

MEMO

TO: All Members of the Board of Supervisors
FROM: Tony Obadal
DATE: November 30, 2006
RE: Section 7 Perennial Stream Buffer

This memo is divided into two parts. The first discusses Legal Issues relevant to Applicant's petition for the rezoning of Section 7 and 8. These issues have been raised either by the Applicant or by the staff. The second part concerns water quality which Applicant asserts will be improved if its variable buffering proposals are accepted by the Board.

LEGAL ISSUES

New Town has asked the Board to rezone Section 7 from R8 with proffers to MU and seeks to reduce the width of a buffer of a perennial stream which flows into Powhatan Creek. This stream and the area surrounding it is vital to the environmental condition of the Creek and the continued existence and good health of many smaller creatures, fish, animals, and rare plants located there.

The Chesapeake Bay Ordinance (CBO), effective in January 2004, requires that the buffer along this perennial stream be 100 feet in width. The Applicant makes the legal contention that it was granted an exception to the Ordinance by the staff, per a letter written on December 22, 2004 issued under Section 23-7. It also asserts that the December 22nd letter was authorized by the Grandfathering/Vesting Rules issued by the Board of Supervisors on November 25, 2003. Finally, it is asserted that Applicant's 50 foot variable buffering system will provide greater water quality protection than the 100 foot buffer required by the CBO.

Vesting assures landowners that they possess certain property rights which may not be altered, prohibited or reduced by subsequent zoning legislation. The contention has been made that the December 22nd letter created a vesting right allowing the use of a variable buffer on the perennial stream in Section 7.

County counsel, Leo Rogers, rejects this view and takes the position that the December 22nd letter was issued pursuant to Paragraph 5 of the Grandfathering Rules and that it does not confer vesting on the Applicant's rights in Sections 7 and 8. He has verbally stated that the letter applies only to Applicant's right to develop Section 7 as an R8; and that the Board in this MU zoning application may, by the exercise of its legislative authority, reject the request for a 50 foot variable buffer and insist upon a 100 foot buffer before rezoning is granted. This is arguably a sound view. However, this memo takes the position that we must look to a more secure harbor if the Board is to reject this application.

To have a vested property interest in a particular benefit a person must have more than an abstract need or desire for it (Board of Regents of State Colleges v. Roth, 408US564.)

Virginia Code 15.2-2307 identifies the three factors that must be established in order for an owner's rights to be deemed vested: (1) the owner obtains or is the beneficiary of a significant affirmative governmental act that remains in effect allowing development of a specific project; (2) the owner relies in good faith on the significant affirmative governmental act; and (3) the owner incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

Virginia Code 15.2-2307 also identifies those affirmative government acts that are deemed to be significant: (1) the governing body has accepted proffers or proffered conditions which specify the use related to a zoning amendment; (2) the governing body has approved an application for a rezoning for a specific use or density; (3) the governing body or the BZA has granted a special exception or use permit with conditions; (4) the BZA has approved a variance; (5) the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner's property and the applicant diligently pursued approval of the final plat or plan within a reasonable period of time under the circumstances; or (6) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner's property.

Without fully arguing the case in this memo, Applicant's contention can be shown to be without merit. Each of the above factors are distinguishable from what has occurred here. For example, the letter of December 22nd is not a "significant, affirmative governmental act" since the requirements of Section 23-7(2)(a)(1) were not met [See below].

Vesting may be denied if the exception granted by staff to the Ordinance is the result of a mistake, fraud, or change in circumstances that substantially affects the public safety, health or welfare.

The December 22, 2004 letter was based upon mistakes both in its interpretation of the

law and its analysis of the facts. Section 23-7(2)(a)(1) allows the granting of exceptions to the buffer rules when encroachments into the buffer are the “minimum necessary” to achieve a reasonable, buildable area for a “principal structure and necessary utilities.”

The Applicant submitted a site map which clearly shows that the old 100 foot buffer only cuts through the rear lawn area of three building sites. The old buffer could have very simply been designed to go around those rear lawns. Applicant sought and now seeks far more. It wishes the Board to eliminate hundreds of feet of buffer space by accepting its new 50 foot variable buffer. This alteration is not the “minimum necessary.” Also, this same Section limits staff authority to granting an exception for a “principal structure.” These words are in the singular. This whole Section was intended to deal with a residence or a commercial building. It was not a grant of authority to extensively replace or eliminate buffer widths. The December 22nd letter, therefore, was void ab initio or from the beginning.

- o **The Grandfathering/Vesting Rules** - Under Paragraph 5 of the Grandfathering Rules, rezoned sites and property for which an SUP has been issued, prior to the effective date of the Ordinance, must comply with the Ordinance “unless the property cannot legally be developed to the proffered density, use, or square footage because of the new rules...” (See Grandfathering Ordinance, paragraph 5, 11/25/03.) There was no binding proffered density for this specific Section prior to the CBO effective date. The New Town plan was accepted in concept in 1997 with overall residential unit densities for the entire project given a fixed range. The Section densities were conceptual, not fixed. These densities could and have been moved around from one Section to another. Indeed, that has been done both with units in this Section and with other Sections. There is ample room for Applicant to carry out its building plans on this very site.

ON NOVEMBER 28, 2006, SUPERVISOR ICENHOUR WAS INFORMED BY THE ENVIRONMENTAL DIRECTOR THAT THE 100 FOOT BUFFER CUT ACROSS THE REAR LAWN ONLY OF THREE BUILDING LOTS. NO BUILDINGS ARE ELIMINATED BY THE OLD BUFFER. OBVIOUSLY, A PLAIN READING OF PARAGRAPH 5 SHOWS THAT A UNIT MUST BE AFFECTED. SINCE THAT IS NOT THE CASE, THE PROVISIONS OF THE GRANDFATHERING ORDINANCE PARAGRAPH 5 ARE NOT MET AND THE DECEMBER 22ND LETTER IS BASELESS.

Staff and Applicant should have made this fact known at an earlier stage of this proceeding. A great deal of work could have been avoided.

The effect of reducing the buffer by 50 feet may well allow the Applicant to proceed to construct roads, BMPs, and residential units in the old protected area, i.e., the area no longer protected by the full 100 foot requirement. If the area is not protected,

alteration of the steep slopes now located there is arguably permissible. Before any approval of the new buffer is made, Applicant's plans need to be determined.

While Paragraph 5 of the Grandfathering Rules is not applicable, Paragraph 4 of those rules certainly is. It states that:

“Conceptual plans approved prior to the effective date of the Ordinance will not be grandfathered nor will they grandfather any subsequent site or subdivision plans.”

- o **Exceptions** - In its letter of December 22nd the staff asserts that “the major factor for consideration of the exception request is that a strict application of the 100 foot RPA buffer greatly impacts the Master Planning efforts...” and that “this variable buffer proposal is being allowed for application in this case only because of the Master Planning that occurred on the project prior to January 1, 2004.” Concern for the Master Plan is not a factor in making a determination under 23-7. In relevant part, this Section requires meeting the criteria of the Section before an exception is issued.

Matters outside those criteria should go back to the elected Board for decision. Extensive buffer alterations present a clear case of overreaching. As noted above, a limited intrusion into a buffer might administratively be allowed but authority for a major reduction of the buffer for other perceived gains is not.

Moreover, none of the specific criteria required by Section 23-7 (C)(2)(a) and (b) are met:

- o The lots or parcels were not created as a result of a legal process.
- o The mitigation measures were not approved by a previous exception.
- o The use of BMPs on this site was not previously required.
- o And, the criteria contained in paragraph (a) concerning “loss of buildable area” are not met, i.e., no residential units are lost, transferring of units elsewhere on the project can be done, the area apparently is also a steep slope and therefore not “buildable.”

The Board is not barred by the vesting requirement of the state statute or by the Ordinances from putting the staff granted exemption aside and from insisting upon a 100 foot buffer before it designates this Section as MU.

WATER QUALITY

Applicant's contentions concerning buffer filtration effectiveness are based on a methodology contained in Information Bulletin #3 published by the Chesapeake Bay Local Assistance Department, hereafter known as CBLAD. (See, WQIA submitted with Applicant's request for the December 22, 2004 letter.)

Significantly, CBLAD itself no longer uses Information Bulletin #3 for county guidance regarding buffer effectiveness. It has been withdrawn and CBLAD asserts that counties should not reduce the required 100 foot CBO buffer. Moreover, Information Bulletin #3 never received final consensus approval from CBLAD. It is a draft only. No mention was made by staff of the shortcomings.

When the particulars of Information Bulletin #3 are studied, its questionable usefulness become even more apparent. The effectiveness of buffers varies from site to site and is dependent upon such matters as topography, composition of the soil, and plant growth in the buffer. Average annual rainfall is supposed to be put into the formula of Bulletin #3 when used for guidance. Now, here we have a variable that does not exactly lend itself to providing a usable, much less precise measurement. The formula also apparently assumes that the average land cover condition is 16% impervious. That is not so here.

Four criteria are generally recognized for determining adequate buffer sizes: (1) resource functional value, (2) intensity of adjacent land use, (3) buffer characteristics, and (4) specific buffer functions required. (Castelle et al., 1992a, J. Environ. Qual 23:878-882 (1994). The methodology used in Bulletin #3 is limited to the first factor and should not therefore be used here.

Bulletin #3 was an effort to make one size fit all. It doesn't work and was abandoned.

The WQIA offered by the Applicant makes matters even less certain. Its calculations for comparison of the 100 foot buffer with the proposed variable buffer are not based on any actual tests of the stream in order to determine a real baseline against which filtering proposals can be judged, even though Applicant has held this property since 1997. The effectiveness of the proposed models' variable width buffer estimates sprinkled throughout the New Town development are estimates and extrapolations and nothing else and they are compared with a fiction, not a reality.

There are more particulars which show that the Water Quality Impact Assessment should not be relied upon:

- o A standard natural buffer of 100 feet filters out 75% of the sediments and up to 40% of the pollutants. The Water Quality Impact Assessment asserts that its systems will remove a greater amount of phosphorous than the natural

100 foot buffer. Assuming the validity of that statement, phosphorous is not the only pollutant. The CBO (Section 23-3 at NSP) includes in its definition such things as:

- o toxic metals
- o hydrocarbons
- o nitrates
- o fecal matter
- o nutrients, such as phosphorous and nitrogen
- o viruses
- o chloride
- o toxic chemicals

Yet, phosphorous is the only item mentioned by the WQIA. Phosphorous levels were determined by first estimating nutrient levels and then estimating the amount of phosphorous in the nutrients. It is, therefore, an estimate within an estimate. Even so, Applicant's own comparison chart shows that on Section 7 the 100 foot natural buffer, if left alone, removes more "phosphorous" than Applicant's proposal. (6.50 vs 3.82 lb TP/yr)

- o Information Bulletin #3 sought to provide a general theoretical estimate for determining filtering effectiveness. The WQIA takes those estimates and extrapolates them to the site in order to determine pollution removal down to under a pound per year on varying streams. That does not produce reliable guidance. Here, the effectiveness of the 100 foot buffer could have been determined by field tests which might have produced significantly different results than the theoretical estimate provided in Information Bulletin #3. Actual measurement of buffering effectiveness could have been easily and inexpensively done. Such testing was not done. Moreover, the buffer from this perennial stream is exceptionally steep at certain points and water runoff and rainwater do not penetrate deeply into the soils. A 50 foot variable buffer will rarely be as effective as a 100 foot natural buffer. You cannot cut off the top of a steep slope, then, bring in impervious cover in the form of buildings and roads and put them on the new ledge along the narrowed buffer and contend that you are doing a better job for the environment. Assumptions, estimates and extrapolations should not be allowed to carry the day. They do not meet the level of science needed to justify a decision that jeopardizes this area and every area located below it leading to the James.

On February 23, 2006, the Fish and Wildlife Service and the Department of the

Interior issued a report on the proposed Section 7 project. The report was submitted in accordance with the provisions of the Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661et seq.) and the Endangered Species Act of 1973 of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.) **This report rejects the Applicant's reduced buffering plan, stating that the Service recommends that "the Applicant incorporate 100 foot forested buffers on each side of the streams and wetlands on this property and reduce the amount of impervious surface." This was not the first time that the Service made these recommendations. The Service also has recommended denial of this project "due to inadequate riparian buffers and the amount of impervious surface proposed for these sections of the site."**

No mention was made of this recommendation in the staff report to the Planning Commission. It should have been and the letter should have been included with the material given the Commission.

Section 7 is the most sensitive area of the Powhatan watershed. If we play fast and loose with it now it will be destroyed.

RECOMMENDATIONS

This application should be deferred.

Deferral will allow time to the Applicant to submit a modified proposal for Sections 7 and 8 which includes the CBO 100 foot buffer along this perennial stream and a 50 foot intermittent stream buffer along other streams mentioned in its proposal. (See Powhatan Study recently formally approved by the Board.)

The Board may also want a full review of all RPA and stream protections in New Town since this is the last opportunity for such a review.

There are other issues that need an opportunity for further consideration: most important, is the adequacy of Applicant's proffer relating to affordable housing. Inquiry should be made into the percentage of affordable housing being offered by the Applicant. At the Board work session in July it was indicated that the number was around four per cent. The Master Plan authorized 1,972 total housing units. If credit for tendering a public benefit is going to be given to the Applicant for its proffer, affordable housing should be around 12 per cent. Additionally, these units while initially being sold as affordable housing when resold will be priced at market. The Applicant has not established a soft mortgage system in order to preserve the affordable housing units which it proffers.

The Master Plan provided for Section rezonings in order to allow the Board to consider the conditions and problems that become apparent during the build-out. The County should take advantage of that intention at this time. For the above reasons the application should be deferred.