmer, Stevensville, on brief), for appellees.

Jon W. Luther, Washington, DC, as amicus curiae, for appellees.

Argued before BELL, C.J., RAKER, WILNER, CATHELL, HARRELL, BATTAGLIA and GREENE, JJ.

Opinion

HARRELL, J.

Development Rights and Responsibilities Agreements ("DRRAs") are a relatively recent addition to the Maryland toolbox of land use and development implements approved by the Legislature for possible use by many local political subdivisions and the legal or equitable owners of real properties desiring to develop their properties. Although many states, such as California in 1979, preceded Maryland in recognizing the use of DRRAs or their equivalents, our Legislature lingered until 1995 before enacting § 13.01 ("Development Rights and Responsibilities Agreements") of Article 66B ("Land Use") of the Maryland Code.¹ The legislation seems to ***309** be the result of the balancing of developers' and property owners' desires for a larger measure of certainty than that offered by proceeding to market through the traditional development processes, while risking the monetary investment to develop their property, against local governments' desire to receive greater public benefits on a more predictable schedule than might otherwise be attainable through the traditional processes. See generally, Brad K. Schwartz, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719 (2001); David L. Callies and Julie A. Tappendorf, *Unconstitutional Land Development Conditions and The Development Agreement Solution: Bargaining For Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663 (2001); John J. Delaney, *Development Agreements: The Road From Prohibition to*

"Let's Make a Deal!," 25 URB. LAW. 49 (1993).

As explained in the amicus brief of the National Association of Home Builders filed in the present case:

****327** "[A] central purpose of the development agreement is to vest development rights in the landowner or developer in exchange for the dedication and funding of public facilities. A vested right allows development of a proposed use of land to proceed even when subsequent changes in zoning regulations would render the proposed use impermissible....

"Development agreements are public contracts between a municipality and a property owner or developer, and are executed pursuant to state law as part of the development approval process. Such agreements can be executed in conjunction with the rezoning of land, at a post-zoning stage of the development review process (such as subdivision or ***310** site plan review), or at the time of permit approval. Aside from developers and builders, [local governments] find these agreements advantageous as sources of funding for major infrastructure, and as an assurance for the timely provision of needed public facilities and amenities."

Amicus brief at 2-4 (footnotes omitted).

The present case does not call for us to scrutinize the validity of § 13.01 of Article 66B or even of the execution of the particular DRRA that instigated the litigation. Rather, this appeal touches upon an important, but tangential threshold issue, which necessitates that we determine the correct path to be followed by a person or entity, not a party to a DRRA, but who feels aggrieved by the execution of the agreement, in obtaining scrutiny of the legal bona fides of the DRRA.

I.

On 17 September 2002, a DRRA was entered into by K. Hovnanian at Kent Island, L.L.C., ("Hovnanian") and the County Commissioners of Queen Anne's County ("the County Commissioners"). Shortly thereafter, the Queen Anne's Conservation Association, Inc., and seven individual plaintiffs (collectively "the Conservation Association") filed a Complaint in the Circuit Court for Queen Anne's County, naming Hovnanian and the Commissioners as defendants, seeking declaratory and injunctive relief to the effect that the DRRA was invalid.

In response, the defendants filed a Motion to Dismiss urging that the Conservation Association failed to exhaust available, exclusive administrative remedies before seeking judicial scrutiny.

The Circuit Court entered judgment in the defendants' favor on 25 February 2003, preeminently holding in its declaratory judgment that the Conservation Association failed to follow the statutory procedure for appeals of administrative decisions to the Board of Appeals for Queen Anne's County. The result was dismissal of the Complaint because the Conservation Association, having missed the deadline for noting such ***311** an administrative appeal, could not now perfect one. The Conservation Association appealed to the Court of Special Appeals. We, on our initiative and before the appeal could be decided in the intermediate appellate court, issued a writ of certiorari to determine whether the Circuit Court properly dismissed the Complaint for declaratory and injunctive relief based on the Conservation Association's failure to exhaust administrative remedies. *Queen Ann's Conservation v. County Commissioners*, 379 Md. 224, 841 A.2d 339 (2004).

Appellants, the Conservation Association, present the following two questions for our consideration:

- I. Where Queen Anne's County has no administrative remedy available to challenge a developer's rights and responsibilities agreement by appeal to the Queen Anne's County Board of Appeals, is such a challenge ****328** properly brought in a declaratory action?
- II. Is an administrative appeal from a developer's rights and responsibilities agreement mandated by Article 66B, § 4.08, which applies to "zoning actions" of a local legislative body?

We hold that Appellants, in pursuing a challenge to the execution of the DRRA in this case, were first required to file an appeal to the Board of Appeals and obtain a final administrative decision prior to seeking judicial review in the Circuit Court. Therefore, we shall affirm the Circuit Court's judgment dismissing this action for Appellants' failure to exhaust an available and exclusive administrative remedy. Accordingly, we need not address the second question raised by Appellants.

II.

Hovnanian is the developer of a proposed "active adult, age-restricted community" on Kent Island in Queen Anne's County. The 560-acre community is to be known as Four Seasons at Kent Island ("Four Seasons") and would consist of 1,350 residential units, an assisted living facility, and recreational uses. The Four Seasons property is zoned, in the vernacular *312 of the Queen Anne County zoning ordinance, Stevensville Master Planned Development Zone and Chester Master Planned Development Zone. The property is identified in both the Chester Community Plan of 1997 and the Stevensville Community Plan of 1998 as a "Planned Growth Area" and was "pre-mapped" to receive a Chesapeake Bay Critical Area Growth Allocation. The uses sought by Hovnanian were permitted ones generally under the existing zoning, but subject to subdivision and site plan review and approval processes.

A. Administrative Proceedings

Hovnanian submitted an application to the Queen Anne's County Planning Commission (the Planning Commission) for Concept/Sketch Plan approval for Four Seasons in June 1999. The application was reviewed by Queen Anne's County planning and public work officials, Chesapeake Bay Critical Area Commission staff, and various other State and County departments and agencies. On 26 April 2000, the Planning Commission approved the Concept/Sketch Plan. Hovnanian next filed a petition with the County Commissioners requesting Growth Allocation approval to change the Chesapeake Bay Critical Area Land Use Designations on the property. The petition requested that roughly 293.25 acres be redesignated from the Chesapeake Bay Critical Area designation of Resource Conservation Area to Intense Development Area, and roughly 79.55 acres be redesignated from Limited Development Area to Intense Development Area.

Following a public hearing before it on 13 July 2000, the Planning Commission recommended that the County Commissioners approve Hovnanian's request for Growth Allocation, subject to certain conditions, one of which was that Hovnanian enter into a DRRA with the County before final plan approval. On 6 December 2000, after yet another public hearing, the Chesapeake Bay Critical Area Commission endorsed the Petition for Growth Allocation, also with certain conditions.

The County Commissioners conducted another public hearing on 27 February 2001. As a result, the County Commissioners made substantial and detailed findings of fact concerning *313 Hovnanian's request for Growth Allocation. On 10 April 2001, the County Commissioners approved the redesignation of the Chesapeake Bay Critical Area Land Use Designations of **329 the Four Seasons property, subject to conditions, including the execution of a DRRA.

On 14 June 2001, the Planning Commission reviewed and approved an amended Concept/Sketch Plan for the Four Seasons, which had been revised to reflect the later conditions imposed by the Planning Commission, the Critical Area Commission, and the County Commissioners during the Growth Allocation process. On 20 August 2001, the County Commissioners adopted ordinances that required a DRRA as a condition of the Growth Allocation approval.

Ultimately, on 20 May 2002, Hovnanian filed a Petition for a DRRA, pursuant to the enabling legislation in Maryland Code (1957, 2003 Repl. Vol.), Article 66B § 13.01² and the implementing *315 provisions **330 of Queen Anne's County Code ("QACC") §§ 18-1301 through 1311.¹ The draft **331 DRRA was vetted *317 through a series of hearings before the Planning Commission and the County Commissioners.

**332 On 11 July 2002, the Planning Commission considered the proposed DRRA at a public hearing. At the hearing, the Planning Commission indicated that there were certain technical issues that yet needed to be addressed, but concluded nonetheless that the proposed DRRA was consistent with the 2002 Comprehensive Plan for Queen Anne's County, as well as the applicable Stevensville and Chester Community Master Plans.

The County Commissioners held a public hearing on the proposed DRRA on 6 August 2002. Following the public hearing, the proposed DRRA was modified based on comments from all the previous hearings. On 17 September 2002, a final DRRA was executed by Hovnanian and the County Commissioners. In pertinent part, the DRRA: (1) established limitations on allowable development, including limitations on density and intensity; (2) established detailed requirements concerning public improvements to be financed by Hovnanian, *318 including a dedication of parkland, construction of park facilities, purchase of off-site parkland, construction and reconstruction of public roads and paths, and construction of public facilities both on-site and off-site; (3) established timing for water and sewer allocation; (4) required substantial cash payments

to the Kent Island Volunteer Fire Department and to the County; and (5) froze the laws and regulations governing the use, density or intensity of the development as of the date of the execution of the Agreement for the duration of the Agreement. The DRRA was recorded on 18 September 2002.

B. Circuit Court Proceedings

The Conservation Association filed a Complaint for Declaratory and Injunctive Relief with the Circuit Court for Queen Anne's County on 8 October 2002, asserting an array of legal defects with regard to the DRRA. The Conservation Association requested a declaration that the DRRA was an illegal contract violative of a prohibition against conditional use zoning; that the DRRA was illegal contract zoning; that the DRRA was violative of constitutional due process because it created preferences for Hovnanian's project denied to other developers under the law; that the process leading to approval and execution of the DRRA violated the hearing requirements of § 13.01(j)(2) of Article 66B because certain provisions were inserted in the final draft which did not appear in the earlier versions that were the subject of public hearings; and, that the DRRA violated the County's existing moratorium on new development and, thus, rendered the moratorium a special law contrary to Article III, § 33 of the Maryland Constitution.

Hovnanian and the County Commissioners filed a Motion to Dismiss, under Maryland Rule 2-322, arguing, among other things, that the Conservation Association failed to exhaust available administrative remedies by not appealing to the Board of Appeals for Queen Anne County. After briefing and oral argument on 25 February 2003, the Circuit Court dismissed the Complaint, reasoning preeminently that the Conservation Association should have appealed the County Commissioners' approval and execution of the DRRA to the *319 County Board of Appeals ("the Board"), as required by Maryland Code (1957, 2003 Repl.Vol.), Article 66B § 4.07 and QACC §§ 18-1-174 through 18-1-180. The Board is to "hear and decide appeals where it is alleged there is an error in any order, requirement, decision, or determination made by an administrative officer in the enforcement of [Art. 66B] or of any ordinance adopted under this article." Md.Code (1957, 2003 Repl.Vol.), Art. 66B § 4.07 (d)(1). Similarly, QACC § 18-1-175(a) provides that "the Board shall have **333 the power to hear and decide appeals where it is alleged that ... there is error in any order,

requirement, decision, or determination made by an administrative official in the enforcement of Article 66B of the Annotated Code of Maryland or this subtitle...."

The Circuit Court concluded that, when the County Commissioners approved and executed the DRRA, it acted collectively as an "administrative officer," i.e., as the "public principal" contemplated in the DRRA enabling legislation, defined as "the governmental entity of a jurisdiction that has been granted the authority to enter agreements under ... this section." Md.Code (1957, 2003 Repl.Vol.), Article 66B § 13.01(a)(4). The administrative process of appealing to the Board, therefore, was available to the Conservation Association and a necessary step in the process of seeking redress on its claims.

The Circuit Court also considered Article 66B, § 4.08, which provides for immediate judicial review by a circuit court of a "zoning action of a local legislative body." Md.Code (1957, 2003 Repl.Vol.), Article 66B § 4.08(a)(1). The court concluded, however, that because the County Commissioners had acted administratively as a statutory "public principal" when it executed the DRRA, it did not act as a "local legislative body," a prerequisite to immediate judicial review under Article 66B, § 4.08.

Alternatively, it seems, the court also concluded that "if no distinction is made between the exercise of the county's powers as a governing body and its powers as public principal, i.e., *320 it is viewed as 'a local legislative body' in both instances, the result would be direct review by this Court under § 4.08." In other words, Article 66B, § 13.01, in the Circuit Court's view, might countenance different methods of review. In either event, however, because the Conservation Association sought neither an administrative appeal to the Board of Appeals nor judicial review pursuant to Maryland Rules 7-201 through 7-209, dismissal of the Complaint for Declaratory and Injunctive Relief was proper.

We shall affirm the judgment of the Circuit Court in dismissing this case for Appellants' failure to exhaust their available administrative remedies. The Conservation Association's proper recourse in the present case was an administrative appeal to the Board of Appeals under Article 66B, § 4.07 and, if aggrieved by the Board of Appeals's final action, a petition for judicial review in the Circuit Court.

III.

As alluded to earlier, Queen Anne's County is a Code home rule county within the purview of Article 25B of the Maryland Code. Article 66B of the Maryland Code, governing land use, applies to Code counties and requires the legislative bodies of such counties to "provide for the appointment of a board of appeals." Md.Code (1957, 2003 Repl.Vol.), Art. 66B, § 4.07(a)(1). Each board of appeals possesses expressly delegated general powers, including the power to "[h]ear and decide appeals where it is alleged there is an error in any order, requirement, decision, or determination made by an administrative officer in the enforcement of this article [i.e., Art. 66B] or of any ordinance adopted under this article." Md.Code (1957, 2003 Repl.Vol.), Art. 66B, § 4.07(d)(1).

In *Miller v. Pinto*, 305 Md. 396, 403 n. 4, 504 A.2d 1140, 1143 n. 4 (1986), we stated that "the local legislative body in a code county is required to enact local laws authorizing the county's board of appeals to exercise the powers provided by § 4.07(d) of Article 66B." Accordingly, the County **334 Commissioners enacted an ordinance establishing the Board of Appeals *321 of Queen Anne's County. QACC § 18-1-174(a). The establishing ordinance states that "the Board shall have the powers and duties provided in Article 66B of the Annotated Code of Maryland and in this subtitle." QACC § 18-1-174(b). Mirroring the delegation of powers in Article 66B, the County Commissioners granted the Board "the power to hear and decide appeals where it is alleged that: (i) there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of Article 66B of the Annotated Code of Maryland." QACC § 18-1-175(a)(1)(i).

A. "Administrative Officer"

The Conservation Association contends that the County Commissioners did not act as an "administrative official" because its determination of the DRRA's contents was a fundamentally legislative, rather than an administrative act. In particular, the Conservation Association points to the DRRA's "description of the conditions, terms, restrictions or other requirements determined by the governing body of the local jurisdiction to be necessary to ensure the public health, safety, or welfare," as being the "heart and soul" of the agreement. Md.Code (1957, 2003 Repl.Vol.), Art. 66B, § 13.01(f)(ix). The Conservation Association concludes that a determination by the

governing body of the local jurisdiction as to what terms, conditions, restrictions or other requirements are necessary to ensure the public health is the "very essence" of the legislative function performed by local elected officials. We disagree with this analysis for two reasons.

¹¹ First, the negotiation of terms protective of public health, safety, or welfare, in a contract entered into by a local government body is a discretionary executive act, not a legislative one. See *Montgomery County v. Revere Nat'l Corp., Inc.*, 341 Md. 366, 390, 671 A.2d 1, 12 (1996) ("When the executive *322 branch of the county government, in carrying out the laws and functions of government, enters into a contract, such action constitutes the exercise of executive discretion."). A DRRA is not an ordinance or legislation as those terms are commonly understood; rather, it is a contract whose purpose is to vest rights under zoning laws and regulations, in consideration of enhanced public benefits.

Second, the "public principal," not the "governing body," has the principal responsibility and authority under the DRRA statute to protect the public health, safety, and welfare. Md.Code (1957, 2003 Repl.Vol.), Art. 66B, § 13.01. As we shall explain, the County Commissioners was acting as the "public principal," i.e., acting in its executive and administrative capacities, when it approved and executed the DRRA in this case.

¹² As a general matter, "it long has been recognized in Maryland that County Commissioners in much of their functioning act as administrators or in an executive capacity." *City of Bowie v. County Comm'rs for Prince George's County*, 258 Md. 454, 461, 267 A.2d 172, 176 (1970). It is recognized that the protean nature of a board of county commissioners makes it "a unique body" and "somewhat of a hybrid." *Bd. of County Comm'rs of Washington County v. H. Manny Holtz, Inc.*, 60 Md.App. 133, 142, 481 A.2d 513, 518 (1984). We have noted that:

**335 County Commissioners are outgrowths of the old Levy Courts originally established by the Act of 1794, Chapter 53. These courts were composed of the Justices of the Peace of the several counties. Their duties were to meet and to adjust the ordinary and necessary expenses of their counties, and to impose an assessment or rate on property to defray county charges. During the course of the succeeding fifty years the name "County Commissioners" came into existence. It was first recognized in the underlying law of the state in the Constitution of 1851, Article 7, Section 8. In that constitution it was provided that the commissioners should exercise only such powers and duties as the legislature *323 should from time to time prescribe. When the present Constitution of 1867 was

adopted, Article VII, Section I, provided that the power and duties of County Commissioners should be such "as now or may be hereafter prescribed by Law." Until the constitution of 1867, County Commissioners were simply administrative officers in charge of county finances, and taking care of the public roads. After the constitution of 1867 these powers could be broadened by legislative authority.

Cox v. Bd. of Comm'rs of Anne Arundel County, 181 Md. 428, 433–34, 31 A.2d 179, 182 (1943) (citations omitted). A board of county commissioners functions as the county government and "is the county body politic. In performing its various functions, it exercises legislative, quasi-legislative, executive, and quasi-judicial authority, sometimes in combination." *H. Manny Holtz*, 60 Md.App. at 144, 481 A.2d at 518. A board of county commissioners can, for example, control county property and roads, enact county ordinances, enforce building codes, borrow money and issue bonds—all "in addition to their authority under Art. 66B of the Maryland Code to enact, administer, and enforce zoning and land use laws." *H. Manny Holtz*, 60 Md.App. at 143, 481 A.2d at 518.

As the present case illustrates, the County Commissioners' particular exercise of its distinct roles in a given situation determines the appeal rights of those affected. We have held, for example, that a statute that authorized appeal to a circuit court from "an assessment made by the county commissioners" did not authorize an appeal from a tax valuation by a board of county commissioners sitting as the county board of control and review. *Chesapeake & Potomac Tel. Co. v. Bd. of County Comm'rs*, 116 Md. 220, 226, 81 A. 520, 522 (1911). Although the same individuals composed the two boards, we reasoned that "their duties are as separate and distinct in the respective capacities in which they act, as if they were different individuals." *Chesapeake & Potomac Tel. Co.*, 116 Md. at 225, 81 A. at 522.

As regards DRRAs in particular, Maryland Code (1957, 2003 Repl.Vol.), Article 66B, § 13.01(a)(4) defines the "public *324 principal" as "the governmental entity of a local jurisdiction that has been granted the authority to enter agreements under" a local ordinance. The County Commissioners in Queen Anne's County exercise the administrative authority of the public principal with respect to DRRAs. QACC § 18–1302.⁵ Maryland Code (1957, 2003 Repl.Vol.), Article 66B, § 13.01 enables the "public principal" to perform a series of essentially administrative tasks that include: **336 § 13.01 (c) (accepting the petition of a property owner or its representatives for a DRRA); § 13.01(d) (holding a hearing on the petition); §§ 13.01(b)(2) and 13.01(e) (executing the DRRA after obtaining the local planning

commission's approval); § 13.01(h) (amending the DRRA, if desired, by mutual consent and after public hearing); § 13.01(i) (either terminating the DRRA by mutual consent or, "if essential to ensure the public health, safety, or welfare," suspending or terminating the DRRA after a public hearing). The Queen Anne's County Code, tracking Maryland Code (1957, 2003 Repl.Vol.), Article 66B, § 13.01, assigns this same series of administrative functions of the "public principal" to the County Commissioners: QACC § 18–1303 (accepting the petition of a property owner for a DRRA); § 18–1306 (holding a hearing on the petition); §§ 18–1302 and 18–1305 (executing the DRRA after obtaining the local planning commission's approval); §§ 18–1307(a) (amending the DRRA, if desired, by mutual consent and after public hearing); and § 18–1308 (either terminating the DRRA by mutual consent or, if "essential to ensure the public health, safety, welfare," suspending or terminating the DRRA after a public hearing).

Subsection (b) of Article 66B, § 13.01 divides authority for the creation of DRRAs into two parts. Under Article 66B, § 13.01(b)(1), the governing body of a county (in the present case the County Commissioners) is given power to:

*325 "(i) By ordinance, establish procedures and requirements for the consideration and execution of agreements; and

"(ii) Delegate all or part of the authority established under the ordinance to a public principal within the jurisdiction of the governing body."

These powers of the governing body are circumscribed by statutory direction that the powers of the governing body are "Subject to subsections (c) through (l) of this section." Under Article 66B, § 13.01(b)(2), a "public principal" is given power to:

"(i) Execute agreements for real property located within the jurisdiction of the governing body with a person having a legal or equitable interest in the real property; and

"(ii) Include a federal, State, or local government or unit as an additional party to the agreement."

The distinction between the legislative powers of the governing body and the executive and administrative powers of the public principal is important. The governing body has no power with respect to the actual operation of the statute. Aside from those matters listed in § 13.01(b)(2) above, the governing body may only and co-extensively with the public principal, "after a public

hearing ... suspend or terminate an agreement upon determination that such is 'essential to ensure the public health, safety, or welfare.' " Md.Code (1957, 2003 Repl.Vol.), Art. 66B, § 13.01(j). Otherwise, the governing body has no authority with respect to any particular DRRA.

The public principal, on the other hand, is defined as "the governmental entity of a jurisdiction that has been granted the authority to enter agreements under ... this section." Md.Code (1957, 2003 Repl.Vol.), Art. 66B, § 13.01(a)(5). Sole power to negotiate, execute, and enforce agreements lies with the public principal. Petitions to enter into agreements are made to the public principal; and the required public hearing is conducted by the public principal. In any particular case, the only limitations on the public principal's authority is to follow general procedures adopted by the governing body and a requirement—unrelated to the governing body or its ***337 legislative *326 functions—that all agreements be determined by the Planning Commission to be "consistent with the plan of the jurisdiction." Md.Code (1957, 2003 Repl.Vol.), Art. 66B, § 13.01(e). Further evidence of the distinction, and the autonomy of the public principal, lies in Article 66B, § 13.01(m) which states, "this section does not require the adoption of an ordinance by a governing body." This can only be read as applying to agreements, because an earlier provision, specifically requires that procedures be established "by ordinance." Md.Code (1957, 2003 Repl.Vol.), Art. 66B, § 13.01(b)(1)(i)

¹³¹ ¹⁴¹ The County Commissioners in the present case successively wore two different hats and performed a legislative action followed by an administrative/executive action. The test to determine when action is legislative and when executive or administrative is "whether the [action] is one making a new law—an enactment of general application prescribing a new plan or policy—or is one which merely looks to or facilitates the administration, execution or implementation of a law already in force and effect." *City of Bowie*, 258 Md. at 463–64, 267 A.2d at 177 (citations omitted). Initially, the County Commissioners acted legislatively, as a governing body under Maryland Code (1957, 2003 Repl.Vol.), Article 66B, § 13.01(b)(1), by authorizing DRRAs in Queen Anne's County through enactment of Subtitle 13 of the Land Use and Development Title of the Queen Anne's County Code. In enacting Subtitle 13, the County Commissioners reserved to themselves the role of the "public principal" under Maryland Code (1957, 2003 Repl.Vol.), Article 66B, § 13.01, with its concomitant powers to conduct hearings on, enter into, execute, and enforce DRRAs. Subsequently, the County Commissioners signed off on the DRRA in its

administrative and executive role as the "public principal." The County Commissioners' approval was the act of an "administrative officer" or "administrative official" under the Maryland and County Codes, respectively, because "the term 'administrative official' is most reasonably read as embracing whatever administrative mechanism a local jurisdiction in Maryland sets up to enforce its planning and zoning laws and ordinances, including a multi- *327 member body...." *See Wharf at Handy's Point, Inc. v. Dep't of Natural Res.*, 92 Md.App. 659, 672, 610 A.2d 314, 320 (1992) (holding that the term "an administrative official" in § 4.07 (d) includes the Kent County Planning Commission) (citation omitted); *Howard Research & Dev. Corp. v. Concerned Citizens for Columbia Concept*, 297 Md. 357, 366–67, 466 A.2d 31, 35–36 (1983) (holding that a five-member Planning Board constituted the "administrative official" whose decisions were subject to appeal to the Howard County Board of Appeals); *see also* Md.Code (1957, 2001 Repl.Vol.), Art. 1, § 8 (stating the rule of construction when interpreting the Code is that "the singular always includes the plural, and vice versa, except where such construction would be unreasonable.").

B. The Scope of the Board's Authority

The Conservation Association also contends that QACC § 18–1–175 contemplates that aggrieved persons may appeal to the Board only from decisions of "the Planning Director or any other employee of the Department of Planning and Zoning." QACC § 18–1–179(c). This kind of limiting argument was raised to no avail by the appellees in *Wharf at Handy's Point*. We agree with the Court of Special Appeals reasoning in *Wharf at Handy's Point* and apply it to the present case. *Wharf at Handy's Point*, 92 Md.App. at 670–73, 610 A.2d at 319–20.

**338 ¹⁵¹ ¹⁶¹ In *Wharf at Handy's Point*, an issue arose as to whether the term "administrative official" included the Kent County Planning Commission, within the meaning of the statute requiring county boards of appeals to hear and decide appeals from administrative officials. Pursuant to the authority granted to it in Article 66B, § 4.07(d), the County Commissioners of Kent County provided in its zoning ordinance that the Board of Appeals shall have the power "[t]o hear and decide appeals of any decision or determinations made by the Administrator in the enforcement and administration of this Ordinance." Ordinance, Art. IX, § 2.1. The zoning ordinance defined the "Administrator" as "[t]he Zoning Administrator of

Kent County.” Appellees there argued that “an administrative *328 official” in Article 66B, § 4.07(d) should not be construed to include the Kent County Planning Commission. The Court of Special Appeals quoted the Attorney General’s conclusion that “on the whole, we think the term ‘administrative official’ is most reasonably read as embracing whatever administrative mechanism a local jurisdiction in Maryland sets up to enforce its planning and zoning laws and ordinances, including a multi-member body such as a local planning commission.” *Wharf at Handy’s Point*, 92 Md.App. at 672, 610 A.2d at 320 (quoting 64 Op. Atty Gen. 349, 355 n. 4 (1979)). The intermediate appellate court concluded that “regardless of what was intended by the County Commissioners” in the local ordinance, the more broadly drafted Article 66B, § 4.07(d) took precedence, and invested the local board of appeals with authority to hear appeals from the Kent County Planning Commission, as well as the Zoning Administrator. *Wharf at Handy’s Point*, 92 Md.App. at 670–73, 610 A.2d at 319–20. Furthermore, the Court of Special Appeals’s interpretation of the overriding authority of Article 66B, § 4.07(d), is consistent with the 1971 amendment of Article 66B, § 4.07.1971 Md. Laws, Chap. 793. The 1971 revision of Article 66B, § 4.07 broadened its scope, empowering local boards “to act on matters arising out of the enforcement of any part of Article 66B or an ordinance passed under any of the subtitles of Article 66B.” 64 Op. Att’y Gen. 349, 351 (1979). In addition, our conclusion that Article 66B, § 4.07 overrides the reference in QACC § 18–1–175 to “the Planning Director” is consistent with the established principle that in cases of conflict between local and State enactments, the State statute “must prevail.” *Boulden v. Mayor and Comm’rs of Town of Elkton*, 311 Md. 411, 415, 535 A.2d 477, 479 (1988) (finding that Article 66B, § 4.08 overrode

local ordinance limiting right of appeal from the board of appeals). The Board has the general power to decide an appeal involving an “error in any order, requirement, decision or determination made by an administrative official.” QACC § 18–1–175(a)(1)(i). The Board’s general powers refer to “an administrative official” (not limited to the Planning Director) and *329 encompass the entirety of Article 66B (not simply the Planning Director’s role in the administration of zoning issues).

Accordingly, under the authority of Article 66B, § 4.07, the Board is the proper body to hear and decide in the first instance an appeal from the County Commissioner’s administrative/executive actions in negotiating and executing the DRRA with Hovnanian. The Conservation Association’s failure to avail itself of this appeal to the Board means that the Conservation Association failed to exhaust its administrative remedies. As exclusive or primary administrative remedies must be exhausted before judicial relief is sought, the present litigation could not be maintained and must be dismissed. *See Brown v. Fire and Police Employees’ Retirement **339 System*, 375 Md. 661, 669, 826 A.2d 525, 530 (2003) (“The exhaustion doctrine enforces the notion that an administrative agency should have the opportunity to exercise its expertise first to resolve an issue.”).

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

All Citations

382 Md. 306, 855 A.2d 325

Footnotes

- 1 Article 66B generally regulates land use (planning and zoning) in Maryland’s non-charter, Code home rule counties, Baltimore City, and municipalities possessing planning and zoning powers; however, of relevance to DRRAs, § 1.02(b) of Article 66B makes applicable also to chartered counties (except Montgomery County and Prince George’s County) the provisions of § 13.01. Ordinarily, the planning and zoning powers exercised by charter counties in Maryland flow from Article 25A, § 5(X) of the Maryland Code, except for Montgomery and Prince George’s counties which look to Article 28 of the Maryland Code for enablement of their planning and zoning authority.
- 2 Maryland Code (1957, 2003 Repl.Vol.), Article 66B § 13.01 states:
 - (a) *Definitions.*—(1) In this section the following words have the meanings indicated.
 - (2) “Agreement” means a development rights and responsibilities agreement.
 - (3) “Governing body” means the local legislative body, the local executive, or other elected governmental body that has zoning powers under this article.
 - (4) “Public principal” means the governmental entity of a local jurisdiction that has been granted the authority to enter agreements under subsection (b)(1) of this section.
 - (b) *Authority and delegation of authority.*—(1) Subject to subsections (c) through (1) of this section, the governing body of a local jurisdiction may:

(i) By ordinance, establish procedures and requirements for the consideration and execution of agreements; and
(ii) Delegate all or part of the authority established under the ordinance to a public principal within the jurisdiction of the governing body.

(2) The public principal may:

(i) Execute agreements for real property located within the jurisdiction of the governing body with a person having a legal or equitable interest in the real property; and

(ii) Include a federal, State, or local government or unit as an additional party to the agreement.

(c) *Petition.*—Before entering an agreement, a person having a legal or equitable interest in real property or the person's representative shall petition the public principal of the local jurisdiction in which the property is located.

(d) *Public hearing.*—(1) After receiving a petition and before entering an agreement, the public principal shall conduct a public hearing.

(2) A public hearing that is required for approval of the development satisfies the public hearing requirements.

(e) *Approval by commission.*—The public principal of a local jurisdiction may not enter an agreement unless the planning commission of the local jurisdiction determines whether the proposed agreement is consistent with the plan of the local jurisdiction.

(f) *Contents of agreement.*—(1) An agreement shall include:

(i) A legal description of the real property subject to the agreement;

(ii) The names of the persons having a legal or equitable interest in the real property subject to the agreement;

(iii) The duration of the agreement;

(iv) The permissible uses of the real property;

(v) The density or intensity of use of the real property;

(vi) The maximum height and size of structures to be located on the real property;

(vii) A description of the permits required or already approved for the development of the real property;

(viii) A statement that the proposed development is consistent with the plan and development regulations of the local jurisdiction;

(ix) A description of the conditions, terms, restrictions, or other requirements determined by the governing body of the local jurisdiction to be necessary to ensure the public health, safety, or welfare; and

(x) To the extent applicable, provisions for the:

1. Dedication of a portion of the real property for public use;

2. Protection of sensitive areas;

3. Preservation and restoration of historic structures; and

4. Construction or financing of public facilities.

(2) An agreement may:

(i) Fix the time frame and terms for development and construction on the real property; and

(ii) Provide for other matters consistent with this article.

(g) *Time limitations.*—An agreement shall be void 5 years after the day on which the parties execute the agreement unless:

(1) Otherwise established under subsection (f)(1)(iii) or (2)(i) of this section; or

(2) Extended by amendment under subsection (h) of this section.

(h) *Amendment of agreements.*—(1) Subject to paragraph (2) of this subsection and after a public hearing, the parties to an agreement may amend the agreement by mutual consent.

(2) Unless the planning commission of the local jurisdiction determines that the proposed amendment is consistent with the plan of the local jurisdiction, the parties may not amend an agreement.

(i) *Termination of agreements; suspension.*—(1) The parties to an agreement may terminate the agreement by mutual consent.

(2) If the public principal or the governing body determines that suspension or termination is essential to ensure the public health, safety, or welfare, the public principal or its governing body may suspend or terminate an agreement after a public hearing.

(j) *Applicable laws, regulations and policies.*—(1) Except as provided in paragraph (2) of this subsection, the laws, rules, regulations, and policies governing the use, density, or intensity of the real property subject to the agreement shall be the laws, rules, regulations, and policies in force at the time the parties execute the agreement.

(2) If the local jurisdiction determines that compliance with laws, rules, regulations, and policies enacted or adopted after the effective date of the agreement is essential to ensure the health, safety, or welfare of residents of all or part of the jurisdiction, an agreement may not prevent a local government from requiring a person to comply with those laws, rules, regulations, and policies.

(k) *Recording.*—(1) An agreement that is not recorded in the land records office of the local jurisdiction within 20 days after the day on which the parties execute the agreement is void.

(2) The parties to an agreement and their successors in interest are bound to the agreement after the agreement is

recorded.

(l) *Enforcement by interested parties.*—Unless the agreement is terminated under subsection (i) of this section, the parties to an agreement or their successors in interest may enforce the agreement.

(m) *Adoption of ordinance not required.*—This section does not require the adoption of an ordinance by a governing body or authorize a governing body to require a party to enter into an agreement.

3 Queen Anne's County Code §§ 18–1301 through 1311 (2004) state:

18–1301. *Definitions.*—Unless otherwise provided in this subtitle, the definitions provided in § 18–1–001 of this title shall apply.

18–1302. *Authority.*—The County Commissioners for Queen Anne's County shall exercise the authority granted by Section 13.01 of Article 66B, Zoning and Planning, of the Annotated Code of Maryland to enter into development rights and responsibility agreement.

18–1303. *Applicability.*—Any person having a legal or equitable interest in real property in Queen Anne's County may petition the County Commissioners for Queen Anne's County to enter into an agreement.

18–1304. *Contents of development rights and responsibilities agreement.*—(a) At a minimum a development rights and responsibilities agreement shall contain the following:

- (1) A lawyer's certification that the petitioner has either a legal or equitable interest in the property;
- (2) The names of all parties having an equitable or legal interest in the property, including lien holders;
- (3) A legal description of the property subject to the agreement;
- (4) The duration of the agreement;
- (5) The permissible uses of the real property;
- (6) The density or intensity of use;
- (7) The maximum height and size of structures;
- (8) Description of the permits required or already approved for the development of the property;
- (9) A statement that the proposed development is consistent with applicable development regulations, the Comprehensive Plan and Growth Area Plan;
- (10) A description of the conditions, terms, restrictions or other requirements determined by the County Commissioners, or their designees, to be necessary to ensure the public health, safety and welfare;
- (11) To the extent applicable, provisions for:
 - (i) Dedication of a portion of the real property for public use.
 - (ii) Protection of sensitive areas;
 - (iii) Preservation and restoration of historic structures.
 - (iv) Construction or financing of public facilities;
 - (v) Responsibility for attorney's fees, costs and expenses incurred by the County Commissioners in the event an agreement is abandoned or breached by the petitioner.

(b) An agreement may fix the period in and terms by which development and construction may commence and be completed, as well as provide for other matters consistent with this title.

18–305. *Referral to Planning Commission.*—Upon receipt of a petition, the County Commissioners shall refer the petition to the Planning Commission for a determination whether the proposed agreement is consistent with the Comprehensive Plan and, where applicable, the Growth Area Plan. The County Commissioners may not enter into an agreement unless the Planning Commission determines whether the proposed agreement is consistent with the Comprehensive Plan and, where applicable, the growth area plan.

18–306. *Public Hearing.*—Before an agreement may be executed by the County Commissioners, the County Commissioners shall hold a public hearing on the agreement. Notice of the hearing shall be published in a county newspaper of general circulation once each week for two consecutive weeks, with the first such publication of notice appearing at least 14 days prior to the hearing. The notice shall contain the name of the petitioner, a brief description sufficient to identify the property involved, a fair summary of the contents of the petition and the date, time and place of the public hearing.

18–1307. *Amendment of agreements.*—(a) Subject to paragraph (b) of this subsection and after a public hearing, the parties to an agreement may amend the agreement by mutual consent.

(b) The parties may not amend an agreement unless the Planning Commission determines whether the proposed amendment is consistent with the Comprehensive Plan and, where applicable, the Growth Area Plan.

18–1308. *Termination of agreements; suspension.*—(a) The parties to an agreement may terminate the agreement by mutual consent.

(b) After a public hearing, the County Commissioners may suspend or terminate an agreement if the County Commissioners determine that suspension or termination is essential to ensure the public health, safety or welfare.

18–1309. *Applicable laws, regulations and policies.*—(a) Except as provided in paragraph (b) of this subsection, the laws, rules, regulations and policies governing the use, density or intensity of the real property subject to the agreement shall be

the laws, rules, regulations and policies in force at the time the County Commissioners and the petitioner execute the agreement.

(b) An agreement may not prevent compliance with the laws, rules, regulations and policies enacted after the date of the agreement, if the County Commissioners determine that imposition and compliance with these laws and regulations is essential to ensure the public health, safety or welfare of residents of all or part of Queen Anne's County.

18-1310. *Recording.*—(a) An agreement shall be void if not recorded in the land records of Queen Anne's County within 20 days after the day on which the County Commissioners and the petitioner execute the agreement.

(b) When an agreement is recorded, the County Commissioners and the petitioner, and their successors in interest, are bound to the agreement.

18-1311. *Enforcement by interested parties.*—Unless terminated under § 18-308 of this subtitle, the County Commissioners or the petitioner, and their successors in interest, may enforce the agreement.

- 4 Maryland Code (1957, 2003 Repl.Vol.), Article 66B, § 4.07(d)(1) uses the term "administrative officer," whereas Queen Anne's County Code § 18-1-175(a)(1)(i) uses the term "administrative official." We view the terms, in this particular context, as interchangeable. See 64 Md. Op. Atty. Gen. 349, 356 n. 7 (1979).
- 5 Queen Anne's County Code § 18-1302 provides that "the County Commissioners for Queen Anne's County shall exercise the authority granted by Section 13.01 of Article 66B, Zoning and Planning, of the Annotated Code of Maryland to enter into development rights and responsibility agreements."

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT 3

DAVID M. FUNK
BRYAN D. BOLTON
REYNOLD POPHAM
KEN L. TUNDBERMAN
DENVER R. YARMIS
CHARLES D. MACLEOD
JEREMY L. BLUMQUIST
JENNIFER A. RADER

ADMITTED IN NE AND DC ONLY
ADMITTED IN VA ONLY

FUNK & BOLTON
A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW
33 SOUTH CHARLES STREET, 12TH FLOOR
BALTIMORE, MARYLAND 21201
(410) 659-7700
FACSIMILE (410) 659-7773

Writer's Direct Dial (410) 659-4970
jblumquist@fbaw.com

JEROME D. BRESLIN
HUGH M. BERNSTEIN
JAMES F. TAYLOR
PETER C. ISMAY
CYNTHIA L. MCCANN
CHERYL A. C. BROWN
HISHAM M. AMIN

OF COUNSEL

JOHN A. ANDRYSZAK
GARY C. HARRIGER
MICHAEL R. MCCANN
J. FRANK NAYDEN
DEBORAH R. RIVKIN
JOHN R. STIEKHOFF

January 2, 2003

Mark D. Stemen
K. Hovnanian Enterprises, Inc.
4090/A Lafayette Center Drive
Chantilly, Virginia 20151

Steven Pelz, Esquire
Thomas Pellerito
K. Hovnanian Enterprises, Inc.
Southeast Region
1802 Brightseat Road
Landover, Maryland 20785

Re: Queen Anne's Conservation Association, Inc., et al.
v. County Commissioners of Queen Anne's County, MD, et al.
Case No. CV 9163

Gentlemen:

The law firm of Funk & Bolton, P.A. represents the County Commissioners of Queen Anne's County (the "County"). As you undoubtedly are aware, the County has been sued in the above captioned case, and the Plaintiffs contend that the Developer Rights and Responsibilities Agreement (the "DRRA") to which you are parties was void *ab initio*.

We are in the process of evaluating the DRRA, the circumstances surrounding its execution, and its efficacy. Questions have been raised about whether the DRRA was undertaken in compliance with the statutory prerequisites of Article 66B § 1301 of the Maryland Annotated Code. Additionally, the County Commissioners are evaluating whether the suspension or termination of the DRRA is essential to ensure the public health, safety or welfare.

This letter constitutes written notice, pursuant to Article III Paragraph 13.3 of the DRRA, that the agreement may be void *ab initio*. Additionally, it may be essential to terminate or

January 2, 2003

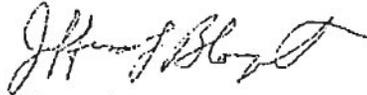
Page 2

suspend the DRRA to ensure the public health, safety or welfare. You are expressly advised that the DRRA could be suspended or terminated in the not too distant future, if it is not already void. You are expressly advised and directed not to expend any additional sums in furtherance of the DRRA or the development of the Four Seasons subdivision until the County has evaluated the forgoing issues. Any sum you spend on or after this Notice shall be undertaken solely at your risk and with full knowledge that the DRRA may be void, suspended and/or terminated.

The County will not consider or declare you in breach of the DRRA for failing to undertake any action in furtherance of the DRRA pending the investigation by the County Commissioners of the before stated issues. The County Commissioners hope to have completed their evaluation by no later than the close of the meeting of the County Commissioners set for Tuesday, March 5, 2003, although they make no guarantee of adhering to that self imposed aspiration.

At this juncture, you are requested to address any questions you may have to my partner, Charles D. "Chip" MacLeod, who is resident in our Chestertown office (410/810-1381), or to me. We will endeavor to provide you with advance notice of any public meeting held relative to the DRRA, and request that Mr. Stevens review the agenda for upcoming meetings of the County Commissioners as well.

Sincerely,



Jefferson L. Blomquist

JLB/DD

cc: Joseph A. Stevens, Esquire
Charles D. MacLeod, Esquire

58384 00 00510

EXHIBIT 4



Queen
Anne's
County

BOARD OF COUNTY COMMISSIONERS

The Liberty Building
107 North Liberty Street
Centreville, Maryland 21617

Telephone: (410) 758-4098
Fax: (410) 758-1170
TDD: (410) 758-2126
e-mail: qacc@qac.org

County Commissioners:

Benjamin F. Gassell, Jr. - At Large
Joseph F. Cupani - District 1
R.O. "Nemo" Nledomanaki - District 2
Gene Ransom III - District 3
Michael S. Koval - District 4

Clerk to County Commissioners: Margie A. Houck
County Attorney: Patrick Thompson

TO: ALL COUNTY DEPARTMENT HEADS

DATE: JANUARY 7, 2002

Four Seasons Subdivision

The County has been sued over the Developer Rights and Responsibilities Agreement (DRRA) entered into with the developer of the Four Seasons subdivision. The Plaintiffs claim that the DRRA was void from its inception for failure to adhere to the statutory prerequisites. Additionally, questions have arisen about whether suspension or termination of the DRRA is essential to ensure public health, safety or welfare. We have retained the law firm of Funk & Bolton to help us with our evaluation of these issues.

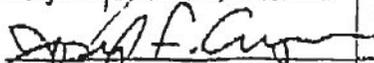
Pending our evaluation of these issues, which we hope to complete within two months, if not sooner, every Department is directed not to take any action with respect to any plans, plats, or permit applications, and not to issue any permits or approvals with respect to the Four Seasons subdivision. We have notified the developer that we are undertaking a review of the above issues and we have directed the developer to discontinue all work with respect to the subdivision while we evaluate these issues.

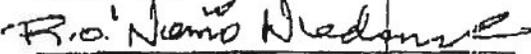
Please advise if you have any plans awaiting approval, any plats awaiting approval or recordation in the land records of Queen Anne's County, or any permit applications being processed for the Four Seasons subdivision.

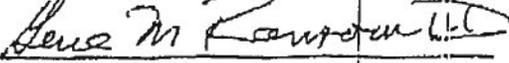
Sincerely,

QUEEN ANNE'S COUNTY
BOARD OF COUNTY COMMISSIONERS


Benjamin F. Cassell, President


Joseph F. Cupani


R. O. "Nemo" Niedomanski


Gene Ransom III

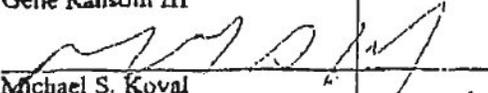

Michael S. Koval

EXHIBIT 5

and D of the Complaint, as to which no action has yet been taken.

The Court finds that, while the matter of damages is somewhat dependent upon the matters decided by this Judgment, it ultimately depends upon independent issues regarding the type and amount of damages claimed and that, while the matter of damages could be affected by ultimate determination of the issues already decided, the converse is not true: the issues here involved are wholly unaffected by the matter of damages. The Court further finds that the issues determined by this Judgment involve questions having very substantial public interest, whose resolution should not be postponed for determination of whether damages should be awarded. Accordingly, the Court expressly determines that there is no just reason for delay; and **THE CLERK IS DIRECTED TO ENTER THIS JUDGMENT AS A FINAL JUDGMENT**, in accordance with Rule 2-602 (b),

DEFINITIONS

As used in this Judgment:

County means The County Commissioners of Queen Anne's County, the individual Commissioners and all officers, boards, commissions and agencies of Queen Anne's County.

Hovnanian means K. Hovnanian at Kent Island, LLC, and its successors and assigns.

DRRA means the "Developer's¹ Rights and Responsibilities Agreement," dated September 17, 2002, between the County and Hovnanian.

Four Seasons means the property which is the subject of the DRRA.

CMPD means the Chester Master-Planned Development district defined and regulated by Title 18, Subtitle 5, of the *County Code*, being one of the two zoning districts in which Four Seasons is located.

SMPD means the Stevensville Master-Planned Development district defined and regulated by Title 18, Subtitle 7, of the *County Code*, being one of the two zoning districts in which Four Seasons is located.

¹ The enabling legislation (*Code Article 66B*, §§ 1.01 (d) and 13.01) and Title 18, Subtitle 13, of the *County Code* refer to a "development rights and agreement." The agreement here is nominated as in the above text.

DRRA Exhibit 3 means the “SKETCH FOR K. HOVNIANIAN'S FOUR SEASONS ON KENT ISLAND, FOURTH ELECTION DISTRICT, QUEEN ANNE'S COUNTY, MARYLAND” prepared by McCrone, Inc., dated May 23, 2001, and attached to the DRRA as Exhibit 3.

Development approvals means and includes all proceedings for approvals required for development of the real property described in the DRRA, including (but not limited to) those involving site plans, subdivision plans, road plans, sewer and water collection, distribution and infrastructure plans; water treatment facilities plans; storm water management and drainage plans.

Consistency finding means the determination of the Planning Commission on July 11, 2002, that “the proposed draft Developer’s Rights and Responsibilities Agreement . . . [is] . . . consistent with the 2002 Comprehensive Plan . . . and the Stevensville and Chester Community Plan.”

DECLARATORY PROVISIONS

The Court **FINDS AND DECLARES** that:

1. Because the Planning Commission has found their inclusion in th DRRA to be consistent with the comprehensive plan and other reasons which authorize such finding, the DRRA is not invalid or unenforceable by reason that it contains one or more of the following characteristics:

a-Private roads, which are (i) expressly allowed in the CMPD district by §18-505(i) of the *County Code* and (ii) otherwise subject to approval by the Planning Commission pursuant to §18-705 (h) of the *County Code*, which provides that “road standards shall be determined by the Planning Commission for each individual development in the SMPD.”

b-Buildings exceeding the height limits contained in §18-1-044 of the *County Code*, such deviation being allowed by (i) §§18-504 (k) and 18-704 (k) of the *County Code*, which specifically state that standards contained in §18-1-044 are specifically inapplicable within the CMPD and SMPD districts and (ii) §18-504 (h) and 18-704 (h) of the *County Code* specifically provide that “height . . . standards shall be determined by the Planning Commission for each individual development in the . . . [CMPD/SMPD] District.”

c-Condominium (multiplex) buildings containing more than the 8 units permitted by §18-1-044, *supra*, such deviation being authorized by (i) §§18-504 (k) and 18-704 (k) of the *County Code*, which state that ordinary standards contained in §18-1-044 of the *County Code* are inapplicable within the CMPD and SMPD districts; (ii) other provisions of §§18-504 and 18-704, the Planning Commission is authorized to establish standards of this type in CMPD and SMPD districts; and (iii) the provision of §18-1-044 (i) of the *County Code* being void by reason of §11-122 of the Real Property Article of the *Annotated Code of Maryland*.

d-Provisions, such as contained in the final sentence of paragraph 12.1 (b), which undertake to construe the meaning and intent of provisions of Article 66B, §13.01, of the *Code*, and Title 18, Subtitle 13, of the *County Code*, because such represent an unauthorized intrusion upon the prerogatives of the judiciary and will be disregarded and severed from the DRRA in accordance with §13.11 thereof.

2. The consistency finding is final and binding for all purposes and thus (i) there having been no timely appeal, is not subject to review at this time and (ii) is to be accepted as such in all development approvals.

3. DRRA Exhibit 3 is neither a "preliminary plan," referred to in §§18-1-210 through 18-1-215, nor a "site plan," referred to in §§18-1-216 through 18-1-225 of the *County Code*. Rather, for the following reasons, its entire meaning and significance are defined by the office which it serves in the DRRA.

a-The DRRA describes the role and purpose of DRRA Exhibit 3 as being "to conceptually illustrate the proposed Four Seasons development." While some features of the DRRA are reflected in the Exhibit, others appear in the instrument itself to such a degree as to cause the parties to provide for possible inconsistency: "If a limitation or restriction contained herein conflicts with that shown on the Sketch Plan, the more restrictive shall apply."

b-The injunction of the DRRA statute and ordinance is that the Planning Commission "determine whether the *proposed agreement* is consistent with the [comprehensive] plan of the local jurisdiction"; and the Commission here carried out that mandate in the consistency finding by making that determination on the basis of the entire "Developer's Rights and Responsibilities Agreement."

4. As in any action of a public body, the County's adoption of the DRRA

involves an implicit finding that the DRRA is consistent with the public health, safety and welfare. The inference is conclusive here, since the County was specifically enjoined to include in the DRRA “the conditions, terms, restrictions or other requirements determined by the County Commissioners, or their designees, to be necessary to ensure the public health, safety and welfare” (Article 66B, §13.01 (f)(1)(9); *County Code*, §18-1304 (f)(1)(9)).

5. The finding of consistency with the public health, safety and welfare referred to in paragraph 4 is final and binding upon the County, except upon a later finding that, because of circumstances that did not exist on the effective date of the DRRA, the public health, safety or welfare requires (i) its suspension or termination and/or (ii) compliance with laws, rules, regulations and policies enacted or adopted after the effective date of the DRRA.

6. Any public hearing conducted for the purpose of determining the existence of circumstances referred to in paragraph 5 must involve (i) adequate public notice of the hearing, which includes a reasonable description of the circumstances giving rise to the hearing, and is sufficient to permit interested persons, including Hovnanian, to address those specific issues; (ii) adequate opportunity for interested persons, including Hovnanian, to present evidence; and (iii) adequate opportunity for interested persons, including Hovnanian, to cross-examine witnesses.

7. The paper dated January 7, 2002 [sic] from the County to “All County Department Heads”, by which “every Department is directed not to take any action with respect to any plans, plats, or permit applications, and not to issue any permits or approvals with respect to the Four Seasons subdivision,” is contrary to the County’s duties set forth in the DRRA and, having no basis in law or fact, is void. Because of the County’s direct hindrance, the term referred to in paragraph 13.2 of the DRRA does not commence until the day following that on which the County rescinds the aforesaid directive in compliance with the injunctive provisions of this Judgment.

8. The validity of paragraph 6.2 (d) of the DRRA, as involving the principle that the power of eminent domain may be exercised only for a public purpose, depends entirely upon the context in which it is sought to be applied. Since that context cannot be anticipated, and since the provision may never be invoked, the matter is not susceptible to declaratory relief at this time.

9. As neither party has advanced or argued the propriety of the duration of the DRRA, as set forth in paragraph 13.2, it will not be considered here, beyond the observation that both parties have indicated willingness to change that duration to 10 years.

10. Except as provided in paragraphs 2, 3, 5 and 6, no provision of these Declarations shall be construed to limit the powers of the County with respect to any

development approvals.

INJUNCTIVE RELIEF

1. The County is directed and enjoined to forthwith rescind the memorandum or paper dated January 7, 2002 [sic] and hereafter issue no directive, order or memorandum of any kind which is inconsistent with its duties as set forth in the DRRA and this Judgment.

2. The County is hereby directed and enjoined to specifically perform its responsibilities under the DRRA, as generally set forth in its specific undertaking "to use its best efforts to ensure that all remaining development reviews, including but not limited to, preliminary subdivision, final subdivision and final site plan review are performed in a succinct, timely, manner, without undue delay, not inconsistent with the County's current development review process."

3. In all development approvals involving Four Seasons, the County is directed and enjoined:

a-to proceed in a manner which is consistent with the Declarations contained in this Judgment

b-to regard the consistency finding (referred to in Declaratory paragraph 2) and the finding of consistency with public health, safety and welfare (referred to in Declaratory paragraph 4) as the functional equivalents of laws, rules, regulations, and policies governing the use, density, or intensity of the real property subject to the DRRA and therefore final and binding upon the County and not subject to further review or modification.

By way of illustrating, but not limiting, the foregoing provisions of this paragraph, the County may not under any theory, guise or other pretext consider or take any action which would to any degree or extent, directly or indirectly reconsider or otherwise fail to give total finality to the findings referred to subparagraph (b), except in the actual context of a proceeding by the County Commissioners to exercise its powers under subsections (i)(2) and/or (j)(2) of Article 66B, §13.01, of the *Annotated Code of Maryland* and the corresponding provisions of the *County Code*.

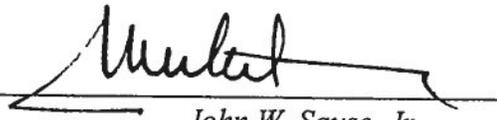
4. In all matters relating to the DRRA which is the subject of this proceeding, the County is directed and enjoined not to conduct any hearing pursuant to subsections (i)(2) and/or (j)(2) of Article 66B, §13.01, of the *Annotated Code of Maryland* and the corresponding provisions of the *County Code*, unless such hearing involves

circumstances relating to the public health, safety or welfare that did not exist on the effective date of the DRRA and provides:

a-adequate public notice of the hearing, including a reasonable description of the matters of public health, safety or welfare which give rise to the hearing and are sufficient to permit interested persons, including Hovnanian, to address those matters;

b-adequate opportunity for interested persons, including Hovnanian, to present evidence; and

c-adequate opportunity for interested persons, including Hovnanian, to cross-examine witnesses.



John W. Sause, Jr.
Chief Judge

September 17, 2003

THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

K. HOVNIANIAN AT KENT ISLAND, LLC :
v. : Civil #9494
QUEEN ANNE'S COUNTY :
:
: : : :

SUPPLEMENTAL MEMORANDUM

A development rights and responsibilities agreement may be undertaken at any time in the regular development process, the statute (§13.01 (f)(1)(vii)) and the ordinance (§18-1304 (a)(8)) requiring only that a DRRA provide a "description of the permits required or already approved for the development of the real property." Whatever the stage, the Planning Commission must certify that the plan – as reflected in approvals already received and the details for its ultimate development – is "consistent with the plan of the local jurisdiction" (Article 66B, §13.01 (e)); and a DRRA must reflect such finding (Article 66B, §13.01 (f)(1)(vii)). Sole "jurisdiction" over this determination remains with the Planning Commission: "Unless the planning commission . . . determines that the proposed amendment is consistent with the plan of the local jurisdiction, the parties may not amend an agreement." (Article 66B, §13.01 (h)(2)).

The ultimate function of a DRRA is to insure continuance of the status quo: "the laws, rules, regulations and policies governing the use, density or intensity of the real property subject to the agreement shall be the laws, rules, regulations and policies in force at the time the County Commissioners and the petitioner execute the agreement"(§18-1309 (a) of the County Code). The statute and ordinance are silent as to determinations with regard to consistency, but there is no reason to suppose that this sine qua non of any agreement is an exception to the general purpose of preserving the status quo; and every reason to conclude that it is not an exception.. We note first, that re-visitation of the matter of consistency would require the Planning Commission to retrace its steps in every future procedure and, as recognized in our prior Memorandum, remove any real "finality" to any of those determinations, thus providing the possibility of continuing appeals based upon

challenges considered in a prior appeal. In short, if the matter of consistency were to be re-opened at every future stage of the development process, a DRRA would be meaningless. Further, to allow re-visitation of the matter would create a means for effectively terminating the agreement, in addition to those methods so carefully spelled out in §13.01 (i) of the statute and/or providing for application of external factors other than those specified in §13.01 (j). Finally, provisions of law specifically designed to provide finality to all other decisions of the Planning Commission would be rendered a dead letter.

We believe that the determination of consistency with the comprehensive plan, being a specific part of the DRRA program, and specifically embodied in the DRRA itself, constitutes a provision of the agreement to which "the parties to an agreement and their successors in interest are bound . . . after the agreement is recorded" (Article 66B, §.13.01 (k)(2)). Parenthetical note is made of our prior finding that the time for objection to the decision of the subject DRRA by way of appeal to the Board of Appeals has expired.

Similar considerations apply in the matter of the status of the public health, welfare or safety. By Article 66B, §13.01 (b)(1)(ix), a DRRA *must* contain "A description of the conditions, terms, restrictions, or other requirements determined by the governing body of the local jurisdiction to be necessary to ensure the public health, safety, or welfare." Perforce, a DRRA read as a whole represents a finding by the County that it contains all provisions "necessary to ensure the public health, safety, or welfare." Thereafter, the matter may be revisited only in connection with suspension or termination of the entire agreement or application of "laws, rules, regulations, and policies enacted or adopted after the effective date of the agreement" under Article 66B, §13.01 (i) and (j). It may not be raised in any other context.

These conclusions are contained in the accompanying Judgment.



John W. Sause, Jr.
Chief Judge

September 17, 2003

EXHIBIT 6

THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

ROBERT W. FOLEY, JR et al

v.

THE COUNTY COMMISSIONERS
OF QUEEN ANNE'S COUNTY et al

Civil # 10855

JUDGMENT

For reasons expressed at a hearing on January 30, 2006, and set forth in a Memorandum filed herewith (which is hereby incorporated in this Judgment for purposes of identifying the source and interpretation of the following provisions), it is **ADJUDGED AND ORDERED** that:

1. As used in this Judgment, the following words and phrases have the meanings indicated:

a-"County" means Queen Anne's County, Maryland, a municipal corporation, and includes the County Commissioners and all of its officers, boards, commissions, departments, agencies and employees.

b-"Hovnanian" means K. Hovnanian at Kent Island, LLC, and all of its officers, directors, agents, servants, employees and contractors.

c-"development area" means one of the three development areas within the Queen Anne's County critical area, each having distinct characteristics and permissive uses, as referred to in §14:1-17 B of the *Queen Anne's County Code*.

e-"growth allocation approval" means approval of a change in a development area classification by use of acreage which the County's critical area plan has set aside for creating new intensely developed areas and new limited development areas within the Chesapeake Bay Critical Area.

c-"Hovnanian project" means the proposal for use of growth

Exhibit 6



2006 FEB -9 AM 10:00
QUEEN ANNE'S COUNTY

allocation approval presented to the County by Hovnanian in June 2000, as amended or supplemented by the Hovnanian approvals.

d-"Hovnanian approvals" means the growth allocation approvals given to the Hovnanian project by the Queen Anne's County Planning Commission on June 14, 2001, by the Critical Area Commission on December 4, 2000, and July 11, 2001; and by the County Commissioners of Queen Anne's County on August 21, 2001.

2. The Court finds and declares that:

a-Neither Title 8, Subtitle 18, of the Natural Resources Article of the *Annotated Code of Maryland*, nor regulations adopted by the Critical Area Commission require or regulate the use of maps in the context of this action.

b-Section 14:1-17 B of the *Queen Anne's County Code* requires that critical area development areas be "delineated on the Official Critical Area Maps, as they may be amended from time to time." Growth allocation approval requires such amendment.

c-An amendment of an Official Critical Area Map must delineate (meaning indicate or represent that approval by drawn lines which describe, portray, or set forth with accuracy or in detail) the final approval given by the County Commissioners; must be susceptible of interpretation in accordance with Sections 14:1-6 and 14:1-18 of the *Queen Anne's County Code*; and may contain "explanatory materials."

d-Maps or overlays provided by the County Commissioners in October 2002 are void in that they do not accurately delineate the growth allocation approval previously given by the Planning Commission, the Critical Area Commission and the County Commissioners of Queen Anne's County.

e-The *Queen Anne's County Code* regards final approval of use of growth allocation and map amendment which delineates that action as distinct procedures which may occur at different times.

f-The County Commissioners gave final approval to the Hovnanian project within 120 days after notification of approval by the Critical Area Commission

g-Title 8, Subtitle 18, of the Natural Resources Article of the Code, regulations adopted by the Critical Area Commission and the "Queen Anne's County Chesapeake Bay Critical Area Act" contained in Chapter 14:1 of the *Queen Anne's County Code* do not specify the time within which maps must be provided.

h-After growth allocation approval, the County may not engage in any type of consideration, authorization, approval or action of other kind which presupposes or otherwise involves that approval, until a map properly delineating the approved development area is provided.

i-An incorrect map may be amended or replaced to reflect the actual final approval given to use of growth allocation.

j- Action approving delineation on an Official Critical Area Map must be conducted in public session.

k-Consideration and approval of a map or overlay which delineates final growth allocation approval by the County Commissioners does not require repetition of the procedures required for that final approval.

3. Subject to the provisions of paragraph 5 of this Judgment, after final approval of use of growth allocation, the County may not engage in any preliminary or final consideration, authorization, approval or action of any other kind which directly or indirectly presupposes or otherwise involves that approval.

4. Subject to the provisions of paragraph 5 of this Judgment, Hovnianian is hereby enjoined from doing any act which is directly or indirectly based upon the existence of the Hovnianian approvals.

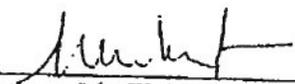
5. During the period hereafter provided in paragraph 7, the provisions of paragraphs 3 and 4 of this Judgment do not prohibit the County from preparing and adopting, in a manner which complies with the Open Meetings Act, maps which properly delineate the Hovnianian approvals. Upon submission by way of motion for approval and determination by the Court, after hearing, that those requirements have been met, the Court will vacate paragraphs 3 and 4 of this Judgment.

6. During the period hereafter provided in paragraph 7, the Court specifically retains jurisdiction for the purposes referred to in paragraph 5 and for determining, upon motion, whether specific conduct is within the prohibitions contained in paragraphs 3 and 4.

7. The provisions of paragraphs 5 and 6 of this Judgment shall expire with-

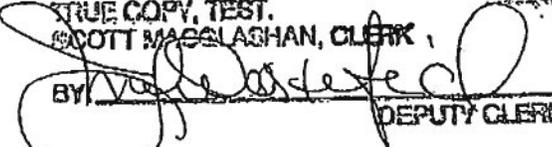
out other or further action by the Court if no determination has been made by the Court in accordance with paragraph 5 by June 1, 2006, or, if an appeal is filed from this Judgment, on the first day of the month which is at least three calendar months after receipt of a mandate of the appellate court affirming this Judgment. Upon motion filed at least 20 days prior to the expiration date referred to in the preceding sentence, the Court may extend the time for confirmation if it is shown that the need for extension has not been caused by inaction or deliberately insufficient action of the County or Hovnanian. Further extensions may be made by the Court on the same basis, upon motion filed at least 20 days prior to the expiration of an existing extension.

8. This Judgment adjudicates all of the claims presented in this action and, notwithstanding that further action is authorized by paragraph 7, the Court expressly determines in accordance with Rule 2-602 (b) that there is no just reason for delay and directs that the Clerk enter this as a final judgment.



John W. Sause, Jr.
Chief Judge (ret)
Sitting by Designation

February 8, 2006

TRUE COPY, TEST.
SCOTT MAGSLASHAN, CLERK
BY 
DEPUTY CLERK

FILED - 9 AM 10:01
SEVEN ANNE'S COUNTY

EXHIBIT 7

410 Md. 128
Court of Appeals of Maryland.

Robert W. FOLEY, Jr., et al.
v.
K. HOVNANIAN AT KENT ISLAND, LLC.

No. 35 Sept. Term, 2007.
|
Aug. 21, 2009.

critical area overlay maps did not nullify zoning ordinances.

Affirmed.

West Headnotes (14)

Synopsis

Background: Neighbors brought action for declaratory and injunctive relief, challenging the validity of county zoning ordinances which redesignated land in county's bayside critical area from resource conservation area (RCA) and limited development area (LDA) to intense development area (IDA) in order to accommodate planned development. Developer intervened in the litigation as a defendant and filed motion for summary judgment, and neighbors filed cross-motion for summary judgment. The Circuit Court, Queen Anne's County, John Sause, Jr., J., entered judgment for neighbors, denied developer's motion to alter or amend, and denied neighbors' motion to modify injunctions. Developer appealed, and neighbors cross-appealed. The Court of Special Appeals reversed, and neighbors file petition for writ of certiorari, which was granted.

Holdings: The Court of Appeals, Bell, C.J., held that:

- ^[1] residents preserved for appeal issue of whether zoning ordinances were invalid due to lack of attached revised overlay maps;
- ^[2] failure of ordinances to describe the location of the new district boundaries in meets in bounds or by revised overlay maps did not render ordinances invalid;
- ^[3] accurate overlay maps did not have to be drafted and filed with zoning ordinances in order for developer's growth allocation to be effective;
- ^[4] county employees were not required to follow any formal process before correcting cartographic errors on critical area overlay maps; and

commissioners clearly approved developer's later growth allocation plan such that absence of attached

^[1] **Zoning and Planning**

↻ Preservation below of grounds of review

Residents adequately asserted in memorandum in support of summary judgment that zoning ordinances which redesignated land in county's bayside critical area were invalid because their text expressly and explicitly provided, and thus required, that revised overlay maps would be attached, and thus preserved issue for appeal. Md.Rule 8-131(a).

Cases that cite this headnote

^[2] **Appeal and Error**

↻ Grounds of Review

Appeal and Error

↻ References to Record

Every party has a responsibility not only to ensure that a proper record is made but also to refer the reviewing court to the proper location in the record carefully and accurately.

Cases that cite this headnote

^[3] **Appeal and Error**

↻ Necessity of presentation in general

Ordinarily, an appellate court will not review an issue that has not been preserved in the trial court. Md.Rule 8-131(a).

1 Cases that cite this h

141 Zoning and Planning
↳ Particular Uses or Restrictions

Failure of county zoning ordinances, which redesignated land in county's bayside critical area in order to accommodate planned development, to describe the location of the new district boundaries in meets in bounds or by revised overlay maps did not render ordinances invalid; ordinances contained a geographical description of the property, ordinances only changed the development categories on property belonging to developer, there was ample notice to the surrounding property owners of developer's petition for growth allocation, and county's clear intent was to approve developer's project, which required approval of its growth allocation petition.

Cases that cite this headnote

151 Municipal Corporations
↳ Construction and operation
Statutes
↳ Intent

The Court's task, when the meaning of legislation is at issue, is to ascertain and effectuate the real intent of the legislative body enacting it; this interpretive principle applies whether the legislative enactment is by a state legislature or is one passed by a local legislative body.

Cases that cite this headnote

161 Zoning and Planning
↳ Filing, publication, and posting; minutes and findings

Accurate critical area overlay maps did not have to be drafted and filed with zoning ordinances which redesignated developer's land in county's

bayside critical area in order for developer's growth allocation to be effective, although ordinances specifically stated they adopted attached maps but maps were not attached; statutes did not address the specific role which maps played in the growth allocation process, amendment of overlay maps was not a precondition under county code to the authority of the county commissioners to give final approval to a growth allocation petition, and regulatory authorities could ascertain whether development activity was lawful without accurate overlay maps. West's Ann.Md.Code, Natural Resources, §§ 8-1802(a)(11), 8-1808.1(c)(4), 8-1809(g).

1 Cases that cite this headnote

171 Municipal Corporations
↳ Construction and operation

When presented with a question involving statutory interpretation, the court begins with the words of the ordinance, since the words of the ordinance, construed according to their ordinary and natural import, are the primary source and most persuasive evidence of legislative intent.

2 Cases that cite this headnote

181 Statutes
↳ Intent

The court's goal in construing a statute is to effectuate the intent of the legislative body.

Cases that cite this headnote

191 Statutes
↳ Departing from or varying language of statute

The Court will neither add nor delete language in a statute so as to subvert that body's plain and unambiguous intent in enacting the particular

legislation.

1 Cases that cite this headnote

[10] Municipal Corporations
Construction and operation

The court construes an ordinance so as to give effect to each word so that no word, clause, sentence or phrase is rendered superfluous or nugatory.

5 Cases that cite this headnote

[11] Municipal Corporations
Construction and operation

If an ordinance is clear and unambiguous, the court's inquiry is at an end; if, however, the language in an ordinance is ambiguous, then the court will look to external sources in an effort to glean the legislature's intent.

Cases that cite this headnote

[12] Zoning and Planning
Map

County employees were not required by statute or county code to follow any formal process before correcting cartographic errors on critical area overlay maps, but rather were required to correct any such drafting errors as revealed. West's Ann.Md.Code, Natural Resources, § 8-1809(l)(1).

Cases that cite this headnote

[1] Zoning and Planning
Map

County commissioners clearly approved developer's later growth allocation plan such that absence of attached critical area overlay maps did not nullify zoning ordinances which redesignated developer's land in county's bayside critical area and which specifically referred to the adoption of attached maps, where commissioners passed resolution, developer subsequently submitted an amended growth allocation plan to reflect the conditions mandated by that resolution, and all administrative agencies voted to approve that amended plan.

Cases that cite this headnote

[14] Evidence
Official Proceedings and Acts

In the absence of evidence to the contrary, administrative officers will be presumed to have properly performed their duties.

1 Cases that cite this headnote

Attorneys and Law Firms

****224** C. Daniel Saunders (Cristina Hardin Landskroener, Chestertown, MD), on brief, for Petitioners.

Brief of Amicus curiae, Chester River Ass'n, Inc.: Thomas A. Deming, Annapolis, MD.

Brief of Amicus Curiae The Chesapeake Bay Foundation, Inc.: Jon A. Mueller, Esquire, Amy E. McDonnell, Esquire, Annapolis, MD.

John H. Zink, III (Venable, L.L.P., Towson, MD; Nancy L. Slepicka of O'Malley, Miles, Nylan & Gilmore, P.A., LaPlata, MD), on brief; Joseph A. Stevens of Stevens, Phillips & McCann, L.L.C., Centerville, MD, on brief, for Respondent.

ARGUED BEFORE BELL, C.J., RAKER*, HARRELL, BATTAGLIA, JOHN C. ELDRIDGE, (Retired, specially assigned), ALAN M. WILNER, (Retired, specially assigned).

assigned) and DALE R. CATHELL, (Retired, specially assigned), JJ.

BELL, Chief Judge.

*132 I. Introduction

The Chesapeake Bay is nothing short of magnificent. For decades, fishermen **225 found plentiful supplies of blue crabs, clams and oysters in its waters. Over time, however, the results of increased human activity on, in and near the Bay saw its deterioration and the decrease in the fruits it bore. In 1984, the Maryland General Assembly responded in part. It enacted the Chesapeake Bay Critical Area Protection Program ("the Program"), see Maryland Code (2007 Repl. Vol.) §§ 8-1801 to 8-1817 of the Natural Resources Article, to counteract the increasing levels of deterioration that human activity near the Chesapeake Bay's waters and habitats was causing. The Program required all local jurisdictions, under the direction of a newly created Chesapeake Bay Critical Area Commission, to formulate and implement a plan to control development near certain shoreline areas. § 8-1801(b)(1)-(b)(2). Queen Anne's County adopted such a Critical Area Program, the provisions of which were set forth in Queen Anne's County Code, Environmental Protection Article, Chapter 14.

The Queen Anne's County program divides land within the Critical Area into three development categories: Resource Conservation Area ("RCA"), Limited Development Area ("LDA") and Intensely Developed Area ("IDA"). Development *133 on land in the RCA is highly restricted; only one dwelling per 20 acres is permitted. Land within the LDA is subject to fewer development restrictions; however, that area only allows impervious surfaces to comprise 15% of the development that occurs in that designated area. The IDA, the least restrictive development classification, allows most land uses, although it does require strict adherence to performance standards for storm water runoff. In addition, consistent with, and as permitted by, § 8-1808.1(b)¹ of the Natural Resources Article, Queen Anne's County retained a growth allocation.² Section 8-1808.1(c) permits a local jurisdiction to retain the power to reclassify land designated as RCA into either or both of the less restrictive development categories, IDA or LDA. Nevertheless, before the Queen Anne's County Commissioners may grant a growth allocation petition,

approval from the Critical Area Commission first must be obtained. Q.A.C.C. § 14:1-77(E).³

**226 *134 K. Hovnanian at Kent Island, LLC ("Hovnanian"), the respondent, is the developer of Four Seasons at Kent Island ("Four Seasons"), an "active adult, age restricted" community, located in Queen Anne's County, Maryland. The plans for Four Seasons provide for 1,350 dwelling units, an assisted living facility and various community and recreational amenities, to be constructed on approximately 560 acres of land situated within the Chesapeake Bay Critical Area. Hovnanian thus was required to request that the Queen Anne's County Commissioners exercise their authority to reclassify the retained growth allocation so that more intensive development could occur on certain portions of the proposed site.

Article XV, § 14:1-76⁴ of the Queen Anne's County Code ("Q.A.C.C."), outlines **227 the steps that an applicant seeking a *135 growth allocation must follow. In conformance with that provision, Hovnanian submitted a concept plan (the "2000 Growth Allocation Plan") and a Petition for Growth Allocation to the Queen Anne's County Commissioners on June 9, 2000. The 2000 Growth Allocation Plan was a plat that depicted the acreage and location of the land Hovnanian wanted the Commissioners to reclassify from RCA to either LDA or IDA. On June 13, 2000, the County Commissioners forwarded Hovnanian's *136 Petition for Growth Allocation and the 2000 Growth Allocation Plan to the Queen Anne's County Planning Commission, which conducted a public hearing and recommended that Hovnanian's Growth Allocation Petition be approved, with several conditions. The County Commissioners accepted that recommendation, granted "conceptual approval" to Hovnanian's Petition for Growth Allocation and forwarded the Petition to the Chesapeake Bay Critical Area Commission for approval. The Critical Area Commission, following a public hearing and public comment, approved Hovnanian's Petition and the 2000 Growth Allocation Plan.

The County Commissioners held a public hearing on Hovnanian's Petition, following which it made "Findings of Fact." Subsequently, the County Commissioners passed Resolution No. 01-13, proposing to approve Hovnanian's Growth Allocation Petition, subject to numerous conditions. One of the conditions was that Hovnanian "enter into a legally binding Developers Rights and Responsibilities Agreement with the County." The County Commissioners then referred their proposed approval, along with the outlined conditions, back to the Critical Area Commission for its review and approval.

Hovnanian prepared an Amended Concept/Sketch Plan that incorporated the conditions imposed by Resolution No. 01-13. This Amended Concept/Sketch Plan (the "2001 Growth Allocation Plan"), referencing the conditions, included a revised Growth Allocation Plan that was labeled and referred to as "Sheet 7 of 8." The County's Planning Commission and the Critical Area Commission approved Hovnanian's 2001 Growth Allocation Plan. Subsequently, with the enactment of Ordinances 01-01 and 01-01A on August 21, 2001, the Queen Anne's County Commissioners approved Hovnanian's 2001 Growth Allocation Plan. Together, Ordinances 01-01 and 01-01A granted Hovnanian the Growth Allocation it sought. Ordinance 01-01 provided, in relevant part:

137** "FOR THE PURPOSE of utilizing Critical Area Growth Allocation to redesignate 293.25 acres of property near Stevensville, Maryland from Resource Conservation Area (RCA) to Intense Development Area (IDA) and to utilize pre-mapped growth allocation to redesignate 79.55 acres of land from Limited Development Area (LDA) to Intense Development Area (IDA) by amending part of parcels 7, 8 and 11 on Queen Anne's County Official Chesapeake Bay Critical Area Map No. 49 and Parcels 1, 8, 347 and *228** 532 on Official Chesapeake Bay Critical Area Map No. 57."

Ordinance 01-01 also provided:

"BE IT ENACTED BY THE COUNTY COMMISSIONERS OF QUEEN ANNE'S COUNTY, MARYLAND that Title 14 of the Code of Public Local Laws of Queen Anne's County (1996 Ed.) be amended by the repeal of Official Chesapeake Bay Critical Area Map Nos. 49 and 57 and the adoption of the attached Map Nos. 49 and 57 as the Official Chesapeake Bay Critical Area Map Nos. 49 and 57." (Emphasis Added).

Ordinance 01-01A conditioned approval given by the

County Commissioners of the Hovnanian Growth Allocation Petition both on Hovnanian entering into a Developer Rights and Responsibilities Agreement with the County and satisfying the conditions imposed on the project by its earlier conditional approval of Resolution No. 01-13.

It is undisputed that, when the Queen Anne's County Commissioners enacted Ordinances 01-01 and 01-01A on August 21, 2001, no Critical Area Overlay Maps' were attached to the *138 Ordinances. Instead, several months later, on December 4, 2001, the Queen Anne's County Commissioners signed Overlay Maps 49 and 57 (the "2001 Overlay Maps"). There were cartographic errors on the 2001 Overlay Maps, however. Therefore, revised Overlay Maps were drafted and submitted to the County Commissioners on October 8, 2002 (the "2002 Overlay Maps").

After litigation commenced in this case, the Circuit Court for Queen Anne's County appointed an independent surveyor to evaluate whether the 2002 Overlay Maps accurately depicted Hovnanian's 2001 Growth Allocation Plan. The surveyor's report determined that the 2002 Overlay Maps also contained a cartographic error—the maps wrongly classified as in IDA 7.5 acres of property belonging to a third-party, when that property actually was classified RCA—a fact that Hovnanian acknowledged in open court to be correct.

II. Procedural History

Kent Island resident Robert W. Foley, along with three other individual plaintiffs and Queen Anne's Conservation Association, Inc. (the petitioners), filed, in April of 2005 in the Circuit Court for Queen Anne's County, a complaint for declaratory and injunctive relief. In that action, they challenged the validity of Ordinances 01-01 and 01-01A. Hovnanian intervened in the litigation as a defendant and filed a Motion for Summary Judgment. After twice amending their complaint, the plaintiffs filed their own Motion for Summary Judgment. After three hearings on the Cross-Motions for Summary Judgment, the Circuit Court issued a Memorandum Opinion and entered Judgment in favor of the plaintiffs. That judgment enjoined Hovnanian from utilizing the County's award of growth allocation until accurate Critical ****229** Area Overlay Maps had been drafted. Hovnanian responded by motioning both to alter or amend the judgment, pursuant to Maryland Rule 2-534, and to modify the injunctions. Hovnanian's ***139** Motion to Alter or Amend the Circuit Court's Judgment argued, as relevant here, that accurate

Overlay Maps, delineating where the growth allocation had been awarded, were not a condition precedent to the acts pertinent or necessary to that approval and, therefore, that the Circuit Court erred in declaring otherwise. In addition, Hovnanian's Motion to Modify Injunctions sought permission from the Circuit Court to request that the Department of Planning and Zoning extend the time period available for Hovnanian to seek site plan and subdivision approval for Four Seasons. The Circuit Court denied both Motions, whereupon Hovnanian noted an appeal to the Court of Special Appeals. The plaintiffs filed a cross-appeal.

The Court of Special Appeals, in an unreported opinion, reversed the judgment of the Circuit Court, including the injunction, holding that the enactment of Ordinances 01-01 and 01-01A constituted final legislative action granting Hovnanian's Growth Allocation Petition. The intermediate appellate court reasoned that the effectiveness of the approval of a Growth Allocation Petition did not depend upon the drafting, and therefore, the existence, of accurate Overlay Maps. Aggrieved, the plaintiffs filed a Petition for a Writ of Certiorari, which this Court granted. *Foley v. Hovnanian*, 399 Md. 595, 925 A.2d 634 (2007).

One of the central issues in this case is whether, where the ordinances approving a growth allocation petition, enacted by the County Commissioners, reference Critical Area Overlay Maps, the effectiveness of that approval depended on the existence of such maps and on their being filed with the ordinances when the ordinances were enacted.⁶ We shall ***140** hold, for the reasons that follow, that amended Critical Area Overlay Maps do not have to be in existence when, or filed at the same time that, the ordinances granting the amendments reflected on the maps are enacted.

III. Legal Analysis

¹¹ Ordinances 01-01 and 01-01A memorialized the Queen Anne's County Commissioners' approval of Hovnanian's Growth Allocation Petition. They did so "by the repeal of Official Chesapeake Bay Critical Area Map Nos. 49 and 57 and the adoption of the attached Map Nos. 49 and 57 as the Official Chesapeake Bay Critical Area Map Nos. 49 and 57." See Queen Anne's County Ordinances 01-01 and 01-01A (Emphasis Added). The petitioners' first argument, therefore, is that Ordinances 01-01 and 01-01A are invalid because ****230** their text expressly and explicitly provided, and thus required, that revised Overlay Maps would be attached to the

ordinances when, in actuality, none were. They assert that, because no Overlay Maps actually were attached to these Ordinances, enactment of these Ordinances by the Queen Anne's County Commissioners was a nullity. The petitioners reason that, without the Overlay Maps, the County Commissioners had no way of knowing the impact granting Hovnanian's Growth Allocation Petition would have or how the boundaries for the various development categories would be affected. They note that Hovnanian's request for growth allocation did not follow readily identifiable landmarks such as property lines or roadways, making the attachment of the referenced Overlay Maps even more critical, if not essential, to the ability of each of the ***141** County Commissioners to understand the consequences of his or her vote. According to the petitioners, the absence of a metes and bounds description of the development boundaries or of text in the Ordinances directing a reader to a specific plat containing that information, made it impossible for the County Commissioners to know the location of the growth allocation they were approving and, therefore, its effect or impact on the Critical Area regime.

¹² The Court of Special Appeals held that the petitioners waived the Overlay Maps issue. In reaching this conclusion, the intermediate appellate court referred not only to the record, but also to the Circuit Court's observation that "[a]ll parties recognize in one way or another that the action of the County Commissioners on August 21, 2001, represented final approval of the Hovnanian proposal in terms of the conditions stated in Ordinance 01-01A and other documents containing the County Commissioners' resolution of April 17, 2001, and conditions of the Planning Commission and CAC [the Critical Area Commission]." In the petitioners' brief to this Court, they proffer that they have preserved this argument for review, stating that "the issue was fully briefed in Plaintiff's (sic) [M]emorandum in [S]upport of Summary Judgment at pages E-21-22." Brief of Appellants at 9.

¹³ Ordinarily, an appellate court will not review an issue that has not been preserved in the trial court. Maryland Rule 8-131(a) provides, in relevant part, that "[o]rordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the ***142** trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." The rationale for this preservation rule is the promotion of the orderly administration of the law and the desirability that all parties in a case have a fair opportunity to address fully the issues raised by opposing counsel. See *Brice v. State*, 254 Md. 655, 255 A.2d 28

1969); *Basoff v. State*, 208 Md. 643, 119 A.2d 917 (1956).

On review of the Plaintiffs' Memorandum in Support of Summary Judgment, we **231 are satisfied that the petitioners did preserve this issue for review. There, the petitioners argued:

"In this case though, there is no 'ambiguity.' Ordinance 01-01A clearly and unequivocally 'adopt[ed]' nothing more nor less than certain 'attached' maps. These words must be given meaning: the courts may 'not add words or ignore those that are there'. In fact, no maps were 'adopt[ed]'. For this reason alone, Ordinance 01-01A must fall." (Citations and italics omitted).

¹⁴¹ The petitioners assert that since the maps were not attached to the Ordinances, as the Ordinances' text expressly and explicitly stated they would be, the Ordinances are invalid. This is especially so, they continue, because the Ordinances lacked any metes and bounds description indicating the location of the growth allocation the County Commissioners were authorizing. The petitioners rely on *Soron Realty Co. v. Town of Geddes*, 23 A.D.2d 165, 259 N.Y.S.2d 559 (N.Y.App.Div.1965).

In *Soron*, zoning amendments enacted by the Town of Geddes were challenged. In 1942, the Town of Geddes, the appellee, adopted a Zoning Ordinance under which property, owned by Soron Realty Co., Inc. (Soron) was unclassified. That property was leased by Solvay Iron Works, Inc. (Solvay), a small steel fabricating operation, which, in 1948, slowly began to expand its operations. The property remained unclassified until the zoning amendments at issue in *Soron* sought to classify it as Commercial A. In 1954, the Town of Geddes enacted amendments to the Zoning Ordinance that *143 reclassified multiple properties. Soron, 23 A.D.2d at 166, 259 N.Y.S.2d at 560. The property owned and leased by Soron and Solvay, the appellants, was one of the properties reclassified. Dissatisfied and because the reclassification adversely affected Solvay's business, the appellants challenged the validity of the 1954 Amendments.⁸ Their challenge was two-fold. First, they argued that, before the enactment of the 1954 Amendments, the appellants had a nonconforming use as to the entire property. Second, they maintained that the enactment of the 1954 Amendments did not comply with the procedural requirements of a section of the Town Law. *Soron*, 23 A.D.2d at 166, 259 N.Y.S.2d at 561. It was the latter argument which the New York intermediate appellate court found persuasive and, thus, on which it based its holding.

Section 264 of the Town Law, the section on which the *Soron* appellants relied, required that "every amendment to a zoning ordinance (including any map incorporated therein) * * * shall be entered in the minutes of the town board * * * and a copy of such ordinance or amendment together with a copy of any map incorporated therein shall be posted on the sign board maintained by the town clerk." *Soron*, 23 A.D.2d at 167, 259 N.Y.S.2d at 561. Soron and Solvay asserted that the procedural requirements of Section 264 were not satisfied because the 1954 Zoning Amendments did not include a geographical description of the areas impacted by the amendments, nor were the new zoning maps entered into the Town Board's minutes. Additionally, Soron and Solvay argued that the 1954 Amendments were not enacted pursuant to Section 264 because **232 no new zoning map was placed on the signboard maintained by the Town Clerk. *Soron*, 23 A.D.2d at 167, 259 N.Y.S.2d at 561.

*144 The *Soron* court held that the Town Board's failure to comply with the procedural requirements of Section 264 rendered the 1954 Zoning Amendments invalid. *Soron*, 23 A.D.2d at 167, 259 N.Y.S.2d at 561. The intermediate appellate court reasoned that, in light of its earlier precedent, the Town Board's failure to publish the proposed New Zoning Map or to provide a geographical description of the affected properties denied to affected property owners the right to know the zoning classification of their property. *Soron*, 23 A.D.2d at 168, 259 N.Y.S.2d at 562.

The petitioners in the case *sub judice*, believing the cases to be factually quite close, proffer that, just as the *Soron* court found it essential that property owners have proper notice of zoning changes, Queen Anne's County residents also are entitled to know when and where the County Commissioners have awarded growth allocation. Because no maps were attached to Ordinances 01-01 and 01-01A, they argue that Queen Anne's County property owners, like the property owners in *Soron*, were deprived of this important and essential information.

The respondent does not agree. It proffers that, under the petitioners' view, literal intent would trump the real intention of the Queen Anne's County Commissioners in enacting Ordinances 01-01 and 01-01A. In support of this proposition, the respondent argues:

"In the case of a mistake in a reference in a statute to another statute, to a constitutional provision, or to a public document, record, or the like, where the real intent of the legislature is manifest, and would be defeated by an adherence to the terms of the mistaken reference, the mistaken reference will be regarded as

surplusage, or will be read as corrected, in order to give effect to the legislative intent.” (Footnotes omitted).

Quoting 73 Am.Jur.2d *Statutes* § 122 (2006). See *Tatlow v. Bacon*, 101 Kan. 26, 31, 165 P. 835, 837 (1917) (citing *Coney v. Mayor & Comm’rs of Topeka*, 96 Kan. 46, 49, 149 P. 689, 690 (1915)) (Legislative enactments containing errors, omissions or *145 mistakes will not be the basis for defeating a statute when the intent of the Legislature is obvious). See also *Metro. Life Ins. Co. v. Durkin*, 195 Misc. 1040, 1045, 91 N.Y.S.2d 26, 31–32 (1949). The respondent concludes: the failure of the Queen Anne’s County Commissioners to attach Overlay Maps 49 and 57 should not overshadow the real intention of the Queen Anne’s County Commissioners when they enacted Ordinances 01–01 and 01–01A, which was to approve Hovnanian’s Growth Allocation Petition. We agree.

The preamble to Ordinance 01–01 provides:

“An act concerning the Repeal and Readoption with amendments of the Public Local Laws of Queen Anne’s county (1996 Ed.) Title 14, *Environmental Protection*, 1996 Official Chesapeake Bay Critical Area Map Nos. 49 and 57.

“For the purpose of utilizing Critical Area Growth Allocation to redesignate 293.25 acres of property near Stevensville, Maryland from Resource Conservation Area (RCA) to Intense Development Area (IDA) and to utilize pre-mapped growth allocation to redesignate 79.55 acres of land from Limited Development Area (LDA) to Intense Development Area (IDA) by amending part of parcels 7, 8 and 11 on Queen Anne’s County Official Chesapeake Bay Critical Area Map No. 49 and Parcels 1, 8, 347 and 532 on Official Chesapeake Bay Critical Area Map No. 57.”

**233 There seems to be no dispute, and certainly there is no doubt, that the land referred to in the preamble to Ordinance 01–01 is that belonging to the Four Seasons at Kent Island. Nevertheless, and even though the preamble unequivocally declares that Ordinance 01–01 was intended to utilize growth allocation for the Four Seasons property, the petitioners maintain that this Court should invalidate Ordinances 01–01 and 01–01A because no maps reflecting what the Commissioners approved had been drafted and no such maps were attached to the Ordinances. That is contrary to the court’s duty, however.

¹⁵¹ This Court’s task, when the meaning of legislation is at issue, is to ascertain and effectuate the real intent of the legislative body enacting it. *146 *Andrews v. City of Greenbelt*, 293 Md. 69, 75, 441 A.2d 1064, 1068–69

(1982) (citing *Harbor Island Marina, Inc. v. Bd. of County Comm’rs*, 286 Md. 303, 311, 407 A.2d 738, 742 (1979)). To be sure, this interpretive principle applies whether the legislative enactment is by a state legislature or is one passed by a local legislative body. See *Trip Associates, Inc. v. Mayor & City Council*, 392 Md. 563, 573, 898 A.2d 449, 455–56 (2006) (citing *County Council v. E.L. Gardner, Inc.*, 293 Md. 259, 268, 443 A.2d 114, 119 (1982)); *O’Connor v. Baltimore County*, 382 Md. 102, 113, 854 A.2d 1191, 1198 (2004) (“Local ordinances and charters are interpreted under the same canons of construction that apply to the interpretation of statutes.”); *Waters Landing Ltd. P’ship v. Montgomery County*, 337 Md. 15, 28, 650 A.2d 712, 718 (1994); *Village Square No. 1, Inc. v. Crow–Frederick Retail Limited Partnership*, 77 Md.App. 552, 562, 551 A.2d 471, 475 (1989) (interpreting City of Frederick, Maryland Code § 22–35). By enacting Ordinances 01–01 and 01–01A, the Queen Anne’s County Commissioners intended to approve Hovnanian’s project which required approval of its growth allocation petition. That was their real intent. If this Court were to adopt the petitioners’ reasoning, we would be placing form over substance and disregarding the real intent of the Queen Anne’s County Commissioners.

The petitioners’ reliance on *Soron Realty Co. v. Town of Geddes*, 23 A.D.2d 165, 259 N.Y.S.2d 559 (1965) is not persuasive. The notice concerns in *Soron* are absent here. The proposition for which the petitioners rely on *Soron* is that, without the Overlay Maps attached to Ordinances 01–01 and 01–01A, Queen Anne’s County landowners would not have notice of the development category into which the subject property would fall or of any contemplated change to that development category that the County Commissioners’ approval of the Hovnanian Growth Allocation Petition would effectuate. This argument lacks merit because here, unlike in *Soron*, Queen Anne’s County residents were given a description of the property that was being awarded growth allocation. In the preamble to Ordinance 01–01, approving the growth allocation at issue here, the Queen Anne’s County Commissioners *147 reclassified “293.25 acres of property near Stevensville, Maryland ... by amending part of parcels 7, 8 and 11 on Queen Anne’s County Official Chesapeake Bay Critical Area Map No. 49 and Parcels 1, 8, 347 and 532 on Official Chesapeake Bay Critical Area Map No. 57.” The 1954 Zoning Amendments in *Soron*, on the other hand, contained no geographical description of the reclassified boundaries enacted by the Town Board, and Town Officials failed to publish the map containing such information. *Soron*, 23 A.D.2d at 166, 259 N.Y.S.2d at 561. Thus, citizens in the Town of Geddes had no way of knowing which properties were impacted by the

reclassifications that occurred as a result of the 1954 Amendments. Ordinance 01- **234 01, on the other hand, contained a geographical description of the properties that would be reclassified as a result of the County Commissioners' approval of Hovnanian's Growth Allocation Petition.

In addition, the growth allocation ordinances enacted in this case, unlike the zoning amendments enacted in *Soron*, only changed the development categories on one property, that belonging to The Four Seasons. Said otherwise, Ordinance 01-01 and 01-01A did not intend to affect the level of development that any surrounding landowners could engage in because the ordinances only altered the classification of the development categories on the Four Seasons' property. *See* Q.A.C.C. § 14:1-77(A) ("A request for growth allocation petition may be initiated by a *petition of the property owner filed with the County Commissioners.*" (Emphasis added)). Thus, growth allocation is awarded only to property owners that file the requisite petition with the Queen Anne's County Commissioner.

To be sure, like zoning, where non-petitioning landowners can be affected by a county's legislative acts, *see Harbor Island Marina v. Board of County Commissioners*, 286 Md. 303, 312-13, 407 A.2d 738, 743 (1979) (stating that Maryland counties within the limits of the police power, have broad authority to exercise zoning powers), the award of growth allocation can affect the property of a non-growth allocation awardee. That is not the concern that the *Soron* case addressed. *148 There was ample notice to the surrounding property owners of Hovnanian's petition for growth allocation. Indeed, Robert W. Foley, the named petitioner in this case, addressed the Critical Area Commission on September 12, 2000 about Hovnanian's Growth Allocation Petition. Moreover, Foley was informed about Hovnanian's Growth Allocation Petition for Four Seasons, as were other contiguous property owners pursuant to Q.A.C.C. § 14:1-77(B).⁹ Q.A.C.C. § 14:1-77(B) required that an announcement of the public hearing on Hovnanian's Growth Allocation Petition be published in a County newspaper at least 14 days prior to the hearing before the Planning Commission. The ample notice that both Foley and Queen Anne's County residents received further detracts from Foley's argument that notice, or the lack thereof, was an issue when Queen Anne's County Commissioners enacted the Ordinances with no maps attached. There simply is no issue of the kind addressed in *Soron*, whether the property owner whose property had been reclassified had notice, or sufficient notice, of the classification.

¹⁶ The central point of contention in this case is whether accurate Overlay Maps had to be drafted and filed with the approving ordinances, which the County Commissioners enacted, in order for Hovnanian's growth allocation to be effective. The petitioners refer this Court to Maryland Code (2000 Repl. Vol., 2006) § 8-1808.1(c)(4) of the Natural Resources Article:

****235 *149** "New intensely developed or limited development areas to be located in the resource conservation area shall conform to all criteria of the Commission for intensely developed or limited development areas and shall be designated on the comprehensive zoning map submitted by the local jurisdiction as part of its application to the Commission for program approval or at a later date in compliance with § 8-1809(g) of this subtitle[.]"

We disagree with the petitioners' reliance on that section.¹⁰ Section 8-1808.1(c)(4) addresses a county's initial establishment of a Critical Area Program and the periodic review of that program that counties must undertake as required by § 8-1809(g) of the Natural Resources Article.¹¹ In Maryland *150 Code (2000 Repl. Vol., 2006) § 8-1808 of the Natural Resources Article, local jurisdictions are directed to establish a Critical Area Program, such as the one adopted by Queen Anne's County, that establishes certain land use policies for development in areas surrounding the Chesapeake Bay. Maryland Code (2000 Repl. Vol., 2006) § 8-1809(g) of the Natural Resources Article provides that "[e]ach local jurisdiction shall review its entire program and propose any necessary amendments to its entire program, including local zoning maps, at least every 4 years beginning with the 4-year anniversary of the date that the program became effective and every 4 years after that date." As pointed out by the respondent, this statutory language does not require **236 or even imply that Overlay Maps for every award of Growth Allocation by County Commissioners be added before any such Growth Allocation Petition can be approved and become effective. Instead, § 8-1808.1(c)(4) and § 8-1809(g) require only that maps outlining newly classified IDA or LDA areas be provided to the Chesapeake Bay Critical Area Commission at the inception of a county's program and every four years thereafter. As neither § 8-1808 nor §

1809 addresses the specific role that Overlay Maps play in the Growth Allocation Petition process, and more particularly, whether the effectiveness of the County Commissioners' approval of Hovnanian's Growth Allocation Petition is contingent on the attachment to the Ordinances of accurate Critical Area Overlay Maps depicting the approved Growth Allocation, we turn our attention to Q.A.C.C. § 14:1-77.

*151 Article XV, § 14:1-77 of the Queen Anne's County Code addresses the Growth Allocation Petition process. Q.A.C.C. § 14:1-77(F) and (G) provide:

"F. Final approval by the County Commissioners.

"(1) Within 120 days of receiving notification from the Critical Area Commission that the proposed growth allocation petition has been conditionally approved pursuant to the provisions of § 8-1809 of the Natural Resources Article of the Annotated Code of Maryland, the County Commissioners shall introduce legislation and take final legislative action on the proposed growth allocation.

(2) If the Planning Commission has recommended approval of a growth allocation petition and the County Commissioners propose to approve an award of growth allocation which substantially changes or departs from those recommendations, the proposal of the County Commissioners shall be referred to the Planning Commission, in writing, for its further recommendations and to the Critical Area Commission for review and approval prior to any legislative action. If such recommendations are not received by the County Commissioners within 90 days after the proposal has been transmitted to the Planning Commission, the County Commissioners may proceed to take final action without such recommendations.

(3) A growth allocation petition shall not be effective until after it is approved by the Critical Area Commission and not until 45 days after approval by the County Commissioners.

"G. Map amendment. The Official Critical Area Map(s) will be amended to reflect the new development area designation when the approved growth allocation petition becomes effective."

Pursuant to Queen Anne's County Code § 14:1-77(F), there is a 45 day waiting period between the time when the Queen Anne's County Commissioners' approve an applicant's petition for growth allocation and when that applicant's approved petition can become effective. Thus,

approval of a petition for *152 growth allocation and the effectiveness of the approved petition are not events that occur simultaneously.

[7] [8] [9] [10] [11] When presented with a question involving statutory interpretation, we begin with the words of the ordinance "since the words of the [ordinance], construed according to their ordinary and natural import, are the primary source and most persuasive evidence of legislative intent." *Lanzaron v. Anne Arundel County*, 402 Md. 140, 149, 935 A.2d 689, 694 (2007) (quoting *Rose v. Fox Pool Corp.*, 335 Md. 351, 359, 643 A.2d 906, 909 (1994)). Our goal is to effectuate the intent of the legislative body. *Comptroller of the Treasury **237 v. Science Applications Int'l Corp.*, 405 Md. 185, 198, 950 A.2d 766, 773 (2008); *Ishola v. State*, 404 Md. 155, 160, 945 A.2d 1273, 1276 (2008); *Taylor v. Mandel*, 402 Md. 109, 128, 935 A.2d 671, 682 (2007). This Court will neither add nor delete language in a statute so as to subvert that body's plain and unambiguous intent in enacting the particular legislation. *Maryland Overpak Corp. v. Mayor & City Council*, 395 Md. 16, 47, 909 A.2d 235, 253 (2006) (quoting *Kushell v. Dep't of Natural Res.*, 385 Md. 563, 576-77, 870 A.2d 186, 194 (2005)). We construe the ordinance so as to give effect to each word so that no word, clause, sentence or phrase is rendered superfluous or nugatory. *Kushell*, 385 Md. at 577, 870 A.2d at 193 (citing *Collins v. State*, 383 Md. 684, 691, 861 A.2d 727, 732 (2004)). Thus, if an ordinance is clear and unambiguous, our inquiry is at an end. *Kushell*, 385 Md. at 577, 870 A.2d at 193-94. If, however, the language in an ordinance is ambiguous, then we will look to external sources in an effort to glean the legislature's intent. *Kushell*, 385 Md. at 577, 870 A.2d at 194.

In outlining the process for the Queen Anne's County Commissioners to approve a Growth Allocation Petition, § 14:1-77(F) provides, in part, that within 120 days of receiving the Critical Area Commission's conditional approval of a proposed growth allocation petition, the County Commissioners must introduce legislation and take "final legislative action" on the proposed growth allocation. Q.A.C.C. § 14:1-77(F)(1). If, however, the County Commissioners propose to *153 approve a growth allocation petition that substantially deviates from the terms of a proposed petition that previously has been reviewed and approved by the Planning Commission and the Critical Area Commission, then the County Commissioners must, in writing, once again refer the revised petition, with the Commissioners' proposed changes, to the Planning Commission and to the Critical Area Commission. In the absence of further action or recommendation on the revised petition by the Planning

Commission or the Critical Area Commission within 90 days, the County Commissioners “may proceed to take final action without such recommendations.” Q.A.C.C. § 14:1-77(F)(2).

The first mention of Critical Area Overlay Maps occurs in Q.A.C.C. § 14:1-77(G):

“G. Map amendment. The Official Critical Area Map(s) will be amended to reflect the new development area designation when the approved growth allocation petition becomes effective.”

The fact that Q.A.C.C. § 14:1-77(G) is not found in the subsection entitled “Final approval by the County Commissioners” is significant. It indicates, or at least is some evidence, that the amendment of Critical Area Overlay Maps is not a precondition to the authority of the County Commissioners to give final approval to a growth allocation petition. *See Morris v. Prince George’s County*, 319 Md. 597, 604, 573 A.2d 1346, 1349 (1990) explaining that the interpretation of a statute is influenced by the context in which it appears.

There is not one word in § 14:1-77(G) to which the petitioners have pointed, and this Court has found none, that indicates that accurate Critical Area Overlay Maps have to be drafted and filed before the County Commissioners’ approval of a growth allocation petition will take effect.¹² **238 Instead, the *154 interplay between Q.A.C.C. § 14:1-77(F)(3) and (G) leads us to conclude that Queen Anne’s County Commissioners could have, as they did, approve Hovnanian’s Growth Allocation Petition whether, or not, there was in existence at the time, and attached to the Ordinances, amended Overlay Maps reflecting the decision made by the County Commissioners. In particular, Q.A.C.C. § 14:1-77(F)(3) provides that “[a] growth allocation petition shall not be effective until after it is approved by the Critical Area Commission and not until 45 days after approval by the County Commissioners.” Q.A.C.C. § 14:1-77(G) provides that the “Official Critical Area Map(s) will be amended ... when the approved growth allocation petition becomes effective.” Thus, the Queen Anne’s County Code did not contemplate that amended Overlay Maps had to be drafted and attached in order that the Queen Anne’s County Commissioners’ Growth Allocation Petition approval take effect. Whether amended Overlay Maps reflecting the approved Growth Allocation Petition

must be drafted, thus, be in existence, in order for the approval to be effective is a closer question.

Queen Anne’s County Code § 14:1-77(G) does not make clear whether amended Critical Area Overlay Maps must exist before or after an approved Growth Allocation Petition becomes effective. As we have seen, it requires, “[t]he Official Critical Area Map(s) [to] be amended to reflect the new development area designation when the approved growth allocation petition becomes effective.” Thus, the words of Q.A.C.C. § 14:1-77(G), giving them their plain meaning, does not indicate when the Critical Area Overlay Maps must be amended and, thus, they do not provide for when the amendments must be prepared. The only temporal indicator that *155 Q.A.C.C. § 14:1-77(G) provides in this regard is that it uses the word “when” in connection with the requirement that the Critical Area Overlay Maps be amended. The word “when” is defined as “during the time at which; while” or “at the time that.” American Heritage College Dictionary, Third Edition. In the context of Q.A.C.C. § 14:1-77(G), the word “when” is ambiguous in that no clear answer is provided to the question whether amended Critical Area Overlay Maps are prerequisite to the effectiveness of an approved growth allocation petition. Because Q.A.C.C. § 14:1-77(G) is ambiguous, and does not answer the question presented, we will attempt to glean the legislature’s intent by reviewing the general purpose of Q.A.C.C. § 14:1-77 and how that purpose is served by the competing interpretations of the statute proffered by the parties. *Witte v. Azarian*, 369 Md. 518, 526, 801 A.2d 160, 165 (2002).

Queen Anne’s County Code § 14:1-3 states, in relevant part, that the purpose underlying “Chapter 14:1 is to establish the critical area and to provide special regulatory protection for the land and water resources located within the Chesapeake Bay critical area in Queen Anne’s County.” Q.A.C.C. § 14:1-3. Q.A.C.C. § 14:1-6 codifies the interpretive principles that the Queen Anne’s County Commissioners prescribed for reviewing administrative or judicial bodies to apply when interpreting the provisions of Chapter 14:1. These interpretive principles include **239 determining whether an interpretation of a specific provision within Chapter 14:1 is consistent with the goals and objectives of the Critical Area Program in Maryland Code § 8-1801 et seq. of the Natural Resources Article. *See* Q.A.C.C. § 14:1-6. Q.A.C.C. § 14:1-6 emphasizes that “[t]his Chapter 14:1 has been carefully designed by the County Commissioners of Queen Anne’s County to avoid regulations that either sacrifice legitimate public goals ... or require undue limitations on the ability of property owners to use their land in manners consistent with the goals of the program.” Q.A.C.C. § 14:1-6(A)(4).

Reviewing bodies are also admonished that “great care should be taken by those interpreting this Chapter 14:1 not to substitute their judgments for *156 the legislative acts of the County Commissioners.” Q.A.C.C. § 14:1-6(A)(4). In light of the principles articulated in Q.A.C.C. § 14:1-6, we conclude that the interpretation given Q.A.C.C. § 14:1-77(G) by the petitioners is unpersuasive and contrary to the interpretive principles articulated in Q.A.C.C. § 14:1-6.

The respondent contends that this Court should hold that accurate amended Overlay Maps do not have to be prepared as a precondition to the approved growth allocation taking effect or being effective. Hovnanian asserts that “[w]ith no statutory provision as to procedures, investigations, hearings, timeframes, standards, public notice and/or participation in connection with the drafting of Overlay Maps, it is clear that drafting Overlay Maps is a ministerial function.” Brief of Respondent at 27. From a practical perspective, Hovnanian maintains that it would be absurd for this Court to conclude that the County Commissioners’ legislative approval of a growth allocation petition has no substantive effect until County personnel, charged with the duty of drafting Overlay Maps, decide to perform their duty. The petitioners, on the other hand, assert that Hovnanian cannot be permitted to use the approved Growth Allocation until accurate Overlay Maps have been drafted because “[c]learly delineated land use boundaries are essential.” Brief of Petitioners at 15. Without accurate Overlay Maps depicting the boundaries of the Growth Allocation the County Commissioners approved, the petitioners posit that regulatory authorities would have no way of knowing whether development activity at a particular location is consistent with the law.

We disagree with the petitioners and conclude that their interpretation would, in effect, and contrary to Q.A.C.C. § 14:1-6, permit Queen Anne’s County employees “to substitute their judgments for the legislative acts of the County Commissioners.” This is a result that we cannot endorse. The holding of the Court of Special Appeals in *Clarke v. Greenwell*, 73 Md.App. 446, 534 A.2d 1344 (1988) informs our decision.

*157 The court in *Clarke* was asked to determine whether the appellee in that case timely filed an appeal to the decision of the St. Mary’s County Commissioners to rezone a parcel of land. *Clarke v. Greenwell*, 73 Md.App. 446, 447, 534 A.2d 1344 (1988). Critical to that determination was the question of when the St. Mary’s County Commissioners took final legislative action in the matter. In order to make that determination, the court looked to the St. Mary’s County Zoning Code § 20.03,

which read:

“If, in accordance with the provisions of this Ordinance and Article 66B of the Annotated Code of Maryland as amended, changes are made in ... matter[s] portrayed on the Official Zoning Maps, such changes shall be made a part of the Official Zoning Maps promptly after the amendment **240 has been approved by the County Commissioners.... *No amendment to this Ordinance which involves a matter portrayed on the Official Zoning Maps shall become effective until after such change has been made a part of said maps.*” St. Mary’s County Zoning Code, § 20.03 (Emphasis Added).

In February of 1985, the appellant, Joseph Abel Clarke filed a Rezoning Application with the St. Mary’s County Office of Planning and Zoning. *Clarke*, 73 Md.App. at 447-48, 534 A.2d at 1344. Clarke’s application sought to have his property rezoned from R-1 (Rural Residential) to CM (Commercial Marine). The County Commissioners approved the change on August 19, 1986. Subsequently, however, Clarke received a letter from the Office of Planning and Zoning that stated that “[t]he change will become effective when, according to Section 20.03, a signed survey of the area rezoned is attached to the official zoning map.” *Clarke*, 73 Md.App. at 450, 534 A.2d at 1346. The survey was not attached to the official zoning map until almost five months later. *Id.* at 451, 534 A.2d at 1346.

On the thirty-first day after the St. Mary’s County Commissioners approved rezoning, and the day on which Clarke was advised of when the change would take effect, Joseph A. Greenwell, the appellee, noted an appeal in St. Mary’s County Circuit Court. Clarke moved to dismiss the appeal, with *158 prejudice, arguing that the appeal was filed one day late and, therefore, the Circuit Court lacked jurisdiction to hear the case. He relied on Maryland Rule B4(a), which provided: that rule required an order for appeal from an administrative agency decision to be filed within thirty days of the date of the action on which review is sought. *Clarke*, 73 Md.App. at 449, 534 A.2d at 1345. The Circuit Court ruled in favor of the appellants. Because the zoning changes had not yet been made on the map, the decision to rezone was not final, with the result that no appeal could have been taken from the decision of the County Commissioners. *See* Maryland Rule B1(a) (requiring that an order seeking judicial review of an administrative agency decision be filed within thirty days after the date of the decision.).

The Court of Special Appeals reversed, reasoning that it would be inconceivable for the “ministerial act” of attaching changes to the zoning map, notwithstanding the

explicit language in § 20.03 of the St. Mary's County Code, to be the dispositive factor in determining the finality of an action by a legislative body. *Clarke*, 73 Md.App. at 452, 534 A.2d at 1347. It held that the appellee's appeal was untimely. Specifically, the intermediate appellate court pointed out that, if the literal words of § 20.03 were to be given effect, then numerous people that possessed the power and duty to affix zoning changes to the official maps would be vested with the ability unilaterally to supersede the legislative decision-making of the County Commissioners. Therefore, the court concluded, that it could not have been the intent of the County Commissioners to vest third-persons with the authority to overrule their decisions. *Id.* at 447, 534 A.2d at 1344.

The *Clarke* holding and its rationale is applicable to the resolution of the case *sub judice*. Were we to adopt the petitioners' reasoning, the Queen Anne's County employees, responsible for drafting Critical Overlay Maps, and amendments to them, would be vested with the power to delay, or even completely preclude, an approved growth allocation petition from becoming effective. They would have, in effect, veto authority. That would, in essence, undermine, if not nullify *159 completely, Q.A.C.C. **241 § 14:1-77(F), which vests Queen Anne's County Commissioners with the authority to exercise "final legislative action" on growth allocation petitions. It would also be inconsistent with Q.A.C.C. § 14:1-77(G), which, to the contrary, judging from the words used, contemplates that County Commissioners would have just such authority. Accordingly, we hold that adoption and filing of amended Critical Area Overlay Maps were not prerequisites, conditions precedent, either to the Queen Anne's County Commissioners' approval of Hovnanian's Growth Allocation Petition or its being effective. The drafting of amended Critical Area Overlay Maps quite simply is a ministerial function that necessarily must occur subsequent to an award of Growth Allocation becoming effective.

The petitioners next contend that, without accurate amended Critical Area Overlay Maps, regulatory authorities will not be able to ascertain whether development activity at a particular location is lawful. We do not agree. To be sure, as the respondent acknowledges, while Overlay Maps must be as accurate as possible, with particular reference to the maps in this case, the drafting of Critical Area Overlay Maps is "not an exact exercise" and is "perhaps impossible." Mr. Nuttle, the court appointed surveyor, confirmed this point. Commenting on the attendant difficulties of drafting accurate Overlay Maps, he said:

"I was specifically asked to review several documents,

Sheet 7 of the Sketch/Concept Plan by McCrone and numbers 49 and 57 of the Chesapeake Bay Critical Area overlays to determine any differences. I was also asked [to] give an opinion as to the extent that these differences were the result of tax map inaccuracies and differences in the scales used.

* * *

"The Chesapeake Bay Critical Area maps were apparently made by using the tax maps as a base. Some land use lines were made by scaling specified distances from natural features such as shore lines, creeks, wetlands, etc. Others *160 were obviously made by following property lines shown on the tax maps. The assessment people have done a great job with their maps, but the maps are too inaccurate both as to the position of property lines and of shore lines."

Notwithstanding the inaccuracies that seem to be inherent in the drafting process for Critical Area Overlay Maps, the petitioners maintain that, before an applicant can use an admittedly approved growth allocation, accurate Overlay Maps must be drafted and themselves filed with the ordinances. Only then, they submit, can regulatory authorities determine whether a developer is conducting development activity lawfully. Again, we disagree. The petitioners seem not to appreciate that all growth allocation applicants are required to submit sketch or concept plans with their petitions and that no such petition may be approved without them. A sketch or concept plan is required to contain a detailed description of the property as to which an award of growth allocation is sought. Moreover, pursuant to Q.A.C.C. § 14:1-76, the sketch or concept plan must include the recommendations made by the Planning Commission. Thus, it will have been reviewed by the Planning Commission. Only then will this sketch or concept plan be submitted to the Critical Area Commission. It follows, therefore, that the reviewing agencies, the Planning Commission, the CAC and the regulating body, the County Commissioners, are well aware of the property to be developed. Consequently, should the exact location of growth allocation ever be in question and there are no approved Critical Area Overlay **242 Maps reflecting the award, either because they have not yet been drafted or contain cartographic errors, the regulatory authorities, contrary to the petitioners' assertions, need only to look to the approved sketch or concept plans for clarification.

¹¹²¹ The petitioners also ask this Court to determine the procedures to be followed to correct the cartographic errors found on the most recent Critical Area Overlay Maps. They assert that Maryland Code (2000 Repl. Vol., 2006) § 8-1809(l) *161 of the Natural Resources Article

lines the procedures to be followed. That section provides:

“(1) Correction of clear mistakes, omissions, or conflicts with criteria or laws.

“(1) If the Commission determines that an adopted program contains a clear mistake, omission, or conflict with the criteria or law, the Commission may:

“(i) Notify the local jurisdiction of the specific deficiency; and

“(ii) Request that the jurisdiction submit a proposed program amendment or program refinement to correct the deficiency.

“(2) Within 90 days after being notified of any deficiency under paragraph (1) of this subsection, the local jurisdiction shall submit to the Commission, as program amendments or program refinements, any proposed changes that are necessary to correct those deficiencies.

“(3) Local project approvals granted under a part of a program that the Commission has determined to be deficient shall be null and void after notice of the deficiency.” Md. Code (2000 Repl. Vol., 2006) § 8-1809(l), Natural Resources Article.

The petitioners urge us to hold, as they maintain, that § 8-1809(l) clearly indicates the Legislature’s intent to prohibit “informal manipulation of Critical Area boundaries lacking public process or oversight by the Critical Area Commission.”

The respondent, not unexpectedly, does not agree. Rather than challenging the petitioner’s interpretation of § 8-1809(l)(1), it submits that it is inapposite. It argues that an “adopted program,” as referenced and used in § 8-1809(l)(1) refers to the County’s initial establishment of a Critical Area Program. At issue here is “Growth Allocation,” an entirely different issue, requiring considerations that also are completely different. Indeed, the respondent maintains that nothing in § 8-1809 requires that formal amendment procedures be followed to correct mere ministerial mapping errors. We agree.

*162 Q.A.C.C. § 14:1-77(G) is of no assistance either. Section 14:1-77(G) does not contain a procedure, formal or informal, for correcting an erroneous Critical Area Overlay Map. And, the petitioners have not, and we believe cannot, point this Court to any statutory language that would suggest that there is a formal procedure that

must be followed for the correction of cartographic errors on Critical Area Overlay Maps to be corrected once an applicant’s growth allocation petition has been approved and has become effective. This conclusion is confirmed by reference to Q.A.C.C. § 14:1-77(G), which does not mention or even remotely suggest that there is a formal process that must be followed in order to correct cartographic errors on Overlay Maps. In the absence of a procedure prescribed legislatively for correcting cartographic errors on Critical Area Overlay Maps and consistent with our holding today, we believe Queen Anne’s County employees may, indeed must, correct, as revealed, drafting errors, on the County’s Critical Area Overlay Maps.

**243 ¹¹³ The final issue that we shall address emanates from the petitioners’ argument that, due to the absence of attached maps, Ordinances 01-01 and 01-01A were nullities. Here, the petitioners contend that the administrative record makes it impossible to know if Queen Anne’s County Commissioners actually approved Hovnanian’s 2000 or 2001 Growth Allocation Plan. According to the petitioners, “There is absolutely nothing contained in the record of this case that indicates that the 2001 plan was ever presented to the County Commissioners[.]” Brief of Appellants at 24. As the boundaries on the 2000 and 2001 Growth Allocation Plans were different, the petitioners assert that the only remedy to clarify this issue is to require the Critical Area Commission and the County Commissioners to go through the process of reapproving Hovnanian’s 2001 Growth Allocation Plan.

The respondent counters that “[a] fair reading of the administrative record makes it abundantly clear that on June 14, 2001, the County Planning Commission approved the 2001 Growth Allocation Plan (Sheet of 7), and on July 11, 2001, the *163 Critical Area Commission approved the same plan.” Brief of Respondent at 38. The Court of Special Appeals agreed and held that there was no basis for the court to conclude that the Critical Area Commission or the County Commissioners approved anything other than Hovnanian’s 2001 Growth Allocation Plan. We agree with the Court of Special Appeals.

¹¹⁴ We begin by noting that “[i]n the absence of evidence to the contrary, administrative officers will be presumed to have properly performed their duties.” See *Johnstown Coal & Coke Co. v. Dishong*, 198 Md. 467, 474, 84 A.2d 847, 849 (1951); *Armco Steel Corp. v. Trafton*, 35 Md.App. 658, 671, 371 A.2d 1128, 1134 (1977). The record makes it abundantly clear that after the Queen Anne’s County Commissioners passed Resolution No. 01-13 on May 23, 2001, and Hovnanian subsequently

Submitted an Amended Concept/Sketch Plan (the 2001 Growth Allocation Plan) to reflect the conditions mandated by that Resolution, all administrative agencies voted to approve the 2001 Growth Allocation Plan. The primary evidence that supports this conclusion is a June 14, 2001 letter addressed to the Queen Anne's County Commissioners from the Planning Commission which stated, in relevant part:

"The Planning Commission was directed to review *the amended concept/sketch plan that reflects, where applicable, the conditions contained in County Commissioner Resolution No. 01-13 and make any further recommendations deemed appropriate.* The Planning Commission reviewed the project on June 14, 2001 and offers no objection to the 25 conditions contained in County Commissioner Resolution 01-13. The Planning Commission offers a favorable recommendation for the County Commissioners to take final action on the award of Growth Allocation to change 293.25 acres of RCA land to IDA and redesignation of 79.55 acres of Critical Area land from LDA to IDA with no additional conditions or recommendations." (Emphasis Added).

As further evidence that there was no confusion about which of Hovnanian's Growth Allocation Plans was being approved by the responsible administrative agencies, we refer to the *164 July 13, 2001 letter from the Chesapeake

Bay Critical Area Commission to Queen Anne's County Planning Commission. In that letter, the Commission stated, in relevant part:

"At its meeting of July 11, 2001, the Chesapeake Bay Critical Area Commission voted to confirm its previous approval **244 of the request for growth allocation for the Four Seasons at Kent Island project. *It was noted that the amended concept plan reflects the conditions placed on the Critical Area Commission approval through graphic depiction or plat notes.*" (Emphasis Added).

The repeated references to the "amended concept/sketch plan" and the "amended concept plan" in the letters above clearly demonstrate that neither Queen Anne's County Commissioners nor the Chesapeake Bay Critical Area Commission was confused about the Growth Allocation Plan that each approved. To the contrary, the letters illuminate the fact that both agencies knowingly approved Hovnanian's 2001 Growth Allocation Plan.

JUDGMENT AFFIRMED WITH COSTS.

All Citations

410 Md. 128, 978 A.2d 222

Footnotes

* Raker, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, she also participated in the decision and adoption of this opinion.

1 § 8-1808.1(b) of the Natural Resources Article provides:

"(b) *Calculation of growth allocation.*—The growth allocation for a local jurisdiction shall be calculated based on 5 percent of the total resource conservation area in a local jurisdiction:

"(1) In the Chesapeake Bay Critical Area at the time of the original approval of the local jurisdiction's program by the Commission, not including tidal wetlands or land owned by the federal government; or

"(2) In the Atlantic Coastal Bays Critical Area at the time of the original approval of the local jurisdiction's program by the Commission, not including tidal wetlands or land owned by the federal government."

2 Maryland Code (2007 Repl. Vol.) § 8-1802(a)(11) of the Natural Resources Article defines "Growth Allocation" as "the number of acres of land in the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area that a local jurisdiction may use to create new intensely developed areas and new limited development areas." Queen Anne's County Code § 14:1-11 defines "Growth Allocation" as "[a]n area of land calculated as 5% of total resource conservation area designated land within the critical area (excluding tidal wetlands and federally owned land), that the County Commissioners may convert to more intensely developed areas."

3 Q.A.C.C. § 14:1-77(E) states:

"Critical Area Commission approval. All growth allocation petitions that receive conceptual approval by the County Commissioners will be forwarded to the Critical Area Commission for review and approval. No award of growth allocation shall become effective until after the County Commissioners

have taken final legislative action on the petition.”

4 Q.A.C.C. § 14:1–76 reads:

“ § 14:1–76. *Growth allocation process.*

“The County’s growth allocation will be used to amend the development area classification on the Official Critical Area Maps on a project-by-project basis. The following procedures will be followed in determining if a site qualifies for growth allocation:

A. Prior to submitting a petition to the County Commissioners for map amendments utilizing the growth allocation, applicants shall submit a sketch or concept plan to the Planning Commission, together with a fee as prescribed by the Planning Commission. The Planning Commission will review the sketch or concept development plan for consistency with the County’s Critical Area Program and will provide technical comments and recommendations. The applicant shall incorporate the Planning Commission’s technical comments and recommendations into the petition filed with the County Commissioners.

B. All petitions for map amendments utilizing growth allocation shall be accompanied by a concept site plan or subdivision sketch plat, prepared in conformity with the requirements of the Queen Anne’s County Zoning Ordinance in addition to any information required by § 14:1–77A of this Chapter 14:1.

C. In approving a map amendment utilizing the growth allocation, the County Commissioners may establish additional conditions of approval that are consistent with the intent of the Queen Anne’s County Critical Area Program.

D. Review criteria. The following review criteria will guide the selection of projects that may be assigned growth allocation:

(1) Proposed development projects using growth allocation must be determined to be consistent with the Queen Anne’s County Comprehensive Plan and Queen Anne’s County Critical Area Program and the Growth Subarea Plans.

(2) Proposed development projects that implement specific development or redevelopment objectives of the Comprehensive Plan or a Growth Subarea Plan shall be given priority for growth allocation, and growth allocation is set aside for implementation of these projects in the Growth Management Pool.

(3) Proposed development projects determined by the County to be of substantial economic benefit and located in a designated growth area shall be given priority for growth allocation, and growth allocation is set aside for implementation of these projects in the Growth Management Pool.

(4) Proposed development projects located outside of designated growth areas may be assigned growth allocation if they are a commercial, industrial, residential or institutional project determined to be of substantial economic benefit to residents of the County and/or meet a recognized public need. Growth allocation for implementation of these projects may be from either the General Pool or the Growth Management Pool.

E. Minimum mandatory design standards. Once the maximum permitted density of development has been determined, the proposed project must demonstrate that it will meet or exceed the following design standards in order to be approved:

(1) All applicable requirements of the Queen Anne’s County Zoning Code, the Subdivision Regulations and the Queen Anne’s County Chesapeake Bay Critical Area Program and Act have been met.

(2) A land management classification change has been approved by the County Commissioners and the Critical Area Commission.

(3) The design of the development enhances the water quality and resource and habitat values of the area, e.g., results in additional planting of forest cover in the Buffer or implementation of best management practices on portions of the site to be retained in agriculture use.

(4) The development incorporates the comments and recommendations of the County and the Maryland Fish, Heritage and Wildlife Administration in the project design.

(5) The developer executes restrictive covenants that guarantee maintenance of any required open space areas.”

5 Critical Area Overlay Maps are transparent overlays that literally are placed on top of Queen Anne’s County Zoning Maps. The Zoning Maps, in turn, are based on tax maps prepared by the Maryland Department of Assessments and Taxation (“SDAT Maps”). The respondent concedes that there will be “inherent inaccuracies” between the Critical Area Overlay Maps and the SDAT Maps because the SDAT Maps, which the Zoning Maps are based on, are not created based on an actual survey. The potential for inaccuracies is openly acknowledged on the SDAT Maps: “The information shown hereon has been compiled from deed descriptions and is not an actual survey. It should not be used for legal descriptions. Users noting errors are urged to notify the Property Map Division....”

We granted Certiorari to consider the following questions:

- "1) What is the legal effect of an Ordinance enacted to create new Critical Area districts, when the Ordinance contains no information about the location of the new district boundaries?
- "2) Does the Chesapeake Bay Critical Area Act allow intensive development in the Critical Area, absent delineation of a supporting development district on the official Critical Area Maps?
- "3) Did the Circuit Court err by enjoining the County from acting upon development proposals which are predicated upon the re-classification of land until the re-classified land has been accurately delineated on the official Critical Area Maps?
- "4) When a map amendment process concludes with the creation, approval and recordation of an official Critical Area map with demonstrable mistakes, is the proper procedure for correcting the mistakes the same as the statutory procedure created to correct other mistakes in the Program? If not, what law sets forth the specific steps the County must take to lawfully correct the mistakes?"

7 The record does contain the Plaintiffs' Memorandum in Support of Summary Judgment, but it is not where the Extract references indicated it is. The plaintiffs' Complaint for Declaratory and Injunctive Relief is at E. 21–22 of the Record Extract. The Plaintiffs' Memorandum in Support of Summary Judgment does not begin until E. 75. Our precedent has made it clear that every party has a responsibility not only to ensure that a proper record is made but also to refer the reviewing court to the proper location in the record carefully and accurately. *See King v. State Rds. Comm'n*, 284 Md. 368, 374 n. 3, 396 A.2d 267, 271 n. 3 (1979); *Tilghman v. Frazer*, 198 Md. 250, 258, 81 A.2d 627, 631 (1951).

8 The 1954 Zoning Amendments, by changing the zoning of the property to Commercial A, would have prohibited Solvay from operating its steel fabricating business except under a prior nonconforming use. *Soron*, 23 A.D.2d at 167, 259 N.Y.S.2d at 561. The Town of Geddes conceded that a nonconforming use existed on the petitioners' property, but maintained that it applied only to a portion of the premises.

9 Q.A.C.C. § 14:1–77(B) reads:

"Planning Commission; referral, investigation and recommendation. All growth allocation petitions shall be referred to the Planning Commission for investigation and recommendation. The Planning Commission shall first hold a public hearing at which parties of interest and citizens shall have an opportunity to be heard. At least 14 days' notice of the time and place of such hearing shall be published in a newspaper of general circulation in the County. In addition, the Planning Commission shall post notice of its public hearing on the property for which growth allocation is requested and, to the extent possible based on the best available information, notify all property owners immediately contiguous to the property of the hearing date, time and place."

10 The Circuit Court below believed that Q.A.C.C. § 14:1–17(B) was dispositive on the issue of whether accurate Critical Area Overlay Maps had to be drafted before or contemporaneous with the County Commissioners' award of growth allocation. Q.A.C.C. § 14:1–17(B) reads as follows:

"ARTICLE IV Boundaries; Interpretations; Maps

"B. Development areas. For the purposes of this Chapter 14:1, all land and water areas in Queen Anne's County which are located within the critical area are hereby divided into one of three development areas as determined by the criteria established for each development area in this Chapter 14:1 and as delineated on the official Critical Area Maps of Queen Anne's County, as they may be amended from time to time, which, together with any explanatory materials thereon, are hereby made a part of this Chapter 14:1: (1) Intensely developed area (IDA); (2) Limited development area (LDA); or (3) Resource conservation area (RCA)."

The Court of Special Appeals rejected the Circuit Court's reliance and interpretation of Article IV:

"Use of the conjunctive in this section [the conjunctive "and" in Q.A.C.C. § 14:1-17(B)] led the court to conclude that approval and delineation were distinct acts, but also led the court to conclude that 'until both requisites are met, a development area remains as it was before any amendatory action.' We disagree. Section 17.B is part of Article IV of Part 4 of Chapter 14:1. Part 4 deals with the 'Establishment of Development Areas.' We deal here with growth allocations. The more particular provisions concerning map amendments utilizing growth allocations are found in Article XV of Chapter 14:1."

11 Maryland Code (2007 Repl. Vol.) § 8-1809(g) reads:

"(g) *Review and proposed amendment of entire program.*—Each local jurisdiction shall review its entire program and propose any necessary amendments to its entire program, including local zoning maps, at least every 6 years. Each local jurisdiction shall send in writing to the Commission, within 60 days after the completion of its review, the following information:

"(1) A statement certifying that the required review has been accomplished;

"(2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;

"(3) An updated resource inventory; and

"(4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining."

12 Initially, one might argue that the word "reflect" in Q.A.C.C. § 14:1-77(G) would be dispositive of whether accurate Critical Overlay Maps had to be drafted and attached to the Ordinance before or contemporaneous with the County Commissioners' award of growth allocation to Hovnanian. The word "reflect," depending on the context in which it is used, can have two different meanings. For instance, "reflect" can mean "to remember with thoughtful consideration," implying that an event already has occurred. Webster's Third New International Dictionary, 1976. Alternatively, the word "reflect" can mean "to bring about a specified appearance or characterization," suggesting that, at least from a temporal standpoint, the event is occurring contemporaneously. Webster's New Collegiate Dictionary, 1973.

EXHIBIT 8

425 Md. 482
Court of Appeals of Maryland.

MARYLAND BOARD OF PUBLIC WORKS, et al.
v.
K. HOVNANIAN'S FOUR SEASONS AT KENT
ISLAND, LLC.

No. 67, Sept. Term, 2011.

April 23, 2012.

substantive law in the proceeding or in formulating its decision; and (3) agency acted arbitrarily or capriciously in applying the law to the facts, in essence, whether a reasoning mind could reasonably reach the conclusion reached by the agency from the facts in the record. West's Ann.Md.Code, State Government, § 10-222.

14 Cases that cite this headnote

Synopsis

Background: Developer of mixed-use senior citizen community, which was to be built on a parcel bordering three bodies of tidal water, appealed denial by Board of Public Works of its application for state wetlands license to construct a bridge, storm water management system, drill water and sewer lines, and construct a community marina. The Circuit Court, Queen Anne's County, John W. Sause, Jr., J., reversed. Board and several individuals who appeared at Board's informational hearing in opposition to the project appealed. Certiorari was granted.

[Holding:] The Court of Appeals, Alan M. Wilner (Retired, specially assigned), J., held that Board was required to apply standard of whether impact of development on affected wetlands was sufficiently adverse as to make it in the State's interest to deny application, rather than whether the project as a whole should have proceeded.

Vacated and remanded.

^[2] **Administrative Law and Procedure**

☞ Fact Questions

Judicial review of findings of fact in quasi-judicial administrative decisions is highly deferential. West's Ann.Md.Code, State Government, § 10-222.

3 Cases that cite this headnote

^[3] **Administrative Law and Procedure**

☞ Law questions in general

Judicial review of determinations of legal error in quasi-judicial administrative decisions is conducted under a standard that is much less than highly deferential. West's Ann.Md.Code, State Government, § 10-222.

2 Cases that cite this headnote

^[4] **Administrative Law and Procedure**

☞ Legislative questions; rule-making

If the agency acted in a quasi-legislative capacity, the scope of judicial review is limited to assessing whether the agency was acting within its legal boundaries. West's Ann.Md.Code, State Government, § 10-222.

3 Cases that cite th

West Headnotes (7)

^[1] **Administrative Law and Procedure**

☞ Scope of Review in General

Courts look for three things when reviewing a quasi-judicial decision, namely, whether: (1) findings of fact made by the agency were supported by substantial evidence in the record made before the agency; (2) agency committed any substantial error of procedural or

¹⁵¹ **Environmental Law**

Wetlands

Board of Public Works was required to apply standard of whether impact of mixed-use senior citizen community development on affected wetlands was sufficiently adverse as to make it in the State's interest to deny developer's application, rather than whether the project as a whole should have proceeded, which application was for state wetlands license to construct a bridge, storm water management system, drill water and sewer lines, and construct a community marina. West's Ann.Md.Code, Environment, § 16-202(g)(1); COMAR 23.02.04.01(B), 23.02.04.10.

2 Cases that cite this headnote

Administrative Law and Procedure

Administrative construction

Although a reviewing court is required to give considerable deference to an agency's interpretation of its own regulation, the interpretation of a regulation is akin to the interpretation of a statute; it is an issue of law which, ultimately, the court must decide.

4 Cases that cite this headnote

¹⁷¹ **Administrative Law and Procedure**

Annulment, vacation or setting aside of administrative decision

Administrative Law and Procedure

Remand

The appropriate remedy when an agency uses the wrong standard in formulating its decision is to vacate the decision and remand for further proceedings designed to correct the error.

6 Cases that cite this headnote

Attorneys and Law Firms

**41 Adam D. Snyder, Asst. Atty. Gen. (Douglas F. Gansler, Atty. Gen. of Maryland, John B. Howard, Jr., Deputy Atty. Gen.; Baltimore, MD), on brief, for appellants.

C. Daniel Saunders (Cristina Harding Landskroener, Chestertown, MD), on brief, for appellants.

John H. Zink, III (Venable LLP, Towson, MD); Charles R. Schaller, Jr. of Linowes and Blocher, LLP, Annapolis, MD; Joseph A. Stevens (Stevens & McCann, LLC, Centreville, MD), on brief, for appellee.

Argued before BELL, C.J., HARRELL, BATTAGLIA, GREENE, ADKINS, BARBERA and ALAN M. WILNER (Retired, specially assigned), JJ.

Opinion

ALAN M. WILNER (Retired, specially assigned), J.

*485 This is an action for judicial review to determine whether the Maryland Board of Public Works—a body created by the Maryland Constitution and consisting of the Governor, the State Comptroller, and the State Treasurer (the Board)—committed legal error in denying, by a two-to-one vote, respondent's application for a license to fill and dredge on certain State wetlands. The Circuit Court for Queen Anne's County concluded that the Board did err, by basing its decision on considerations outside the lawful scope of its discretion. The court reversed the Board's negative decision and remanded the matter to the Board for further proceedings in conformance with the findings and principles set forth in the court's judgment and accompanying memorandum.

The Board and several individuals who had appeared at the Board's informational hearing in opposition to the project appealed, and we granted *certiorari* prior to any significant proceedings in the Court of Special Appeals. We agree with most of the findings and holdings of the Circuit Court and, in particular, with its ultimate conclusion that the Board, through its majority vote, committed legal error by basing its decision on factors outside the scope of its authority and discretion. We shall vacate the Circuit Court judgment and remand the case to that court with instructions to vacate the Board's decision

and remand the case to the Board for further proceedings in conformance with this Court's opinion.

BACKGROUND

Regulation of Wetlands In General

The Maryland Code does not define the broad term "wetlands," and definitions of it seem to vary. The State Department *486 of the Environment (DOE) has noted, with seeming approval, the definitional characteristics articulated by Ralph W. Tiner and David G. Burke, *Wetlands of Maryland* **42 (1995)—areas that hold water for significant periods during the year characterized by anaerobic conditions favoring the growth of specific plant species and the formation of specific soil types. See *An Overview of Wetlands and Water Resources of Maryland*, prepared by DOE for the Maryland Wetland Conservation Group (Jan.2000). Wetlands may be permanently flooded by shallow water, permanently saturated by groundwater, or periodically inundated or saturated for varying periods. *Id.*

Being a coastal State blessed with a large portion of one of the world's great estuaries—the Chesapeake Bay—as well as several coastal bays and numerous tributaries, Maryland has an abundance of wetlands. According to the U.S. Fish and Wildlife National Wetlands Inventory, 9.5% of the State's land surface—some 600,000 acres—is covered by vegetated wetlands. See *id.* All are subject to some form of State regulation.

For purposes of regulation, the Code defines three types of wetlands—State, private, and non-tidal. Md.Code, § 16-101(o) of the Environment Article (ENV) defines State wetlands as "any land under the navigable waters of the State below the mean tide, affected by the regular rise and fall of the tide" except wetlands of that category that have been transferred by the State by valid grant, lease, patent, or grant confirmed by Art. 5 of the Md. Declaration of Rights. ENV § 16-101(k) defines private wetlands as "any land not considered 'State wetland' bordering on or lying beneath tidal waters, which is subject to regular or periodic tidal action and supports aquatic growth," including wetlands transferred by the State by valid grant, lease, patent, or grant confirmed by Article 5 of the Declaration of Rights.¹ State and private

*487 wetlands, under those definitions, are tidal. Non-tidal wetland is defined in ENV § 5-901(i), the important aspect of which, for our purposes, is that it does not include tidal wetlands regulated under Title 16 of the Article.

Comprehensive regulation of the State's wetlands, both State-owned and in private hands, came about with the enactment of the Wetlands Act of 1970, which this Court described in *Bd. of Pub. Works v. Larmar Corp.*, 262 Md. 24, 277 A.2d 427 (1971) and *Hirsch v. Md. Dep't of Nat. Resources*, 288 Md. 95, 416 A.2d 10 (1980). The regulation was prompted by legislative concern over the loss or despoliation of the wetlands, which the General Assembly considered an important natural resource, as the result of unregulated dredging, dumping, filling, and like activities. That concern and the statement of public policy regarding the need to preserve the wetlands and prevent further loss or despoliation was expressed in the Code and now appears in ENV § 16-102.²

**43 As we pointed out in *Hirsch*, 288 Md. at 100-01, 416 A.2d at 12-13, the Act established a bipartite regulatory scheme, one part for State-owned wetlands and one for private wetlands. Activities on State wetlands always were subject to *being* regulated, precisely because the State owned them. What the 1970 Act did was to put in place a scheme for actually regulating the filling and dredging of State wetlands and, for the first time, to regulate activity on private wetlands. The effect of the Act was to preclude riparian owners from freely *488 exercising rights on adjacent wetlands that, under common law or pre-existing statutory law, they previously could exercise. In *Larmar*, the Court observed that, under an 1862 statute, a riparian owner "had the right to make artificial landfill in navigable waters in front of his shore, limited only to the extent that he could not obstruct navigation" and that the 1970 Act unqualifiedly repealed that right. *Larmar, supra*, 262 Md. at 44, 277 A.2d at 436.

The nature and scope of the regulatory scheme differ based on the type of wetland involved. Certain activities on non-tidal or privately owned wetlands require a *permit* from DOE. See ENV §§ 5-905, 5-906, and 16-307. Activities on State wetlands that fall within the definition of dredging or filling (ENV § 16-101(e) and (f)) require a *license* from the Board of Public Works. ENV § 16-202. We are dealing here with the latter, so, except for purposes of comparison, when relevant, our focus will be on the statutes and regulations governing the licensing procedure relating to those kinds of activity on State wetlands.

Regulation of State Wetlands

Before considering the actual procedures, it is important to note some general propositions that govern those procedures. First, the requirement of a license and the Board's authority to issue one are entirely statutory. Though implemented to a large extent by regulations adopted either by the Board (*see* COMAR 23.02.04) or by DOE (*see* COMAR 26.24), the nature of the activities on State wetlands that *require* a license, the authority of the Board to *issue* a license, the nature of a license, some of the conditions which may be attached to it, and the procedures and basic ground rules for the issuance of a license are provided by the statutes in ENV, title 16, subtitles 1 and 2. Except that those aspects of regulation must comport with basic due process, they are not Constitutionally mandated and are not within any inherent power of the Board. The Legislature, if it wished, could have delegated that authority to any State agency.

*489 Some of the applicable regulations, unfortunately, are not easy to follow and interpret, especially when read in conjunction with the statutes. The Board regulations and the DOE regulations overlap to some degree, and, in part through cross-references to each other and to the statutes, they appear to contain exceptions to exceptions and other facial ambiguities. Some parts of the license procedure are dealt with in the Board's regulations and other parts in the DOE regulations, requiring one to bounce back and forth between them to see the whole picture. Persons who deal regularly with those regulations may have no problem understanding these intricacies, but, for the uninitiated, they are a challenge.

ENV § 16-202(a) precludes a person from dredging or filling on State wetlands without a license. "Dredging" is defined in § 16-101(e) as "the removal or displacement by means of soil, sand, gravel, shells, or other material, whether or not of intrinsic value, from any State or private wetlands." The term "filling" is defined in § 16-101(f). It is a longer definition because it lists the things it expressly includes and excludes, but generally it **44 means "[t]he displacement of navigable water by the depositing into State or private wetlands of soil, sand, gravel, shells, or other materials" or "[t]he artificial alteration of navigable water levels by any physical structure, drainage ditch, or otherwise." That is the extent of the Board's authority to issue, or deny, a license.³

The term "license" is not defined in either the general

definitions applicable to the Environment Article as a whole (§ 1-101) or in the definitions applicable to title 16 (§ 16-101). The only definition appears in the regulations. *490 COMAR 23.02.04.01A defines a wetland license as "the authorization issued by the Board of Public Works under Environment Article, Title 16 ... for the performance of dredging, filling, the construction of structures, or the conduct of certain other activities on land and waters of the State which are tidal wetlands." A license, it continues, "authorizes construction during a specified period and sanctions the licensed use of State lands and waters" but "does not convey ownership of lands below the mean high water line or tidal waters of the State or the affected air space or diminish the full and free use and enjoyment of the tidal waters of the State by the public."

In that latter regard, paragraph 01D of the regulation makes clear that the regulations governing State wetland licenses do not address the full range of fiduciary and proprietary responsibilities of the Board relating to the private use of State wetlands, "which may be considered by the Board of Public Works through easement, lease, quitclaim deed, or other instrument to protect the State's interests or to convey an interest in State wetlands."

COMAR 23.02.04.05 provides for three types of license—a general license, an individual license, and an expedited license. A general license is a standing authorization, subject to periodic review and readoption by the Board, for any of the eleven "recurrent or minimally disruptive activities" listed in paragraph 05A(3) of the regulation. According to the regulation, DOE determines the applicant's qualifications for a general license and actually forwards the license to a qualified applicant. *See* § .04.05A(3). COMAR 26.24.02.04C., which is a regulation of DOE, provides that an authorization under a general license expires three years after it is issued.

An individual license is required for construction or activities not listed in COMAR 23.02.04.02A,⁴ or construction or *491 activity subject to delegation to DOE under COMAR 23.02.04.04. An expedited license is limited to cases of emergency conditions or undue hardship. The record does not reveal what kind of license was at issue here, but, as none of the parties have made that an issue in the case, we shall assume that it is not one. We note only that there is **45 no indication of any emergency or undue hardship or that the authorizations would have expired after three years.

With exceptions not relevant here, only a person with a riparian interest in upland adjacent to the State wetlands

that person's agent may apply for a license. COMAR 26.24.02.02A. The application is made to DOE, which evaluates it in light of 19 criteria set forth in COMAR 26.24.02.03. Those criteria include, among other things (i) ecological, developmental, recreational, and aesthetic values of tidal wetlands in order to preserve them and prevent their despoliation and loss, (ii) the proprietary interests of the Board over State wetlands, and (iii) the degree to which dredging and filling activities can be avoided or minimized, will alter or destroy tidal wetlands, are consistent with Federal, State, and local land use plans, and will provide facilities for the handling of storm water runoff and sanitary wastes.

In determining whether to grant a *permit* to conduct regulated activity on *private* wetlands, DOE is required by statute to provide both an opportunity for an informational hearing before making an initial decision on the application, and a contested case hearing, if one is timely requested, following notice of the initial decision. See ENV §§ 16–307(d) and 5–204. That is not the case, however, with respect to its review of an application for a license to dredge or fill *State* wetlands. The only statutory provision with respect to the role of DOE in that regard is ENV § 16–202(f), which provides that (1) the Secretary shall assist the Board in determining whether to issue a license to dredge or fill State wetlands, and (2) after consultation with interested Federal, State, and local units, the *492 Department shall issue a public notice, hold any requested hearing, take any evidence the Secretary deems advisable, and submit a report indicating whether the license should be granted and, if so what if any terms, conditions, and consideration should be required.

That statutory requirement is amplified by both Board and DOE regulations. COMAR 23.02.04.06A., a Board regulation, requires DOE to hold an informational hearing, either on written request or its own determination that a hearing is in the public interest. Although the informational hearing is not a contested case hearing, the applicant and other interested persons must be given the opportunity to present evidence and argument. Questions may be asked, but cross-examination is not allowed. *Id.*

After the informational hearing and consideration of the 19 *environmental* criteria set forth in COMAR 26.24.02.03, DOE forwards its Report and recommendations. The Report and recommendations must be based on the five *legal* criteria stated in COMAR 23.02.04.07—legal requirements, information compiled during site visits, consultations with governmental units, evidence admitted during the public informational hearing, and comments submitted by public and governmental units. The Report and recommendations

must state whether the license should be granted, any terms and conditions to which it should be subject, and all relevant findings and documentation. *Id.*

Although ENV § 16–202(f) does not specify to whom the DOE Report and Recommendation are submitted, they are, in fact, submitted to the Wetlands Administrator. There is nothing in the Code regarding even the existence, much less the role, of that official. The functions of the Wetlands Administrator are set forth in the Board's regulations, in particular **46 COMAR 23.02.04.08 and .09.' The Administrator *493 receives the DOE Report and recommendations, evaluates it, and makes an independent recommendation to the Board. COMAR 23.02.04.08 provides for two situations—Concurrence Cases and Extraordinary Cases.

Concurrence cases are those in which the Administrator concurs in the DOE recommendation. They are cases which:

- “(1) Are within the rights of a riparian owner;
- (2) Are recommended for approval by the Department;
- (3) Are recommended for approval by the Administrator under the same terms and conditions, if any, specified in the Department's report and recommendation; *and*
- (4) *Have no substantial or long term adverse effect on State wetlands.*”

COMAR 23.02.04.08A. (Emphasis added).

Extraordinary cases are those in which (1) a public informational hearing is held; (2) the recommendations of the Department and the Administrator are inconsistent; (3) denial of a license is recommended by the Department or the Administrator; (4) a proposed structure or activity involves substantial destruction or loss of State wetlands; (5) a proposed structure or activity involves substantial public interest or public works; (6) the case involves a recommendation that compensation be assessed or that a bond be posted; (7) request has been made for release of a bond; *or* (8) substantial objection to a proposed *494 structure or activity has been made involving a request for personal appearance before the Board. (Emphasis added). COMAR 23.02.04.08B.

The Board is not required to hold a hearing as such. It may, but is not required to, permit persons to appear before the Board. See COMAR 23.02.04.09B (“The Board reserves the right to decline to hear personal

appearance testimony based upon the merits of the information before it"). The Board's action is guided by both statute and regulations. ENV § 16-202(g)(1) [which was § 16-202(c)(1) when the Board acted in this case] provides:

"Upon receipt of a report by the Secretary [of DOE], the Board shall decide if issuance of the license is in the best interest of the State, taking into account the varying ecological, economic, developmental, recreational, and aesthetic values each application presents. If the Board decides to issue the license, the issuance of the license shall be for consideration and on terms and conditions the Board determines. Every license shall be in writing."

COMAR 23.02.04.10 provides:

****47** "The Board shall approve, conditionally approve, or deny any individual or expedited license sufficient to the attainment of riparian rights the Board determines to be reasonable in accordance with the best interests of the State. In making its determination with respect to each application, the Board shall consider the recommendations of the Department and the Administrator, public testimony at any hearing, and information available in the public record, and shall take into account the varying ecological, economic, developmental, recreational, and aesthetic values to preserve the wetlands and prevent their despoliation and destruction."

Finally, in terms of procedure, ENV § 16-204, as it read when the Board acted in this case, when the action for judicial review was filed, and when the hearing in that

action was conducted, provided that "[a]ny party to the proceedings aggrieved by the decision of the Board, may petition the *495 circuit court of the county where the land is located within 30 days after receiving the decision. The appeal shall be heard on the record compiled before the Board."⁶

Proceedings In This Case

The project that led to this proceeding has been before this Court twice before. See *Queen Anne's Conservation v. County Comm.*, 382 Md. 306, 855 A.2d 325 (2004) and *Foley v. Hovnanian*, 410 Md. 128, 978 A.2d 222 (2009). It involves the proposed construction of a mixed-use adult community on Kent Island, in Queen Anne's County, to be known as Four Seasons at Kent Island. The project envisions 1,350 single and multifamily dwelling units, an assisted living facility, and related community and recreational facilities, to be erected on two tracts comprising 562 acres that lie on the north side of U.S. Route 50 between the towns of Chester and Stevensville.

As described in the Board's brief, the parcel borders three bodies of tidal water—the Chester River to the east; Macum Creek, a tributary of the Chester River, also to the east; and Cox Creek, which bisects the property and drains into the Chesapeake Bay. About 92% of the land lies within the 1,000 foot critical area buffer.⁷ Although there has been, and remains, considerable opposition to the project, Hovnanian has managed, over the past 13 years, to obtain all of the permits and approvals necessary at this point to proceed, save for a wetlands license.

In October 1999, because the project called for activity on both State and private wetlands, Hovnanian applied to DOE *496 for a license from the Board with respect to the State wetlands and a permit from DOE with respect to the private wetlands. That application was updated at least twice, in September 2000 and November 2001. In its June 2006 Report to the Board, DOE stated that it proposed to issue a permit to directionally drill a water and a sewer line, 80 feet of which would lie beneath private tidal wetlands of Cox Creek. Actual issuance of the permit was stayed, however, pending a decision on the license. It is not an issue in this appeal. ****48** We are concerned only with the Board's denial of the license for activity on State wetlands.

As noted, the license application is not in the record. The record reveals, however—and the parties do not

dispute—that the license sought in the last amended application was limited to the following four elements that, collectively, directly impact only 9,939 square feet of vegetated State wetlands:

- (1) Construction of a 250-foot long by 33-foot wide pile-supported bridge across Cox Creek, to connect the two parcels;
- (2) Construction of a storm water management system with 18 outfalls discharging to tidal waters of Cox Creek, Macum Creek, and the Chester River;
- (3) Directionally drill a 168-foot 12-inch diameter water line and a 179-foot 12-inch diameter force sewer line beneath State wetlands of Cox Creek;³ and
- (4) Construction of a ten-slip community marina that would be 470 feet long and eight feet wide extending into the Chester River, at the end of which would be a “T” head with four finger piers, six mooring piers, and three cluster-pile dolphins.

Jointly with the U.S. Army Corps of Engineers, DOE held an informational hearing in Queen Anne’s County on March 6, 2003. Other than to note that most of the comments were in ⁴⁹⁷ opposition to the project, the department’s ultimate Report says little about the hearing. The Wetlands Administrator, in his report, stated that about 50 people were in attendance, 11 spoke, and six of them were in opposition. In its June 2006 Report and Recommendation, DOE noted that, in 2005, an empty and damaged eagle’s nest had been discovered near the proposed bridge and that, because, despite its condition, the nest was deemed an active one, Hovnanian had agreed not to do any work in any area that could adversely affect the eagles until it could be determined whether the eagles would return. The Report also noted that Hovnanian had modified its initial plan for the marina pier, reducing it from 72 to 10 slips and reducing the deck at the end of the pier from 1,500 to 600 square feet.

The DOE Report addressed eight issues:

- (1) An alternatives analysis—where else could this project be located: DOE seemed to accept that there were no feasible alternative locations.
- (2) Avoidance and minimization: DOE noted that Hovnanian had agreed to reduce significantly the size of the proposed community pier.
- (3) Historic and archaeological resources: DOE noted that 17 potential historic sites had been identified and that an agreement had been signed to protect those

sites.

(4) Threatened and endangered species: DOE noted that the only such species involved the active bald eagle nest and advised that (i) the nest would be monitored for the next three years to see if the eagle pair returned, (ii) no work would be done in the area of the nest, and (iii) if the eagles returned, the project would have to be modified.

(5) Submerged aquatic vegetation: None was found at the Chester River site. Some was found at the Cox Creek and Mecum Creek sites, but the Report did not indicate what, if any, effect any of the four elements would have on that vegetation.

⁴⁹⁹ (6) Waterfowl: DOE noted that the Chester River in the area of the project is classified as an Historic Waterfowl ⁴⁹⁸ Staging and Concentration Area and that the Department of Natural Resources had recommended two measures to protect that area, both of which were recommended as conditions of the license.

(7) Shellfish: DOE found that there were no oyster beds in the project vicinity.

(8) Stormwater and Flooding: DOE noted that stormwater management plans for Phase I had been reviewed and approved by the Critical Area Commission staff.

In the next section of its Report—Mitigation—DOE reported that a Phase II mitigation plan for both tidal and non-tidal wetland impacts had been developed and approved. The plan provided for mitigation at a 2:1 replacement ratio for the 9,939 square feet of tidal wetland impacted by the proposal, including the footprint of the proposed bridge across Cox Creek and direct impacts from one storm water outfall structure.

Upon these findings, DOE recommended that a wetland license be granted for the four elements, subject to any general conditions imposed by the Board and ten special conditions intended to address the few problems noted.

The Report and Recommendation was received by the Wetlands Administrator on June 12, 2006. It was released for public comment, but no comments were received by the Administrator. At the request of the applicant, consideration of the Report was delayed until March 2007 because of pending litigation. On April 11, 2007, the Administrator filed his Report, his ultimate conclusion being that “[b]ased on the favorable dispositions of the State and federal reviewing agencies, and the

commendations and conditions set forth below, issuance of the wetlands license is recommended.”

The Administrator's Report added comments on two matters not discussed in the DOE Report. One dealt with the economic and tax benefits from the project. Based on data supplied by the applicant, the Administrator estimated that, once built out, the economic benefits to the State would be \$34.7 million in goods and services on an annual basis, \$440 million in retail sales and services over a 20-year period, and *499 100 permanent full-time jobs. Estimated tax revenues from the project were \$114 million over 20 years and \$3.8 million in property taxes once built out. The Administrator estimated a positive net fiscal impact over 20 years of \$88 million.

The second added comment concerned the impact of the project on *non-tidal* wetlands. The Administrator noted that the project would permanently impact 8,189 square feet of scrub-shrub/emergent non-tidal wetlands and temporarily impact 1,968 square feet of such wetlands. In addition, project activities would permanently impact 13,508 square feet of regulated non-tidal wetlands buffer and temporarily impact 3,766 square feet of such buffer. Mitigation requirements would be satisfied by the creation of 39,000 square feet of forested wetlands and 300 square feet of emergent/shrub-scrub wetlands located on site and adjacent to Cox Creek. With respect to tidal wetlands, the Administrator concurred in DOE's recommendation that the license be conditioned on the establishment of 19,878 square feet of tidal marsh within one growing season subsequent to the commencement of any construction—that being the 2:1 replacement ratio recommended by DOE.

The matter first came before the Board on May 9, 2007. Notwithstanding that the **50 application met all of the criteria for a concurrence case as set forth in COMAR 23.02.04.08A, *see supra*, the Board classified it as an extraordinary case because a public informational hearing was to be held.

The first speaker on May 9 was the Wetlands Administrator, Doldon Moore. In describing the impact of the four elements for which a license was requested, he observed that:

(1) With respect to the directional drill, there would be no adverse impact on tidal water bodies or vegetative tidal wetlands. That was because directional drill bore methods disturb the soil surface only at the entrance and exit holes, and both of them were located outside the 100-foot critical area buffer;

(2) With respect to the shading of wetlands by the

proposed bridge and the single direct impact of the storm *500 water structure, which comprised most or all of the 9,939 square feet of impact, mitigation at a 2:1 ratio would be required. In addition, Hovnanian had implemented an invasive species control program and continues to restore and enhance degraded tidal wetlands located on the site and a tidal pond adjacent to the Chester River;

(3) The project site was located in a smart growth and State priority funding area, that it was granted critical areas growth allocation, and that 40 percent of the land would remain in green space; and

(4) With respect to the eagle's nest, in the summer/fall of 2005, a storm blew the nest from the tree, the eagles had not returned in 2006 or 2007, but the site would be monitored for three years to determine its viability.

In response to questions from the Governor regarding the 18 storm water outfalls into the Chester River and Cox and Macum Creeks, Mr. Moore advised that because the runoff would be pre-treated, there would be a minimum of ten percent less nutrients running off the property into tidal waters than is currently the case, which complied with critical area requirements. A representative from Hovnanian amplified that response later, pointing out that, in earlier times, storm water management, to the extent it existed, relied on large holding ponds to collect and filter the runoff, but that the current technology called for a larger number of smaller ponds, closer to the site of the runoff, supplemented by sand, gravel, and “rip rap” further away. The 18 small outfalls, rather than one large one, reflected the current approach.

The concern that ultimately led to the negative vote by the Governor and the Comptroller was first raised by the Comptroller, who asked the Secretary of DOE, Shari Wilson, whether, from an environmental standpoint, this was a good project to have at that location. Ms. Wilson responded that there were two aspects to the question. As to the “narrower aspect” that was then before the Board, she said that, from an environmental standpoint, “the project meets current tidal wetlands licensing requirements.” She added that, in terms of *501 the larger question, this was not a preferable site for such a large project, but again confirmed that, “in terms of the application for the license that's before you, the project meets the requirements” of existing law and that there was “nothing particularly unusual about this project as opposed to others.”

The Comptroller accepted the Secretary's explanation but, though recognizing that the only issue was the license for the four minor impacts, he stated that it was important to

“Take a step back” and ask whether it was in the best interest of the State “to allow the kind of development ***51 that’s killing the Bay to move forward.” He also expressed concern that there was “some kind of a gag order floating around” that prohibited Queen Anne’s County Commissioners from commenting on the project. We shall address that point later; suffice it to say at this point that there was no such gag order, and the Queen Anne’s County Commissioners were not precluded from expressing their opinions. Ms. Wilson responded that DOE’s contact with local officials had been through water and sewer planning, but that other agencies had been working with them on the critical area issues.

In response to further questions, a representative from the Critical Areas Commission for the Chesapeake and Atlantic Coastal Bays noted that about 60 percent of the land was in the critical area, that one of the critical area requirements for a project was that there be at least a ten percent reduction in pollutant runoff, and that requirement was met in this case. A representative of Hovnanian, Nancy Slepicka, emphasized that point—that, in accordance with the critical area law, the county had designated the location as a growth area because it was near major roads, existing water and sewer facilities, and existing developments, and that the county also had designated that location as one of its priority funding areas. She noted that the county had taken at least ten different votes over the years approving the project.

The Comptroller noted again his concern that the county commissioners were unable to comment on the proposal. Counsel for Hovnanian, John Zink, explained that, in 2002, *502 Hovnanian and Queen Anne’s County entered into a Development Rights and Responsibilities Agreement (DRRA) which, in return for certain substantial benefits to the county, froze all of the then-existing county development laws and regulations with respect to the project, so that it could proceed without fear that those laws or regulations might be changed mid-stream.⁹ After that agreement was signed, new county commissioners took office and, in the view of Hovnanian, breached the DRRA by interfering with permits and approval. Hovnanian filed suit, and, in September 2003, the Circuit Court found the DRRA to be valid and required the county to abide by its commitments. The court reserved jurisdiction to assess, at a later time, damages incurred by Hovnanian by reason of the commissioners’ conduct. The county noted an appeal.

In an attempt to resolve all disputes between Hovnanian and the county regarding the project, the parties entered into a settlement agreement in October 2003. As part of that agreement, which was in the record before the Board,

the county agreed to dismiss its appeal, comply diligently and in good faith with the Circuit Court judgment, and refrain from “directly or indirectly oppos[ing] or interfer[ing] with any approvals for the development of [the project].” Counsel noted that the county commissioners could terminate the DRRA if Hovnanian violated its provisions, but it had not done so and the current position of the county was that the ***52 project could proceed. He said that he was unaware of any “gag order,” although he acknowledged that he was “concerned” whether opposition by a county commissioner to the issuance *503 of a wetland license would violate at least the spirit of the agreement. The Comptroller persisted, that he had contacted four of the five commissioners and they all expressed fear of being sued by Hovnanian.¹⁰

The next presenter, representing a non-profit organization devoted to environmental improvement, discussed some of the details of the project and confirmed the views of DOE and the Wetlands Administrator that, when built out, it would improve the water quality of the run-off. He was followed by a representative from the State Highway Administration, who advised that the Administration was satisfied with the traffic plan regarding State Route 18 submitted by Hovnanian.

The Treasurer then raised the kind of question with regard to traffic congestion that the Comptroller had raised regarding environmental impact—whether the focus should be just on Route 18 or on U.S. Route 50—a major highway connecting the Eastern and Western Shores of the State—as well. John Porcari, the Secretary of Transportation who was in attendance, responded that he too had been concerned about congestion, both on Route 50 and the Chesapeake Bay Bridges. He said that he had tried to get the local land use authorities in that part of the Eastern Shore to take that into account when approving developments, but the fact was that they were not required to do so. The current requirements, he said, had been met.

The Board then heard from several residents of the area who, without focusing on any of the four elements for which a license was required, expressed opposition to the project as a whole, from an environmental, traffic, and public safety point of view. Richard Altman’s position was that “Kent Island is not a suitable place for intensive development.” One opponent, Mike Koval, had been a Queen Anne’s County Commissioner from 2002 to 2006. He said that he had testified against the project at all of the hearings and averred that the people in the county did not want it. The Board then voted to *504 defer further consideration of the matter until its next meeting on May 23. At the request of the Treasurer, the Board agreed to

...solicit advice on a number of questions from the Attorney General.

On May 21, 2007—two days before the next Board meeting—the Attorney General's Office responded to the Board's request for advice through two opinions, one dealing with the criteria for designating a priority funding area, and the other dealing with the effect of the settlement agreement on limiting the ability of Queen Anne's County Commissioners to speak out against the project. The opinion dealing with priority funding areas noted that priority funding area was a concept created by the State's "smart growth" law (Md.Code, §§ 5-7B-01 *et seq.* of the State Finance and Procurement Article (SFP)). It pointed out that the law defined seven categories of "growth-related Projects," one of which was areas designated by a county. A county-designated project must meet the criteria in SFP § 5-7B-03 and must be certified to the State Department of Planning, but that the Department had no authority to overrule the county's certification.

In the second opinion, the Attorney General's Office, noting both the DRRA and the settlement agreement, advised that (1) **53 it was legally permissible for the county commissioners to agree to withhold opposition or preference, but (2) such an agreement would affect only county approvals and not State ones. Thus, the Office concluded that nothing in the DRRA or the settlement agreement could commit the commissioners to a particular position on a State wetlands license.

Responding directly to the question of whether the settlement agreement constituted a "gag order," the opinion declared that it did not, and that, if it did, it would be of doubtful legality. It stated that neither the DRRA nor the settlement agreement "directly prohibits individual County Commissioners from expressing their views concerning the [project] or from appearing before the Board of Public Works and responding to questions." It noted, however, that counsel for Hovnanian had taken a different view and had threatened to *505 seek indemnification from the county if an individual commissioner were to speak in opposition to the granting of a license, and that, if he pursued such a threat, a court would ultimately have to decide the matter.¹¹

The Board reconvened on May 23, 2007. During the two-week interval, the members had visited the site. At the outset of the renewed hearing, the Board acknowledged the two opinions from the Attorney General's Office. They were placed into the record, and the Governor read aloud the conclusions reached in the opinion concerning the effect of the settlement agreement.

The discussion turned first to that issue—whether the settlement agreement limited the ability of past and present county commissioners to comment on the issuance of a wetlands license. The Comptroller said that, notwithstanding the opinion of the Attorney General's Office, the Queen Anne's County Attorney had advised the Commissioners not to testify or take any official position on the matter. The Deputy Attorney General, John B. Howard, then advised the Board unequivocally that neither the county nor the Commissioners were precluded from expressing their views on the issuance of a State license. He regarded the concern expressed by the county attorney as a "red herring." The Comptroller expressed his agreement with that view but nonetheless repeated his belief that, at the behest of Hovnanian, the Commissioners "have duct tape wrapped around their mouth." The Treasurer indicated her regret that the Commissioners *506 had chosen not to appear and suggested that their absence may simply be a matter of political convenience.

The Board's Secretary then referenced the second opinion, regarding priority funding areas. She informed the Board that, when a county designates such an area, the State Department of Planning is permitted to make comments on it, but not to veto it. In this case, she said, the Department of Planning had made no comment on the designation.

**54 The next presenter, at the Board's request, was the Deputy Secretary of DOE, Robert Summers. He pointed out the environmental impact of large developments generally—increased runoff, increased pollution from runoff, treated sewage discharges, atmospheric deposition, and biological degradation of streams and habitats. He also noted that the purpose of priority funding areas is to concentrate that development in the better areas where stormwater and sewage can get state-of-the-art treatment. There were problems with any development site close to the Chesapeake Bay. Secretary Wilson agreed that "we would not want to have development occurring along the shoreline," but noted again that the application before the Board "appears to have met all of the state and local land use requirements." In response to a question from the Treasurer, she confirmed that DOE had considered each of the 19 criteria listed in COMAR 16.24.02.03 and found that the impact was such as warranted the Department's recommendation that the license be issued. Her point was that a broader approach than that currently in the law was advisable.

The Comptroller then asked Ms. Wilson directly, for the second time, whether she regarded the project as

Environmentally sound, and she replied that it was, because it met all the regulations currently in force. In response to a question from the Governor, she noted that, under the regulatory criteria, DOE had to look at the impact on the 9,939 square feet of wetlands, and, given the 2:1 mitigation and other enhancements, the project met the legal requirements and the license should issue. She added that the advisability of placing a *507 development such as this in that location was reviewed under the critical areas law, which was a separate regulatory scheme. The Secretary of Planning, Richard Hall, noted that the location had received priority funding status by the county in 2001, that the Department of Planning had reviewed it and concluded that it met the legal requirements, which is why the Department did not oppose it. He agreed that some of the regulations should be changed, but the Department had to deal with the law as it is; “[w]e have a limited role with the critical area now.”

Attention then turned to the question of evacuating people from Kent Island in the event of a major hurricane, a matter raised by Mr. Altman at the earlier meeting on May 3. John Chew, the Director for Emergency Services for Queen Anne’s County, stated that a 1,350-unit development certainly would add to the problem, but that plans had been developed for emergency evacuation of the entire Eastern Shore, including Queen Anne’s County. The bottleneck would be getting people across the Chesapeake Bay bridges, which would require that evacuation begin at least three days before the storm actually hit the area. Mr. Chew stated that the National Weather Service “advise[s] us well in advance of times to evacuate.”

The Board then heard from proponents of the project. One of them, Linda Friday, was president of the Queen Anne’s County Chamber of Commerce. She estimated that the project would have a positive fiscal impact to the county of \$135 million over a 20-year period. Douglas Shreve, executive director of a county business group noted that the benefits required under the DRRA were worth \$40 million to the county, including an extension of the sewer system and an \$8 million contribution to the expansion of the wastewater treatment system. Following their statements, several opponents testified. As before, their focus was on the project as a whole, which they felt was inappropriate for Kent Island, not on its impact on **55 the 9,939 square feet of wetlands. Mr. Zink, counsel for Hovnanian, addressed that point, making clear that the Board was not a planning and zoning body but was *508 limited to considering the effect of the project on the preservation of the affected wetlands and nothing more.

The Comptroller raised again his belief that Hovnanian had, in effect, gagged the county commissioners. Mr. Zink denied that was the case. He iterated his belief that the settlement agreement precluded the county from opposing the issuance of the license and that, if it did so, it may be liable to indemnify Hovnanian for any loss suffered as a result, but that no commissioner was precluded from appearing before the Board and offering an opinion he or she wished to offer.

The final presenters were Joseph Stevens and John Delaney, on behalf of Hovnanian. Among other things, Mr. Stevens noted that the greatest part of the 9,939 square feet of State wetland affected by the project was the 9,000 square feet that would be shaded by the 250-foot bridge across Cox Creek. That bridge, he asserted, was one that the county itself wanted, to connect the north part of Kent Island to the southeast part in order to avoid the circuitous route that people now needed to travel.

Following these presentations, the Board members announced their individual decisions and the reasons for them. The Governor began by observing that the Board was required to decide whether issuance of the license was in the best interest of the State, taking into account the varying ecological, economic, developmental, recreational, and aesthetic values of the application. He also acknowledged that the Board’s authority was limited to whether a wetlands license should be issued at the particular site, and that it is not authorized to order that there be no development at that site. He quoted from the statutory purpose of the Wetlands Law, to prevent the loss or despoliation of the wetlands.

Having said that, the Governor then noted that this would be “the largest development in the history of the critical area law,” consuming about one-quarter of the total growth allocation of Queen Anne’s County. He then announced his conclusion:

*509 “[G]iven the size of this development, 1,350 units densely crammed into a critical area of the bay, given the lack of assurance that this will not as common sense would tell us do further damage to the wetlands and critical areas of the bay, to say nothing of the public safety concerns which I will leave to the Queen Anne’s people to figure out how they justify putting 1,350 senior units in an island that

gets cut off in a hurricane one storm, but because of the lack of any assurance because common sense tells us that to cram this many units into this area, I will be voting no on the application for the permit.”

The Treasurer disagreed and voted to approve the application. She acknowledged that she would not have chosen to put the development at that location, but observed that it had been approved by the Critical Areas Commission and by the county government, which was the body charged with planning and zoning authority. She pointed out that DOE had found the project in compliance with the 19 criteria that they were obliged to consider, that the Department of Planning had no problem with the county's priority funding determination, that it was within two growth areas, that it met all requirements of the law, and that it would have little negative impact on the wetlands themselves. She agreed that the laws needed to be strengthened but insisted that the instant **56 case had to be decided based on the existing law.

Although briefly echoing the Governor's concern about the environmental impact of the project as a whole on the Chesapeake Bay, Comptroller Franchot voted against the application because he believed that the county commissioners had been bullied and threatened and effectively silenced and that, as a result, the Board had been denied their testimony. That, he concluded, impeded the Board's ability to conduct due diligence on the matter.

Hovnanian sought judicial review of the Board's denial, arguing that the Board misinterpreted its statutory authority and unlawfully extended its scope of review beyond the preservation of State wetlands, that all of the evidence supported *510 approval of the license, and that the decision should be reversed without remand. In addressing the first issue, the court, in its memorandum, made a number of subsidiary findings, the most relevant of which were:

(1) That proceedings before the Board with respect to such licenses are quasi-legislative, rather than quasi-judicial, in nature and that the standard of judicial review, therefore, was whether the Board acted within its legal boundaries;

(2) That the Board had no statutory (or other) authority to adopt regulations, other than interpretive ones, at least with respect to wetlands licenses and, as a result, the provision in COMAR 23.02.04.10 that, in determining the

public interest, the Board must consider the ultimate project had no force other than as an interpretive regulation;

(3) That the Governor's rationale for voting against the application was more a repudiation of the growth allocation made by the county under the critical area law than a more narrow determination that a license would unduly harm the wetlands it actually impacted; and

(4) That the Comptroller's rationale regarding pressure put on the county commissioners had nothing whatever to do with the best interest of the State.

In light of those findings, the court found it unnecessary to reach the evidentiary issue. In its judgment, it declared that the Board, *i.e.*, the Governor and the Comptroller (i) made no assessment of each specific activity for which the wetlands license was sought, as it was required to do, (ii) gave no consideration to the statutory criteria applicable to the proposed activity, (iii) ignored determinations that had been made by coordinate agencies on the basis of applicable statutory criteria, (iv) supplemented the statutory criteria, and (v) applied criteria or standards different from the statutory ones. Upon those findings, it reversed the Board's decision and remanded the case for further proceedings consistent with the court's judgment.

*511 DISCUSSION

In its brief, the Board raises one very general question—whether the Board acted Constitutionally and within its legal boundaries when it denied the license. In responding affirmatively to that question, it argues (1) that the Board's decision was quasi-legislative rather than quasi-judicial, (2) that, accordingly, the standard of judicial review is whether the Board acted Constitutionally and within its legal boundaries, and (3) that it did so. The individual appellants raise essentially the same general issue. Their view is that the Board is vested with discretionary authority over the issuance of licenses for dredging and filling State wetlands, and that it did not exceed its authority in denying the license in this case.

**57 Hovnanian, of course, has a different view. It contends that the Board's decision was an adjudicatory, quasi-judicial, one and that the standard of judicial review is therefore less deferential. The Board's decision, it

...gues, must be based on evidence pertaining to the impact of the four elements on the affected wetlands, not on the general environmental impact of the entire project on the ecology of the region, and that, applying the appropriate standard, its decision to deny the license was unsupported by any substantial evidence.¹²

Nature and Scope of the Board's Authority

In resolving those issues, we need to examine first the nature and scope of the jurisdiction and authority that the Board exercises when dealing with a State wetlands license. Although it had antecedents dating back to 1825, the Board of Public Works in its present form was created in the 1864 Constitution for the purpose of managing the State's investments in various railroad, turnpike, and canal companies until those investments could be sold or otherwise liquidated. Indeed, even to this day, the Board's direct Constitutional authority, as set forth in Article XII, §§ 2 and *512 3 of the Constitution, is limited to those functions, which clearly do not encompass the issuance of wetlands licenses.

The wellspring of all other jurisdiction and authority of the Board emanates from the brief statement in § 2 of Art. XII that the Board "shall perform such other duties as may be hereafter prescribed by law." That is why, earlier in this Opinion, we noted that the Board's jurisdiction and authority over wetlands licenses is derived solely from statutory delegation by the General Assembly and not from any Constitutional or inherent authority the Board possesses on its own.

The greatest part of the Board's statutory authority lies in the general area of procurement—superintending or having approval power over the acquisition and disposition of interests in real property needed or owned by the State, construction of public facilities, and the acquisition of certain services needed by the State. *See*, in general Title 10 of the State Finance and Procurement Article (SFP). In this case, the Board and the individual appellants invoke some of that authority as part of what they regard as the Board's overarching composite jurisdiction over State wetlands.¹³ Particular reference is made to SFP §§ 10–305 and 10–402. Neither has anything to do with the issuance of a wetlands license.

SFP § 10–305(a) permits the Board to approve the sale, lease, transfer, exchange, grant, or other disposition of any real or personal property of the State for a

consideration the Board decides is adequate, provided the conditions set forth in § 10–305(b) have been satisfied. Apart from the fact that the record before us fails to show that the conditions in subsection (b) were satisfied, or even thought relevant, a wetlands license does not constitute or involve the sale, lease, or other disposition of the State wetlands. The Board's own wetlands regulations *513 make that clear. *See* COMAR 23.02.04.01A and D.¹⁴ Similarly, **58 SFP § 10–402 applies only to the conveyance of *title* to land owned by the State as a result of the relationship of the land to the waters of the State. Whatever general discretion the Board may have under either of those statutes when considering the conveyance of title or a leasehold interest has no relevance to the issuance of a wetlands license. The Board's authority with respect to a wetlands license emanates solely from and is controlled by ENV title 16, subtitles 1 and 2. As we have observed, the applicable standard that guided the Board's discretion in that regard, at the time, was ENV § 16–202(c)(1), which now appears as § 16–202(g)(1):

"Upon receipt of a report by the Secretary [of DOE], the Board shall decide if issuance of the license is in the best interest of the State, taking into account the varying ecological, economic, developmental, recreational, and aesthetic values each application presents. If the Board decides to issue the license, the issuance of the license shall be for consideration and on terms and conditions the Board determines."

Nature of That Function: Quasi-Judicial or Quasi-Legislative

^[1] ^[2] ^[3] ^[4] The parties spend some effort explaining their different positions as to whether the Board's decision not to issue a license was quasi-judicial or quasi-legislative in nature. The practical importance of that ordinarily lies in its impact on the standard of review that courts must apply in resolving challenges *514 to the administrative decision, essentially how much deference the court must give to the agency's determination.¹⁵ As far back as *Hyson v. Montgomery County*, 242 Md. 55, 62, 217 A.2d 578, 583 (1966), this Court recognized, at least up to then, that "no one has been able to delineate, with precision and accuracy, an exact formula for determining the line of demarcation between the differences between legislative and judicial functions" especially "when mixed, blended, or combined functions are given, and exercised by, the same official, board, or agency ..."

Although we generally have characterized the two functions, it does not appear **59 that we are any closer to such a precise line of demarcation now. In *Queen Anne's Conservation v. County Comm.*, *supra*, 382 Md. 306, 326, 855 A.2d 325, 337, we confirmed our previous statement in *City of Bowie v. County Comm'rs*, 258 Md. 454, 463–64, 267 A.2d 172, 177 (1970) that “the test to determine when action is legislative and when executive or administrative is ‘whether the [action] is one making a new law—an enactment of general application prescribing as new plan or policy—or is one which merely looks to or facilitates the administration, execution, or implementation of a law already in force and effect.’ ”

*515 In *Overpak v. Baltimore*, 395 Md. 16, 33, 909 A.2d 235, 245 (2006), we adopted the view of the Court of Special Appeals in *Armstrong v. Baltimore*, 169 Md.App. 655, 906 A.2d 415 (2006) that an agency acts in a quasi-judicial function when “(1) the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property ... and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence.” Normally, that requires a contested case hearing, so that evidence (as opposed to informal statements of general beliefs) may be presented, challenged, and analyzed, in order that reasonable credibility determinations can be made.

The nature of the Board's decision with respect to a wetlands license has aspects of both quasi-judicial and quasi-legislative functions. It is quasi-judicial in that it is property-specific—whether the applicant should be permitted to dredge or fill specific State wetlands in the particular manner it wishes. That focuses on the nature and extent of the impact of the proposed activity on specific wetlands, which is fact-driven and susceptible to the deferential standard of judicial review applicable to quasi-judicial proceedings. Yet, in clear contrast to the situation with respect to the issuance of a *permit* for activity on *private* wetlands, at no point in the application process—not before DOE, the Wetlands Administrator, or the Board—is anything approaching a contested case hearing required. Indeed, the Board itself is not required to have any kind of hearing at all, which seems antithetical to the notion of a quasi-judicial proceeding. Apart from that, even under ENV § 16–202, the Board possesses a great deal of largely unguided discretion in determining whether to issue a license and on what terms and conditions, which ordinarily would call for the expanded judicial deference that attaches to quasi-legislative decisions.

In this case, the distinction is largely irrelevant. Although Hovnanian contended, among other things, that the

Board's decision was not supported by substantial evidence in the record which, if so, would clearly be a ground to vacate that decision if it was quasi-judicial in nature, the Circuit Court, in *516 light of its conclusion that the Board's rationale for denying the license was *legally* erroneous, found it unnecessary to address that argument, and, because we agree with the Circuit Court's conclusion, we need not address it. If, as we shall hold, the Board applied incorrect standards in making its determination—standards that caused it to exercise an authority beyond that which was delegated by the General Assembly—it would have “exceeded its statutory authority” if its decision was quasi-judicial and would not have been “acting within its legal boundaries” if its decision was quasi-legislative.

Wrongful Standard Applied By The Board

¹⁵ Hovnanian needed a license because four elements of its project impacted, in particular ways, 9,939 square feet of State wetlands. The nature of those impacts, in light of the conditions recommended **60 and the mitigation agreed to by Hovnanian, was considered by DOE and the Wetlands Administrator and was properly the subject of their respective reports recommending issuance of the license. There is nothing in the record before the Board challenging, or even purporting to challenge, the conclusions reached in those Reports. Neither the Comptroller nor the Governor, in explaining the reasons for their vote, addressed that impact. Neither of them even suggested that they disagreed with the conclusions reached by DOE or the Administrator that the direct impact on the State wetlands was minimal and that, through the 2:1 replacement ratio and other mitigation efforts, any adverse impact was well compensated. Neither of them expressed any disagreement with any of the subsidiary conclusions noted in the two Reports or with the recommended conditions.

As we have observed, although seemingly recognizing that the Board's authority was limited to whether a wetlands license should be issued at the particular site and not whether the project as a whole should proceed, the Governor made absolutely clear in his remarks that his negative vote was based entirely on his “common sense” view that putting “1,350 units densely crammed into a critical area of the bay” would *517 “do further damage to the wetlands and critical areas of the bay,” not to mention the public safety problem of evacuating 1,350 senior citizens in the event of a hurricane. It is clear from

... statement and others made during the course of the hearing that the Governor viewed the role of the Board in considering a wetlands license as extending beyond that of DOE and the Wetlands Administrator and encompassing a broader mandate to protect the ecology of the Chesapeake Bay and its tributaries and the public safety of the residents of Kent Island and Queen Anne's County.

We do not question whether the environmental concerns expressed by the Governor were genuine. The Treasurer and the Comptroller also expressed reservations about the location of the project, as did the Secretaries of DOE and Planning and the Director for Emergency Services for Queen Anne's County, all of whom felt that current laws and regulations regarding the placement of large developments in the vicinity of the Chesapeake Bay needed to be changed.

The point, clearly explained by the two Secretaries, however, is that, in deciding whether to issue a wetlands license, the Board does not act—is not authorized to act—as a super land use authority. Its own regulation, COMAR 23.02.04.10, limits its focus to considering the recommendations of DOE and the Wetlands Administrator and taking into account the ecological, economic, developmental, recreational, and aesthetic values “to preserve the wetlands and prevent their despoliation and destruction,” not to determine whether the project as a whole is environmentally sound at its particular location. That authority lies elsewhere.

The decision to allow a development to proceed within the Chesapeake Bay or Atlantic Coastal Bays Critical Area is specifically committed by law to the jurisdiction of the affected counties and the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, created by Md.Code, § 8–1803 of the Natural Resources Article (NR). See *Critical Area Commission v. Moreland*, 418 Md. 111, 12 A.3d 1223 (2011); *Smith v. Kent County*, 418 Md. 692, 18 A.3d 16 (2011). In enacting *518 the laws governing development in those critical areas, the General Assembly made clear that its purpose was:

“(1) [t]o establish a Resource Protection Program for [those areas] by fostering **61 more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats; and

(2) [t]o implement the Resource Protection Program 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.”

NR § 8–1801(b).

The State agency given general supervisory authority over the development and implementation of the Resource Protection Program is the Chesapeake and Atlantic Coastal Bays Critical Area Commission, a unit within the Department of Natural Resources. See NR §§ 8–1803 and 8–1806. Nowhere in that entire subtitle that creates and governs the program is the Board of Public Works even mentioned, much less given any authority to control development. That is the case as well with the designation of priority funding areas, which is likely to be critical to large developments generally and was critical to this one. As was explained, that program is part of the State's “smart growth” initiative codified in SFP §§ 5–7A–01 through 5–7B–10. Although the Board has approval power over State funding for developments in areas other than designated priority funding areas (see SFP §§ 5–7B–05 and 5–7B–06), it is given no such approval power over developments within priority funding areas designated by the counties and municipalities. See SFP §§ 5–7B–03(a)(1) and 5–7B–04.

The language of ENV § 16–202(c)(1) [now § 16–202(g)(1)] cannot reasonably be read to broaden the jurisdiction of the Board in such a manner as to trump the clear commitment of land use policy to the local governments and, in part, to the Critical Area Commission and other State agencies. The requirement that the Board consider the ecological, economic, *519 developmental, recreational, and aesthetic values presented in the application in determining whether issuance of the license is in the State's interest has reference to the impact of the proposed dredging or filling on the affected wetlands. Section 16–102(b), which declares the public policy behind the Wetlands Law, makes abundantly clear that those considerations are tied to the desire “to preserve the wetlands and prevent their despoliation and destruction,” not to control all development near the Chesapeake Bay, and the Board's own regulation confirms that narrower focus.

That same limitation dooms the Board's reliance on COMAR 23.02.04.01B as a basis for considering the environmental impact of the entire project, rather than just the effect of the four elements on the 9,939 square feet of wetlands directly impacted by those elements.

Section 01B of the regulation deals with “Public Interests.” Paragraph (1) defines “public interests” as “the demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action or activity involving State

wetlands, and which would exceed all demonstrable environmental, social, and economic costs of the proposed action or activity.” Paragraph (3) includes within “public interests” the preservation of tidal wetlands, conservation of natural values and living resources, fishing and crabbing, navigational needs, water access and related recreation, and maritime commerce. That is what the Board is to consider.

Paragraph (2) of the regulation requires that “[i]n determining the public interest in a request for a private use, structure, or activity over, on, in, or under State wetlands or severance of materials from State **62 wetlands, the Board of Public Works shall consider the ultimate project and beneficial purposes to be served.” The Board, weaving in its view that it is “the agency with exclusive authority over the disposition of State property,” latches on to the requirement that it “consider the ultimate project” to argue that it was entitled to look beyond the impact of the four elements on the small area of wetlands *520 and consider, and find conclusive, the impact of the entire project on the economy, ecology, and public safety of the entire area, including the entire Chesapeake Bay, as authorized by the COMAR regulation.

Hovnanian, dismissing the relevance of the Board’s approval authority over the actual disposition of State property under SFP, contends, first, that the Board is misreading the regulation and second, that if the Board’s interpretation is correct, the regulation is inconsistent with the statute and, to that extent, invalid. Hovnanian is correct in both respects.

¹⁶ Although a reviewing court is required to give considerable deference to an agency’s interpretation of its own regulation, the interpretation of a regulation is akin to the interpretation of a statute. It is an issue of law which, ultimately, the court must decide. *See Cathey v. Dept. of Health*, 422 Md. 597, 604, 31 A.3d 94, 98 (2011) (despite the deference due to an agency’s interpretation of its own regulation, “[f]or cases in which an agency interprets its own regulations, we have held that ‘questions of law are completely subject to review by the courts.’ and that this Court ‘is not bound by the agency’s legal conclusions; we are, in short, under no constraints in reversing an administrative decision which is premised solely upon an erroneous conclusion of law’ ”).

Paragraph B(2) of the regulation must be read in harmony with paragraph B(1). Its clear intent is to allow the Board, if it finds “demonstrable environmental, social, and economic costs of the proposed action or activity” (emphasis added) which, taken alone, might make

issuance of a license *not* in the State’s interest, to consider whether the ultimate project and beneficial purposes to be served exceed those costs, thereby, on balance, making the license consistent with the State’s interest. As we have observed, evidence was presented to the Board by both the Wetlands Administrator and the president of the Queen Anne’s County Chamber of Commerce indicating a positive economic benefit from the project, which the Board chose to ignore.

*521 The Board seeks to reverse that analysis and allow it to consider the environmental *cost* of the ultimate project on the ecology of the entire region as a basis for denying a license that would have a minimal cost on the affected wetlands. Such a reading is not only contrary to the plain wording of the regulation but would achieve what the statutory scheme does not permit.

Finally, in this regard, a comment on the rationale expressed by the Comptroller. To the extent that he based his decision on his view of the effect of the entire project on the Chesapeake Bay as a whole, it suffers from the same defect as that of the Governor. His principal concern, however, seemed to be his belief, gleaned from some *ex parte* private conversations he apparently had with some of the Queen Anne’s County Commissioners and a letter from the county attorney, that, despite the views of the Attorney General’s Office to the contrary, there was a “gag order” of some kind that precluded Queen Anne’s County Commissioners from expressing opposition to the application.¹⁶

**63 The Comptroller expressed that view at the May 9 hearing and maintained it even after he received the opinion from the Attorney General’s Office and had the opportunity to question the Deputy Attorney General at the May 23 hearing. There is no indication in the record that either the Comptroller or the Board itself ever formally requested that the current commissioners appear or submit written material or that they ever formally notified the Board that they felt precluded from appearing. The issue before the Board, as we have noted, was whether the impact on the affected wetlands of the four elements that comprised the application was sufficiently adverse as to make it in the State’s interest to deny the application. There is nothing in the record before the Board to indicate that any commissioner had a view with respect to *522 that issue. Accordingly, as stated by the Deputy Attorney General, it was, indeed a “red herring” and not a legitimate basis for denying the application.

Remand

¹⁷¹ The error committed by the Board was one of law—applying the wrong standard in formulating its decision. The appropriate remedy in such a situation is to vacate the decision and remand for further proceedings designed to correct the error. *Bereano v. State Ethics*, 403 Md. 716, 756, 944 A.2d 538, 561 (2008); *O'Donnell v. Bassler*, 289 Md. 501, 511, 425 A.2d 1003, 1009 (1981). In this case, that would be for the Board to consider whether, applying the considerations set forth in ENV § 16–202(g)(1) and its own regulations, as construed in this Opinion, issuance of the license is in the State's interest.

ANNE'S COUNTY VACATED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO VACATE DECISION OF BOARD OF PUBLIC WORKS AND REMAND THE CASE TO THE BOARD FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION; COSTS TO BE PAID BY APPELLANTS.

All Citations

425 Md. 482, 42 A.3d 40

JUDGMENT OF CIRCUIT COURT FOR QUEEN

Footnotes

¹ By virtue of its succession, upon Independence from England, to the rights of the colonial Proprietor under the 1632 Charter granted by King Charles I to Caecilius Calvert and his heirs, the State of Maryland owned all of the land within the geographic boundaries of the State lying under navigable water. During the colonial period, the Proprietor, and for 86 years thereafter, the State, granted private individuals patents to some of that land, which is what created private wetlands. *See Bd. of Pub. Works v. Larmar Corp.*, *supra*, 262 Md. 24, 47, 277 A.2d 427, 437; also the brief summary in *Harbor Island Marina v. Calvert Co.*, 286 Md. 303, 315, n. 9, 407 A.2d 738, 744, n. 9 (1979) and cases cited there; *cf. PPL Montana, LLC v. Montana*, 565 U.S. —, 132 S.Ct. 1215, 182 L.Ed.2d 77 (2012).

² Initially, the Department of Natural Resources was given primary responsibility for identifying and mapping the State and private wetlands and, except for the licensing authority of the Board, regulating activities on wetlands. When DOE was created in 1987, most of that responsibility was statutorily shifted to the new agency.

³ COMAR 23.02.04.04B appears, at least facially, to broaden the preclusion, and thus the requirement of a license. It provides that a person may not, without a license, dredge; fill; construct, reconstruct, or repair structures, “[c]onduct certain other activities over, on, in, or under State tidal wetlands”; or “[a]lter State tidal wetlands.” *See also* COMAR 23.02.04.01A and 02A. Because the parties agree that what Hovnanian applied to do constituted dredging or filling, we need not address whether, to the extent that those regulations may purport to require a license for activities that would not fall within the definitions of dredging or filling, they exceed the Board's statutory authority.

⁴ COMAR 23.02.04.02 describes the scope of the regulations in chapter .04. It states that the chapter applies to all dredging, filling, or altering of State wetlands and to the construction, reconstruction, or repair of structures on State wetlands except ten listed activities. We assume that the reference in COMAR 23.02.04.05B to “those listed in Regulation .02A of this chapter” is intended to refer to the exceptions in .02A.

⁵ When the Wetlands Act was first enacted in 1970, it simply authorized the Board to issue licenses for dredging and filling on State wetlands after a hearing in the local subdivision, but did not indicate who was to conduct that hearing. Concerned about the burden of having to conduct hundreds of hearings itself, the Board sought the advice of the Attorney General, who construed the law as requiring the Secretary of Natural Resources to conduct the hearing, noting that “[i]t is illogical and inconsistent for the Board of Public Works to be required to hold a hearing after the Secretary of Natural Resources [now the Secretary of DOE] has already done so for the same purpose.” *See* 55 Op. Atty. Gen. 350, 351 (1970). The Attorney General opined, however, that the Board could designate *its* Secretary to join with the Secretary of Natural Resources in holding the hearing, but that the Board could not delegate the ultimate responsibility for approval or disapproval of license applications. The Board did not follow that advice and, instead, appointed a Wetlands Administrator as its agent to receive applications, conduct hearings, and make recommendations. As noted *supra* in text, through regulations adopted by the Board, that structure has changed somewhat.

⁶ In 2009, after the hearing in the Circuit Court was held but before the court's memorandum and judgment were filed, § 16–204 was rewritten to provide certain standing requirements and to add that “[a] contested case hearing may not occur on a decision of the Board in accordance with § 16–202 of this subtitle” and that “[j]udicial review under this section shall be conducted in

- accordance with Title 1, Subtitle 6 of this article.”
- 7 When we use the term “critical area,” we mean the Chesapeake Bay Critical Area as defined in Md.Code, §§ 8–1802(a)(5) and 8–1807 of the Natural Resources Article.
- 8 These water and sewer lines apparently were to go under both State and private wetlands and were the subject of the requested permit as well.
- 9 We traced some of the history of that agreement in *Queen Anne’s Conservation v. County Comm.*, *supra*, 382 Md. 306, 855 A.2d 325, which involved an action by opponents to the project for a declaratory judgment that the DRRRA was illegal. We affirmed a dismissal of the complaint because the plaintiff failed to exhaust available administrative remedies. Quoting from an amicus brief filed in that case, we noted that DRRRA’s were authorized by State law and that their central purpose is to vest development rights in the developer in exchange for the dedication and funding of public facilities. *Id.* at 309–10, 855 A.2d at 327.
- 10 We shall comment on that assertion later in this Opinion.
- 11 The Attorney General’s Office, before issuing its opinion, had asked counsel for Hovnanian for his views on the issues raised. Mr. Zink responded on May 16 that the settlement agreement was not a “gag order” and did not preclude the county commissioners, past or present, from speaking with other public officials concerning their view on the Four Seasons development, but that, “if an individual Commissioner speaks in opposition to a permit the County is contractually bound to support, we believe K. Hovnanian would be entitled to indemnification.” He continued that the Agreement did not prohibit Commissioners from responding to questions posed by the Board of Public Works, but if the question and answer forum is used by a Commissioner to oppose or interfere with approval of the wetland permit, the County would have to indemnify Hovnanian. As noted, the Attorney General’s Office disagreed with that view.
- 12 As part of its response to the Board’s argument, Hovnanian has moved to dismiss the appeal as not allowed by law. We have considered its motion and deny it.
- 13 The Board argues that its decision to deny a wetlands license “is legislative in nature, and not adjudicatory, because it flows from the exclusive authority over disposition of State property that the General Assembly has vested in the Board, involves broad public policy issues, and is not the product of a contested case hearing.”
- 14 Section 01A. provides that a license does not convey ownership of lands below the mean high water line or tidal waters of the State or the affected air space, or diminish the full and free use and enjoyment of the tidal waters of the State by the public. Section 01D provides that it is not the intent of the wetlands regulations “to address fully the range of fiduciary and proprietary responsibilities of the Board of Public Works relating to the private uses of State wetlands. These matters may be considered by the Board of Public Works through easement, lease, quit-claim deed, or other instrument to protect the State’s interests or to convey an interest in State wetlands.”
- 15 Whether by statute (*see* Md.Code, State Government Article, § 10–222, for example) or by common law, courts look for three things when reviewing a *quasi-judicial* decision: (1) were the findings of fact made by the agency supported by substantial evidence in the record made before the agency; (2) did the agency commit any substantial error of procedural or substantive law in the proceeding or in formulating its decision; and (3) did the agency act arbitrarily or capriciously in applying the law to the facts—in essence, whether a reasoning mind could reasonably reach the conclusion reached by the agency from the facts in the record. With respect to the findings of fact, judicial review is highly deferential. With respect to determining legal error, it is much less so. *See Spencer v. Board of Pharmacy*, 380 Md. 515, 846 A.2d 341 (2004); *Bayly Crossing v. Consumer Protection*, 417 Md. 128, 9 A.3d 4 (2010). If the agency acted in a *quasi-legislative* capacity, the scope of judicial review is limited to “assessing whether the agency was acting within its legal boundaries.” *Schade v. Board of Elections*, 401 Md. 1, 38, 930 A.2d 304, 326 (2007); *Judy v. Schaefer*, 331 Md. 239, 265, 627 A.2d 1039, 1052 (1993), quoting from *Dep’t of Nat. Res. v. Linchester*, 274 Md. 211, 224, 334 A.2d 514, 523 (1975).
- 16 Two commissioners, Mike Koval and Gene Ransom, appeared at the March 2003 hearing conducted by DOE and expressed opposition to the project. As we indicated, Mr. Koval—by then a former commissioner—appeared before the Board at its May 9 hearing in opposition.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT 9

CASE A-_____

**QUEEN ANNE'S COUNTY BOARD OF APPEALS
IN THE MATTER OF THE APPLICATION OF:**

QUEEN ANNE'S CONSERVATION ASSOCIATION, INC.
A Maryland Corporation
PO Box 157
Centreville, MD 21617

and

RICHARD S. ALTMAN and ELEANOR ALTMAN
2800 Bennett Point Road
Queenstown, MD 21658

and

ROBERT W. FOLEY, JR., and CAROLYN A. FOLEY
308 Skipper Lane
Chester, MD 21619

and

JAMES M. WIMSATT, JR. and KAREN L. WIMSATT
140 Benton Court
Stevensville, MD 21666

and

MARILYN DONOVAN
806 Petinot Place
Stevensville, MD 21666

FOR REVIEW OF SEVERAL DECISIONS MADE BY THE QUEEN ANNE'S
COUNTY PLANNING DIRECTOR AND THE QUEEN ANNE'S COUNTY
PLANNING COMMISSION IN GRANTING FINAL PHASE 1 SUBDIVISION AND
SITE PLAN APPROVAL FOR K. HOVNANIAN'S FOUR SEASONS AT KENT
ISLAND.

(FILE # 04-02-03-0002-C)



IN THE MATTER OF
THE APPLICATION OF

BOARD OF APPEALS OF
QUEEN ANNE'S COUNTY

CASE NUMBER _____

Please check one:

Property Owner _____ Contract Purchaser _____ Lessee _____
ADJACENT PROPERTY OWNERS X QUEEN ANNE'S CONSERVATION ASSOC X
Applicant's Phone No.: BY ATTORNEY C. DANIEL SAUNDERS

H: _____ W: (410) 778-4510

TO THE BOARD OF APPEALS OF QUEEN ANNE'S COUNTY:

1. Application is hereby made for: (Check one)

X Appeal from the County Zoning Administration, PLANNING DIRECTOR
AND PLANNING COMMISSION.

_____ Variance

_____ Conditional Use

2. Description of Property:

a) Election District 4TH Sectional Zoning Map 49, 57

b) Name of Subdivision PROPOSED: FOUR SEASONS AT KENT ISLAND
PARCEL 7, 8, 11 MAP 49, PARCEL 1, 8, 347, 532 MAP 57

c) Parcel No. _____ Block No. _____ Lot No. _____

d) Abutting or binding roads CASTLE MARINA ROAD,
MAIN STREET (RT. 18), BENTON ROAD

e) Acres or Size of Property 550 AC ±

f) Improved or Unimproved UNIMPROVED

g) Zoning District SMPO, CMPO Critical Areas District RCA, LDA

h) 911 Address N/A

3. Relief requested.
Please state with specificity the relief which you request and the facts upon which you base this request:

SEE ATTACHMENT A

4. State the name, address and Phone No. of the record owner of the property involved. If Applicant is not the record owner, also state your status with regard to the property.

K. HOVNANIAN AT KENT ISLAND, LLC

Owner's Phone No.: H: _____ W: (703) 631-0834

5. Names and addresses of persons to be summoned as witness or notified of hearing (please circle one):

SEE ATTACHMENT B

6. Previous Applications. If this property has previously been the subject of a prior application, state the name, date, the number of the application and the results thereof.

PRIOR APPEALS A-110022, A-010005

PENDING APPEALS A-100009, A-100030

7. Documents required for submission. Please attach hereto the following documents: **FAILURE TO ATTACH ANY REQUIRED DOCUMENT WILL SUSPEND THE APPLICATION PROCESS UNTIL SUBMISSION. DOCUMENT MAY NOT BE ALTERED OR AMENDED AT THE TIME OF THE HEARING WITHOUT APPROVAL OF THE BOARD.**

- 1. Eight copies of this Application, including "Affidavit As To Owners of Adjoining Property". (attached). SEE ATTACHMENT C
- 2. One copy of the most recent deed to property. SEE ATTACHMENT D, E
- * 3. If Applicant is Lessee, one copy of Lease Agreement between Lessee and Lessor.
- * 4. One copy of the sectional zoning map.
- * 5. One copy of tax map.
- * 6. One copy of correspondence from the Department of Planning & Zoning.
- * 7. One copy of Notification of Project Application form (attached) if property is located within the Critical Area.

* = SEE PLANNING AND ZONING DEPARTMENT FILES.

- * 8. One copy of correspondence from the Critical Area Commission, if applicable.
- * 9. One copy of correspondence from the Queen Anne's Co. Health Dept., if applicable.
- * 10. One copy of correspondence from Queen Anne's Co. Sanitary District, if applicable.
- * 11. One copy of soil conservation permit, if applicable.
- * 12. One copy of building or use permit, if applicable.
- * 13. Eight copies of site plan, concept plan or sketch plan required by Chapter 18, §18:1-139 and §18:1-158, of the Code of Public Laws of Queen Anne's Co. (1996 ED).
- * 14. One copy of Army Corps of Engineers and Dept. of Natural Resources permits, if applicable. (These permits shall be required to be obtained and introduced for the record for all applications involving structures in navigable waters and requiring Army Corps of Engineers and Dept. of Natural Resources permits).
- * 15. For pier applications, depth soundings are required.
- * 16. Any other documents necessary for project approval pursuant to Chapter 14, §18:1-132, of the Code of Public Laws of Queen Anne's Co. (1996 ED).
- * 17. Any other documents necessary for project approval pursuant to Chapter 14, §14:1-61, of the Code of Public Laws of Queen Anne's Co. (1996 ED).

I CERTIFY that a copy of the within Application was filed with the Queen Anne's Co. Board of Appeals on this 6TH day of JANUARY, ~~2005~~ 2006

I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing application are true and correct to the best of my personal knowledge, information and belief.

 PSA

Applicant or his/her or their Attorney

C. DANIEL SAUNDERS, ESQ.

* = SEE PLANNING AND ZONING FILES.

AFFIDAVIT AS TO OWNERS OF ADJOINING PROPERTIES

Instructions

All adjoining property owners should be listed below by parcel number, owner's name and address as per the records of the Dept. of Assessments and Taxation located at 120 Broadway, Centreville, MD 21617.

<u>Parcel Number</u>	<u>Owner's Name & Address as per Assessment Records</u>
1. _____	SEE ATTACHMENT C
2. _____	
3. _____	
4. _____	
5. _____	

(Use additional sheet if necessary).

By signature on Page 3 of this application, the applicant does solemnly declare and affirm under the penalties of perjury that the contents of the foregoing Affidavit as to Owners of Adjoining Property is true and correct to my personal knowledge, information and belief.

Appeal Application Attachment A

Appealing Approvals of Final Subdivision and Final Site Plan
Four Seasons at Kent Island- Phase 1
File # 04-02-03-0002-C

1. Appellants request that the Board consolidate this appeal with two pending grading permit appeals, A-100009 and A-100030, that are directly related this appeal.
2. These grounds for appeal and relief sought are tentative pending receipt of the Planning Commission transcript. Appellants reserve the right to expand or modify the "relief requested" and the "facts upon which [we] base this request" once the record is available. Further, Appellants intend to introduce additional information in support of the claims.
3. The Planning Commission failed to grant other approvals necessary to validate approval of the phase 1 final subdivision plan for 106 single-family lots. TD
4. There were several procedural errors made by the Planning Director in accepting an incomplete application and advancing the proposal to the Planning Commission.
5. The approved plats violate several statutory and other requirements. The Planning Director and the Planning Commission made errors by recommending and granting approvals.
6. There were several errors made by the Planning Commission in the "findings-of-fact" required by statute as a prerequisite to granting the development approvals.
7. Appellants request that the Board review the alleged errors and resolve the issues through de novo (new, a second time) proceedings or by remanding previously undecided matters to the Planning Director and Planning Commission.

Appeal Application Attachment B

Appealing Approvals of Final Subdivision and Final Site Plan
Four Seasons at Kent Island– Phase 1
File # 04-02-03-0002-C

1. Appellants request that the Board subpoena all the surveys for the subject property done by McCrone, Inc. or others which in any way modify the representations in the 1999 ALTA/ACSM survey or which in any way modify, or should in any way modify, any representations on any plats or exhibits previously submitted to the Planning Department, the Planning Commission, or the County Commissioners. Appellants request these surveys be provided to the Board thirty days prior to a hearing.
2. Appellants request that the Board subpoena full size and complete preliminary architectural drawings for the condominium buildings that formed the basis for the developer's "power-point" presentation of the condominium buildings to the Planning Commission.

Appellants request high-quality black and white (or preferably electronic) copies of architectural plans, elevations and building sections for the presented prototype, 14 unit, condominium building. Plans should include each of the building's occupied floors and a roof plan. Elevations should include all four building elevations and identify the building's principal façade materials. Sections should include one full building section that illustrates the building's entry, stairway and elevator and identifies the roof pitch and building height. A second full building section should illustrate the garage parking at each end of the building.

Drawings should be drawn and reproduced at an identified scale (1/4"=1'-0" preferred). Detailed floor plans for the individual apartments are not required. Appellants request these architectural drawings be provided to the Board sixty days prior to a hearing.

3. Appellants request that the Board subpoena Commissioner Gene Ransom.

EXHIBIT 10

BEFORE THE BOARD OF APPEALS OF QUEEN ANNE'S COUNTY

* * * * *

An Appeal by the *
Queen Anne's Conservation Association, Inc., et al. *

from Decisions of the Planning Commission, in re: * Case No. A-010008
Four Seasons at Kent Island *

(*Applicant*: K. Hovnanian's Four Seasons at Kent *
Island, LLC) *

* * * * *

OPINION AND ORDER

I. Introduction

On January 6, 2006, Robert W. Foley, Jr., Carolyn A. Foley, James M. Wimsatt, Karen L. Wimsatt, and the Queen Anne's Conservation Association, Inc. (jointly, the "Association") appealed three land-use approvals granted to K. Hovnanian's Four Seasons at Kent Island, LLC ("Hovnanian").¹ Hovnanian is the developer of Four Seasons at Kent Island, a proposed active-adult community planned for 556 acres along the Chester River in northeastern Kent Island ("Four Seasons").

The three appealed approvals consist of: (1) a final subdivision plat for Phase I of Four Seasons, which the Planning Commission conditionally approved on December 8, 2005; (2) a final site plan for a planned-development multifamily residential use (with a condominium form of ownership) included in Phase I, which the Planning Commission also conditionally approved

¹Originally, parties filing the appeal included Richard S. Altman, Eleanor Altman, and Marilyn Donovan. Prior to commencement of the Board's public hearing, Mr. Jay Falstad, Executive Director of the Queen Anne's Conservation Association, informed the Board's clerk that the Altmans and Ms. Donovan are no longer parties to the appeal. Although the Board did not hear directly from the Altmans or Ms. Donovan with regard to their status as parties, neither the Altmans nor Ms. Donovan appeared before the Board in person or through legal counsel.

ORDER

For the reasons set forth in the Board's Opinion, it is this 21st day of October, 2016, ordered that:

1. The appeal filed on January 6, 2006 by Robert W. Foley, Jr., Carolyn A. Foley, James M. Wimsatt, Karen L. Wimsatt, and the Queen Anne's Conservation Association, Inc., Case No. A-010008, is denied; and

2. The application by K. Hovnanian's Four Seasons at Kent Island, LLC for final site plan approval for 56 condominium dwelling units located in four buildings, with parking and other related improvements, as more particularly described in Planning and Zoning Department file no. 04-02-03-0002-C, is granted; and

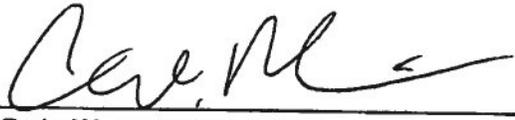
3. The application by K. Hovnanian's Four Seasons at Kent Island, LLC for final subdivision approval for 106 single-family lots, access roads, stormwater facilities, buffers, open space and other associated parcels and improvements, as more particularly described in Planning and Zoning Department file no. 04-02-03-0002-C, is granted.

[See Statement of Concurrence and Dissent]

Kenneth R. Scott, Chair



Howard A. Dean, Vice Chair



Craig W. McGinnes, Member

EXHIBIT 11

TIMELINE AND CONCURRENT DELAYS

2003

2004

2005

2006

2007

2008

2009

2010

2011

2012

2013

2014

2015

2016

County Commissioner Breach of DRRA
January 7, 2003 - October 23, 2003
10 Months, 16 Days

Growth Allocation/Overlay Maps Challenge Injunction
February 9, 2006 - August 21, 2009
42 Months, 12 Days

State Tidal Wetlands License Delay
May 23, 2007 - April 23, 2012
59 Months

**Phase 1 Subdivision Site Plan
Approval Appeal**
November 15, 2015 - October 21, 2016
11 Months, 3 Days

**CONCURRENT LITIGATION AND APPEALS
RESULTS IN A 96 MONTH TOLLING OF THE DRRA**