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memorandum

TO	Gregg A. Todd, County Administrator	**DATE**	April 23, 2014
FROM	Kurt J. Fischer	**EMAIL**	kjfischer@venable.com
		PHONE	410-244-7554
RE	Queen Anne's County Bill No. 13-24: Grandfather/Merger Law		

You have asked for our advice as to (1) the legality and constitutionality of Bill No. 13-24 which would grandfather certain substandard lots in the Neighborhood Conservation (NC) District and impose merger requirements, and (2) whether there are any legal constraints which would prevent the County Commissioners in the future from repealing the grandfather/merger provisions in Bill No. 13-24 and permitting construction on the numerous small and substandard lots existing prior to the mergers mandated by Bill No. 13-24. For the reasons stated below, we believe that grandfather/merger provisions similar to those in Bill No. 13-24 have been consistently upheld against legal and constitutional challenge and would pass muster in the Maryland courts. Further, we believe that, because the County anticipates receiving Chesapeake Bay Restoration Fund grants to pay the debt service on capacity in the County's wastewater treatment plant to serve improved properties with failing septic systems, MD. ENVIR. CODE ANN. § 9-1605.2(h)(5)(V)1. will mandate that the funding agreement between the State and the County ensure the denial of future connections not included in the project's proposed service area. This provision will have the effect for preventing the repeal of the grandfather/merger provisions to increase residential development on South Kent Island and resultant future connections to the system.

BACKGROUND

You have advised us that during the 1950s, after the Chesapeake Bay Bridge was opened, an explosion of development activity occurred on South Kent Island, and approximately 3,966

residential lots, most of them relatively small, were platted and recorded. Many homes were constructed on the lots, relying on wells and septic systems. As a result of a high water table, poor soil for disposing of sewage, and the small size of the lots, approximately 80% of the homes now have failing septic systems. Further, the County Health Department has reported that 12 vacant lots on South Kent Island have passed modern percolation tests.

The County is pursuing a public project to extend sewerage service to these subdivisions to address the public health problem presented by the failing septic systems. The County is currently finalizing the scope of the extension of sewerage service and the method for financing the extension. It is anticipated that sewerage service would be extended to improved properties in the County's current South Kent Island service area established in its Comprehensive Water and Sewerage Plan. Further, sewerage service will be extended to 658 unimproved lots in the existing service area. The number of unimproved lots to which service will be extended will be limited to 658 by operation of the grandfather/merger provisions in Bill No. 13-24, which has been introduced before the County Commissioners and scheduled for a public hearing on May 1, 2014. The County has concluded based on historic data that not more than 85% of the unimproved lots available for development will actually be developed. Thus, sewerage service will be extended to approximately 560 unimproved properties, all located in the existing service area.

Bill No. 13-24 would amend the County Zoning Ordinance by adding a new Section 18:1-19G. which would apply only in the NC District in areas designated S-3 through S-6 in the County's Comprehensive Water and Sewerage Plan as of the effective date of the bill. That is, Bill No. 13-24 will apply only to properties in the NC District to which, as of the effective date of the bill, sewer service is not available. Bill No. 13-24 would provide that (1) a dwelling may not be constructed on an unimproved and substandard lot or lots that is contiguous with an improved lot under the same ownership as of November 12, 2013 and that the unimproved lot or lots must be merged with the improved lot, and (2) substandard, contiguous unimproved lots under the same ownership as of November 12, 2013 must be merged to the extent possible to comply with current NC District bulk regulations. Bill No. 13-24 would not downzone properties in the NC District, but rather, require the substandard lots be merged with other lots

under the same ownership as of November 12, 2013 to the extent possible to comply with existing bulk regulations in the applicable NC District.

Additionally, it is anticipated that Bay Restoration Fund grants will pay outstanding debt attributable to the plant capacity for improved properties only. Chapter 80 of the Laws of 2014, at MD. ENVIR. CODE ANN.§ 9-1605.2(h)(2)(i)(1)(E), reiterated this use limitation, also specifically authorizing use "... for payment of principal, but not interest,". Other, debt service not funded with these grants will be paid through the imposition of benefit assessments to all properties with a significant economic benefit premium included in the benefit assessment imposed on unimproved, unbuildable lots.

DISCUSSION

1. Bill No. 13-24: Grandfather/Merger

Grandfather/merger ordinances have been consistently upheld in this country as a legislative vehicle fashioned to prevent the imposition of enhanced density or minimum lot-size requirements enacted by a new zoning ordinance from effecting an unconstitutional taking of lots made substandard by the new zoning ordinance. The imposition of a density or minimum lot-size requirement that prevents a pre-existing lot from being buildable would effect an unconstitutional taking without just compensation if not accompanied by a grandfather/merger provision. The Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006 (1992), is on point. There, David Lucas owned two lots on a barrier island off South Carolina zoned for single family residential use and sought to build houses on the lots. Under a 1977 law, South Carolina required the owners of land in a "critical area" coastal zone to obtain a permit from the Coastal Council before constructing a house or other structure. 505 U.S. at 1007. When Lucas purchased the two lots in 1986, the lots were zoned for residential use and did not qualify as part of the "critical area." 505 U.S. at 1008. In 1988, however, the State enacted a Beachfront Management Act which expanded the critical area within which construction was prohibited, and the Coastal Council would not issue a permit for the construction of houses on Lucas' lots. In response to Lucas' claim that South Carolina's new

regulation had effected a taking of his lots without just compensation, the Supreme Court ruled that, if a newly enacted State regulation deprives a property owner of all substantial beneficial use of a property, the regulation effects a taking without just compensation, unless the property owner had no reasonable expectation of using the property under prior law. 505 U.S. at 1026-27. The Court remanded the case solely for a determination as to whether Lucas had a right under prior law to build houses on the lots. 505 U.S. at 1031-32.

The *Lucas* decision was consistent with the general understanding in this country that a new zoning restriction, such as a density limitation or minimum lot size, may constitute a taking without just compensation if it prevents the owner of a pre-existing parcel from making any reasonable, beneficial use of the property. 3 Rathkopf, *The Law of Zoning and Planning*, § 49.24 (2008). The issue in the *Lucas* case, however, was unusual because zoning ordinances and land use regulation statutes typically contain "grandfather/merger" provisions fashioned to prevent unconstitutional takings without just compensation and undue hardships that may result from changing density or minimum lot size requirements. "Grandfather" provisions allow the owner of an existing lot to build a house notwithstanding the zoning restriction change. 3 Rathkopf at § 49.25. The grandfather provisions, however, ordinarily include so-called "merger" provisions which require that contiguous substandard lots in common ownership be merged to meet, to the extent possible, the newly enacted density or lot size requirement. *Id*.; 2 Anderson's *American Law of Zoning*, § 9.67 (4th ed. 1996). The Court of Appeals has addressed merger provisions generally in *Remes v. Montgomery County*, 387 Md. 52, 67 (2005) and *Friends of the Ridge v. Baltimore Gas & Elec. Co.*, 352 Md. 645, 658 (1999). The merger provisions pass constitutional muster because the owner of a lot is not deprived of all substantial beneficial use of the lot if the owner can combine it with another lot or lots that he or she owns to create a larger parcel on which a house can be constructed. In short, grandfather/merger provisions are typically included in zoning ordinances to (1) ensure that newly enacted density or minimum lot size restrictions do not constitute takings without just compensation or impose undue hardship, and (2) effectuate the purpose of the new restriction to the extent feasible by mandating the merger of contiguous lots under the same ownership. 3 Rathkopf at § 49.25.

The State itself has imposed a grandfather/merger provision in the Critical Area. The General Assembly enacted the Chesapeake Bay Critical Area Protection Program (the "Critical Area Law") in 1984 establishing the Chesapeake Bay Critical Area Commission (the "Commission") and requiring the Commission to promulgate criteria that regulate activity in the Critical Area.[1] In response, the Critical Area Commission promulgated regulations requiring that local jurisdictions develop a Critical Area Program and designate certain types of undeveloped areas with a land use classification called the Resource Conservation Area ("RCA") in which residential density is limited to one dwelling unit per 20 acres. The Critical Area Law, however, also contained a provision codified in MD. NAT. RES. CODE ANN., § 8-1808(c)(1)(iii)(5) which required that local jurisdictions include in their program provisions to "grandfather" development existing at the time the local program is adopted or approved by the Commission. In response to this provision in the Critical Area Law, the Commission promulgated COMAR 27.01.02.07 (the "Grandfathering Regulation"). This regulation mandated that local jurisdictions establish grandfather provisions which protect the owners of lots that were in existence prior to the adoption of a local jurisdiction's program. The Grandfathering Regulation required, however, that contiguous lots under the same ownership be consolidated or merged in an attempt to comply with the program. In Chapter 119 of the Laws of 2008, the General Assembly enacted the requirements of the Grandfathering Regulation into the Critical Area Law, § 8-1808(c)(1)(iii)(12). In short, the Grandfathering Regulation and the current grandfathering provision in § 8-1808(c)(1)(iii)(12) are consistent with typical grandfather/merger provisions included in zoning ordinances to ensure that new minimum lot size requirements do not effect unconstitutional takings or impose undue hardship.

In Bill No. 13-24, the County is not downzoning lots on South Kent Island. The lots which were platted in the 1950s were zoned for the first time in the late 1980s in the NC District

[1] The Maryland Critical Area Protection Program designates the critical area as all land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides. MD. NAT. RES. CODE ANN., § 8-1807(b)(2) (Apx. 15). As a matter of public policy, the General Assembly declared that "it is necessary whenever possible to maintain a buffer of at least 100 feet landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands." § 8-1801(a)(4). (Apx. 3). The critical area buffer is expanded to 50 feet from the top of the bank of steep slopes, and 25 feet from all nontidal wetlands. COMAR 27.01.09.01(C)(7). (Apx. 106-9). Only water-dependent uses are permitted in the buffer. COMAR 27.01.03.02. (Apx. 105).

and have been substandard since that time. Rather, in Bill No. 13-24, the County is (1) grandfathering existing substandard lots that are not contiguous with another lot or lots under the same ownership, and (2) requiring the merger of unimproved lots with contiguous lots under the same ownership. This grandfather/merger requirement has the effect of reducing the number of lots on South Kent Island in a manner that is consistent with modern land use policies and zoning, and at the same time passes constitutional muster.

2. Legal Constraints on the Repeal of Grandfather/Merger Provisions in Bill No. 13-24

It is anticipated that Bay Restoration Fund grants will finance the capacity of the County's sewerage treatment plant attributable to the extension of service to improved properties. As noted previously, in Chapter 80 of the Laws of 2014, the General Assembly amended MD. ENVIR. CODE ANN. § 9-1605.2 to authorize the use of the Bay Restoration Fund to pay certain debt for the cost of connecting properties served by on-site sewage disposal systems to municipal wastewater facilities. This amendment to § 9-1605.2 would authorize the use of Bay Restoration Fund revenues to pay the debt service on the County's wastewater treatment plant capacity that will be allocated to the improved properties on South Kent Island to which sewerage service will be extended under the current project. Section 9-1605.2(h)(5)(V)1., however, requires that any funding agreement for the provision of such grants must, among other things, "ensure … denial of access for any future connections that are not included in the project's proposed service area …." This language prohibiting the granting of access to sewer service for lots that are not a part of the project's proposed service area would effectively prevent the repeal of the grandfather/merger provisions in Bill No. 13-24 for the purpose of creating additional buildable lots. The funding agreement would be subject to specific enforcement by the State.

Further, in a situation where the State was not proactive in requiring the denial of access for future connections, a taxpayer could assert standing to enforce the requirements of § 9-1605.2(h)(5)(V)1. A taxpayer could assert standing to enjoin the State, or to obtain a writ of mandamus ordering the State, to fulfill a legal obligation that it is obligated to fulfill. Section 9-1605.2(h)(5)(V)1. establishes mandatory duties (not discretionary) that the State is obligated to

fulfill. In *120 West Fayette Street, LLP v. Mayor & City Council of Balto.*, 426 Md. 14, 27-28 (2012), the Court of Appeals explained that, if a taxpayer alleges that a local government violated its charter or applicable law by taking an action, including entering into a contract, a taxpayer has standing to bring a lawsuit to enjoin the action if the taxpayer can establish that the government action may result in a pecuniary loss through the increase of taxes. The Court emphasized, however, that taxpayer standing does not lie to establish that the government has breached a contractual obligation. 426 Md. at 28-29.

In the present situation, § 9-1605.2(h)(5)(V)1. mandates that, when Bay Restoration Fund monies are used to pay debt service to construct a sewerage system to retire on-site septic disposal systems, the State and local government must execute a funding agreement to "ensure" the "denial of access" for future connections not included in the project's proposed service area. Thus, the failure of the State to include and enforce such a provision in a funding agreement could be construed to constitute a violation of State law for which a taxpayer would have standing to seek an injunction. *Boitnott v. Mayor and City Council of Balto.*, 356 Md. 226, 234 (1999); *Inlet Associates v. Assateague House Condominium Ass'n*, 313 Md. 413, 441 (1988).

K.J.F.