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| IN THE MATTER OF | * | BEFORE THE COUNTY |
| RM WATER'S LANDING, LLC | | |
| (WATER'S LANDING AT MIDDLE RIVER PUD) | * | BOARD OF APPEALS |
| Hopkins Landing Drive and Weber Avenue | | |
| | * | OF |
| 15 th Election District; 6 th Councilmanic District | | |
| | * | BALTIMORE COUNTY |
| RE: GROWTH ALLOCATION REQUEST/ | | |
| PAI#: 15-0966 | * | Case No. CBA-18-026 |

* * * * *

OPINION

This matter comes to the Baltimore County Board of Appeals on a Request for Growth Allocation of a 56.167 acre property located off of Hopkins Landing Drive and Weber Avenue, on a peninsula south of Middle River and north of Hopkins Creek, in the Essex-Middle River Area of Baltimore County (hereinafter the "Property" and the "Project"). The majority of the property is located within the Chesapeake Bay Critical Area ("CBCA"), as designated by the State of Maryland, which protects all land and water areas within 1,000 feet of tidal wetlands and waters.

On the State level, the Maryland General Assembly created the Chesapeake Bay Critical Area Commission ("Commission") and regulations administered thereby which are designed to protect CBCA. These laws and regulations are codified in Md. Code Ann., Nat. Res. § 8-1801, et seq. (2017 Repl. Vol.) and the Code of Maryland Regulations ("COMAR") § 27.01.01, et seq. In Baltimore County, the growth allocation regulations are codified in Baltimore County Code ("BCC") §§ 32-9-101 through 32-9-112, 32-3-224 and 32-3-511. Additionally, the County had adopted regulations, pursuant to BCC § 3-7-207, entitled "Growth Allocation Submittal Requirements and Evaluation Objectives" to evaluate each application for growth allocation.

The applicable laws provide that lands located within the CBCA are classified as one of three categories. Those categories are Resource Conservation Area ("RCA"), Limited Development Area ("LDA") and Intensely Developed Area ("IDA"). The classifications permit

development of property in the CBCA at different levels of use and intensity. 52.975 +/- acres of 56.167 acre site lies within the CBCA. All 52.975 +/- acres are currently classified LDA. The State Critical Area Criteria allow local jurisdictions to create new IDAs or LDAs within the County's Critical Area by reclassifying land into a different land use category. The total amount of land that may be reclassified is referred to as "Growth Allocation", and is equal to five percent of a local jurisdiction's total RCA. The amount of "Growth Allocation" that was available to Baltimore County in 1988 was 462 acres. Half of this acreage could be used for RCA conversions to either LDA or IDA, while the other half could be used for LDA conversions to IDA. Presently, the County's remaining Growth Allocation acreage is 44.66 acres for RCA conversions, and 88.22 acres for LDA conversions. This growth allocation request seeks approval to reclassify the entire CBCA portion of the Property, 52.975 +/- acres, from LDA to IDA.

By way of background, the applicant seeks growth allocation in order to construct 5 single-family detached homes and 184 single-family attached and semi-detached homes on the Property. These homes would replace old shore homes that are currently dilapidated and inhabited by squatters, and a popular site for illegal dumping.

Procedural Background

Before discussing the instant growth allocation application process, it should be pointed out that all applications for growth allocation are subject to the development review and approval process. BCC § 32-9-105. The instant proposed development is no exception. It was authorized to proceed as a Planned Unit Development ("PUD") when the County Council approved Resolution No. 47-15 in July 2015 after considering agency and community comments from the post-submission community meeting on the PUD application. Following the filing of a Concept Plan, a Concept Plan Conference and Community Input Meeting ("CIM"), the proposed

development was further refined when the Development Plan was filed. Thereafter, the property owner requested a stay of the public hearing before the Administrative Law Judge on the development. The stay was requested in the event any changes to the proposed development, as part of the review and approval of this growth allocation application, would materially alter the Development Plan and necessitate an additional hearing. The Director of the Department of Permits, Approvals and Inspections ("PAI") approved the stay request on or about December 1, 2016.

The instant growth allocation application was initially filed with PAI on or about December 19, 2016 in accordance with BCC § 32-9-106. PAI forwarded the application to the Department of Environmental Protection and Sustainability ("EPS") who reviewed the application to insure that it met the applicable minimum standards for development set forth in the CBCA Program and as further delineated in EPS' "Chesapeake Bay Critical Area Growth Allocation Submittal Requirements and Evaluation Objectives." EPS issued 37 comments to the applicant requesting changes and additional information in a letter dated December 28, 2016. The applicant filed a revised application on or about March 30, 2017. EPS again issued comments requesting changes and additional information dated May 11, 2017. On or about August 2, 2017, the applicant filed another revised application, to which EPS made additional comments requesting changes and additional information in a letter dated August 15, 2017. The applicant filed another revised application on or about September 27, 2017. Once again, EPS issued comments requesting changes and additional information in a letter dated October 5, 2017. On November 6, 2017, the applicant filed another application. Upon receipt of additional comments from EPS requesting changes and additional information in a letter dated December 1, 2017, the Applicant filed the instant growth allocation application which is before this Board on or about December 13, 2017. Thereafter, EPS

determined the application was acceptable and forwarded it to the Growth Allocation Review Committee ("GARC") for review and recommendation.

In accordance with BCC § 32-9-110, the GARC, comprised of the Directors of the following Baltimore County agencies, or their designated representatives: (1) EPS; (2) the Office of Planning; (3) PAI; (4) the Department of Public Works ("DPW"); (5) the Department of Recreation & Parks; and, (6) the Department of Economic Development, was formed. A CIM (on the growth allocation request only) was held at the Essex Branch of the Baltimore County Public Library on January 11, 2018 in accordance with BCC § 32-9-106(c) where citizen comments on the application were received. On January 26, 2018, the GARC issued a report (hereinafter the "GARC Report") recommending approval of the growth allocation application with certain conditions for approval.

EPS forwarded the GARC Report to the Baltimore County Planning Board for review and to hold one or more public meetings regarding the application. On March 1, 2018, the plan and GARC Report were presented to the Planning Board by Eric C. Hadaway, Daft McCune Walker Inc., and Patricia Farr, Manager, Environmental Impact Review Section of EPS/Chairperson of the GARC. Members of the public were permitted to comment at this public meeting. On March 15, 2018, the Planning Board, held a public hearing to take public comment after the public meeting and, having considered all comments from the public, voted to recommend approval of the applicant's proposal, subject to all 16 conditions listed in the GARC Report.

Thereafter, the growth allocation application file was forwarded to this Board and the hearing was scheduled for May 23, 2018.

Board of Appeals – Standard of Review

The Chesapeake and Atlantic Coastal Bays Critical Area Protection Program, Md. Code Ann., Nat. Res. § 8-1801, et seq. (2007 Repl. Vol.), requires all local jurisdictions, under the direction of the Chesapeake Bay Critical Area Commission, to formulate and implement a plan to control development in the “critical” or protected area. While each local jurisdiction has primary responsibility for developing and implementing a local program, such responsibility is subject to review and approval by the Commission. Md. Code Ann., Nat. Res. §§ 8-1808(a); 8-1808.1(c).

Baltimore County’s program mandates in BCC § 32-9-112(g) that, upon review of the Planning Board’s recommendation that requires an amendment of the CBCA overlay areas, the Board of Appeals must make a final determination by considering the factors set forth in BCC § 32-3-511(d).¹ BCC § 32-3-511(d) reads in pertinent part:

- (d) *Written findings.* The Board of Appeals may not grant an amendment to the Chesapeake Bay Critical Area Overlay Areas unless the Board has made written findings that the proposed amendment will:
- (1) Minimize adverse impacts on water quality that result from pollutants that are discharges from structures or conveyance or that have runoff from surrounding lands;
 - (2) Conserve fish, wildlife, and plant habitat; and
 - (3) Be consistent with established land use policies for development in the Chesapeake Bay Critical Area that:
 - (i) Accommodate growth; and
 - (ii) Address the fact that, even if pollution is controlled, the number, movement and activities of persons in an area can create adverse environmental impacts.

The Board’s final determination does not authorize the growth allocation. After the adoption by a local government of its initial plan, the Commission shall treat a proposed change as a program amendment unless its chairman determines that the proposed change is a program refinement. All changes to the local plan, *including growth allocation amendment requests*, are

¹ See also Md. Code Ann., Nat. Res. § 8-1808(b) and COMAR § 27.01.10.01.O.

subjected to a two-tiered approval process, similar to the process for the initial plan adoption. If a local government approves a growth allocation request, the Commission shall ensure that the guidelines have been applied in a manner that is consistent with the purposes, policies, goals, and provisions of the Program. Md. Code Ann., Nat. Res. § 8-1801, et seq.

Evidence

At the hearing before this Board, there was specific and detailed testimony and evidence offered by Eric C. Hadaway and Patricia Farr as to how the growth allocation application met the requirements of BCC § 32-3-511(d) and the Growth Allocation Submittal Requirements and Evaluation Objectives.

The evidence consisted of two exhibits. The package that the Department of Planning forwarded to the Board, which consisted of the growth allocation application, the GARC Report and the Planning Board Recommendation, is Applicant's Exhibit No. 1. Applicant's Exhibit No. 2 is a binder with 16 tabs that included, among other things, prior growth allocation decisions by the Board, Resolution No. 47-15, EPS Comments regarding the various application submissions, growth allocation CIM meeting minutes and Mr. Hadaway's CV.

Mr. Hadaway, who was accepted as an expert witness in the field of environmental compliance, testified that his firm has been working on developing this property since 2001. The instant development is in the midst of being reviewed under the PUD process. The County Council, authorized the use of the PUD process, when it approved Resolution No. 47-15 about three years ago (in the summer of 2015). The processing of the instant PUD has been put on hold while growth allocation is being sought.

Mr. Hadaway further testified that the site has historically been used for residential purposes (shore shacks) and more recently was inhabited by squatters and was a popular site for

illegal dumping. As noted in Resolution No. 47-15, the applicant paid \$290,000 to clean up the site (tires, abandoned boats, etc.). Access to the site is now gated off.

Ms. Farr testified that the GARC applied the general objectives applicable to requests for growth allocation outlined in the Growth Allocation Submittal Requirements and Evaluation Objectives and BCC § 32-9-111. Both Mr. Hadaway and Ms. Farr testified that the evidence shows that the proposed residential development is consistent with the Master Plan and other small area plans. By way of example, the residential development is consistent with the Eastern Baltimore County Revitalization Strategy (1996) insofar as this area plan identifies the peninsula, referred to as "Hopkins Landing", as one of the community conservation areas of opportunity where development, redevelopment and improvement will promote revitalization and ensure that Eastern Baltimore County realizes its maximum potential, p. 12. The record further reflects that there are no adequate public facilities issues. The site is served by public water and sewer which has ample capacity to accommodate this development. Not only are there no water or sewer capacity issues noted on the Basic Services Maps but DPW has confirmed that adequate sewage capacity and water availability exists with certain upgrades that will be made. The Hopewell Pointe sewage pumping station has sufficient capacity to accommodate the proposed number of units. A traffic impact analysis, which was reviewed by both the State Highway Administration and DPW without objection, and the fact that the property is not within a failing traffic shed on the Basic Services Maps makes it clear that the public roads are adequate. It should be noted that a widening of Hopkins Landing Drive will provide a safer, more functional travel lanes and improved access to and from Old Eastern Avenue to the peninsula. The Essex Fire Response Station and Baltimore County Police Precinct 11 in Essex are in close proximity, have not objected to being able to service the development thusfar and the development will have to comply with all of the Baltimore

County Fire Marshall's Office requirements as part of the development review and approval process. Regarding school capacity issues, the school impact analysis shows that there is adequate capacity at the vicinal schools. Mr. Hadaway and Ms. Farr both testified that agency comments had largely been addressed by modifications made to the plan following PUD application and Concept Plan submissions. Most importantly, Ms. Farr pointed out how the GARC found that the Pattern Book showed that the mix of housing types and coastal architectural design was functionally compatible since it was compatible with the adjoining Hopewell Pointe development and the waterfront.

Mr. Hadaway testified that the proposed development satisfies the resource protection objectives from the Growth Allocation Submittal Requirements and Evaluation Objectives and BCC § 32-9-111. Ms. Farr similarly testified that the GARC found these objectives had been satisfied. Clearance of trees and woody vegetation was minimized by reconfiguring the road network. Only 18.33 of the 31.60 acres of forest and 1.98 acres of the 5.46 acres of developed woodland will be cleared. The forest and developed woodland to be cleared, as well as the proposed reforestation and developed woodland enhancement, is specifically identified on the Critical Areas Management Plan/Forest Protection and Establishment Plan ("CAMP/FPEP"). Both witnesses testified that the development layout will result in a critical area easement which includes the critical area buffer and will protect 23.75 acres of the property in perpetuity. They similarly testified that the minimal impacts to the shoreline and steep slopes have been mitigated by supplemental planting and that there are no stream crossings in the critical area portion of the site. They further testified that the most sensitive natural features have been protected and grading minimized by clustering units and the plan to use Hopkins Landing Drive rather than the old layout of Weber Avenue. Lastly, there are no plant or wildlife Habitat Protection Areas on the site so

there is no habitat to protect but the CAMP/FPEP shows significant enhancement of protected Forest Interior Dwelling Species ("FIDS") Habitat at the offsite mitigation areas in the CBCA. Ms. Farr corroborated Mr. Hadaway's testimony and further pointed to the GARC Report recommendations.

Mr. Hadaway testified that the proposed development satisfies the resource enhancement objectives from the Growth Allocation Submittal Requirements and Evaluation Objectives and BCC § 32-9-111. Most notably, he pointed out that the installation of over 30 micro-bioretenion stormwater facilities with suitable outfalls will provide 10% pollutant reduction. Appendix XIV of the Application. Ms. Farr testified that the GARC found that open space was optimized, the percentage of impervious surfaces was minimized and afforestation optimized by clustering dwelling units along the road, utilizing existing roads to the extent possible, removing impervious surfaces from buffers and reducing the paths providing access to the community piers, also, historically disturbed buffer areas are proposed to be restored by planting woody vegetation. Ms. Farr further testified that environmental conditions have been optimized and habitats enhanced by the permanent protection of existing forest, and a non-CBCA forested stream buffer containing wetlands and steep slopes, on and off-site and stormwater management treating on-site improvements and 1.83 acres of the adjoining school bus parking lot.

Ms. Farr testified that the design quality objectives have been provided by removing old shore homes and structures and replacing them with new dwelling units which are compatible with the adjoining Hopewell Pointe development that are located further from the water and planting supplemental trees in the buffer areas. Ms. Farr further testified that the location objectives have been satisfied because the proposed reclassification from LDA to IDA is both adjacent to existing IDAs and at least 20 acres. BCC § 32-9-104(a). She also testified that the offsite community

enhancements will be provided by widening the Hopkins Landing entrance road to the peninsula, a storm drain system with an inlet to be included in the road widening and the dedication of a right-of-way along the road to ensure that road repairs may be made in the future. Lastly, Ms. Farr opined that permission for the construction of micro-bioretenion facilities at Chase Elementary School, was not granted. Therefore, a comparable community benefit/mitigative measure to offset 300-foot buffer impacts that provides similar water quality benefits must be provided.

Based on the evidence presented at the hearing and as specifically set forth herein, the Board finds that the proposed growth allocation: (1) minimizes the adverse impacts on water quality that result from pollutants that are discharges from the proposed homes or that have runoff from surrounding lands; (2) conserves fish, wildlife and plant habitat, particularly the FIDS Habitat; and (3) is consistent with established land use policies for development in the CBCA that (i) accommodate growth; and (ii) address the fact, even if pollution is controlled, the number, movement and activities of persons in an area can create adverse environmental impacts.

The proposed development minimizes adverse impacts on water quality by avoiding all new impacts to tidal wetlands and almost all impacts to non-tidal wetlands as well as clustering of dwelling units to retain existing natural vegetation on site and increasing the functionality of the critical area buffer by replanting historically impacted areas and Environmental Site Design practices to manage stormwater runoff. It will conserve fish, wildlife, and plant habitat through on and off-site measures including retention and enhancement of sensitive buffer areas and by replacing previously impacted areas in the critical area buffer with woody vegetation on site and wetland mitigation and/or extensive forest planting adjacent to large forests protected by the County's Coastal Rural Legacy Program at two offsite mitigation sites which will expand the contiguous acres of protected Forest Interior Dwelling Bird habitat in the critical area. Lastly,

growth will be accommodated and pollution controlled by providing a mix of housing types that will improve the supply and diversity of housing stock which will help the Essex-Middle River area revitalize, limiting buffer impacts to the two community piers and through removal of old shore homes, driveways, other impervious surfaces, and large amounts of debris from the critical area buffer; removal of dilapidated piers from the water; and the planting of previously disturbed buffer areas;

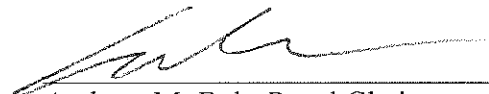
ORDER

THEREFORE IT IS, this 13th day of July, 2018, by the Board of Appeals of Baltimore County,

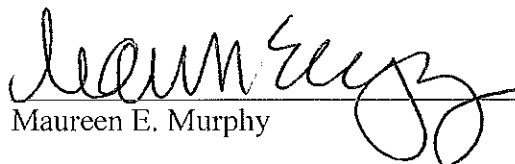
ORDERED, that, by final action, the application for an award of growth allocation of 52.975 acres on the Property to reclassify that acreage from LDA to IDA, as is more particularly set forth in growth allocation application, be and the same is hereby **GRANTED**, subject to all sixteen (16) conditions set forth in the GARC Report and a condition to provide a water quality related community benefit.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

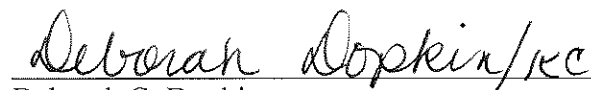
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Andrew M. Belt, Panel Chairman



Maureen E. Murphy



Deborah C. Dopkin



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

July 13, 2018

Jason T. Vettori, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204


RE: In the Matter of: *RM Water's Landing, LLC*
Case No.: CBA-18-026

Dear Mr. Vettori:

Enclosed please find a copy of the Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,


Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure

c: Office of People's Counsel
Jeffrey D. DelMonico, Development Review Associate/Department of Planning
Andrea Van Arsdale, Director/Department of Planning
Patricia M. Farr, Manager/Environmental Impact Review/DEPS
Vincent J. Gardina, Director/DEPS
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law