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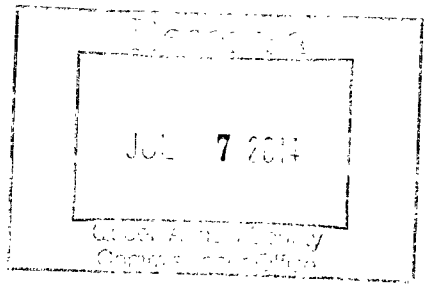

July 3, 2014

Gregg A. Todd
County Administrator
for Queen Anne's County
107 North Liberty Street
Centreville, Maryland 21617

Re: Public Sewer Facilities and Service on Kent Island

Dear Mr. Todd:

You have asked us to review and comment on the legal memorandum submitted by Rosemary Greene, Esquire on behalf of the Queen Anne's County Conservation Association ("QACA") in which she suggests that Ordinance No. 13-24, enacted by the County Commissioners on May 27, 2014, is illegal and unconstitutional. For the reasons stated below, we believe that the arguments stated by Ms. Greene are inconsistent with settled legal and constitutional principles and are without merit.

1.
ORDINANCE NO. 13-24

Ordinance No. 13-24 is a grandfather/merger provision applicable only to certain lots in the Queen Anne's County (the "County") Neighborhood Conservation (NC) Zone. Grandfather/merger provisions have gained wide acceptance in this country. The provisions are typically fashioned to prevent changes in density or minimum lot size provisions in a zoning ordinance applicable to a property from effecting a taking without just compensation or causing undue hardship. "Grandfather" provisions allow the owner of an existing lot to build a structure notwithstanding the zoning restriction change in minimum lot size or density. 3 Rathkopf, *The Law of Zoning and Planning*, § 49.13 (4th ed. 2001). The grandfather provisions ordinarily are accompanied by "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 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). As a general rule, 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 structure 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.

In the present situation, numerous, small and substandard lots in South Kent Island subdivisions were created by the recordation of plats prior to the County's adoption of a zoning ordinance and subdivision regulations. Virtually all of the vacant lots in these subdivisions are unbuildable because they will not pass modern percolation tests. A pending County project to extend sewerage service to the South Kent Island subdivisions to correct a public health concern caused by failing septic systems, however, would make many of these small lots buildable. The lots are in environmentally sensitive areas and the lot sizes are not consistent with modern land use policies and density requirements in the Critical Area and the current Neighborhood Conservation (NC) District in which they are located. Further, we are advised that the development of these lots could have a severe negative impact on the County's ability to evacuate Kent Island in an emergency.

To address environmental and land use issues created by the proliferation of small, substandard lots, the County Commissioners decided to make the current zoning applicable to the vacant, substandard lots to the extent they could do so without effecting an unconstitutional taking of the lots. The grandfather/merger provisions in Ordinance No. 13-24 were enacted to prevent the application of the current NC zoning from effecting unconstitutional takings.

Ordinance No. 13-24 amended § 18:1-19 of the County Code, governing the NC District, to add a new Subsection G. Subsection G(1) states that the grandfather/merger provisions of Subsection G apply only in areas in the NC District designated S-3, S-4, S-5 and S-6 in the Comprehensive Sewer Plan as of the effective date of the Ordinance. That is, the grandfather/merger provisions apply only to lots that were not currently eligible for public sewer service as of the effective date of Ordinance No. 13-24.

Subsection G(2) contains the grandfather provision. It states that, unless the merger requirements in Subsections G(3) and (4) apply, a dwelling may be constructed on a lot that does not comply with the minimum area or dimensional requirements of the zoning district in which the lot is located, provided that the lot complied with applicable minimum area and dimensional requirements, if any, at the time it was created.

Subsection G(3) states:

> A dwelling may not be constructed on an unimproved lot or lots that do not comply with the minimum area or dimensional requirements of the zoning district in which the lot or lots are located if the unimproved lot or lots are contiguous with an improved lot under the same ownership on November 12, 2013. An unimproved lot or lots governed by this subsection shall be administratively merged with the contiguous improved lot under the same ownership as of November 12, 2013 prior to the extension of public sewer service to the improved lot. Further, an unimproved lot or lots that must be merged with an improved lot under this subsection shall be merged with an additional contiguous unimproved lot or lots with the same ownership on November 12, 2013 that is or are necessary to prevent leaving an unimproved lot that does not satisfy the minimum area and dimensional requirements of the zoning district.

Subsection G(4) states that, except as provided in subsection G(5), an unimproved lot that does not comply with the minimum area or dimensional requirements of the NC District in effect at the time an application for a building permit is submitted may not be used for the construction of a dwelling if the lot was contiguous to and under the same ownership as one or more unimproved lots on November 12, 2013.

Finally, Subsection G(5) states that a lot described in subsection (4) of this subsection may be used for the construction of a dwelling if the lot is merged with the contiguous, unimproved lot or lots in order to create a lot that (i) complies with, or comes as close as possible to complying with, the minimum area and dimensional requirements of the NC District, and (ii) does not leave a contiguous lot under the same ownership that does not comply with minimum area and dimensional requirements of the zoning district.

Accordingly, Ordinance No. 13-24 grandfathers substandard lots in the NC District, but requires that vacant substandard lots be merged with contiguous improved or unimproved lots to the extent necessary to comply with the current NC District minimum lot size requirements.

2.
THE VALIDITY OF ORDINANCE NO. 13-24

QACA suggests that Ordinance No. 13-24 is invalid on grounds that it (1) is not authorized by State law, and (2) constitutes a taking without just compensation. These contentions are without merit, and we will address each in turn.

(a) STATE LAW AUTHORITY

Queen Anne's County is a code county operating under Article XI-F of the Maryland Constitution. Under MD. CODE ANN., LOCAL GOVT. § 10-324(a), a code county has authority to enact local laws relating to zoning and planning. The power on the part of a code or charter county to enact laws governing planning and zoning gives the county broad and extensive authority to create zoning and planning ordinances to ensure orderly development of land within the county. *Hillsmere Homes Improv. Ass'n v. Singleton*, 182 Md. App. 667, 726 (2008). Generally, the Maryland appellate courts have construed zoning authority to include the power to create districts and impose regulations governing the use of land, including the height, size and configuration of structures, the size and configuration of lots and yards and the percentage of a lot that may be occupied or improved. *Cardin Invs. v. Town of New Market*, 55 Md. App. 573, *aff'd*, 302 Md. 77 (1984).

The general power to impose zoning regulations has been construed to include the power to include grandfather/merger provisions. 2 Anderson's *American Law of Zoning*, § 9.67 (4th ed. 1996 Cum. Supp.). The Court of Appeals discussed grandfather/merger provisions and assumed that they were authorized by State law and valid 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).

QACA argues at page 2 of its memorandum that for a grandfather/merger ordinance to be valid "there must be some evidence that the owner of two or more contiguous lots actually intends (or intended) to merge the properties." QACA does not analyze any authority to support this proposition. It cites two cases, *Stansbury v. Jones*, 372 Md. 172, 189 (2002), and *Mueller v. People's Council for Balto. County*, 177 Md. App. 43 (2007). Neither supports the proposition. In *Stansbury*, 372 Md. at 189, the Court of Appeals ruled that compliance with Anne Arundel County's Antiquated Lots Law, which required the merger of contiguous, substandard lots under the same ownership to the extent feasible to comply with current zoning, did not constitute a self-imposed hardship that would constitute a basis for the denial of a variance. In *Mueller*, 177 Md. App. 43, 94-95, the Court of Special Appeals quoted with approval the following description of grandfather/merger provisions from Rathkopf, *The Law of Zoning and Planning*, § 49.13 (4th ed. 2001) (emphasis in original):

> Zoning ordinance provisions often limit exemptions or grandfather clauses to lots of record that are in single or separate ownership. *Either implicitly by such provisions or expressly by "merger" requirements in the ordinance itself, contiguous substandard lots under common ownership may lose their separate identity and be treated as a single parcel for purposes of zoning area and frontage requirements and subdivision restrictions. Merger provisions generally*

> *have been upheld against due process, equal protection, and taking claims. The application of merger provisions when a variance is sought is often the subject of litigation and denial of a variance is frequently sustained by courts based on such provisions. Merger requirements may operate upon contiguous undeveloped lots or upon contiguous lots where one or more of the lots are already developed.*
>
> In dealing with substandard lots, as with nonconforming uses which are analogous, the point of reference is the effective date of the bylaw. The basic purpose of the ordinance provision establishing generally applicable minimum lot requirements has as its corollary the purpose to freeze and minimize substandard lots. If there is a merger provision in the ordinance, it is designed to result in a maximum number of standard lots from each separate tract of land in single ownership at the effective date of the ordinance. The number of separately described parcels which an owner or his predecessors in title may have acquired over the course of time to make up the entire tract is thus immaterial.

Finally, in *Friends of the Ridge*, 352 Md. at 645, 662, the Court of Appeals discussed an intent requirement in connection with a grandfather/merger provision only in connection with the question whether a merger occurs automatically under the law or whether the property owner has to take action indicating an intent to effect the merger. The Court expressed no doubt that a zoning ordinance merger provision could prohibit the construction of an improvement on a substandard lot that is contiguous with another lot under the same ownership and thus effectively compel a merger.

(b) TAKING WITHOUT JUST COMPENSATION

The QACA suggests that the grandfather/merger provision in Ordinance No. 13-24 would effect a taking without just compensation because: (1) it seeks only to stop growth and thus is not substantially related to a legitimate governmental interest, and (2) it deprives the owner of the lot required to be merged of all substantial, beneficial use of the lot. As to the first argument, QACA contends (at 1): "Many courts have recognized that a law or regulation (like the Ordinance) enacted simply and unavowedly in an attempt to thwart growth is, as a general matter, impermissible."

In *Dolan v. City of Tigard*, 512 U.S. 374, 1391 (1994), the United States Supreme Court described in detail the circumstances under which land use regulation can effect a taking. There, a property owner applied to the City of Tigard for a building permit to construct an expanded hardware store. As conditions to granting the permit, the city required the property owner to dedicate a portion of his property as a greenway and to dedicate a pedestrian/bicycle pathway.

The Supreme Court explained that, in determining whether land use regulation effects a taking, a court must first focus on the nature of the governmental action. The government must demonstrate that there is an "essential nexus" between a "legitimate state interest" and the regulation. The required "essential nexus" must be a logical, reasonable connection in which the regulation furthers the interest that the government purports to promote. *Accord, Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987).

In the present case, there can be no question that Ordinance No. 13-24 promotes a legitimate governmental interest. Hundreds of small lots were created on South Kent Island prior to the existence of zoning or subdivision regulations. Those lots are substandard under modern environmental and land use policies in terms of their impact on both the environment and the capacity of public facilities. Thus, by requiring the merger of substandard lots under common ownership, Ordinance No. 13-24 unquestionably promotes legitimate governmental interests. *Agins v. Tiburon*, 447 U.S. 255, 262 (1980) (restrictive zoning ordinances "benefit the [property owners] as well as the public by serving the City's interest in assuring careful and orderly development of residential property with provision for open space areas").

Second, QACA argues that Ordinance No. 13-24 deprives the owners of lots required to be merged of all substantial beneficial use of the lots. In *Lucas v. South Carolina Coastal Comm'n.*, 505 U.S. 1003, 1006 (1992), the Supreme Court explained that land use regulation that deprives an owner of a substantial beneficial use of a parcel effects an unconstitutional taking. 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.

In determining whether the land use regulation has deprived the owner of all beneficial use of the property, however, it is first necessary to identify what constitutes the property for

purposes of the analysis. In *Andrews v. City of Greenbelt*, 293 Md. 69, 77-78 (1982), the Maryland Court of Appeals ruled, consistent with settled precedent in the federal courts, that the "property," for purposes of Takings Clause analysis, includes all contiguous parcels under a unity of ownership and unity of use. Accordingly, contiguous vacant residential lots under common ownership must be treated as one property for purposes of the Takings Clause.

Further, it is settled that the property owner must be deprived of all beneficial use of the whole parcel, not just a portion of the parcel. The Supreme Court decided this issue in *Penn Central Transportation Co. v. New York City*, 458 U.S. 104, 130-31 (1978). That case involved a decision by the New York City Landmarks Preservation Commission to deny Penn Central Transportation Company approval to construct an office tower on top of the Grand Central Terminal building, a structure that the Commission had previously designated as an historic and architectural landmark. Penn Central soon thereafter filed suit against the City claiming that the decision denying approval to construct the office tower constituted a taking. The company contended that the Commission decision had deprived it of the "air rights" above the building, and this action constituted a taking of *those rights* without just compensation.

The Supreme Court rejected this claim, holding that, in takings cases involving land use regulation, the claimant *cannot* divide the parcel into portions and assert a taking with respect to one portion. Specifically, the Court stated (438 U.S. at 130-31, emphasis supplied):

> ... the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable .... Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, *see Welch v. Swasey, supra*, but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and the lateral, *see Gorieb v. Fox*, 274 U.S. 603 (1927), development of particular parcels. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole ....

The Court reaffirmed this basic principle in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). That case involved an attack by several mining companies on Pennsylvania's Subsidence Act which prohibited mining that caused subsidence damage to certain types of buildings. The mining companies claimed that, since the Subsidence Act

required that they leave 27 million tons of coal in place, that is, approximately 2% of the companies' coal, the statute on its face effected a taking of the coal which could not be mined. The Supreme Court, however, rejected this position, relying on *Penn Central* for the proposition that the claimants cannot break their parcels into separate portions and claim a taking of one portion. Rather, their property had to be viewed *as a whole*. The Court explained (480 U.S. at 498):

> The 27 million tons of coal do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. *Cf. Gorieb v. Fox*, 274 U.S. 603, 71 L.Ed. 12228, 47 S.Ct. 675, 53 ALR 1210 (1927) (upholding validity of set-back ordinance) (per Holmes, J.). There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.

Furthermore, in order to effect a taking, government regulation must deprive the owner of *all* reasonable economic use of the whole parcel of land. *Keystone, supra*, 107 S.Ct. at 1246-51; *Department of Transportation v. Armacost*, 299 Md. 392, 420-21 (1984); *Governor v. Exxon Corp.*, 279 Md. 410, 437 (1977), *aff'd*, 437 U.S. 117 (1978); *Rockville v. Stone*, 271 Md. 655, 663 (1974). The Maryland Court of Appeals unequivocally addressed this subject in the zoning context in *Mayor and City Council of Baltimore v. Borinsky*, 239 Md. 611, 622 (1965) (emphasis supplied):

> The legal principles whose application determines whether or not the restrictions imposed by the zoning action on the property involved are an unconstitutional taking are well established. If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of *all* beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for *any* purpose. It is not enough for the property owners to show that the zoning action results in substantial loss or hardship.

Because, for Fifth Amendment purposes, the "property" is defined to include contiguous parcels under the same ownership and use, a grandfather/merger provision which requires that a vacant contiguous lot be merged with an improved lot under the same ownership (and effectively function as the lawn of the improved lot) does not effect a taking. The owner is not deprived of all substantial beneficial use of the merged lots as a whole. Likewise, because two contiguous vacant lots under the same ownership are one property for purposes of Takings Clause analysis, the fact that a grandfather/merger provision requires that they be merged into a larger lot does not effect a taking because the owner is not deprived of all substantial beneficial use of the entire "property."

Accordingly, we have concluded that QACA's legal and constitutional challenges to Ordinance No. 13-24 are without merit.

Very truly yours,

Kurt J Fisher /cm

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